

IN THE COURT OF APPEALS OF IOWA

No. 6-290 / 95-0265

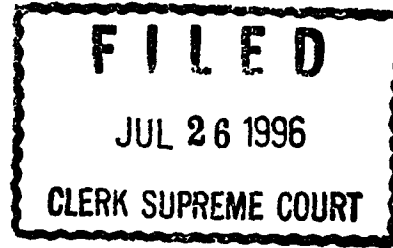
STATE OF IOWA,

Appellee,

vs.

MICHAEL L. HOLT,

Appellant.



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

Michael L. Holt appeals the judgment and sentence entered upon his
conviction of possession with intent to deliver in violation of Iowa Code section
124.401(1)(c) (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant
State Appellate Defender, for appellant.

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

Considered by Cady, P.J., and Huitink and Vogel, JJ.

HUITINK, J.

Michael L. Holt appeals the judgment and sentence for his conviction of possession with intent to deliver a controlled substance. We affirm Holt's conviction.

The record contains evidence of the following. On September 16, 1994, Davenport police conducted a surveillance of a gas station that was reputed to be the sight of illegal drug transactions. Officer Paul Sikorski observed a car being driven by Henry Dinkins park at the station. Dinkins got out of the car and started removing the car's T-tops while his passenger, Holt, went into the station. The officer saw Holt return to the car with another man. After the three men engaged in a short conversation, Dinkins removed a plastic bag from the car's ashtray or dashboard. The officer next saw Dinkins reach in the bag, pinch an object from the bag, and give it to the man who had accompanied Holt. The man then handed something to Dinkins. The officer continued observing Dinkins and Holt. Soon he observed another man approach the car. He saw Dinkins reach into the car and retrieve the plastic bag, pinch an object out, and hand it to the man. The man again handed Dinkins an unidentifiable object.

After Dinkins and Holt left the gas station, they were stopped by another police officer. The officer found a plastic baggie and a wallet containing sixty-eight dollars under the passenger seat. Inside the baggie were seven individually wrapped rocks of crack cocaine, weighing two grams. Both Dinkins and Holt were charged with possession with intent to deliver a schedule II controlled substance.

At trial the observing officer, Officer Sikorski, stated he could not see what was exchanged in either of the two transactions. He saw only Dinkins, the co-defendant, handling the plastic baggie and pinching off a substance for the two men who then handed small objects to Dinkins. The officer further stated neither of the two alleged buyers were picked up by the police.

The jury found Holt guilty as charged. He was sentenced to serve a term not to exceed ten years.

I. Ineffective Assistance of Counsel

Holt first contends he was denied effective assistance of trial counsel. He argues his lawyer was duty bound to object to a portion of Officer Sikorski's testimony. When asked about Holt's whereabouts during the first transaction, Officer Sikorski testified that it appeared Holt had "gotten the customer and brought him over to Mr. Dinkins and was right there during the whole deal." He further stated, "There was no doubt in my mind that they had just performed a drug transaction." Holt contends this testimony was inadmissible because the officer was in essence testifying to the ultimate fact of Holt's guilt or innocence. *See, e.g., State v. Oppendal*, 232 N.W.2d 517, 524 (Iowa 1978).

To prevail on a claim of ineffective assistance of counsel, a defendant must prove counsel failed to perform an essential duty and the failure prejudiced the defendant. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). We ordinarily preserve ineffective assistance claims made on direct appeal to permit a full development of

the record in a postconviction proceeding. *State v. Bumpus*, 459 N.W.2d 619, 627 (Iowa 1990). However, if the claim is based on the failure to object to the admission of certain evidence, we can ordinarily adjudicate the claim on direct appeal if the evidence was sufficiently well developed. *Id.* In doing so, we keep in mind that trial counsel is not required to make every conceivable evidentiary objection to satisfy the standard of normal competency, especially where the evidence is not likely to be outcome determinative. *State v. Carberry*, 501 N.W.2d 473, 477 (Iowa 1993).

On review, we may initially determine whether Holt was prejudiced without resolving the duty element of the foregoing test. *State v. McKettrick*, 480 N.W.2d 52, 56 (Iowa 1992). Holt bears the burden to show a reasonable probability that but for his trial attorney's alleged deficiencies, the outcome of his trial would have been different. *Bumpus*, 459 N.W.2d at 627; *see also State v. Vessey*, 482 N.W.2d 165 (Iowa 1991) (defendant unable to show that if evidence of police officer's testimony regarding ultimate issue of guilt or innocence on drug trafficking charges had been objected to and excluded, he would have been acquitted).

We find that Holt has failed to meet his burden. Officer Sikorski testified he observed Holt in a known drug trafficking area. He also observed a brief exchange of objects between Holt's companion, Dinkins, and two other unidentified men who approached the car separately. Based on this testimony alone, the jury could infer that Holt and Dinkins were dealing in drugs, regardless of the officer's interpretation of what was taking place. Furthermore, immediately following the exchange, Holt

and Dinkins were stopped and seven rocks of cocaine were found in the car. We accordingly affirm on this issue.

Holt next asserts that trial counsel was ineffective in failing to determine the contents of the wallet found in the car. He argues that discovery of the wallet's contents and/or cross-examination of the State's witnesses on this matter may have established that the wallet belonged to Dinkins. We disagree.

