IN THE COURT OF APPEALS OF IOWA

No. 8-579 / 98-0007
Filed November 30, 1998

STATE OF IOWA,
Appellee,

vs.

JOE A. GRIFFITHS,
Appellant.

Appeal from the Iowa District Court for Lee County, William L. Dowell, Judge.

On appeal from his conviction for delivery of methamphetamine, the defendant claims the district court erred in failing to instruct the jury that it could consider possession of methamphetamine as a lesser included offense. **AFFIRMED.**

Barry M. Anderson, Keokuk, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, and Michael P. Short, County Attorney, for appellee.

Considered by Sackett, P.J., and Huitink, Streit, Vogel, and Mahan, JJ.

STREIT, J.

Joe Griffiths appeals his conviction for delivery of methamphetamine in violation of Iowa Code section 124.401(1)(c)(6). We affirm.

On August 7, 1997, Griffiths was charged with delivery of methamphetamine. During trial, at the close of all of the evidence, Griffiths asked that possession of methamphetamine be submitted to the jury as a lesser-included crime. Though the prosecution did not object to the request, the court refused to give that instruction. Griffiths was found guilty by jury verdict and he appeals.

I. ***Scope of Review.*** Our review of a claim that the district court erroneously refused to submit a lesser-included offense instruction is for errors at law. Iowa R. App. P. 4; *State v. Coffin*, 504 N.W.2d 893, 894 (Iowa 1993).

II. ***Possession is not a Lesser-Included Offense.*** This case is controlled by *State v. Grady*. In that case the Iowa Supreme Court held that possession is not a lesser-included offense of delivery. *State v. Grady*, 215 N.W.2d 213, 214 (Iowa 1973). The court's rationale was that conceivably a person might act as a broker in the drug trade effecting delivery of a controlled substance by transfer of title or sale without ever having possession. *State v. Spivie*, 581 N.W.2d 205, 209 (Iowa App. 1998) (citing *State v. Grady*, 215 N.W.2d at 214).

We determine the trial court did not err in refusing to instruct the jury on the lesser crime of possession. "A lesser offense is necessarily included in the greater offense if the greater offense cannot be committed without also committing the

lesser." *State v. McNitt*, 451 N.W.2d 824, 825 (Iowa 1990). Because possession of methamphetamine is not a requirement for delivery of methamphetamine, we determine there was no error. See *State v. Jeffries*, 430 N.W.2d 728, 740 (Iowa 1988) (holding if the lesser offense contains an element not required for the greater offense it is not an included offense).

Griffiths argues, however, that because delivery in this case was actual, not constructive, possession should have been considered a lesser-included offense. His argument is without merit. When the statute defining an offense contains several alternatives, the trial court's marshaling instruction controls which elements are included in the offense for purposes of the lesser-included offense analysis. *State v. Aguiar-Corona*, 508 N.W.2d 698, 702 (Iowa 1993). When the court instructed the jury, it did not limit its instruction to actual delivery. The jury received instruction on constructive delivery as well. Thus, possession was not necessary to satisfy the crime of delivery. That Griffiths did physically deliver the drugs in this particular case is of no consequence to the test of lesser-included offenses. *See State v. Jackson*, 422 N.W.2d 475, 478 (Iowa 1988) (citing *State v. Webb*, 422 N.W.2d 475, 428 (Iowa 1981) (holding the legal test for identifying lesser included offenses depends on the statutory definition of the greater offense rather than the evidence by which the offense may be proved in a particular case)).

III. ***Conclusion.*** The district court did not err in refusing to instruct the jury that possession of methamphetamine is a lesser-included offense of delivery of methamphetamine. The ruling of the district court is affirmed.

AFFIRMED.