IN THE COURT OF APPEALS OF IOWA

No. 5-082 / 94-0202

FILED
APR 28 1995
CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

DARYL E. BROOKS,

Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, James R. Havercamp, Judge.

Daryl Brooks appeals from his convictions, following a jury trial, of three counts of delivery of a controlled substance (crack cocaine), in violation of Iowa Code section 124.401(1)(c)(1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, William E. Davis, County Attorney, and Hugh Pries, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Cady and Huitink, JJ.

SACKETT, J.

Defendant-appellant Daryl E. Brooks appeals his conviction for three counts of delivery of a controlled substance in violation of Iowa Code section 124.401(1)(c) (1993). Defendant contends the district court abused its discretion in refusing to grant his request for a different attorney. Defendant claims his trial counsel was ineffective in allowing exhibits with detailed evidence tags attached to be introduced in evidence without objection. Defendant raises other claims of ineffective assistance of trial counsel which he asked be preserved for postconviction relief. We preserve his claims for postconviction relief. We affirm.

Defendant was charged with delivering cocaine to undercover officers on three separate occasions in May and June 1993. Defendant contended officers mistakenly identified him as the perpetrator.

On the evening of May 5, 1993, undercover Officer Jones drove to an area near The Bar in Davenport, Iowa. Jones parked outside The Bar. A black male approached his car and asked Jones if he was "looking." Jones responded he was "looking for one." The man handed a small cellophane package of cocaine to Jones. Jones gave him $20.

Defendant got out of the car. Jones drove off and radioed the man's description to other officers. Jones described the man who sold him cocaine as a black male wearing a blue shirt, dark pants and baseball cap. Jones said the man had a scar under his left eye.

Davenport police located a man meeting that description and told him they were investigating gang activity. They asked the man for identification. He gave the officer identification showing the name Daryl Brooks. The man was photographed. Jones later identified the man in the photograph as the person who sold him cocaine.

The next day, Jones and Officer Muhs drove to The Bar tavern. As they parked, the same black man approached the car. Jones introduced him to Muhs as "Daryl." Jones and Muhs noted the man was wearing a blue T-shirt, black ball cap, and long red shorts. The man

asked the officers if they were "looking for anything." Jones said he was "looking for one or two." The man left and returned a few minutes later and got in the car He sat in the front seat and, as they drove, the man unwrapped a large rock of cocaine from a plastic baggie He broke off a small piece of cocaine for himself The remaining cocaine broke into several pieces. The man threw the plastic wrapper out the window and placed the pieces of cocaine in Muhs's hand. Jones gave the man $40. He told Jones and Muhs he was stopped by officers the previous night.

Over a month later, on June 23, 1993, undercover Officer Neyrink entered The Bar to purchase cocaine. A black man approached him. Neyrink described the man as a 5' 8", 170 pound black male with black hair and a small scar under his left eye. The man was wearing a black baseball cap, white t-shirt, blue shorts, and white Fila tennis shoes.

The man said he had not seen the officer in the bar before The man asked whether the officer was "looking for anything." Neyrink asked the man to "hook him up with a twenty." They met at a table where the man handed Neyrink a rock of cocaine in exchange for $20. The man asked if he could get a "bump." Neyrink responded he would get a pipe from his car. Neyrink then left the bar and did not return.

A short time later, the man was identified by a patrolman. Neyrink was then shown a picture of Brooks, who he identified as the man involved in the delivery.

At trial, Officers Jones, Muhs, and Neyrink identified defendant as the man who sold them cocaine. Laboratory tests confirmed the substance obtained by the officers was cocaine, weighing .1, .2, and .26 grams.

Defendant testified he did not sell cocaine to the officers and he was often mistaken for another person, Melvin Harris, who often patronized The Bar. Defendant testified Harris looked like him, was approximately the same size, and had a similar scar near his eye. Defendant said he had once been mistakenly arrested as a result of mistakenly being identified

as Melvin Harris. Defendant testified he did not own red clothing, including red shorts, because red was a gang color.

The defense presented testimony from defendant's friend who confirmed defendant did not own or wear red clothing.

Prior to trial, defendant wrote to the court on two occasions asking for a different attorney contending strategic differences between he and his attorney. Defendant contended the attorney failed to properly investigate the case and failed to communicate with him The attorney also moved to withdraw because defendant did not have confidence in her representation. The trial court did not grant defendant's request. On appeal, defendant contends the trial court erred in not appointing a different attorney for him.

A defendant is not necessarily entitled to the court-appointed attorney of his or her choice. *State v. Williams*, 285 N.W.2d 248, 254 (Iowa 1979); *Williams v. Nix*, 751 F. 2d 956, 959 (8th Cir. 1985). To obtain a different attorney, a defendant must demonstrate a sufficient reason. *See State v. Hutchison*, 341 N.W.2d 33, 41 (Iowa 1983); *Smith v. Lockhart*, 983 F. 2d 1314, 1320 (8th Cir. 1991).

