

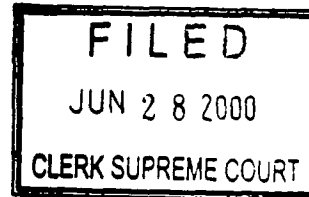
IN THE COURT OF APPEALS OF IOWA

No. 0-217 / 99-0227
Filed June 28, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RODNEY DALE McDOWELL,
Defendant-Appellant.



Appeal from the Iowa District Court for Des Moines County, John C. Miller,
Judge.

McDowell appeals from the judgment and sentence entered upon jury
verdicts finding him guilty of two counts of delivery of a controlled substance,
habitual offender, and possession with the intent to deliver a controlled
substance while in immediate possession or control of a firearm. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shellie L. Knipfer,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney
General, Patrick C. Jackson, County Attorney, and Andrew B. Prosser, Assistant
County Attorney, for appellee.

Heard by Streit, P.J., and Zimmer and Hecht, JJ. Miller, J., takes no part.

STREIT, P.J.

Rodney McDowell professes to be ignorant of the firearm found in the room where he dealt drugs. He also professes that his trial counsel was ignorant—in the foolish sense—for failing to move for an acquittal and to request a more carefully drafted jury instruction regarding the sentence enhancement for having immediate control of a firearm while possessing, with the intent to deliver, a controlled substance. We deny McDowell's claims and affirm his convictions.

I. Background Facts & Proceedings.

Based upon a confidential informant's two controlled buys of cocaine from a man named "Slim" and a woman named "Queenie," officers from the South East Iowa Narcotics Task Force executed a search warrant at the home Bertha Mae Scott (AKA Queenie), the girlfriend of Rodney McDowell (AKA Slim). Once inside the residence, officers found cocaine, marijuana, and an abundance of drug paraphernalia strewn throughout the home. In one of the bedrooms, officers encountered McDowell and another man. In the room where McDowell was located, officers found an electronic scale, weight conversion tables, drug paraphernalia, a number of personal papers belonging to McDowell, and a .22 caliber handgun on a closet shelf in a women's purse.

The State charged the defendant, McDowell and Scott, with two counts of delivering different forms of cocaine in violation of Iowa Code sections 124.401(1)(c)(2)(b) and .401(1)(c)(3) (1997) and possession with intent to deliver cocaine while in immediate possession or control of a firearm in violation of Iowa

code sections 124.401(1)(c)(3) and .401(1)(e). A jury found McDowell guilty, and the trial court sentenced him accordingly.

McDowell appeals, claiming his trial counsel was ineffective for failing to move for an acquittal on the application of the firearm enhancement and for not objecting to the jury instruction that defined immediate possession or control because it did not specifically address his knowledge of the weapon's presence.

II. Standard of Review.

Normally, "we preserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct." *State v. Query*, 594 N.W.2d 438, 444 (Iowa App. 1999). Such claims, however, may be resolved on direct appeal "when the record is adequate to decide the issue." *Id.* We review claims of ineffective assistance of counsel de novo. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996).

III. Ineffective Assistance of Counsel.

McDowell urges two separate grounds in regard to the alleged ineffectiveness of his trial counsel. Finding no merit to his claims, we affirm the convictions.

Our ultimate concern in claims of ineffective assistance is with the "fundamental fairness of the proceeding whose result is being challenged." *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). The burden is on the defendant to prove by a preponderance of the

evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Risdal*, 404 N.W.2d at 131-32. With regard to the first prong, McDowell must prove the performance of trial counsel was not within the normal range of competence. See *State v. Gant*, 597 N.W.2d 501, 504 (Iowa 1999). Improvident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily constitute ineffective assistance of counsel. *Kane v. State*, 436 N.W.2d 624, 627 (Iowa 1989). Where counsel's decisions are made pursuant to a reasonable trial strategy, we will not find ineffective assistance of counsel. See *Hinkle v. State*, 290 N.W.2d 28, 34 (Iowa 1980). In evaluating counsel's performance, we presume competence. See *Risdal*, 404 N.W.2d at 131. The test for prejudice is whether a reasonable probability existed the outcome of the trial would have been different but for counsel's alleged omissions. *State v. Bumpus*, 459 N.W.2d 619, 627 (Iowa 1990). An ineffective assistance of counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). Armed with these principles, we now address appellant's assignments of error.

A. Motion for Acquittal. McDowell first claims his trial counsel was ineffective for failing to move for a judgment of acquittal. He asserts such a motion would have been successful because there was no direct evidence he knew about the presence of the handgun.

In determining the potential success of a motion for judgment of acquittal, the relevant inquiry is whether there was substantial evidence to support the conviction. *State v. Conroy*, 604 N.W.2d 636, 638 (Iowa 2000). If substantial

evidence exists, we must bow to the decision of the jury. *State v. Walker*, 574 N.W.2d 280, 284 (Iowa 1998). Evidence is substantial if it could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. *State v. Conroy*, 604 N.W.2d at 638.

