IN THE COURT OF APPEALS OF IOWA

No. 0-529 / 99-1503
Filed September 27, 2000

FILED
SEP 27 2000
CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

THOMAS CHRISTOPHER DODGE,
Defendant-Appellant.

Appeal from the Iowa District Court for Lee County, John C. Miller (trial and sentencing) and Harlan Bainter (habitual offender determination), Judges.

Dodge appeals the judgment and sentence entered following his conviction for manufacture of a controlled substance, subject to enhancement, and his conviction for possession of pseudoephedrine with intent to manufacture a controlled substance, subject to the enhancement as an habitual offender. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and James G. Tomka, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, and Michael Short, County Attorney, for appellee.

Considered by Sackett, C.J., and Streit and Vaitheswaran, JJ. Miller, J., takes no part.

STREIT, J.

Thomas Dodge was convicted of manufacturing methamphetamine and possessing pseudoephedrine with the intent to manufacture methamphetamine; both convictions were subject to enhancement. He appeals, claiming the evidence was not sufficient to convict him of the latter charge and he was denied the effective assistance of counsel. We affirm.

I. Background Facts and Proceedings.

Acting on a tip from a known citizen informant, law enforcement officers were on private property in rural Lee County looking for a methamphetamine laboratory and a blue Ford Ranger pickup truck. The officers stopped a blue Ford Ranger being driven on the property's farm lane and detained its occupants, Thomas Dodge and Bill Bigelow. The officers' search of the men, the truck, and the surrounding area led to the discovery of various ingredients and supplies commonly used for manufacturing methamphetamine. Dodge and Bigelow were arrested during the course of the investigation. Dodge was convicted of manufacturing methamphetamine and possessing pseudoephedrine with the intent to manufacture methamphetamine.

II. Sufficiency of the Evidence.

Dodge claims the evidence was insufficient to establish he aided and abetted the possession of a pseudoephedrine with the intent to manufacture methamphetamine. Dodge points to nothing in the record showing he preserved this issue for appellate review. *See State v. Jefferson*, 574 N.W.2d 268, 278 (Iowa 1997). Although he moved for a judgment of acquittal at the close of his

trial, he only argued the testimony of one of his accomplices was uncorroborated. Whether the State has sufficient evidence to corroborate the testimony of a defendant's accomplice and whether the State has sufficient evidence to convict that defendant are two distinct issues. *Compare* Iowa R. Crim. P. 20(3) *with* Iowa R. Crim. P. 18(8). Because Dodge did not raise the latter issue at trial, error was not preserved for us to decide it on appeal. *See State v. Webb*, 516 N.W.2d 824, 828 (Iowa 1994).

III. Ineffective Assistance of Counsel.

Dodge also claims he was denied effective assistance of counsel. We review such claims de novo. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa App. 1994). To prevail, a defendant must show his counsel's performance fell outside a normal range of competency and the deficient performance so prejudiced him as to give rise to the reasonable probability that, but for his counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992). We can dispose of a claim on either ground. *State v. Nebinger*, 412 N.W.2d 180, 192 (Iowa App. 1987).

Where the record on direct appeal is not adequate to permit us to resolve a defendant's ineffective assistance of counsel claims, we may preserve them for postconviction proceedings. *State v. Koenighain*, 356 N.W.2d 237, 238 (Iowa App. 1984). Here, we can immediately resolve four of Dodge's eight claims. We will also preserve for postconviction proceedings Dodge's claim his trial counsel failed to properly communicate with him during his plea negotiations. We will not

preserve, however, Dodge's three remaining claims relating to the chain of custody of the State's evidence, destroyed fingerprint evidence, and jury instruction 7B because they are too general. *See State v. Astello*, 602 N.W.2d 190, 198-99 (Iowa App. 1999). For these three claims, Dodge has not stated the specific ways in which his counsel's performance was inadequate and how competent representation probably would have changed the outcome of his trial. *See id.*

A. Motion for Judgment of Acquittal.

Dodge claims his trial counsel was ineffective because he did not argue there was insufficient evidence to support Dodge's conviction for manufacturing methamphetamine in his motion for judgment of acquittal and thus did not preserve the issue for appeal. As we stated above, the first prong of an ineffective assistance of counsel claim requires Dodge to show his counsel's performance fell outside the normal range of competency. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. Counsel will not be deemed incompetent for failing to pursue a meritless issue. *State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999).

