IN THE COURT OF APPEALS OF IOWA

No. 3-375 / 92-1662

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CLERK SUPREME COURT

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STATE OF IOWA,

Appellee,

vs.

RODNEY PHILLIP HILL,

Appellant.

Appeal from the Iowa District Court for Webster County, Allen L. Goode, Judge.

Rodney Hill appeals his conviction, entered following a jury trial, for possession of schedule I and II controlled substances with intent to deliver, possession of a controlled substance in violation of Iowa Code sections 204.401(1)(c) and 204.401(3) (1991), escape from custody in violation of Iowa Code sections 719.1(1) and 719.4, driving while barred in violation of Iowa Code section 321.561, operating while intoxicated in violation of Iowa Code section 321J.2, and being an habitual offender in violation of Iowa Code section 902.8. **DECISION OF THE DISTRICT COURT AFFIRMED. ONE SENTENCE VACATED AND CASE REMANDED FOR RESENTENCING.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Chris Odell, Assistant Attorney General, James J. Koll, County Attorney, and Robert Harger, Assistant County Attorney, for appellee.

Considered by Donielson, P.J., and Hayden and Sackett, JJ.

DONIELSON, P.J. 000613

On October 24, 1991, Rodney Hill was arrested for operating while intoxicated and driving while barred. Hill begged not to be taken to jail and attempted to break free from the officer restraining him. The officer regained control of Hill, placed him in a patrol car, and transported him to the law enforcement center.

The officer observed that Hill became excessively fidgety when placed in the patrol car. Once at the center, Hill was removed from the patrol car and the car was inspected. Several small envelopes, identified as snow seals, and a small tin box were found lying on the floor and the seat of the car. At the station, officers searched Hill and found two wads of cash and two Baggies of what was believed to be marijuana in his pockets. A field test administered to one of the eleven snow seals tested positive for methamphetamine.

As a result of the evidence seized, the officers obtained a warrant to search Hill's home. The officers seized a sack full of some green leafy substance, a couple of mirrors, an adult magazine, a small pipe, a roach clip, four snow seals, and some pills. All the suspected controlled substances were sent to the Department of Criminal Investigations (DCI) for analysis. The lab returned a report identifying the items received as being marijuana, methamphetamine, codeine, and a morphine

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sulphate. All the evidence was lost after being returned to the Fort Dodge Police Department.

On December 6, 1991, the State filed a trial information charging Hill with possession of methamphetamine with intent to manufacture or deliver, possession of marijuana with intent to manufacture or deliver, possessing a taxable substance without affixing a drug tax stamp, possession of codeine, possession of morphine sulfate, escape from custody, driving while barred, operating while intoxicated, and habitual offender status. A jury found Hill guilty of possessing schedule I and II controlled substances (methamphetamine and marijuana) with intent to deliver, possession of a controlled substance, driving while barred, operating while intoxicated, and being an habitual offender.

The court entered judgment on the convictions and sentenced Hill to a term not to exceed fifteen years on each of the following: possession of methamphetamine, escape from custody, and driving while intoxicated, third offense. The court sentenced Hill to a six-month term for possession of marijuana, and a term not to exceed two years for driving while barred. The court ordered the sentences for possession with intent to deliver and operating while intoxicated, third offense, to run consecutively and the remaining sentences to run concurrently with the consecutive sentences.

Hill appeals. He contends the trial court erred in admitting reports concerning the analysis of the controlled substances over his chain of custody objections. The trial court sustained in part Hill's objection to the admission of any testimony or reports concerning the marijuana or any other drug sent to DCI lab under the same seal. Hill established the marijuana received by the DCI lab did not match the description of the marijuana seized by the officers at Hill's home. The trial court concluded a sufficient chain was established for other evidence sent under the same seal. Hill argues the State failed to establish an adequate chain of custody. Hill points to a discrepancy between the officers concerning the color of envelopes seized from Hill and the amount of cash seized.

Hill also contends that he was denied effective assistance of counsel. Hill points to counsel's failure to object to the testimony of two police officers who testified what would distinguish drug possession from drug dealership. Hill also argues that the officers' testimony invaded the province of the jury by expressing an opinion concerning his guilt.

