FILED
FEB 28 1995
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-573 / 93-1968

STATE OF IOWA,

Appellee,

vs.

CHARLES SUMMAGE,

Appellant.

Appeal from the Iowa District Court for Scott County, David J. Sohr, Judge.

Defendant appeals his conviction and sentence on one count each of possession of cocaine with intent to deliver, possession without affixing a drug tax stamp, eluding a marked law enforcement vehicle, and disobedience of an official traffic control device. **AFFIRMED.**

Clemens Erdahl, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, William E. Davis, County Attorney, and Realff H. Ottesen, Assistant County Attorney, for appellee.

Considered by Donielson, C.J., and Habhab and Cady, JJ.

DONIELSON, C.J.

On the night of May 13, 1993, undercover Davenport police officers were watching activities at the Bronze Lantern Motel, a known location of drug transactions, when they observed a vehicle drive into the parking lot. On checking the license plate, police officers found the vehicle was registered to Charles Summage. A confidential source had previously named Summage as a drug dealer.

When Summage left the motel a short time later, several officers, who were in unmarked cars, began trailing him. Summage ran a red light at an intersection. One of the police cars had lights and a siren, and these were activated in an attempt to stop Summage. He slowed down as if to stop, then accelerated very rapidly.

Police officers followed Summage in a high speed chase through a residential area. The officers noted that at one point Summage had rolled down his window. Summage drove through the yard of a residence owned by Nancy Kling, barely missing a garage. The officers lost sight of Summage for a few seconds while they cut through an alley, but soon relocated the suspect's vehicle. Summage then abandoned his vehicle and fled on foot. He was quickly apprehended.

While Summage was being arrested, Kling called the police to report that she found several items lying in the grass near her garage. Kling had gone outside to inspect her yard after she heard the car drive through. When

police officers arrived they found a clear plastic film case containing five bags of white powder, and two separate baggies, one containing a small scale and one containing powdery residue. Subsequent test results revealed that the substance was cocaine. The drugs did not have tax stamps affixed. A fingerprint found on the plastic bag around the small scale matched that of Summage.

Summage was charged by trial information with possession of cocaine with intent to deliver in violation of Iowa Code section 124.401(1)(c) (1993), possession without affixing the drug tax stamp in violation of section 453B.12, eluding a marked official law enforcement vehicle in violation of section 321.279, and disobedience of an official traffic control device in violation of section 321.256.

Sara Weishar was appointed to represent defendant. On the first day of trial, Summage requested the court to appoint him new counsel. The district court treated Summage's request as a motion to continue and denied the request.

The case was tried before a jury. Defendant presented the defense that he sometimes ate his lunch in his car and subsequently, he had baggies in his car. He presented the argument that police officers did not follow proper procedure in collecting evidence and somehow evidence taken at his arrest, which included items taken from his car, became mixed with evidence taken from Kling's yard.

Defendant testified he had no connection to the cocaine found at Kling's residence.

The jury found defendant guilty of the four crimes charged. Summage filed a pro se motion for new trial, based primarily on his claims Weishar had failed to adequately represent him. After a hearing, the district court denied the motion for new trial.

The district court sentenced defendant on the four convictions. The court did not sentence defendant to the mandatory minimum sentence for possession of a controlled substance with intent to deliver.

Summage has appealed, claiming substitute counsel should have been appointed for him and that he received ineffective assistance of counsel. The State cross-appealed on the ground that defendant should have been sentenced to the mandatory minimum sentence on the charge of possession with intent to deliver.

I. Summage argues the district court erred in failing to grant his request for a change of defense counsel. He states he did not have confidence in his defense counsel and believed she was not adequately prepared for trial. At the hearing on this issue, defendant stated defense counsel had been trying to get him to accept a plea bargain. He also stated she had not interviewed several witnesses who he wanted to call at the trial.

