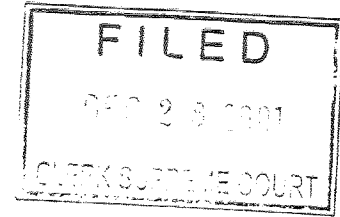


IN THE COURT OF APPEALS OF IOWA

No. 1-532 / 00-1395
Filed December 28, 2001



STATE OF IOWA,
Appellee,

vs.

MORIANDO D. MOORE,
Appellant.

Appeal from the Iowa District Court for Polk County, Linda R. Reade,
Judge.

Moriando Moore appeals the judgment and sentence entered by the
district court upon a jury verdict finding him guilty of possession of cocaine and
marijuana. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney
General, John P. Sarcone, County Attorney, and Gary Kendell, Assistant County
Attorney, for appellee.

Heard by Vogel, P.J., and Miller and Eisenhauer, JJ.

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VOGEL, P.J.

Moriando Moore appeals his judgments and sentences for possession of cocaine and possession of marijuana, in violation of Iowa Code section 124.401(5) (1999). He claims a prior conviction was improperly admitted into evidence and that trial counsel was ineffective. Because we find the prior conviction admissible and that the complained of behavior by counsel constituted a reasonable trial strategy, we affirm.

Background Facts and Proceedings. On December 2, 1999, Moriando Moore was stopped for a traffic offense. When the citing officer noticed a bottle of beer in Moore's vehicle, she requested that Moore exit the car, which he did. A small bag of marijuana was then found on the car's floorboard. Moore was arrested and, upon arrival at jail, was placed in a holding cell. After Moore was released from the cell, a 5.34 gram bag of powder cocaine was found on the floor of the cell, near where Moore had been sitting. Moore was charged with misdemeanor possession of marijuana and felony possession of cocaine with intent to deliver.

During trial the State introduced and the jury viewed a police videotape of the holding cell. The tape shows a handcuffed individual sitting at the far end of the bench in the holding cell when a handcuffed Moore enters the cell and sits in the middle of the bench. Moore then briefly fidgets with his foot area, eventually twisting his body to tug at his sock or shoe. When he stands up and exits the cell a few minutes later, something small and white falls to the ground behind him. Approximately ten minutes after Moore's departure an officer enters the holding

cell and picks a small white item up off the same area of the floor where Moore had been sitting. From the time Moore enters the holding cell until the time the officer discovers the item on the floor, the cell's original occupant remains seated on the far end of the bench.

The State offered testimony that the amount of cocaine in the bag was consistent with drug dealing, rather than personal use. In addition, the State introduced evidence, over defense objections, Moore's 1992 plea to and conviction for possession with intent to deliver 4.6 grams of crack cocaine. A limiting instruction was given.¹

Moore introduced the testimony of Dr. Dennis Weis, who opined Moore possessed a nasoseptal defect consistent with heavy and chronic cocaine use, was addicted to cocaine, and had a history of alcohol and marijuana use. Dr. Weis further testified a heavy user could consume five grams of cocaine in one afternoon and up to ten grams per day. In addition, Moore's counsel admitted during opening and closing statements that Moore was in possession of the cocaine and that the evidence would show Moore was a "drug addict of the highest order."

The jury returned a guilty verdict on the possession of marijuana count and found Moore guilty of possession of cocaine, a lesser-included offense of the

¹ The jury was instructed as follows:

You have heard evidence that defendant has a prior conviction for possession of crack cocaine with the intent to deliver. 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. However, such evidence may be admissible for other purposes such as proof of intent.

possession with intent to deliver count. Both are serious misdemeanors. The district court sentenced Moore to up to one year on the cocaine count and to six months for the marijuana possession, the sentences to run consecutively. Moore appeals.

Scope of Review. Challenges to evidentiary rulings are reviewed for an abuse of discretion. *State v. Sallis*, 574 N.W.2d 15, 16 (Iowa 1998). Abuse is found where a district court exercised its discretion on clearly untenable grounds, for clearly untenable reasons, or to an clearly unreasonable extent. *State v. Bayles*, 551 N.W.2d 600, 604 (Iowa 1996). Our review of an allegation of ineffective assistance of counsel is de novo. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa Ct. App. 1994).

Prior Conviction. Evidence of prior crimes is not admissible to show a general propensity to commit wrongful acts, but even if such evidence has a tendency to demonstrate the defendant's bad character, it may be admitted if it is relevant and material to a legitimate issue. *State v. Plaster*, 424 N.W.2d 226, 229 (Iowa 1988). Among the legitimate purposes for admission is an attempt to demonstrate "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Iowa R. Evid. 404(b). Because proof of intent is a necessary element of possession with intent to deliver, Iowa Code § 124.401(1)(c)(2)(b) (1999), the district court correctly concluded the prior crime in this case was relevant.

Evidence of Moore's prior conviction was therefore admissible unless its probative value was substantially outweighed by the danger of unfair prejudice its

admission could cause. Iowa R. Evid. 403; *Plaster*, 424 N.W.2d at 231. If the evidence is more prejudicial than probative, admission is precluded. *Plaster*, 424 N.W.2d at 231. Moore argues admission of his prior conviction was unduly prejudicial because the State's case as to the cocaine count was "not strong," and it was therefore likely the jury was improperly swayed by the prior conviction evidence.

