IN THE COURT OF APPEALS OF IOWA

No. 1999-117 (9-333) / 98-1050
Filed July 23, 1999

STATE OF IOWA,

Plaintiff-Appellee,

vs.

SHERRILL HODGES,

Defendant-Appellant.

JUL 23 1999

Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge.

On appeal from her conviction of attempting to obtain prescription drugs by fraud, the defendant claims her trial counsel was ineffective in failing to object to hearsay testimony. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, John P. Sarcone, County Attorney, and John Courter, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Mahan, and Zimmer, JJ.

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ZIMMER, J.

Defendant Sherrill Hodges was tried and convicted of attempting to obtain prescription drugs by fraud in violation of Iowa Code sections 124.401(c)(7) (1997) and 155A.23 (1997). In this direct appeal from the judgment of conviction, she claims her trial counsel was ineffective in failing to object to hearsay testimony. We affirm defendant's conviction but preserve her ineffective assistance of counsel claims for postconviction relief proceedings.

On November 4, 1997, a prescription was called into a Walgreen's pharmacy in Des Moines. The caller identified herself as "Kay" from Dr. Saltsman's office in Iowa City. The prescription was for hydrocone, a schedule III controlled substance. The caller said the prescription was for Sherrill Hodges and advised that Hodges was leaving Iowa City and would pick up the prescription in Des Moines. A pharmacist called Dr. Saltsman's office to confirm the prescription. According to office records, Sherrill Hodges had not been seen by the doctor that day.

At approximately 1:00 a.m. on November 5, 1997, an unidentified female attempted to pick up the prescription. The pharmacist told the female the prescription could not be filled until some information could be verified with the doctor in the morning. The following morning an intern at the pharmacy called Dr. Saltsman's office to verify the prescription. A nurse at the doctor's office advised the intern the prescription was invalid.

On November 9, 1997, a female called the pharmacy and asked if the problem with the prescription for Sherrill Hodges had been resolved. She was told she could

come in and pick up the prescription right away. Pharmacy personnel then called the police. Later, a female identifying herself as Sherrill Hodges came to the drive thru lane at the pharmacy to pick up the prescription. The police were called again and an employee of the pharmacy wrote down the license plate number of the vehicle driven by the defendant. Hodges was given a bottle of pills which did not contain a controlled substance, but left before police arrived. The pharmacy intern was able to identify Sherrill Hodges out of a photographic line-up as the female who attempted to pick up the prescription. The police subsequently determined the license plate was registered to Sherrill Hodges as well as another individual.

A trial information was filed on December 23, 1997, charging the defendant with the offense of attempting to obtain prescription drugs by fraud. Jury trial commenced on March 11. On March 12, 1998, Hodges was convicted as charged. On May 19, 1998, a judgment was entered and defendant was sentenced to a term of imprisonment not to exceed ten years. Notice of appeal was filed May 29, 1998. On July 20, 1998, the court reconsidered her sentence and suspended her term of imprisonment. Defendant was placed on probation for a period of two years subject to a number of terms and conditions of probation.

Despite the district court's reconsideration, Hodges has continued to pursue her appeal. She contends her sixth amendment constitutional right to effective assistance of counsel was violated when her trial counsel failed to object to the testimony of two employees of Walgreen's pharmacy concerning information they received by phone from personnel at Dr. Saltsman's office in Iowa City. She claims

a timely hearsay objection would have severely limited, if not excluded, evidence that she attempted to fraudulently obtain a prescription drug.

The defendant requests a new trial or alternatively, that her claim be preserved for postconviction proceedings. The State contends the hearsay claim should be preserved for postconviction review so an evidentiary record can be developed with respect to defense counsel's trial strategy.

Ineffective assistance of counsel claims raised on direct appeal are reviewed de novo. *See State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). Generally, however, we do not review claims of ineffective assistance of counsel on direct appeal. *See State v. Kinkead*, 570 N.W.2d 97, 103 (Iowa 1997). Such claims are generally preserved for postconviction relief proceedings where an evidentiary record can be developed and a hearing can be held on counsel's alleged errors. *See State v. McKettrick*, 480 N.W.2d 52, 56 (Iowa 1992). Such proceedings afford the attorney charged with providing ineffective assistance an opportunity to respond. *See State v. Kinkead*, 570 N.W.2d at 103.

We find the existing record is inadequate for us to determine Hodges' claim of ineffective assistance of counsel on direct appeal. Trial counsel has not been given an opportunity to explain why hearsay objections were not made. *See State v. Bass*, 383 N.W.2d 243, 245 (Iowa 1986). Under the circumstances of this case, counsel may have had a good reason for failing to make the objections urged by defendant. *See, e.g., State v. Connelly*, 551 N.W.2d 329, 332, (Iowa App. 1996) (trial counsel may have had a strategic reason for the action taken). We determine counsel should

be permitted to explain the strategy employed at trial. *See, e.g., State v. Martin*, 587 N.W.2d 606, 610–11 (Iowa App. 1998). Accordingly, we affirm defendant's conviction but preserve her right to raise her claim in an action for postconviction relief. *See State v. Bass*, 383 N.W.2d at 245.

AFFIRMED.