Trial courts have broad discretion, both in the first instance and in considering a motion for substitution of

counsel, in choosing the particular lawyer to represent an indigent defendant. State v. Williams, 285 N.W.2d 248, 254 (Iowa 1979). A court should appoint substitute counsel if the defendant demonstrates sufficient cause. State v. Hutchison, 341 N.W.2d 33, 41 (Iowa 1983). To warrant substitute counsel, a defendant must show justifiable dissatisfaction with appointed counsel. United States v. Grady, 997 F.2d 421, 424 (8th Cir. 1993). This includes a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant. Id.

We find no abuse of discretion in the district court's denial of defendant's request for substitute counsel. Defendant did not request substitute counsel until the day trial was to begin. Generally, reviewing courts have been slow to find an abuse of discretion when a trial court has denied an eleventh-hour request for substitute counsel. Hutchison, 341 N.W.2d at 42. A defendant cannot proceed in a manner that will obstruct the trial and deprive the court of its inherent power to properly control and order the procedures. Id.

Furthermore, defendant has not shown a justifiable dissatisfaction with his appointed counsel. Defense counsel stated she had gone out of her way to prepare for trial. Whether or not she had urgued defendant to accept a plea agreement would be irrelevant once trial started. Also, defense counsel stated defendant has missed several

appointments and did not inform her until the Friday before trial started on Monday that he wanted to call certain people as witnesses. We conclude defendant has failed to show the district court abused its discretion in denying his request for substitute counsel.

II. Defendant contends he received ineffective assistance by his defense counsel. His primary complaint is that his counsel ignored his theory of defense. In addition, he states his counsel: (1) failed to prevent the introduction of evidence a confidential informant told police officers he was a drug dealer; (2) failed to properly impeach a police officer's testimony; (3) failed to obtain all police records and photographs; (4) failed to properly cross-examine the fingerprint expert; and (5) introduced the wrong exhibit to verify defendant's occupation.

Where a defendant asserts violations of constitutional safeguards, such as the right to counsel, an appellate court makes its own evaluation of the totality of the circumstances in a de novo review. Jones v. State, 479 N.W.2d 265, 271 (Iowa 1991).

In order for a defendant to establish a claim of ineffective assistance of counsel, he must show counsel's performance fell outside the normal range of competency and the deficient performance so prejudiced the defendant as to give rise to a reasonable probability that, but for counsel's errors, the result of the proceedings would have

been different. State v. Welch, 507 N.W.2d 580, 584 (Iowa 1993).

A. Defendant revealed to his attorney he had previously had a personal relationship with Kling. He wanted to present a defense that Kling had become unhappy over the breakup of their relationship and had planted the cocaine in her yard in order to implicate him. Defense counsel told defendant she did not think this defense was practical because the State could argue that since defendant knew Kling he could have dropped the cocaine off in her yard, planning to pick it up later. She also explained to defendant his proposed defense did not explain how his fingerprint got onto the plastic bag around the scale or how Kling could have managed to plant the material in her yard in such a short amount of time.

We determine defendant has failed to show ineffective assistance due to counsel's decision not to present his proposed defense. We will not reverse where counsel has made a reasonable decision concerning trial tactics and strategy, even if such judgment ultimately fails. Brewer v. State, 444 N.W.2d 77, 83 (Iowa 1989).

B. Defendant claims his defense counsel should have acted to prevent the introduction of evidence concerning his reputation and prior bad acts. At the trial, a police officer testified he had received a tip from a confidential informant that defendant was a drug dealer. On cross-examination, the officer admitted the information he

received was scant and fairly vague. He admitted he did not consider the tip as giving him reasonable grounds to stop defendant's car.

We determine defense counsel was able to effectively diffuse the introduction of the potentially prejudicial evidence. We find defendant has failed to show a reasonable probability that but for his counsel's failure to prevent the introduction of the evidence received from the confidential informant, the result of the trial would have been different.

