IN THE COURT OF APPEALS OF IOWA

No. 1-142 / 00-1197
Filed May 9, 2001

FILED
MAY 0 9 2001
CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOANN MARY WORLUND,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, J.G. Johnson, District Associate Judge.

Defendant appeals from her conviction for possession of a controlled substance. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Danielle Davis, Assistant County Attorney, for appellee.

Heard by Vogel, P.J., and Zimmer and Hecht, JJ.

HECHT, J.

On appeal from her conviction for possession of a controlled substance, Joann Mary Worlund contends the cocaine residue found on a pipe was insufficient to support her conviction for possession. She also asserts trial counsel was ineffective in failing to assert the evidence was insufficient to establish her conscious knowledge of the presence of cocaine. We affirm.

I. Factual Background and Proceedings. On September 22, 1999, officers from the Waterloo Police Department were conducting a search for a woman named Barbara Helm based on an arrest warrant. The officers approached Worlund at her apartment in attempt to locate Helm, who was a friend of Worlund's. While discussing possible places to find Helm, one of the officers noticed a shadow of another person in the apartment. Suspecting the other person was Helm, the officers asked to enter Worlund's apartment and she consented. While it turned out the other person in the apartment was not Helm, the officers observed a crack pipe in the small apartment on the floor near Worlund's bed. Upon further investigation, the officers discovered another crack pipe on the nightstand near the bed.

The officers sent the pipes to the Division of Criminal Investigation ("DCI") for testing. Both pipes consisted of small glass tubes, approximately four inches long, with steel wool stuffed in one end. The inside of the pipes near the steel wool was charred and a black residue was visible on the inside of the glass. James Bleskacek, a criminalist with the DCI, performed several tests on the substance contained in the larger pipe and determined the pipe contained

cocaine. The State charged Worlund with possession of a controlled substance in violation of Iowa Code section 124.401(5) (1999). Trial commenced on May 23, 2000, and the jury returned a verdict of guilty on May 25, 2000. The district court sentenced Worlund to a jail sentence of 365 days, all but fifteen days suspended.

II. Standard of Review. We review sufficiency of the evidence claims for errors at law. *State v. Brown,* 612 N.W.2d 104, 110 (Iowa Ct. App. 2000). We review claims of ineffective assistance of counsel de novo. *State v. Pace,* 602 N.W.2d 764, 768 (Iowa 1999).

III. Sufficiency of the Evidence. Worlund contends the evidence was insufficient to support her conviction for possession of cocaine because mere residue found in a glass tube is inadequate to constitute possession of a controlled substance. We are bound by the jury verdict unless the verdict is not supported by substantial evidence. *State v. Lewis,* 514 N.W.2d 63, 65-66 (Iowa 1994). In making this determination, we must consider all the evidence in the light most favorable to the State. *State v. Peck,* 539 N.W.2d 170, 172 (Iowa 1995). We accept all legitimate inferences that may fairly and reasonably be deducted from the evidence. *State v. Bayles,* 551 N.W.2d 600, 608 (Iowa 1996). Evidence is substantial if it could convince a rational fact finder the defendant is guilty beyond a reasonable doubt. *Id.*

Worlund argues this court should adopt the "usable amount" or "detectable amount" analysis used by appellate courts of other states when determining whether evidence of a controlled substance is sufficient to support a conviction

for possession of such substance. We acknowledge several states have adopted the standards urged by Worlund, commonly reasoning that:

> [t]he intent of the legislation prohibiting possession of a controlled substance is to prevent use of and trafficking in those substances. Possession of a trace amount or residue which cannot be used and which the accused may not even know is on his person or within his control contributes to neither evil. . . . We agree . . . with the courts that have concluded that possession of less than a usable amount of a controlled substance is not what legislators have in mind when they criminalize possession because it cannot contribute to future conduct at which the legislation is aimed, that is, use of or trafficking in drugs.

Harbison v. State, 790 S.W.2d 146, 151 (Ark. 1990); *see also State v. Rhodes*, 988 P.2d 685, 687 (Idaho 1999) (noting several states follow the "usable-quantity" rule, particularly California, Arizona, and Arkansas).