I. We review the trial court's rulings concerning chain of custody of evidence for an abuse of discretion. State v. Mehner, 480 N.W.2d 872, 877 (Iowa 1992). We reverse only when there has been a clear abuse of discretion. Id.; State v. Lamp, 322 N.W.2d 48, 57 (Iowa 1982). The State is required to show it is reasonably

probable tampering, substitution, or altering did not occur. State v. Gibb, 303 N.W.2d 673, 681 (Iowa 1981). The sufficiency of the showing is dependent on the susceptibility of the items to alteration or substitution. Lamp, 322 N.W.2d at 57; see State v. Bakker, 262 N.W.2d 538, 543 (Iowa 1978). The trial court may be aided by the presumption that state agents would not tamper with the evidence. Mehner, 480 N.W.2d at 877; State v. Orozco, 290 N.W.2d 6, 10 (Iowa 1980). When the trial court has determined the chain of custody is sufficient, alleged inconsistencies that suggest alteration or substitution conceivably could have occurred affect the weight of the evidence, not its admissibility. Lamp, 322 N.W.2d at 59; Gibb, 303 N.W.2d at 681.

The issue before us is not the admissibility of the physical evidence. The items seized have been lost or misplaced. Rather, the issue is the admissibility of the DCI criminalist's testimony concerning testing and analysis of the alleged controlled substances. Our examination of the record reveals the trial court properly placed the burden on the State to lay a proper chain-of-custody foundation for each item sought to be admitted. Discussions out of the jury's presence, offers of proof, and pointed questions show the care the trial court took to be certain the State laid a proper foundation before submitting evidence to the jury. The court did not allow testimony about the analysis of some evidence because of

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concerns about a proper foundation. The court allowed testimony about other items that were tested because it found the State established a sufficient chain of custody. It very carefully evaluated the chain of custody presented for each item and separated out those for which the State failed to meet its burden. We do not believe the court abused its discretion in its decisions concerning the chain of custody or in allowing testimony concerning the analysis of the items for which the State laid a sufficient foundation.

II. Our ultimate concern in claims of ineffective assistance is with the "'fundamental fairness of the proceeding whose result is being challenged.'" State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987) (quoting Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. Risdal, 404 N.W.2d at 131. The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. Id. at 131-32.

Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly-ineffective

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attorney the opportunity to explain his or her conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). We conclude there is an inadequate record for us to adjudicate defendant's claim without counsel's explanation for his/her conduct. We therefore preserve defendant's ineffective assistance of counsel claim for a later proceeding.

III. The trial court sentenced appellant for escape, pursuant to Iowa Code section 719.4(1) (1991), to a term not to exceed fifteen years, pursuant to Iowa Code section 902.9(2) (1991). This sentence was to run concurrently with the consecutive sentences for possession with intent to deliver and operating while intoxicated, third offense. Iowa Code section 901.8 (1991) requires the sentencing court to order any sentences pursuant to section 719.4 be served consecutively to other sentences. This sentence, as imposed, is illegal. See, e.g., State v. Suchanek, 326 N.W.2d 263, 265 (Iowa 1982). Iowa Rule of Criminal Procedure 23(5)(a) permits the court to correct an illegal sentence at any time. See State v. Ohnmacht, 342 N.W.2d 838, 843 (Iowa 1983). "Simply stated, when a sentencing court departs -- upward or downward -- from the legislatively authorized sentence for a given offense, the pronounced sentence is a nullity subject to correction, on direct appeal or later." State v. Draper, 457 N.W.2d 600, 605 (Iowa 1990) (citing Ohnmacht, 342 N.W.2d at 842-45; Suchanek, 326, N.W.2d at 265; State v. Young, 292 N.W.2d 432, 435 (Iowa 1980)). The corrected sentence may result

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in an increase in the sentence. See e.g., Ohnmacht, 342 N.W.2d at 843-44; State v. Burtlow, 299 N.W.2d 665, 668 (Iowa 1980); State v. Wiese, 201 N.W.2d 734, 738 (Iowa 1972). We vacate the sentence of the trial court for escape and remand for resentencing consistent with this opinion and Iowa Code section 901.8

DECISION OF THE DISTRICT COURT AFFIRMED. ONE SENTENCE VACATED AND CASE REMANDED FOR RESENTENCING.