When there is a substantial breakdown in the relationship between a defendant and his or her attorney, a defendant should be allowed to have substitution of counsel. *People v. Hooper*, 267 N.W.2d 162, 163 (Mich. Ct. App. 1978). This may include a conflict of interest, an irreconcilable conflict, or a complete breakdown in communications between the attorney and the defendant. *Lockhart*, 983 F.2d at 1320.

Defendant charges his attorney had not investigated the case and, specifically, did not take depositions, conduct an investigation to determine if there were other suspects, including a suspect he had called to his attorney's attention, and failed to contact an expert in support of his identification defense (cross-racial identification). We agree with defendant that his attorney has an obligation to investigate. *See Origer v. State*, 495 N.W 2d 132, 135-37 (Iowa App. 1992). We are unable from the record to determine the specific preparation defendant's

trial attorney made The trial court asked her if she was prepared. She said she was. She provided no specifics as to her preparation and the trial court gave no reasons on the record why he determined trial counsel was competent. Defendant contends he was misidentified and he should have been entitled to have an expert witness on the issue of identification. We are unable to resolve this challenge on the record before us and reserve it for postconviction relief.

Defendant next contends his trial counsel was ineffective in her failure to object to evidence tags attached to three exhibits. The exhibits were three plastic baggies containing cocaine Attached to each bag was large evidence tags covering one side of the bag. Each tag was:

QUAD CITY MED
No Exh. 1 MEG No. 93W3047
DEFENDANT(S) Daryl E. Brooks
DATE PURCHASED/RECOVERED: 5/5/93
TIME PURCHASE/RECOVERED: 712 P.M.
LOCATION PURCHASED/RECOVERED 300
Blk of Gaines Davenport, IA
SPECIAL AGENT: F. Jones 9796
FIELD TEST? Yes RESULTS: Positive
DESCRIPTION. One plastic bag w/purported crack cocaine. Approx 0.1 grams

QUAD CITY MED
No. Exh. 2 MEG No. 93W3047
DEFENDANT(S): Daryl E. Brooks
DATE PURCHASED/RECOVERED: 5/06/93
TIME PURCHASED/RECOVERED: 7:57 P.M.
LOCATION PURCHASED/RECOVERED: 300
Blk of Warren Street Davenport, IA
SPECIAL AGENT. F. Jones 9796
FIELD TEST? Yes RESULTS: Positive
DESCRIPTION: One purported rock of purported crack cocaine. Approx 0.26 grams.

QUAD CITY MED
No. 93W3047 MEG No. 3
DEFENDANT(S): Daryl E. Brooks
DATE PURCHASED/RECOVERED: 6/23/93
TIME PURCHASED/RECOVERED: 9:05 P.M.
LOCATION PURCHASED/RECOVERED: "The Bar"

300 Gaines St. Davenport, IA
SPECIAL AGENT. Neyrink
FIELD TEST? Cocaine
RESULTS: Positive
DESCRIPTION: One (1) plastic wrapper containing one (1) rock of purported crack cocaine with total package weight approximately .2 grams.

The evidence went in without objection, and the bags with the tags went with the jury to deliberations

The admission of incriminating evidence that bears an evidence tag summarizing the State's case is error. The tags are hearsay and unduly emphasized the State's case against the defendant when the tags remained on exhibits given to the jury. *See State v. Gallup*, 500 N W.2d 437, 441 (Iowa 1993); *State v. Reese*, 259 N.W.2d 771, 774 (Iowa 1977). Had defendant's attorney objected to the admission of the exhibits with the evidence tags, it would have been a valid objection.

The tags clearly were a condensation of the case against defendant and had the effect of allowing the State's witnesses to accompany the jury to the jury room. *See State v. Branch*, 222 N.W.2d 423, 425-27 (Iowa 1974). No proper purpose exists for leaving evidence tags attached to exhibits which summarize the State's testimony regarding the exhibits. *State v. Shultz*, 231 N.W.2d 585, 587 (Iowa 1975).

While the State concedes it was error to admit evidence with an evidence tag, it contends the error was harmless and defendant has not met the necessary burden to succeed on a claim of ineffective counsel. We are not able on this record to determine if counsel had any valid reason for not objecting to the tags. We preserve this issue for postconviction proceedings.

Defendant raises other issues, including his counsel was ineffective in failing to ask for a mistrial after jurors saw him in handcuffs on the first day of trial; in failing to investigate and object to certain alleged comments made by the bailiff in front of the jury and an alleged heated debate between the county attorney and an identified person in front of the jury

concerning the photo array identification issue The State agrees with defendant that these issues should be preserved for postconviction proceedings We find they should be so preserved.

AFFIRMED.