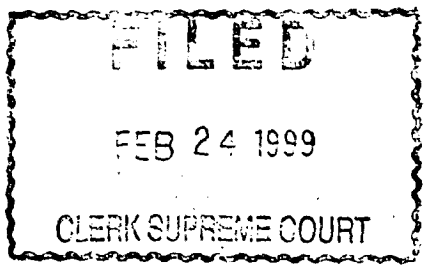
IN THE COURT OF APPEALS OF IOWA

No. 8-729 / 98-0584
Filed February 24, 1999



STATE OF IOWA,
Appellee,

vs.

LOREN DAVID BAILEY,
Appellant.

Appeal from the Iowa District Court for Poweshiek County, Richard J. Vogel, Judge.

Loren Bailey appeals from the judgment and sentence entered following his conviction for possession of methamphetamine with intent to deliver. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, and Michael W. Mahaffey, County Attorney, for appellee.

Considered by Huitink, P.J., and Vogel and Zimmer, JJ.

HUITINK, P.J.

Loren David Bailey contends his trial counsel was ineffective by failing to object to testimony concerning his prior drug involvement and related convictions. Because we find Bailey has failed to demonstrate he was prejudiced by his counsel's representation, we affirm his conviction and sentence.

I. Background Facts and Proceedings.

Loren Bailey was charged by trial information with possession of a controlled substance (methamphetamine) with intent to deliver, in violation of Iowa Code section 124.401(1)(c)(6)(1995). The charges were filed after a Grinnell police officer found drug paraphernalia and a cube of methamphetamine in a shaving bag under the seat of a vehicle Bailey was driving. The vehicle was owned by Bailey's ex-wife, Susan. A search of Bailey's person also led the officer to discover two razor blades inside Bailey's wallet. Bailey denied awareness of the drugs in the vehicle, and explained he used the razor blades to cut plastic wrap on goods he unloaded as an over-the-road truck driver.

Prior to trial of this matter, Bailey filed a motion in limine seeking to exclude any evidence of his prior drug trafficking convictions. The record is unclear as to whether the district court ruled on the motion in limine; however, the court, in the absence of a proper objection by defense counsel, allowed testimony concerning Bailey's previous convictions for conspiracy to deliver controlled substances.

Following a jury trial, Bailey was found guilty and the district court sentenced him to an indeterminate ten-year term of incarceration.

On appeal, Bailey contends he suffered ineffective assistance of counsel because of his attorney's failure to object to testimony concerning his prior drug involvement and related convictions.

II. Ineffective Assistance of Counsel.

Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. *State v. Mulder*, 313 N.W.2d 885, 890 (Iowa 1981); *State v. Nebinger*, 412 N.W.2d 180, 191-92 (Iowa App. 1987). We depart from this preference if the record on direct appeal is sufficient to evaluate the merits of a defendant's ineffective assistance of counsel claim. *Id.* We find the record in this case sufficient to decide Bailey's ineffective assistance claim on direct appeal.

Established principles govern our review of appellant's Sixth Amendment claim his counsel was ineffective. When considering this claim, our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged." *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). In deciding this we must consider whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93. "In examining counsel's conduct we review de novo the totality of

relevant circumstances." *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (citations omitted).

To prevail on his claim of ineffective assistance of counsel, Bailey must ultimately show his attorney's performance fell outside a normal range of competency and the deficient performance so prejudiced him as to give rise to the reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992). Representation is presumed competent and a defendant has the burden to prove by a preponderance of the evidence that counsel was ineffective. *McKettrick*, 480 N.W.2d at 55.

The Iowa Supreme Court has stated it is not necessary to determine whether counsel's performance was deficient before examining the prejudice component of an ineffective assistance claim. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). The court quoted *Strickland v. Washington*:

> The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Taylor, 352 N.W.2d at 685 (quoting *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699-700). Pursuant to *Taylor v. State*, we may affirm applicant's conviction because he has failed to prove prejudice, without deciding whether there was a failure of duty. *See Taylor*, 352 N.W.2d at 685.

Even assuming Bailey's trial counsel breached an essential duty in failing to object to the proffered evidence of the prior drug convictions, we find Bailey suffered no prejudice as a result.

The admissibility of evidence of prior convictions and misconduct is governed, at least in part, by Iowa Rule of Evidence 404(b), which reads:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Our analysis turns on whether the disputed evidence would have been admitted even over a timely-made, proper objection. We hold the evidence would have been properly admitted; therefore counsel's objection, even if timely, would have been meritless. We will not find ineffective assistance of counsel for counsel's failure to make meritless motions. *See State v. Rice*, 543 N.W.2d 884, 888 (Iowa 1996).

We note Bailey was charged with possession of methamphetimine with intent to deliver. In order to obtain a conviction, the State was required to prove Bailey's specific intent to deliver the illegal substance. *See* Iowa Code § 124.401(1) (1997).

In *State v. Grosvenor*, 402 N.W.2d 402, 406 (Iowa 1987), the supreme court held that because specific intent is a necessary element for conviction on charges of possession of controlled substances with intent to deliver, evidence of other illegal activities that tend to prove the defendants' general propensity to deliver illegal drugs is relevant and should be admitted. We conclude that principle is applicable here.

See also State v. McDaniel, 512 N.W.2d 305, 308 (Iowa 1994)(evidence of prior sale of marijuana was relevant to issue of intent in prosecution for possession of marijuana with intent to deliver); *State v. Wade*, 467 N.W.2d 283, 284 (Iowa 1991)(no error in admitting evidence of defendant's prior arrest for possession with intent to deliver in order to show intent, knowledge, and absence of mistake or accident); *State v. Kern*, 392 N.W.2d 134, 136 (Iowa 1986)(prior delivery of controlled substance admitted to show intent); *State v. Mendiola*, 360 N.W.2d 780, 782 (Iowa 1985) (prior conviction of possession with intent to deliver admissible to show knowledge in prosecution for same offense).

Additionally, because Bailey denied knowledge of the shaving bag found under the driver's seat, as well as its contents, the evidence of his prior drug convictions also served the purpose of proving his knowledge of the crime or the absence of mistake or accident in the drugs' location. *See Wade,* 467 N.W.2d at 284; *State v. Goodson*, 516 N.W.2d 30, 34 (Iowa App. 1994)(prior bad acts relevant to prove defendant's knowledge of illegal nature of substance and absence of mistake in possession).

Concededly, the inquiry does not end with a finding that the evidence is relevant for one of the independent purposes listed in Rule 404(b). It must also be determined whether the prejudicial effect of the evidence outweighs its probative effect in the trial of the issues before the jury. *State v. Munz*, 355 N.W.2d 576, 579 (Iowa 1984). Although evidence of other crimes will always be prejudicial to the

defendant on trial, that prejudice in and of itself does not outweigh the interest of the public in the State's ability to present relevant evidence of criminal activity to the trier of fact. *McDaniel*, 512 N.W.2d at 308.

In order for the prejudice engendered by the evidence of another crime to outweigh its probative effect, the evidence must be of a nature that engenders prejudice extending beyond its tendency to show the defendant guilty of an element of the offense charged. *Id.* at 309. In this case, the most contentious issues were Bailey's knowledge of the drugs in the vehicle and his intent to deliver. We find the evidence of his prior drug involvement was highly probative of these two necessary elements of the charged offense. The evidence was used for a proper purpose, and Bailey did not suffer any undue prejudice as a result of its admission.

AFFIRMED.