C. At a deposition, a police officer testified defendant had gone through a red light at Locust and Division Streets. At trial, the officer testified defendant had gone through a red light at Locust and Washington Streets. Defense counsel questioned the police officer about this discrepancy. Defense counsel failed to object when the State asked a leading question on redirect to elicit the officer's statement that he had just misspoke at his deposition about the location of the incident.

Defendant claims his counsel should have impeached the police officer by a different method and should have objected to the State's leading question on redirect. We determine defense counsel adequately impeached the officer's testimony. We also find defendant has failed to show the State would not have been able to elicit the officer's statement by another means on redirect. We

conclude defendant has failed to show he received ineffective assistance on this ground.

D. Defendant contends his counsel failed to obtain all police records and photographs before the trial. However, the record shows the county attorney did turn over all records in accordance with Iowa Rule of Criminal Procedure 13(2)(a). Also, defense counsel inquired about photographs. A police officer testified the photographs had not been submitted at the trial either because there were no photographs taken of the evidence while it was still on the ground at Kling's residence or the photographs had not turned out.

We find defendant has failed to show the photographs contained useful information and that he received ineffective assistance due to his counsel's failure to obtain these photographs prior to trial.

E. Defendant claims defense counsel failed to adequately cross-examine the State's fingerprint expert. He claims his counsel allowed the expert to get away with self-serving testimony that he did not "play a numbers game."

The testimony in question came from the expert's testimony that in other countries two fingerprints could be considered a match if a certain number of characteristics of the two matched. The expert stated that in the United States a match is not made solely on the basis of a number of characteristics, but experts also look for unexplainable

differences. We determine defense counsel adequately cross-examined the fingerprint expert. Defendant has failed to show ineffective assistance on this ground.

F. Finally, defendant claims his counsel introduced the wrong exhibit. At trial, he attempted to show he was a businessperson and he had no need to sell drugs to make a living. He states his counsel should have introduced a letter verifying his contract to plow snow for the State of Iowa. Instead, defense counsel introduced a letter which showed he had been turned down by the Targeted Small Business Financial Assistance Program.

The record shows defense counsel asked defendant about applying for assistance for his business, and thus it appears the letter she introduced was the one she intended to introduce. We are unable to find defendant was prejudiced if there was a mistake in the introduction of the letter. Even if defendant did have a contract to plow snow, he would not have been engaged in his snow plowing business in May when the criminal incidents in question here took place.

In summary, we determine defendant has failed to show he received ineffective assistance of counsel. Also, the evidence against defendant was very strong and we find he has failed to show he was prejudiced by his counsel's actions. The evidence showed defendant led police officers on a high speed chase through Davenport. Evidence of drug dealing was found in Kling's yard very shortly after

defendant had driven through her yard. Defendant's fingerprint was found on this evidence. We affirm defendant's conviction.

III. In its cross-appeal, the State contends the district court abused its discretion in waiving the mandatory minimum sentence found in section 124.413. Because this was defendant's first conviction under section 124.413, the sentencing court had discretion under section 901.10 to waive the mandatory minimum, but only if mitigating circumstances existed and were stated on the record. The State believes the district court did not sufficiently state any mitigating circumstances in this case.

Section 901.10 explicitly gives the court discretion to sentence a person to a prison term less than that imposed by section 124.413 if it is the person's first conviction under that statute. State v. Neary, 470 N.W.2d 27, 29 (Iowa 1991). When a sentence is imposed within statutory limits, it will be set aside only for an abuse of discretion. Id. An abuse of discretion will be found only when the discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. Id.

At sentencing, the court stated it was making the sentences for possession of cocaine with intent to deliver and failure to affix a drug tax stamp concurrent because defendant had no prior history of involvement with drug

dealings. The court stated that for the same reason, it would not impose a minimum sentence in this case. We find the district court gave sufficient reason for the exercise of its discretion and we find no abuse of discretion.

We affirm defendant's convictions for the four crimes for which he was charged.

AFFIRMED.