

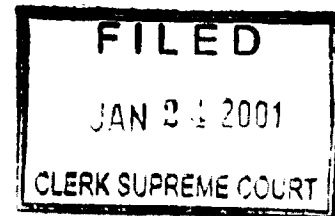
IN THE COURT OF APPEALS OF IOWA

No. 0-706 / 99-1660
Filed January 24, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RICHARD WAYNE EVERHART,
Defendant-Appellant.



Appeal from the Iowa District Court for Clarke County, Scott D. Rosenberg and Gary G. Kimes, Judges.

The defendant appeals from his convictions for possession of more than five grams of methamphetamine with the intent to deliver while in immediate possession or control of a firearm, failure to affix a drug tax stamp, and for being a felon in possession of a firearm. **CONVICTIONS AFFIRMED, SENTENCES AFFIRMED IN PART AND VACATED IN PART AND REMANDED IN PART FOR RESENTENCING.**

Linda Del Gallo, State Appellate Defender, and Martha J. Lucey, Assistant State Appellate Defender, for appellant, and Richard Everhart, Fort Madison, pro se.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, and John D. Lloyd, County Attorney, for appellee.

Considered by Zimmer, P.J., and Hecht and Vaitheswaran, JJ.

VAITHESWARAN, J.

A jury convicted Richard Wayne Everhart of being a felon in possession of a firearm, possession of methamphetamine with intent to deliver and failure to pay an excise tax. Everhart appealed following entry of judgment and sentence, contending: (1) his attorney provided ineffective assistance when he did not object to certain trial testimony, did not move for severance of the felon in possession count and did not request a competency hearing; (2) his due process rights were violated by the court's failure to afford him a competency hearing; and (3) the sentencing court failed to exercise discretion when it imposed a fine. We affirm the convictions, affirm the sentences in part and vacate in part and remand in part for resentencing.

I. Background Facts and Proceedings

State troopers received complaints that a man in a blue truck was driving recklessly in a county park and was walking around suspiciously with a flashlight. The troopers went to the park and found the blue truck. Everhart was in a nearby restroom. The troopers searched the truck with Everhart's permission and discovered an empty gun holster. They subsequently found a fully loaded automatic pistol in the restroom.

The troopers arrested Everhart on an outstanding warrant. A search of Everhart at the jail revealed bags containing brass pipe screens, 12.9 grams of methamphetamine, and a small quantity of marijuana. Officers seized these items as well as cash in excess of \$700.

The State charged Everhart with possession of methamphetamine with intent to deliver, possession of marijuana, failure to pay an excise tax, and the

crime of felon in possession of a firearm. Iowa Code §§ 124.401(1)(b)(7), 124.401(5); 453B.3, and 724.26 (1997). Everhart filed a motion in limine seeking to exclude his prior criminal record and two interviews conducted in furtherance of a plea agreement. The State agreed to stipulate Everhart had previously been convicted of a felony. The State further agreed not to discuss during its case in chief the basis for the outstanding warrant that led to Everhart's arrest or the substance of the interviews. However, the State requested it be allowed to use the prior felony conviction for impeachment purposes and reserved the right to raise the interviews if Everhart took the stand and testified to "material matters that were discussed in any of those interviews." Defense counsel agreed with the State's position on the interviews. Therefore, the court was required to resolve only the question of whether the State could use the prior felony conviction for impeachment purposes. The court granted the State's request.

The case proceeded to trial on all but the marijuana possession count. A jury found Everhart guilty of the remaining counts and the court sentenced him to indeterminate terms not exceeding fifty years on the possession with intent to deliver count, and five years each on the remaining two counts to be served concurrently. The court also imposed a \$5000 fine.

Defense counsel and Everhart filed post-trial motions which the court denied, although the court "preserved for appeal in a post-conviction relief action" Everhart's ineffective assistance of counsel claims. This appeal followed.