Iowa Code section 124.401(1)(e) doubles the sentence imposed on a conviction for possession with intent to deliver a controlled substance if the defendant is "in the immediate possession or control of a firearm." The term "immediate control" requires the defendant to be in such close proximity to the firearm that he could immediately employ its use. *State v. Eickelberg*, 574 N.W.2d 1, 3 (Iowa 1997). Inherent in such a definition is the defendant's knowledge of the weapon's presence. See *id.* at 4 (construing control as akin to constructive possession); *State v. Rudd*, 454 N.W.2d 570, 571 (Iowa 1990) (among the elements of constructive possession is knowledge of the substance's presence). McDowell claims the State failed to prove as a matter of law that he knew of firearm's presence.

The existence of a particular fact contained in one's head cannot be divined by direct proof. Whether a defendant has knowledge of a certain item is purely subjective and can only be circumstantially proven based on the surrounding circumstances. *State v. Rudd*, 454 N.W.2d at 571. Thus, conclusions drawn by a jury based purely on circumstantial evidence do not immediately spawn reasonable doubt. Rather, the totality of the surrounding circumstances must be examined in determining whether the circumstantial evidence presented was sufficient to clear the chasm of reasonable doubt. The

circumstantial evidence adduced at McDowell's trial was strong enough to hurdle that chasm.

The search occurred in the home of McDowell's girlfriend and the gun was found in a purse in her bedroom closet. McDowell had been staying in Scott's home for an extended period of time. He often slept in the bedroom where the gun was found. The officers executing the search found mail addressed to the defendant in the dresser of that room. His state identification card was found in that room. According to the confidential informant, at least one of the controlled buys involving McDowell occurred in that bedroom. Weight conversion charts used to properly weigh the cocaine were in a box immediately next to the purse containing the gun. McDowell referred to the home as his house and excluded third parties from the home. Finally, the entire home was littered with illicit substances and paraphernalia. Drugs were found in the living room, kitchen, bathroom, and bedroom. The police found pipes, plastic bags, and police scanners. We recognize the defendant and his companion testified about his complete lack of knowledge regarding the presence of the firearm, but credibility findings are properly reserved for the trier of fact. Finally, simply because the gun was in a woman's purse does not conjure some type of gender-specific sphere of protection which prevents men from opening or having access to this socially-constructed sacred vessel of femininity. The State presented sufficient evidence to permit a jury to function as it was designed—to determine the facts. As there was substantial evidence to support the firearm enhancement, we

cannot fault trial counsel for failing to raise a meritless issue nor can McDowell show the requisite prejudice. The conviction is affirmed.

B. The Jury Instruction. McDowell next claims his counsel was ineffective for failing to request the addition of a knowledge element to the jury instruction on the firearm enhancement. He claims a correct statement of law would demand the State explicitly prove McDowell knew about the gun, and the instruction in this appeal did not adequately connote that element of the enhancement.

Jury instructions should state the applicable law. *State v. Marsh*, 392 N.W.2d 132, 133 (Iowa 1986). Under Iowa Code section 124.401(1)(e), a defendant is subject to the sentence enhancement if he is knowingly in the immediate possession or control of a firearm. Both the State and McDowell agree section 124.401(1)(e) innately contains a knowledge element, but they disagree whether the instruction in this case accurately connoted that fact.

Instruction 20A read:

If, under count III, you find the Defendant guilty of Possession of Cocaine Base with Intent to Deliver, you must decide if he was in the immediate possession or control of a firearm.

To be in immediate possession or control of a firearm means the Defendant had direct physical control of the firearm on or around his person.

The State must prove beyond a reasonable doubt the Defendant was in the immediate possession or control of a firearm. If you find the Defendant guilty of Possession of Cocaine Base with the Intent to Deliver, you shall answer the question about this issue which is contained in the verdict forms for Count III which are attached to these instructions. Your answer, as with your verdict, must be unanimous.

The State urges it is impossible to exact direct physical control over an object without necessarily having knowledge of its presence. We agree with this proposition, as the term control means to exercise "restraining or directing influence over" an object. Black's Law Dictionary 329 (6th ed. 1990). In order to direct a firearm at another, which the statute seeks to prevent, one must know there is a weapon to point. We recognize that the better course of action would be to free the jury from having to do any type of interpretive reading of the instructions and simply include the additional element of knowledge. Yet, we cannot find trial counsel failed to perform an essential duty when the issue of whether McDowell knew about the weapon so obviously permeated the proceedings and a relatively straightforward reading of the instruction reveals immediate control is part and parcel to knowledge.¹ We therefore reject McDowell's claim of ineffective assistance of counsel and affirm his convictions.

AFFIRMED.

¹ McDowell correctly points out that the standard elements of constructive possession, which the court in *Eickelberg* relied on as the framework for interpreting immediate control for purposes of section 124.401(1)(e), specifically delineates the elements of control and knowledge. We feel for purposes of clarity that the same delineation should be made with regard to future jury instructions regarding the applicability of Iowa Code section 124.401(1)(e). We do not, however, feel it is mandatory.