

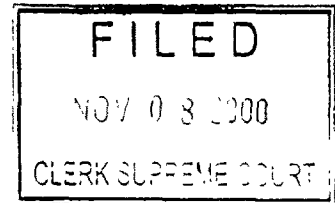
IN THE COURT OF APPEALS OF IOWA

No. 0-621 / 99-1931
Filed November 8, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMES DARYL SPEICHER,
Defendant-Appellant.



Appeal from the Iowa District Court for Polk County, Donna L. Paulsen,
Judge.

Defendant appeals from the judgment and sentence entered upon a jury verdict finding him guilty of conspiracy to manufacture over five grams of methamphetamine in violation of Iowa Code section 124.401(1)(b)(7) (1999) and interference with official acts in violation of section 719.1. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, John P. Sarcone, County Attorney, and Stephanie L. Cox, Assistant County Attorney, for appellee.

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

MAHAN, J.

Defendant appeals from the judgment and sentence entered upon a jury verdict finding him guilty of conspiracy to manufacture over five grams of methamphetamine in violation of Iowa Code section 124.401(1)(b)(7) (1999) and interference with official acts in violation of section 719.1. He contends (1) the district court erred in finding sufficient evidence he participated in a conspiracy to manufacture over five grams of methamphetamine, and (2) counsel was ineffective in failing to advise him to testify or present evidence on his behalf. We affirm.

Background Facts and Proceedings. On June 22, 1999, Officer Carrington of the Des Moines Police Department detected a strong odor of ether while patrolling in the 1000 block of Elder Lane. He called for assistance to locate the source of the smell. Officers eventually determined the smell was coming from a garage behind 4330 Southwest Tenth Street. The officers secured the garage while awaiting the arrival of Sergeant Brown, head of the police department's narcotics unit. Prior to Sergeant Brown's arrival, Officer Carrington observed one man step out of the garage, smoke a cigarette and return to the garage. Shortly thereafter, two males exited the garage and looked around. They looked in the officer's general direction and began walking up the driveway. After walking ten to fifteen feet, both men took off running. Officers pursued and apprehended the men. They were identified as Kelley Page and James Speicher.

Sergeant Brown arrived at the scene and noticed a strong smell of ether. He observed a long table with several containers on it, a stove and makeshift chimney, and a gas can sitting by the doorway with a hose running from it into the stove. He notified the state's laboratory team and asked them to respond to the scene. Sergeant Brown advised Page of his rights and asked if he would sign a consent-to-search form. Page responded, "I may as well sign, but I want you to understand that I was manufacturing the meth for my own use." The sergeant asked Page and Speicher to change into disposable jump suits, because their clothing was contaminated "with the fumes and gases that are associated in the process of making meth."

A criminalist with the division of criminal investigation responded to the scene as part of the state's clandestine laboratory emergency response team. She and her partner put on protective clothing and entered the garage to gather evidence. She found numerous items associated with the manufacture and use of methamphetamine, including: coffee filters with a sludge by-product, a coffee grinder containing precursors, various glass jars, ephedrine tablets, spoons with residue, syringes, discarded battery casings, and containers of liquid containing manufactured methamphetamine. The criminalist also observed an air-purifying respirator and work gloves. In her opinion, based on the items found in the garage, the lab had been used before, although she could not determine for what period of time it had been in use. An analysis of samples seized from the scene revealed sufficient precursors to manufacture approximately 2.2 to 2.8 grams of methamphetamine, along with 3.97 grams of manufactured methamphetamine.

The State filed a trial information, charging Page and Speicher with conspiracy to manufacture a controlled substance (count I), manufacturing a controlled substance (count II), and interference with official acts (count IV).¹ A jury found Speicher guilty of counts I and IV. The trial court denied Speicher's motion for a new trial and sentenced Speicher to a mandatory indeterminate term of imprisonment not to exceed twenty-five years on count I, and a one-year term of imprisonment on count IV, both sentences to run concurrently. Speicher appeals.

