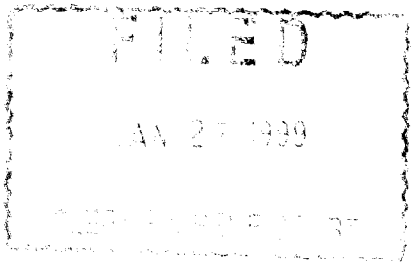
IN THE COURT OF APPEALS OF IOWA

No. 8-319 / 97-0029
Filed January 27, 1999



STATE OF IOWA,
Appellee,

vs.

TERRY WILSON,
Appellant.

Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

On appeal from his conviction for possession of a simulated controlled substance with intent to deliver, Terry Wilson argues his trial counsel was ineffective.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Robert P. Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly A. Griffith, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Vogel, JJ.

HUITINK, J.

Terry Wilson appeals claiming he is entitled to a new trial because he received ineffective assistance of counsel during his criminal trial. We affirm on appeal.

On August 27, 1996, an undercover police officer, Jeff Harrenstein, went to the area of Ira's Bar in Waterloo. He was approached by Barbara Matlock, who agreed to assist him in purchasing crack cocaine. They drove around for a short period of time, then returned to Ira's Bar, where Matlock said, "There's the dopeman," indicating Wilson. Matlock approached Wilson, and returned with what appeared to be a rock of crack cocaine. Harrenstein paid Matlock and drove away. Wilson was arrested later the same evening. He had five rocks of simulated crack cocaine on his person. Testing showed the substances recovered from Wilson were not cocaine.

Wilson was charged with possession of a controlled substance (simulated cocaine base) with intent to deliver, in violation of Iowa Code section 124.401(1)(c), and with being a habitual offender, in violation of sections 124.411 and 902.8. A jury found Wilson guilty of the crime charged.

I. Wilson claims he received ineffective assistance of counsel during his criminal trial. Our review of an allegation of ineffective assistance of counsel is de novo. *Cox v. State,* 554 N.W.2d 712, 714 (Iowa App. 1996). To establish a claim of ineffective assistance of counsel, a defendant must show: (1) the attorney failed to perform an essential duty; and (2) prejudice resulted to the extent it denied defendant a fair trial. *Bettis v. State,* 547 N.W.2d 635, 637 (Iowa App. 1996).

II. Wilson contends his trial counsel failed to perform an essential duty by failing to move for judgment of acquittal. The failure to move for judgment of acquittal precludes Wilson from challenging on appeal the sufficiency of the evidence. *See State v. Heidebrink,* 334 N.W.2d 344, 346 (Iowa App. 1983). Wilson asserts the motion for acquittal would have been successful because there was not sufficient evidence in the record to convict him.

We find Wilson has failed to show he was prejudiced by his counsel's performance. In determining whether a motion for judgment of acquittal would be successful, the relevant inquiry is whether the evidence presented is sufficient to sustain the conviction. *State v. Breitbach,* 488 N.W.2d 444, 446 (Iowa 1992). Here, the evidence showed Matlock identified Wilson as "the dopeman." Matlock told Harrenstein she would obtain crack cocaine for him, then approached Wilson. Matlock returned with a rock of purported crack cocaine, obtained money from Harrenstein, then returned to Wilson. Wilson had five more rocks, packaged to look like crack cocaine, on his person at the time he was arrested. This evidence is sufficient to support Wilson's conviction.

III. The State sought to introduce into evidence a sample of crack cocaine obtained in another case and the lab report showing that the sample was actually crack cocaine. The State wanted to demonstrate what real crack cocaine would look like. Defense counsel did not object to the admission of the exhibits. Wilson contends

defense counsel should have objected, because the exhibits could have mislead or confused the jury.

We determine Wilson has not shown his defense counsel failed to perform an essential duty or that he was prejudiced by the admission of the exhibits. It was clear the exhibits were only admitted for demonstrative purposes, as the following excerpts from the transcript show:

> Q. Now, 6 and 7 are put in for demonstrative purposes to demonstrate what real crack looks like?
>
> A. That's correct.
>
> Q. So that's an unrelated case, that's just to illustrate real crack?
>
> A. That's correct.
>
> * * *
>
> Q. Mr. Clark, just to clarify again, these items that you just showed the jury have absolutely nothing to do with the defendant in this case?
>
> A. That's correct.

Wilson has failed to show he received ineffective assistance of counsel on this ground.

IV. Wilson claims his trial counsel was ineffective in: (1) failing to move for discovery; (2) failing to move for suppression of evidence; (3) not securing his presence for depositions; (4) irregularities in jury selection and deliberations; and (5) failure to file post-trial motions.

There is not sufficient evidence in the record to address these issues. They should be preserved for postconviction review.

We affirm Wilson's convictions for possession of a controlled substance with intent to deliver and for being a habitual offender. Costs of this appeal are assessed to Wilson.

AFFIRMED.