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DEC 17 198[illegible]
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed December 17, 1987
vs.	)	320
ANDREW ASHTON JOHNSON,	)	7-434 87-244
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Scott County (126551-01), David J. Sohr and James E. Kelley, Judges.

Defendant appeals the sentence of the district court on his conviction, after a guilty plea, for the crime of possession of marijuana with intent to deliver, in violation of Iowa Code section 204.401(1)(b). **AFFIRMED.**

Stephen P. Wing of Dwyer & Wing, Davenport, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Thomas D. McGrane, Assistant Attorney General, for plaintiff-appellee.

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

HAYDEN, J.

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Defendant, Andrew Ashton Johnson, appeals the sentence of the district court on his conviction, after a guilty plea, for the crime of possession of marijuana with intent to deliver, in violation of Iowa Code section 204.401(1)(b). He asserts he was denied effective assistance of counsel by the failure of his counsel to file a motion in arrest of judgment or otherwise challenge the applicability and constitutionality of Iowa Code section 204.401(1)(b). He also asserts the district court erred in two ways when it imposed sentence upon him. He contends the court failed to adequately articulate the reasons for the sentence imposed, as required by Iowa Rule of Criminal Procedure 22(3)(d). He also contends the court abused its discretion in selecting the sentence imposed. We affirm.

On September 27, 1986, Johnson left Iowa City, where he is a student at the University of Iowa, for a three-day weekend with friends in Davenport. He took with him approximately eleven bags of marijuana to share with his friends at the party that evening. Upon his arrival in Davenport, he was unable to find the party, so he proceeded to go out drinking with another friend. Sometime during the evening he became separated from this friend, at whose home he had intended to stay that evening. Without a place to stay, he decided to return to Iowa City. On the on-ramp to Interstate 80, just outside Davenport, two policemen stopped to render assistance when they observed Johnson's motorcycle was parked on the shoulder of the ramp, facing the wrong way. Johnson acknowledges he was intoxicated at this time. After Johnson admitted to the officers he had been drinking, and had smoked some marijuana earlier that evening, they searched him and discovered the bags of marijuana. He was arrested and charged with public intoxication and possession of marijuana with intent to deliver.

On January 16, 1987, Johnson pleaded guilty to the marijuana charge. His plea agreement provided the public intoxication charge would be dismissed at sentencing and the State would make no recommendation as to the sentence on the marijuana charge. It was discovered at the plea hearing, however, Johnson had pleaded guilty to the public intoxication charge and paid a $40 fine shortly after his arrest. This portion of the plea agreement was thereby nullified, with no complaint from either the State or Johnson. On February 3, 1987, Johnson was given an indeterminate prison sentence for a period not to exceed five years.

I. **Ineffective Assistance of Counsel.** Johnson's first assertion on appeal is he was denied effective assistance of counsel. We may only consider the merits of an appeal if the defendant's failure to file a motion in arrest of judgment, as in this case, resulted from ineffective assistance of counsel. State v. Schoelerman, 315 N.W.2d 67, 71 (Iowa 1982). In such cases, our review is de novo. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984). Ordinarily, we are hesitant to address ineffective assistance claims on direct appeal. State v. Hildebrandt, 405 N.W.2d 839, 840 (Iowa 1987). However, if the issue can be fairly resolved without the expense of an additional hearing and appeal, we prefer to resolve it expeditiously. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). The record in this case is adequate to permit resolution of the issue.

Johnson contends counsel should have challenged the applicability and constitutionality of Iowa Code section 204.401(1)(b), for the violation of which he pleaded guilty. We first address whether counsel was ineffective by failing to challenge the constitutionality of the statute.

Johnson asserts his trial counsel was ineffective by failing to claim section 204.401(1)(b) is unconstitutionally vague. He contends it is not clear the word

"transfer" in the statute encompasses conduct such as his, i.e., intending to merely make marijuana available to persons attending a party. Ironically, he likens the situation to bringing a dish to a "pot luck" supper. His interpretation of the statute is it only proscribes intent to deliver to a specific person.

A criminal statute is not unconstitutionally vague if it gives a person of ordinary intelligence fair warning of what it prohibits and provides explicit standards for those who enforce it. State v. McKee, 392 N.W.2d 493, 494 (Iowa 1986). The "fair warning" test is met if the meaning of the statute is fairly ascertainable by reference to similar statutes, prior judicial determinations, reference to the dictionary, or if the questioned words have a common and generally accepted meaning. State v. Willis, 218 N.W.2d 921, 923 (Iowa 1974).