Arguing insufficiency of the evidence would have been a losing battle at Dodge's trial. Officers seized items commonly used in the manufacture of methamphetamine from the truck in which Dodge was a passenger. They seized similar items from the property where Dodge was apprehended and from the house were Bigelow lived with his girlfriend. Bigelow's girlfriend also testified about Dodge's involvement in the manufacture of methamphetamine. A rational

trier of fact could have found Dodge guilty of manufacturing methamphetamine beyond a reasonable doubt based on the physical and testimonial evidence the State offered against him. *See id.* at 30. Because a motion for judgment of acquittal based on insufficiency of the evidence would have been meritless, Dodge's claim cannot survive the first prong of the ineffective assistance of counsel test. *See id.*

B. Motion to Suppress.

Dodge's claim his counsel should have filed a motion to suppress fails for the same reason. According to Dodge, he was subjected to an illegal seizure that led to the discovery of incriminating evidence in the truck in which he was a passenger. He argues if this evidence had been suppressed, he likely would have been acquitted.

The law enforcement officers' initial stop of Dodge was valid. Officers can stop a vehicle for investigatory purposes if they have reasonable cause to do so. *State v. Aschenbrenner*, 289 N.W.2d 618, 619 (Iowa 1980). If such a stop is challenged, the State must show the officers had a "specific and articulable cause to support a reasonable belief that criminal activity may have occurred." *Id.* The factual basis for stopping a vehicle can be supplied by information acquired from a person other than a law enforcement officer. *Adams v. Williams*, 407 U.S. 143, 147, 92 S. Ct. 1921, 1924, 32 L. Ed. 2d 612, 617 (1972); *State v. Markus*, 478 N.W.2d 405, 407 (Iowa App. 1991). Whether an informant's tip has established reasonable suspicion of criminal activity depends on the totality of

the circumstances. *Alabama v. White*, 496 U.S. 325, 330, 110 S. Ct. 2412, 2415, 110 L. Ed. 2d 301, 309 (1990); *Markus*, 478 N.W.2d at 408.

The informant's tip in this case contained sufficient indicia of reliability to justify the officers' stop. *See Markus*, 478 N.W.2d at 408. The officers knew the citizen informant and knew she had participated in methamphetamine awareness training. *See Munz v. State*, 382 N.W.2d 693, 700 (Iowa App. 1985). The officers, as they were en route to the suspected lab, also encountered a truck near their destination that matched the color, make, and model of the truck described by the informant. Because the informant had provided accurate information about the truck, the officers had reason to believe she had also provided accurate information about the alleged criminal activity occurring on the property. *Id.* (citing *Illinois v. Gates*, 462 U.S. 213, 244, 103 S. Ct. 2317, 2335, 76 L. Ed. 2d 527, 552 (1983)). The officers thus had reasonable cause to stop the truck in which Dodge was a passenger to further their investigation of that criminal activity.

The officers' seizure of Dodge immediately after they stopped the truck was also permissible. Officers conducting an investigatory stop can briefly detain and conduct a limited warrantless search of the vehicle and its occupants. *State v. Scott*, 518 N.W.2d 347, 349 (Iowa 1994). If the officers' actions during the stop are reasonable given the existing circumstances, their use of force will not elevate the stop to the level of an arrest. *State v. Nucaro*, 614 N.W.2d 856, 860 (Iowa App. 2000). We consider five factors when determining whether the officers' actions constitute an arrest or a reasonable seizure:

> (1) the number of officers and police cars involved; (2) the nature of the crime and whether there is reason to believe the suspect might be armed; (3) the strength of the officers' articulable, objective suspicions; (4) the erratic behavior of or suspicious movements by the persons under observation; and (5) the need for immediate action by the officers and lack of opportunity for them to have made the stop in less threatening circumstances.

Id. (quoting *U.S. v. Raino*, 980 F.2d 1148, 1149-50 (8th Cir. 1992)).

Here, one officer approached Dodge with his weapon drawn and handcuffed him. His actions were reasonable given the circumstances. He and his fellow officers were acting on a tip from a known citizen informant. He also smelled ether—a substance commonly used in methamphetamine manufacturing—as he stepped out of the officers' truck, which alerted him. As he approached the suspects' truck, he saw Dodge reach down for something by his legs. When he ordered Dodge to put his hands up, Dodge did not immediately comply. Given these circumstances, the officer's response was "reasonably necessary to protect [his] personal safety" and did not rise to the level of an arrest. *Id.* (quoting *Raino*, 980 F.2d at 1149-50).

When the officers did ultimately arrest Dodge, they had probable cause to do so. A warrantless arrest must be supported by probable cause. *State v. Harris*, 490 N.W.2d 561, 563 (Iowa 1992).

> Probable cause exists if the totality of the circumstances as viewed by a reasonable and prudent person would lead that person to believe that a crime has been or is being committed and that the arrestee committed or is committing it.

State v. Bumpus, 459 N.W.2d 619, 623 (Iowa 1990); *see also* Iowa Code § 804.7 (1999). Seemingly innocent activities may combine with other factors to give an

experienced law enforcement officer reasonable grounds to suspect wrongdoing. *State v. Rosenstiel*, 473 N.W.2d 59, 62 (Iowa 1991).

