

IN THE COURT OF APPEALS OF IOWA

No. 6-299 / 95-0704

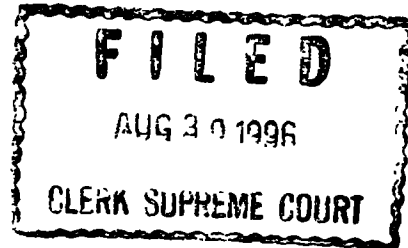
STATE OF IOWA,

Plaintiff-Appellee,

vs.

JAMES McNEAL,

Defendant-Appellant.



Appeal from the Iowa District Court for Scott County, James R. Havercamp,
Judge.

James McNeal appeals from his conviction, following a jury trial, for delivery
of cocaine in violation of Iowa Code section 124.401(1)(c) (1993). **AFFIRMED.**

John O. Moeller, Davenport, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney
General, William E. Davis, County Attorney, and Hugh J. Pries, Assistant County
Attorney, for appellee.

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

HABHAB, J.

Defendant James McNeal was convicted of delivery of a controlled substance. On appeal, he challenges the sufficiency of the evidence to support the conviction and alleges his trial counsel was ineffective. We affirm.

I. Sufficiency of the Evidence. When reviewing criminal convictions for sufficiency of the evidence, we review the evidence in a light most favorable to the State. *State v. McGrew*, 515 N.W.2d 36, 37 (Iowa 1994). A conviction is reversed only if there is no substantial evidence in the record supporting the verdict or the verdict is clearly against the weight of the evidence. *Id.* at 37-38. Substantial evidence is evidence which could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.* at 38. A fair inference of guilt with respect to each element of the crime charged is sufficient to uphold a verdict. *Id.* We consider all of the evidence, not merely that supportive of the conviction, in determining the sufficiency of the evidence to support a guilty verdict. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980).

Defendant asserts there was insufficient evidence to establish his identity as the individual who delivered a controlled substance to an undercover officer on June 1, 1994. At trial, Officer Moreno testified he was in a vehicle near a tavern on June 1, 1994, in Davenport, Iowa. He was approached by James Miles who told the officer he could “hook him up” with someone who could sell him some crack cocaine.

Shortly thereafter a person, later identified as defendant, approached the vehicle and sold the officer crack cocaine for \$40. The officer had previously recorded the serial numbers on the two twenty dollar bills used to pay defendant.

Shortly after the transaction, Officer Moreno was advised to return to the area and drive by a subject stopped by Officer Trudell. Less than ten minutes had elapsed between the drug sale and the time Officer Moreno drove by Officer Trudell and confirmed the man with Officer Trudell was same man who sold him the crack cocaine. Officer Moreno testified at trial the defendant in the courtroom, James McNeal, was the man who sold him the crack cocaine on June 1, 1994.

Officer Trudell testified he stopped Miles and defendant shortly after the purchase in order to identify them and allow Officer Moreno to drive by and observe them. Officer Trudell explained Miles and defendant were not arrested at that time in order to protect the identity of the undercover agents. Later that evening, Officer Trudell stopped defendant again. This time defendant was in a car with an individual named Rodriguez, and another undercover officer had made a drug purchase from them. Officer Trudell pulled the vehicle over, checked their identification, and asked if they had money. A twenty dollar bill recovered from Rodriguez was one of the bills Moreno had given defendant in the earlier transaction.

Officer Trudell, Officer Knittle, and Officer Palmer all participated in the surveillance on June 1, 1994. Each of them testified the man they saw sell crack

cocaine to Moreno wore dark or blue-colored pants. This is consistent with Moreno's testimony that defendant wore dark blue pants.

Defendant called James Miles as a witness at trial. At the time, Miles was incarcerated for delivery of a controlled substance. Miles recalled the transaction on June 1, but claimed a man named Willie T. Young, not defendant, completed the transaction and was with him when he was later stopped by police officers. Defendant testified and denied any involvement in the sale of crack cocaine on June 1, 1994.

"The jury is free to believe or disbelieve any testimony as it chooses and to give weight to the evidence as in its judgment such evidence should receive." *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). The very function of the jury is to sort out the evidence presented and place credibility where it belongs. *State v. Blair*, 347 N.W.2d 416, 420 (Iowa 1984); *see also State v. Phanhsouvanh*, 494 N.W.2d 219, 223 (Iowa 1992) (resolving conflicts in the evidence is for the jury and the jury could believe all, some, or none of the testimony).

A jury's finding of guilt is binding upon this court unless we conclude the record lacks substantial evidence to support such a finding. *State v. Bush*, 518 N.W.2d 778, 779 (Iowa 1994). There was substantial evidence to support defendant's conviction. Officer Moreno identified defendant within ten minutes of the drug transaction as the individual who had sold him crack cocaine. He confirmed this identification in court. The testimony of three other officers corroborated the color of the pants worn by the seller of the crack cocaine.

Officer Trudell testified defendant was the individual he had stopped in order to allow Moreno to drive by and observe him. Officer Trudell also testified when defendant gave him identifying information, defendant identified his birth date as September 30, 1947. Although defendant later learned his birthday was actually January 30, 1947, he admitted he was using the birth date of September 30, 1947, in June 1994 when the drug transaction occurred.

There was substantial evidence from which a rational trier of fact could find the State proved defendant's identity as the individual who sold Officer Moreno crack cocaine on June 1, 1994.