In reviewing an admissibility determination, we must apply an appropriate balancing test. However, we decline Moore's suggestion to apply the balancing test set forth in *State v. Daly*, 623 N.W.2d 799 (Iowa 2001). *Daly* involved the use of a prior conviction for impeachment purposes under Iowa Rule of Evidence 609, and elements of the test, such as the prior conviction's bearing on veracity, are uniquely geared to the impeachment context. Rather, we apply the standards set forth in *State v. Wade*, 467 N.W.2d 283 (Iowa 1991). See *State v. Rodriguez*, ____ N.W.2d ____ (Iowa 2001).

The judge must consider "on the one side, the actual need for the other-crimes evidence in the light of the issues and the other evidence available to the prosecution, the convincingness of the evidence that the other crimes were committed and that the accused was the actor, and the strength or weakness of the other-crimes evidence in supporting the issue, and on the other hand, the degree to which the jury will probably be roused by the evidence to overmastering hostility."

Wade, 467 N.W.2d at 284-85 (citation omitted).

Assessing these factors leads to a conclusion the prior conviction was properly admitted. There appears to be no dispute Moore did indeed commit the prior offense. Moreover, as the only other indicia of intent to deliver was found in the quantity of the cocaine, the State's need for the prior crimes evidence was

substantial and the similarities in the crimes are sufficient to make the prior conviction highly probative of the intent element. Turning to the other side of the equation, this is not the type of crime likely to arouse a jury's sense of horror or improper instinct to punish, and a limiting instruction was given. *See Plaster*, 424 N.W.2d at 232 ("It is only in extreme cases that such an instruction is deemed insufficient to nullify the danger of unfair prejudice."). On balance, we cannot say that admission of Moore's prior conviction was more prejudicial than probative, and thus the district court did not abuse its discretion when it allowed proof of the conviction into evidence.

Ineffective Assistance of Counsel. Moore argues his trial counsel was ineffective when he conceded during opening and closing arguments that Moore was in possession of the cocaine. Moore points to the fact he never personally admitted to possessing the cocaine and, arguing the evidence put on by the State was "thin," contends that but for counsel's statements he would likely have been acquitted of any and all charges related to the cocaine. We cannot agree.

Moore has the burden of proving his attorney's performance fell below "an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Moore must overcome the strong presumption his counsel was competent. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). Counsel's decisions concerning trial tactics or strategy do not qualify as ineffective assistance of counsel. *State v. Harrison*, 578 N.W.2d 234, 239 (Iowa 1998). This can be true even if the strategy or tactic was

improvident or miscalculated. *State v. Oetken*, 613 N.W.2d 679, 684 (Iowa 2000).

Even if Moore can demonstrate his counsel failed in an essential duty, he must show "that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687-88, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. He must demonstrate a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Atwood*, 602 N.W.2d 775, 784 (Iowa 1999). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. Carillo*, 597 N.W.2d 497, 500 (Iowa 1999).

The record before us indicates counsel's statements regarding Moore's cocaine possession were part of a trial strategy to avoid a conviction for felony possession of cocaine with intent to deliver.² While the police videotape, standing alone, did not provide conclusive proof Moore dropped the bag of cocaine, the totality of the evidence was highly persuasive. By painting Moore as a drug addict with a large cocaine habit, counsel offered an alternative explanation for the high quantity of cocaine found in the bag. By admitting to possession, Moore's attorney made the alternate explanation more believable. This strategy was reasonable, particularly in light of counsel's knowledge that

² Significantly, Moore admits counsel's remarks were part of a tactical decision, and he does not claim the concessions were made in opposition to his wishes, or that he was inadequately informed about the consequences of the trial strategy. It is difficult for us to see how Moore can consent to counsel's actions at trial, then cry foul on appeal. See *Jasper v. State*, 477 N.W.2d 852, 856 (Iowa 1991) (declining to second-guess even an improvident trial tactic, especially where any resulting error was invited by the defendant's affirmative acts).

Moore's prior conviction would be admitted into evidence. We decline to second guess a reasonable tactical decision. *State v. Martin*, 587 N.W.2d 606, 609 (Iowa Ct. App. 1998). This is particularly true where, as here, the strategy was a successful one. *Cf. Osborn v. State*, 573 N.W.2d 917, 924 (Iowa 1998) (noting that lack of success does not amount to ineffective assistance of counsel).

Accordingly, we do not find trial counsel's performance to be below the reasonable standard of competency. See *id.* ("Tactical decisions such as this are immune from subsequent attack by an aggrieved defendant claiming ineffective assistance of counsel."); *State v. Johnson*, 604 N.W.2d 669, 673 (Iowa Ct. App. 1999) ("Where counsel's decisions are made pursuant to a reasonable trial strategy, we will not find ineffective assistance of counsel."). In addition, Moore cannot demonstrate prejudice. The evidence presented by the State was of such a quantum that, even absent the challenged statements by counsel, there was not a reasonable probability Moore would be acquitted of possessing cocaine.

AFFIRMED.