Counsel has no duty to pursue each possible avenue or witness that may lead to exculpatory evidence. *Heaton v. State*, 420 N.W.2d 429, 431 (Iowa 1988). We will not grant the requested relief based on the mere speculation that the contents of the wallet may have been exculpatory. *State v. Douglas*, 485 N.W.2d 619, 625 (Iowa 1992). Without more, Holt's speculative assertions will not support a finding of ineffective assistance of counsel. We also affirm on this issue.

Finally, Holt argues that his counsel failed to offer exculpatory statements made by an employee of the gas station and exculpatory statements made by Dinkins. He asks, and the State agrees, this particular claim of ineffectiveness be preserved for postconviction relief. We accordingly preserve this issue for postconviction relief.

II. Sufficiency of Evidence

Holt challenges the sufficiency of the evidence supporting his conviction. We review claims of insufficient evidence for errors at law. Iowa R. App. P. 4. A verdict of guilty is binding on appeal unless there is no substantial evidence in the record to support it, or it is clearly against the weight of the evidence. *State v. Schrier*, 300

N.W.2d 305, 306 (Iowa 1981). Substantial evidence means evidence that could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. *Id.* In determining the sufficiency of evidence, we view the record in a light most favorable to the State. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980). All evidence is considered, not simply the evidence supporting the verdict. *Id.*

In Holt's case, the jury was instructed on the State's two alternative theories: one instruction corresponding to the charge against Holt as a principal in the crime of possession of a controlled substance with intent to deliver,¹ and the other corresponding with the charge against him as an aider and abettor to the same crime.² See Iowa Code § 124.401(1)(c) (1993). The latter instruction also stated that knowledge, nearness, or presence without more is not enough to prove aiding and

¹ Instruction No. 17 - In order to find either Defendant Henry Earl Dinkins or Michael L. Holt guilty of Possession of a Controlled Substance With Intent to Deliver, Cocaine, the State must prove all of the following elements:

1. On or about the 16th day of September, 1994, that defendant knowingly possessed cocaine, a controlled substance.
2. That defendant knew that the substance he possessed was cocaine.
3. That defendant possessed the substance with the intent to deliver cocaine. . . .

² Instruction No. 16 - All persons concerned in the commission of a crime, whether they directly commit the crime or knowingly "aid and abet" its commission, shall be treated in the same way.

"Aid and abet" means to knowingly approve and agree to the commission of a crime either by active participation in it or by some manner knowingly advising or encouraging the act in some way before or when it is committed. Conduct following the crime may be considered only as it may tend to prove the defendant's earlier participation. Mere nearness to or presence at the scene of the crime scene, without more evidence, is not "aiding and abetting". Likewise, mere knowledge of the crime is not enough to prove "aiding and abetting". . . .

abetting. Holt claims, other than the evidence of his presence at the scene of the two transactions, no other evidence of aiding and abetting was presented to the jury. He argues the car belonged to Dinkins, only Dinkins was seen engaging in an exchange with the two men who approached the car, and no evidence was presented as to the ownership of the wallet in which the cocaine was found. Furthermore, the two men who approached the car were never stopped and, therefore, there was no evidence to verify the two men had drugs in their possession after their encounters with Dinkins and Holt.

An aider and abettor is charged, tried, and punished as a principal. *See* Iowa Code § 703.1. Under this theory, the State was required to prove beyond a reasonable doubt that Holt assented to or lent countenance and approval to Dinkins' criminal acts either by active participation in them or by some manner encouraging them prior to or at the time of their commission. *State v. Lewis*, 514 N.W.2d 63, 66 (Iowa 1994). The State was also required to prove that Holt's participation or encouragement was done with the knowledge of the act. *State v. Jones*, 271 N.W.2d 761, 763 (Iowa 1978). Proof of aiding and abetting may be either direct or circumstantial. *State v. Buttolph*, 204 N.W.2d 824, 825 (Iowa 1972).

Although Holt's knowledge of the offense prior to the time or at the time of its commission is essential, neither knowledge nor proximity to the scene is standing alone enough to prove aiding and abetting. *State v. Vesey*, 241 N.W.2d 888, 891 (Iowa 1976). Proof of these facts, however, in addition to circumstantial evidence

such as presence, companionship, and conduct before and after the offense is committed, may be sufficient to support an inference Holt participated in these offenses. *Id.* The “[g]uilt or innocence of a person charged with aiding and abetting must be determined upon the facts which show [the person’s] part in the crime and does not depend upon another’s degree of guilt.” *State v. Fetters*, 202 N.W.2d 84, 90 (Iowa 1972). If specific intent is an element of the crime charged, “a person may be convicted on a theory of aiding and abetting if the person participates either with the requisite intent . . . or with the knowledge that the principal possesses the required intent.” *State v. Lott*, 255 N.W.2d 105, 109 (Iowa 1977). With these principals in mind we turn to the record to evaluate the merits of Holt’s claim.

We find substantial evidence for the jury to reach, inferentially, a finding of guilty on the charge of aiding and abetting. Holt was observed in a known drug trafficking area engaging in conduct indicative of a drug transaction. He was seen exiting a car and returning to the car with a man who then exchanged small objects with Holt’s companion, co-defendant Dinkins. After that exchange, another man was seen approaching the car and making a similar exchange of small objects with Dinkins. Upon arrest, seven individually wrapped rocks of crack cocaine and sixty-eight dollars in cash were found in a wallet in the car driven by Dinkins.

For the reasons expressed, we affirm Holt’s conviction.

AFFIRMED.