The dictionary definitions of the verb form of "transfer" include (1) to convey from one person, place or situation to another, and (2) to cause to pass from one to another. Webster's New Collegiate Dictionary 1253 (9th ed. 1983); see also, American Heritage College Dictionary 1286 (2d ed. 1982). We note the common and generally accepted meaning of "transfer" comports with the dictionary definitions. We have no doubt, therefore, Johnson had clear notice his action was violative of the statute. Providing for the availability of marijuana to partygoers certainly causes the possession of it "to pass from one to another." As such, we uphold the constitutionality of Iowa Code section 204.401(1)(b) both on its face and as applied.

In order to establish ineffective assistance of counsel, Johnson must show counsel failed to perform an essential duty and prejudice resulted. State v. Yaw, 398 N.W.2d 803, 805 (Iowa 1987). Since we have found the statute was not unconstitutionally vague, we conclude Johnson was not prejudiced by counsel's failure to challenge its constitutionality.

Johnson also asserts his trial counsel was ineffective by failing to challenge the applicability of section 204.401(1)(b) to the particular facts and circumstances in his case. He contends his expressed intention of giving away the marijuana at the party did not sufficiently express an intention to transfer possession of it to another. In essence, this is the same contention raised and rejected above. He also contends he had, by the time he was arrested, abandoned any intention to transfer the marijuana. We now address whether counsel was ineffective by failing to challenge the applicability of the statute on the basis of lack of present intent.

Intent to distribute may be established by circumstantial evidence. United States v. Franklin, 728 F.2d 994, 998 (8th Cir. 1984). Factors that may be considered include evidence of an attempt at delivery, the quantity of the drug possessed, and whether the drug was wrapped and packaged in the manner usually associated with drugs possessed with intent to deliver to others. See State v. Boyd, 224 N.W.2d 609, 613 (Iowa 1974).

In this case, Johnson was found to possess marijuana wrapped and packaged in approximately eleven separate cellophane bags. Moreover, he admitted he had attempted, earlier in the evening, to deliver the marijuana to a party. We find these facts constitute significant circumstantial evidence of Johnson's intent to deliver the marijuana.

Johnson bears the burden of showing by a preponderance of the evidence his counsel did not act within the range of normal competence. State v. Killpack, 276 N.W.2d 368, 372 (Iowa 1979). As part of this burden, Johnson must overcome a presumption that counsel is competent. State v. Yaw, 398 N.W.2d 803, 806 (Iowa 1987). Finally, a determination of whether counsel's actions or omissions amounted to ineffective assistance is dependent upon the peculiar facts and

circumstances of the case. See Schrier v. State, 347 N.W.2d 657, 661 (Iowa 1984).

We conclude Johnson's counsel did not have an essential duty to challenge the intent element of Johnson's guilty plea, in light of the significant circumstantial evidence of that intent. Johnson failed to sustain his burden of showing counsel did not act within the range of normal competence.

II. **Articulation of Reasons for Sentence.** Johnson asserts the trial court failed to adequately articulate the reasons for the sentence imposed, as required by Iowa Rule of Criminal Procedure 22(3)(d).

The trial court indicated it opted to incarcerate Johnson because of the following: Johnson had two previous convictions for the same crime, for which he received probation. The previous probations had obviously not been entirely successful. Incarceration was the recommendation of the presentence investigator. And the offense involved was serious, in that people other than Johnson were the intended consumers of the drug.

We conclude these articulated reasons are adequate to satisfy Iowa Rule of Criminal Procedure 22(3)(d). Johnson's contention to the contrary is without merit.

III. **Selection of Sentence.** Johnson asserts the trial court abused its discretion in the selection of his sentence since its decision was allegedly based on an erroneous understanding of his prior record. He also contends the sentence imposed was unreasonable under the circumstances.

In the transcript of the sentencing hearing, the trial court's discussion of Johnson's prior record reads as follows:

> What we have here is a defendant who, in 1982, received a twenty-five year suspended sentences and two two-year probations concurrent for the same crime, Possession with Intent to Deliver.

Johnson actually received two five-year suspended sentences and two two-year probations. He asserts the trial court based its selection of his sentence on its erroneous belief he had received a twenty-five year sentence. We deem it far more likely the transcript is in error, than the trial court believed Johnson had received a twenty-five year sentence for possession with intent to deliver. In any event, it is irrelevant. The trial court clearly was concerned with the failure of Johnson's prior probations, as manifested by the current offense, and not with the length of the prior suspended sentences.

We also conclude the sentence imposed was not unreasonable under the circumstances. A sentence within statutory limits will be set aside on review only if there is an abuse of discretion. State v. Gibb, 303 N.W.2d 673, 687 (Iowa 1981). This was Johnson's third offense for the same crime in four years. He has had an opportunity to rehabilitate himself without confinement. He apparently has been unable to do so. The presentence investigator recommended incarceration to facilitate his rehabilitation. We conclude it was not an abuse of discretion for the trial court to concur with this recommendation.

AFFIRMED.