II. Ineffective Assistance of Counsel

Ineffective assistance of counsel claims are reviewed de novo. See *State v. Oetken*, 613 N.W.2d 683, 683 (Iowa 2000). When specific errors are relied

upon to show ineffective assistance of counsel, the defendant must demonstrate that 1) counsel failed to perform an essential duty and 2) prejudice resulted. See *State v. Goodson*, 503 N.W.2d 395, 399 (Iowa 1993). We generally preserve ineffective assistance of counsel claims for postconviction proceedings to afford defense counsel a chance to respond to the allegations. See *State v. Laffey*, 600 N.W.2d 60, 61-62 (Iowa 1999). However, we may address such claims on direct appeal when the record is adequate. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994).

Everhart raises the following ineffective assistance of counsel claims: (1) failure to object to the State's cross-examination of the defense expert as beyond the scope of direct testimony; (2) failure to object to the State's rebuttal testimony on the ground it did not rebut any material issue raised by the defense; (3) failure to object to testimony relating to the plea negotiation; (4) failure to move to sever the felon in possession of a firearm charge from the other charges; and (5) failure to request a competency hearing. We preserve the last three claims for postconviction relief to afford defense counsel an opportunity to respond to the allegations. We deem the record adequate to resolve the first two issues.

A. Failure to Object to Cross-Examination Testimony. A key issue in the case was whether Everhart had the intent to deliver methamphetamine. Everhart called a psychiatrist, Dr. Charles Wadle, to testify about the effects of methamphetamine on a regular user. He opined it was "definitely possible" for a person to use two to four grams of methamphetamine in a twenty-four hour period. He also testified he had interviewed Everhart and Everhart disclosed he used as much as four grams a day. On cross-examination, the State asked Dr.

Wadle whether Everhart had indicated he sold methamphetamine. Dr. Wadle answered that the topic had come up and Everhart indicated he never sold methamphetamine. Defense counsel did not object to this testimony. Everhart contends counsel should have objected to the State's line of questioning as beyond the scope of direct examination. We disagree.

Cross-examination may address matters inquired into on direct examination and questions "fairly within the area of those matters" constitute proper cross-examination. *State v. Holmes*, 325 N.W.2d 114, 117 (Iowa 1982). Everhart called Dr. Wadle in an effort to establish the amount of methamphetamine in his possession could have been a personal use quantity. He discussed Everhart's drug usage, his potential for tolerance and the quantity of drugs he was using immediately prior to his arrest. We believe the prosecutor's questions concerning the source of funding for Everhart's drug usage were fairly within the scope of this direct testimony. Accordingly, we conclude Everhart's counsel did not breach an essential duty by failing to object to this line of questioning as beyond the scope of direct examination.

B. Failure to Object to Rebuttal Testimony as Unrelated to Material Issue. On rebuttal, the State called two law enforcement officers to testify concerning Everhart's statements to them about his sale of drugs. Everhart asserts his attorney should have objected to the State's questions eliciting the rebuttal testimony, as they did not "rebut any material issue raised by the defense." We disagree.

"Rebuttal evidence includes any competent evidence which explains, or is a direct reply to, or a contradiction of, material evidence introduced by the

accused or which is brought out on his or her cross-examination." *State v. Nicholson*, 402 N.W.2d 463, 466 (Iowa App. 1987). As noted, Dr. Wadle addressed the "intent to deliver" portion of the State's charges and implied Everhart could not have had the intent to deliver drugs because the quantity of drugs was indicative of personal use.

The State's first officer on rebuttal testified Everhart made a voluntary statement he sold drugs to his friends. This statement directly rebuts the inference Everhart wished the jury to draw from Dr. Wadle's testimony.

The second officer testified about the interviews conducted in connection with the plea negotiations. He testified Everhart admitted to dealing drugs. Because the defense presented evidence suggesting the methamphetamine in his possession was a personal use quantity, we conclude this testimony did rebut a material issue raised by the defense. Accordingly, we also conclude defense counsel did not breach an essential duty by failing to object to this testimony on this ground.