II. Ineffective Assistance of Counsel. Defendant argues his trial counsel was ineffective in: (1) failing to object to testimony that the neighborhood in which the undercover buy occurred was a high crime/drug area; (2) failing to object to the "other crime" evidence of the individual who possessed one of the prerecorded bills and in whose company defendant was found; (3) failing to suppress evidence based on a "pretextual" stop; (4) failing to make a record on his decision to testify; and (5) calling Miles as a witness. Defendant requests we preserve each of these claims for postconviction proceedings.

When a defendant asserts a violation of a constitutional right, our review is de novo. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). To prevail on a claim of ineffective assistance of counsel, a defendant must prove by a preponderance of the evidence: (1) counsel failed to perform an essential duty and (2) prejudice resulted.

Id. "This two-pronged test requires, first, a defendant overcome the strong presumption that counsel was competent. Second, defendant must prove that counsel's error worked to the defendant's actual and substantial disadvantage, creating a reasonable probability that but for the error the trial's result would have been different." *Id.* (citation omitted).

Generally, claims of ineffective assistance of counsel are preserved for postconviction proceedings. *State v. Capper*, 539 N.W.2d 361, 367 (Iowa 1995). However, they may be resolved on direct appeal when the record adequately addresses the issues. *Id.*

A reviewing court can deny an application for postconviction relief based on the failure to prove prejudice, without deciding whether counsel's representation was deficient. *See State v. McKettrick*, 480 N.W.2d 52, 56 (Iowa 1992); *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

(a) Testimony Regarding High Crime Neighborhood. Defendant filed a motion in limine seeking to exclude any evidence regarding the "'reputation' of the area under surveillance as a drug-trafficking area or a high-crime area." The trial court denied the request. It found it was standard testimony in drug cases of this kind to allow the prosecution to explain why an area was under police surveillance. Defendant did not object to testimony at trial about the nature of the area, and did not preserve error on this issue. *See State v. Delaney*, 526 N.W.2d 170, 177 (Iowa App. 1994) (filing of motion in limine generally does not preserve error since error does

not occur until matter is presented at trial).¹

We find no breach of an essential duty. In addition to defendant's motion in limine, defendant's trial counsel again asserted the prejudicial effect of the testimony regarding the high crime neighborhood after the verdict and again asserted the court had erred in overruling the motion in limine. We believe such testimony was well within the discretion of the trial court. But assuming, *arguendo*, counsel had a duty to object, defendant has not demonstrated how he could have been prejudiced by the testimony. We find no ineffective assistance with respect to this claim.

(b) “Other Crime” Evidence. Defendant argues his trial counsel was ineffective in failing to object to Officer Trudell’s testimony about his second stop of defendant and his recovery of a twenty dollar bill from Rodriguez. He alleges this evidence was beyond the minutes of testimony. One of the police reports clearly stated Officer Trudell stopped defendant a second time as part of a traffic stop on June 1. Defendant has not specified how he was prejudiced by testimony regarding the second stop and the recovery of the twenty dollar bill. Defendant has not carried his burden to prove his counsel was ineffective.

(c) Motion to Suppress. Defendant argues his counsel was ineffective in failing to file a motion to suppress in connection with Officer Trudell’s two stops of him on June 1. Defendant argues these stops would, at a minimum, require

¹ Defendant did address the issue in his Motion in Arrest of Judgment and For a New Trial, where he asserted the court had erred in overruling that portion of his motion in limine.

justification as *Terry*² stops and appear to have been “pretextual.”

Counsel breached no essential duty as there was no valid basis for challenging the stops. Both stops resulted from the sale of illegal drugs to undercover officers. Officer Trudell clearly had specific and articulable cause to support a reasonable belief criminal activity may have occurred. See *State v. Lamp*, 322 N.W.2d 48, 51 (Iowa 1982).³ Counsel was not ineffective in declining to file a motion to suppress.

(d) Defendant’s Decision to Testify. As one of his allegations of ineffective assistance, defendant asserts “[n]o record is made concerning Mr. McNeal’s decision to testify or decline to testify.” In alleging ineffective assistance of counsel, a defendant is required to “state the specific ways in which counsel’s performance was inadequate and identify how competent representation probably would have changed the outcome.” *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). Defendant does not explain how the absence of a record regarding his decision to testify could constitute ineffective assistance, nor does he elaborate on how the existence of such a record could have changed the outcome of the case. Absent any argument as to how this alleged error affected the outcome of the case, we can neither address this claim nor preserve it for postconviction review. *Dunbar*, 515 N.W.2d at 15.

² *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)

³ Without deciding the issue, we note claims of pretext in the fourth amendment context may no longer be valid given the recent decision of the United States Supreme Court in *Whren v. United States*, ___ U.S. ___, 116 S. Ct. 1769, ___ L. Ed. 2d ___ (1996).

(e) Testimony of James Miles. Defendant's final claim of ineffective assistance is that his trial counsel's decision to call James Miles as a witness did not "appear well informed." We find this argument without merit.

Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance. *Fryer v. State*, 325 N.W.2d 400, 413 (Iowa 1982). James Miles had been identified by the police as one of the parties involved in the drug transaction on June 1. To the extent his testimony admitted his involvement and denied the involvement of defendant, it was beneficial to defendant. Use of this testimony was a strategical decision which cannot be second-guessed merely because the jury did not believe it. Counsel was not ineffective in calling Miles as a witness.

AFFIRMED.