However, our supreme court has expressly rejected the "usable-quantity" theory based on the language of the Iowa possession of controlled substances statute. *State v. Grady*, 201 N.W.2d 493, 496 (Iowa 1972). The section of the Iowa Code of which Worlund was convicted of violating, states, in relevant part, "It is unlawful for any person knowingly or intentionally to possess a controlled substance. . . ." Iowa Code § 124.401(5). In *Grady*, our supreme court held because the statute makes no distinction as to the amount or strength of a controlled substance necessary to convict a person of possession, even a "miniscule" amount of a controlled substance can support a conviction. *Grady*, 201 N.W.2d at 496. This rule is in accordance with the standards adopted by other states whose statutes do not specify the amount needed to sustain a conviction. *See* 25 Am. Jur. 2d *Drugs & Controlled Substances* § 151, at 337 (1996) (stating "under statutes that do not expressly make possession of 'any

amount' of a drug unlawful, the possession of any quantity of a drug, or of any quantity permitting the drug to be identified, has been held sufficient to support a conviction for the possession of that drug.")

Although only a small amount of cocaine was found in the larger crack pipe discovered in Worlund's apartment, we conclude the evidence at trial was sufficient to support a conviction for possession of a controlled substance. The DCI criminalist, Bleskacek, testified he was able to determine the substance in the glass pipe was cocaine, obtaining the same result using three independent testing procedures. While Bleskacek did not measure the amount of cocaine, he testified it was a sufficient amount to identify the substance as cocaine. In addition, the presence of steel wool in one end of the tube and charred marks on the inside of the glass are clear indications the pipe was used to ingest the cocaine and would therefore be likely to contain cocaine.

Worlund further argues a more appropriate charge in this case would have been unlawful possession of drug paraphernalia. She points to the enactment of section 124.414, Iowa's drug paraphernalia law, as a clear indication the legislature intended the new section to control circumstances similar to the present case where a drug may be detectable on an item but is not of significant weight to be used by the individual or measured. However, section 124.414 makes no mention of the presence of an illicit drug on the paraphernalia. Unlike other states' statutes, Iowa's does not make the presence of a drug on an item of paraphernalia a factor in determining whether an individual is in violation of the section. *See generally State v. Baker,* 912 S.W.2d 641, 546 (Mo. Ct. App. 1995).

This omission, coupled with section 124.401(5)'s omission of a specific amount of a controlled substance to constitute possession, is more likely indicative of the legislature's intent for section 124.401(5) to cover possession of controlled substances and section 124.414 to cover possession of the instruments commonly used to ingest, manufacture, or enhance controlled substances. We conclude there is sufficient evidence in the record to support Worlund's conviction for possession of a controlled substance and affirm the district court.

IV. Ineffective Assistance of Counsel. Worlund next contends her trial counsel was ineffective by failing to assert the evidence presented at trial was insufficient to establish her knowledge of the presence of cocaine in the glass tubes found in her apartment. The defendant bears the burden of demonstrating ineffective assistance of counsel. *State v. Morgan,* 559 N.W.2d 603, 612 (Iowa 1997). A defendant receives ineffective assistance of counsel when: (1) the defense attorney fails in an essential duty; and (2) prejudice results. *State v. Bugely,* 562 N.W.2d 173, 178 (Iowa 1997). To prove counsel failed in an essential duty, the defendant must prove the attorney's performance was outside the range of normal competency. *State v. Martin,* 587 N.W.2d 606, 609 (Iowa Ct. App. 1998). The court will generally presume counsel is competent, and we will not second guess a reasonable trial strategy. *State v. Wissing,* 528 N.W.2d 561, 564 (Iowa 1995).

The court must indulge a strong presumption counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action

"might be considered trial strategy." *Id.* The test for prejudice is whether counsel's failure worked to the defendant's actual and substantial disadvantage so that a reasonable possibility exists that but for the trial attorney's unprofessional errors, the resulting conviction would have been different. *State v. Johnson,* 534 N.W.2d 118, 128 (Iowa Ct. App. 1995). "A reasonable probability is one sufficient to undermine confidence in the outcome." *Martin,* 587 N.W.2d at 609.

Initially, we note trial counsel did file a timely motion for directed verdict at the close of the State's evidence. The motion asserted the State had failed to prove Worlund possessed cocaine because the residue in the glass pipe was insufficient to constitute a controlled substance, an issue addressed in division III of this opinion. As Worlund correctly asserts, trial counsel did not challenge the knowledge element of the crime of possession. The record indicates Worlund was previously convicted for possession of cocaine. Trial counsel filed a motion in limine specifically requesting the district court to exclude any evidence of the prior conviction from trial. The State agreed not to present evidence of the conviction unless the defense "opened the door" to the issue by contesting the knowledge element. We conclude it was reasonable trial strategy on the part of trial counsel not to raise the issue of Worlund's knowledge. If counsel had raised the issue, the State would have presented evidence of the prior conviction, which would surely have been detrimental to Worlund's case. Therefore, trial counsel did not fail to perform an essential duty by not including a challenge to the

knowledge element in the motion for directed verdict. Worlund's conviction and sentence are affirmed.

AFFIRMED.