We only address the question of whether defense counsel should have objected to this officer's testimony on the ground it did not rebut any material issue raised by the defense. We do not here pass on the propriety of the State's decision to elicit testimony garnered in furtherance of a plea and the absence of an objection to this testimony pursuant to Iowa Rule of Criminal Procedure 9(5) (providing plea discussions that do not result in plea are inadmissible). This is an issue we have preserved for postconviction relief.

III. Competency

In a pro se brief filed after appellate counsel filed her brief, Everhart contends the district court denied him his right to due process by failing to suspend the proceedings to hold a competency hearing. Everhart also challenges his attorney's performance in failing to insist on a competency hearing. We here address only the issue of the district court's obligation to schedule a competency hearing, having preserved the related ineffective assistance of counsel claim for postconviction relief.

As a preliminary matter, the State asserts Everhart has failed to preserve this issue for appellate review. We disagree. The State concedes defense counsel raised the competency issue below, albeit in a request for payment of expert fees rather than a request for competency hearing. Although the court did not order a formal competency hearing, the court did address the issue both pre-trial and post-trial. We accordingly conclude error was preserved. *See State v. Mann*, 602 N.W.2d 785, 790 (Iowa 1999).

Everhart correctly points out that the criminal trial of an incompetent defendant violates due process. *Cooper v. Oklahoma*, 517 U.S. 348, 354, 116 S. Ct. 1373, 1376, 134 L. Ed. 2d 498, 506 (1996). The test of competence is whether a defendant has the present ability to understand the charges and communicate effectively with defense counsel. *Id.* at 368, 116 S. Ct. at 1384, 134 L. Ed. 2d at 515. A competency hearing is required if "it reasonably appears that the defendant is suffering from a mental disorder which prevents the defendant from appreciating the charge, understanding the proceedings, or assisting effectively in the defense." Iowa Code § 812.3; *State v. Rieflin*, 558

N.W.2d 149, 152 (Iowa 1996). Relevant factors include irrational behavior by the defendant, defendant's demeanor at trial and prior medical opinions on the defendant's competency to stand trial. *Id.*

Shortly before trial, defense counsel sought to have Everhart evaluated by a psychiatrist to determine whether he was able to participate in his defense. The court granted counsel's request and ordered Everhart evaluated by Dr. Michael Taylor. Dr. Taylor's evaluation is not in evidence and the pretrial record contains no further discussion of the competency issue. However, following trial, Everhart, acting pro se, conceded Dr. Taylor had found him competent to stand trial. Everhart nevertheless urged he was not competent and, accordingly, did not have a fair trial. He subsequently sought a motion for new trial based on the court's failure to address his competency. At a hearing on this motion, both the prosecutor and defense counsel stated the competency issue was not addressed in light of the results of Dr. Taylor's evaluation.

We have reviewed the trial transcript and find no indication Everhart behaved irrationally or appeared unable to assist in his defense. As the district court ordered a psychiatric evaluation and the evaluation apparently disclosed no competency issue, we conclude the court was not required to sua sponte hold a competency hearing to further delve into the issue.

IV. Sentencing

Everhart contends the district court did not exercise any discretion in imposing the \$5000 fine. The State agrees Iowa Code section 124.401(1)(e) affords discretion to suspend a fine and concedes the court failed to exercise this discretion. If a court fails to exercise discretion, the sentence must be vacated

and the case remanded for resentencing. *State v. Lee*, 561 N.W.2d 353, 354 (Iowa 1997). Accordingly, we vacate only the fine portion of the sentence and remand for resentencing on that part of the sentence.

**CONVICTIONS AFFIRMED, SENTENCES AFFIRMED IN PART AND
VACATED IN PART AND REMANDED IN PART FOR RESENTENCING.**