Sufficiency of the Evidence. We review Speicher's challenge to the sufficiency of the evidence for errors at law. Iowa R. App. P. 4. The standards governing a challenge to the sufficiency of the evidence are well established:

When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the state, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record. Direct and circumstantial evidence are equally probative so long as the evidence raises "a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture." It is necessary to consider all the evidence in the record and not just the evidence supporting the verdict to determine whether there is substantial evidence to support the charge. Substantial evidence means evidence which would convince a rational factfinder [sic] that the defendant is guilty beyond a reasonable doubt.

State v. Mills, 458 N.W.2d 395, 397 (Iowa App. 1990) (quoting *State v. Wheeler*, 403 N.W.2d 58, 60 (Iowa App. 1987)). The jury is free to believe or disbelieve any testimony as it chooses and to give weight to the evidence as in its judgment such evidence should receive. *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa

¹ The trial information also charged Page with felon in possession of a firearm (count III).

1993). The very function of the jury is to sort out the evidence and "place credibility where it belongs." *Id.*

In order to find defendant guilty of conspiracy to manufacture a controlled substance, the State was required to prove: (1) defendant and his co-conspirator agreed one or both of them would manufacture, attempt to manufacture, or solicit another to manufacture a controlled substance; (2) defendant entered into the agreement with the intent to promote or facilitate the manufacture of a controlled substance; (3) defendant or his co-conspirator committed an overt act; and (4) defendant was not a law enforcement agent or assisting law enforcement agents when the conspiracy began. Defendant argues the evidence does not establish he entered into any agreement, plan, or conspiracy to manufacture the methamphetamine discovered in this case.

An agreement may be inferred from the surrounding circumstances, especially the declarations, acts and conduct of the alleged conspirators. *State v. Mapp*, 585 N.W.2d 746, 748 (Iowa 1998). The agreement need not be formal or express; a tacit understanding will suffice. *State v. Casady*, 597 N.W.2d 801, 805 (Iowa 1999). "All legitimate inferences arising reasonably and fairly from the evidence may be indulged in to support the verdict." *Mapp*, 585 N.W.2d at 748 (quoting *State v. Ruiz*, 496 N.W.2d 789, 792 (Iowa App. 1992) (citations omitted)).

Speicher was inside Page's garage where the manufacture of methamphetamine was taking place. He exited the garage with Page, and the two men ran from the police. The State contends this evidence alone is sufficient

to prove participation in a conspiracy to manufacture methamphetamine. In addition, Speicher's clothing was contaminated "with the fumes and gases that are associated in the process of making meth." We conclude the evidence is sufficient to establish the offense of conspiracy to manufacture methamphetamine.

Ineffective Assistance of Counsel. We review claims of ineffective assistance of counsel de novo. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996).

Ordinarily we reserve 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. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). "Even a lawyer is entitled to his day in court, especially when professional reputation is impugned." *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). We will resolve ineffective assistance of counsel claims on direct appeal when the record is adequate to decide the issue. *State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998). However, only in "rare circumstances will the trial record alone be sufficient to resolve the claim." *State v. Rawlings*, 402 N.W.2d 406, 408 (Iowa 1987).

Defendant claims his attorney was ineffective for not calling him as a witness and for not calling other witnesses at trial. Improvident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily constitute ineffective assistance of counsel. *State v. Johnson*, 604 N.W.2d 669, 673. (Iowa App. 1999). Where counsel's decisions are made pursuant to a reasonable trial

strategy, we will not find ineffective assistance of counsel. *Id.* Defense counsel's trial strategy is unclear from the record before the court. We conclude the record in this case is insufficient for us to address Speicher's claim in this direct appeal. Therefore, we preserve the ineffective assistance of counsel claim for possible postconviction relief action. See *State v. Bass*, 385 N.W.2d 243, 245 (Iowa 1986).

We have carefully reviewed the issues in this case and conclude the district court's judgment and sentence should be affirmed. We are preserving the defendant's claims of ineffective assistance of counsel for possible postconviction relief action.

AFFIRMED.