IN THE COURT OF APPEALS OF IOWA

No. 2-650 / 91-1591

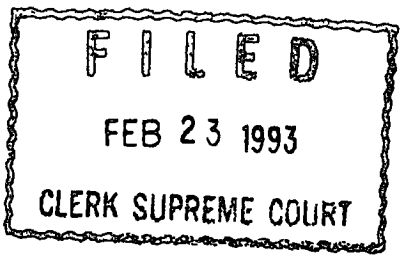
STATE OF IOWA,

Appellee,

vs.

SALVADOR MERCADO PENA,

Appellant.



Appeal from the Iowa District Court for Polk County, Glen E. Pille, Judge.

Salvador Mercado Pena appeals from the entry of judgment and sentences upon his convictions for possession with the intent to deliver cocaine and failure to possess tax stamps. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender; Rachele B. Hjelmaas and Andi S. Lipman, Assistant State Appellate Defenders, for appellant.

Bonnie J. Campbell, Attorney General, and Barbara B. Galloway, Assistant Attorney General, for appellee.

Considered by Oxberger, C.J., and Sackett and Habhab, JJ.

OXBERGER, C.J.

Salvador Pena appeals his conviction of possession with intent to deliver cocaine. Pena's insufficiency of the evidence arguments focus upon his claim that, as a matter of law, he did not have dominion and control over a sufficient amount of cocaine to prove that he had the intent to deliver a controlled substance or to sustain a conviction for tax evasion under Iowa Code section 421A.3 (1991). He claims the record shows that, although he was in the home when the police executed the search warrant, he was not the owner of the home, he did not pay rent and he was just in the home temporarily to do some repair work. Therefore, he claims he did not have sufficient dominion over the premises to constitute possession of the cocaine not found on his person.

Scope of Review.

Our standard of review is well settled. A verdict will be upheld where there is substantial evidence to support the charge. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id. The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence at trial, not just the

evidence that supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980).

I. Sufficiency of Evidence.

Pena contends the evidence was insufficient to support his conviction for possession with intent to deliver cocaine, in violation of Iowa Code section 204.401(1)(c)(2)(b) (1991).

In order to sustain a conviction for the charged crime, the State is required to prove:

1) The defendant knowingly possessed cocaine;

2) The defendant knew the substance he possessed as cocaine; and

3) The defendant possessed the cocaine with the intent to deliver it.

Iowa Code § 204.401(1)(c)(2)(b) (1991).

We first address whether Pena's possession of the cocaine was supported by substantial evidence. Pena does not challenge the possession of the vial of cocaine found in his shirt pocket. In addition, a plastic bag containing 1.94 grams of cocaine was found a few inches from Pena when the police officers entered the home. The defendant's clothing was located in the room Pena claimed was his and he admitted living in the house. He claimed he repaired the home in lieu of paying rent to the owner. Additional amounts of cocaine were found in the kitchen, which was living space shared by Pena, and the codefendant's bedroom. We find this evidence sufficient to support finding Pena was in possession of the cocaine found in the house.

We now turn to the question of whether Pena's intent to deliver was supported by substantial evidence.

Relevant factors considered in determining whether a defendant intended to deliver controlled substances includes the manner of packaging the substance, the presence of weighing devices, and the existence of other paraphernalia commonly used in drug dealing. State v. Luter, 346 N.W.2d 802, 809 (Iowa 1984).

A plastic bag containing paper bundles, typically used to wrap small amounts of cocaine, was found in the search. A small scale which had the capacity to weigh up to one gram was also discovered. An investigating officer testified the scale was similar to the type of scale commonly found at the scene of an execution of a drug search warrant. Finally, the officer testified the street value of the cocaine found was such that few users could afford to purchase that amount for personal use at one time.

We find sufficient evidence to support Pena intended to deliver the cocaine found in the search. We also find sufficient evidence to support Pena's conviction for failure to affix tax stamps.

II. **Ineffective Assistance of Counsel.**

Pena next contends he was denied effective assistance of counsel when his lawyer filed a motion to continue even though Pena never waived speedy trial. Where the record on direct appeal is not adequate to permit us to resolve the

issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly-ineffective attorney the opportunity to explain his or her conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). We conclude there is an inadequate record for us to adjudicate defendant's claim without counsel's explanation for his/her conduct. We therefore preserve defendant's ineffective assistance of counsel claim for a later proceeding.

AFFIRMED.