A reasonable person could have concluded Dodge had committed or was committing a crime. Dodge was in a truck a known citizen informant said was at a nearby meth lab. The truck smelled strongly of ether, and its cab and bed contained items typically used in manufacturing methamphetamine.[1] When an officer approached the truck, Dodge made furtive movements and did not obey the officer's commands. Given the cumulative effect of these circumstances, the officers had probable cause to arrest Dodge. *Harris*, 490 N.W.2d at 563 ("All of the evidence available to the arresting officer may be considered, regardless of whether or not each component would support a finding of probable cause by itself.").

In summary, Dodge's counsel had little reason to believe a motion to suppress the evidence seized from the truck would be successful. His decision not to pursue the motion therefore did not fall outside a normal range of competency.

C. Double Jeopardy and Merger.

Dodge's third ineffective assistance of counsel claim fails as well. Dodge argues the possession of pseudoephedrine with the intent to manufacture methamphetamine is included in the offense of manufacturing methamphetamine. He further argues his trial counsel should have objected to

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[1] Some of this incriminating evidence apparently was in "plain view" of the officers. *See State v. Lamp*, 322 N.W.2d 48, 52 (Iowa 1982). Additional evidence was discovered when an officer "frisked" the truck for weapons. *See State v. Scott*, 518 N.W.2d 347, 349 (Iowa 1994).

his conviction of the former offense on double jeopardy or statutory merger grounds.

Our analysis of an alleged double jeopardy violation arising from a single prosecution begins with an examination of legislative intent. *State v. Perez*, 563 N.W.2d 625, 628 (Iowa 1997). "If the statutory language is plain and the meaning is clear, we do not search for the legislative intent beyond the express terms of the statute." *Id.* If it is not, we apply the rule of statutory construction articulated in *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Under *Blockburger*, we find the legislature intended to authorize separate punishments for two offenses when each offense "requires proof of an additional fact the other does not." *Perez*, 563 N.W.2d at 628.

Each offense of which Dodge was convicted contained an element not found in the other. Dodge's conviction for manufacturing methamphetamine required proof he manufactured methamphetamine or aided and abetted in such activity. *See* Iowa Code § 124.401(1)(c)(6); *see also* II Iowa Cr. Jury Instructions 2300.1 (1994). His conviction for possession of pseudoephedrine with the intent to manufacture methamphetamine did not. Dodge's conviction of the latter offense did require, on the other hand, proof Dodge knowingly possessed (or aided and abetted in possessing) a product containing pseudoephedrine, its salts, optical isomers, salts of optical isomers, or analogs of pseudoephedrine. *See* Iowa Code § 124.401(4); *see also* II Iowa Cr. Jury Instructions 2300.2 (1994). A manufacturing offense does not have such a possession element given it is "conceivable a defendant might be part of the manufacture of a

controlled substance by financing the manufacture without being in actual possession of the illegal substance." *State v. Spivie*, 581 N.W.2d 205, 209 (Iowa App. 1998).

Because Dodge was not entitled to double jeopardy protection, his trial counsel had no obligation to pursue the issue.[2] We deny this ineffective assistance of counsel claim.

D. Relevancy and Prejudice Objections.

Dodge's final ineffective assistance of counsel claim has no merit either. Dodge argues his counsel was ineffective because he did not object to the admissibility of the evidence seized from Bigelow's home. According to Dodge, the outcome of his trial would have been different had counsel raised such objections pursuant to Iowa Rules of Evidence 401 and 403.

Rule 401 states "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Iowa R. Evid. 401. The evidence seized from Bigelow's home included a recipe for manufacturing methamphetamine, items used for manufacturing methamphetamine, and methamphetamine. Dodge claims this evidence is irrelevant because he had "no connection" to the house. Dodge and Bigelow, however, were accomplices. Bigelow's girlfriend also testified Dodge

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[2] Merger claims under section 701.9 of the Iowa Code can be raised at any time because a failure to merge sentences pursuant to the statute constitutes an illegal sentence. *State v. Halliburton*, 539 N.W.2d 339, 343 (Iowa 1995). However, if the Double Jeopardy Clause has not been violated, section 701.9 is not applicable and merger is not required. *Id.* at 344.

had been at the house and had crushed ephedrine there, an activity associated with the manufacture of methamphetamine. The evidence seized from the house was clearly relevant to proving Dodge had manufactured methamphetamine.

Rule 403 states relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Iowa R. Evid. 403. The evidence seized from Bigelow's home was definitely prejudicial to Dodge. Dodge has not shown, however, how this evidence *unfairly* prejudiced him. The evidence was not subject to exclusion.

Dodge's counsel thus had no bases for making either a 401 or 403 objection to the evidence. His failure to raise such objections does not constitute ineffective assistance of counsel.

AFFIRMED.