IN THE COURT OF APPEALS OF IOWA

No. 3-348 / 92-596

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FILED
OCT 28 1993
CLERK SUPREME COURT

STATE OF IOWA,
Appellee,

vs.

BRADLEY LEE WINTERS,
Appellant.

Appeal from the Iowa District Court for Hamilton County, Ronald H. Schechtman and Louie F. Beisser, Judges.

Bradley Winters appeals the judgment and sentenced entered, following a jury trial, upon his convictions for possession of a controlled substance with intent to deliver, failure to affix a drug tax stamp, operating a motor vehicle while intoxicated, third offense, and driving while license under revocation. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender and Patricia Cone-Fisher, Assistant Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Thomas S. Tauber, Assistant Attorney General, James J. Koll, County Attorney and Timothy Palmer, Assistant County Attorney, for appellee.

Considered by Oxberger, C.J., and Schlegel and Habhab, JJ. Donielson, J., takes no part.

OXBERGER, C.J. 060724

State Trooper Jerry Ostbloom stopped a vehicle on Interstate 35 after noticing neither Winters nor Matthew Torres, a passenger in the automobile, were wearing their seat belts. As Trooper Ostbloom approached the vehicle, he smelled marijuana. After investigating, he also learned neither party possessed a valid driver's license.

Because neither occupant could legally drive, Trooper Ostbloom and Trooper Hansen conducted an inventory search of the automobile to prepare it for impoundment. As Trooper Ostbloom was searching, he found five plastic ziplock bags containing marijuana. Trooper Ostbloom arrested Winters and Torres. After placing Winters under arrest, Trooper Ostbloom conducted a horizontal gaze nystagmus test which Winters failed. Winters refused to provide a urine sample at the police station.

Following trial, a jury found Winters guilty of possession with the intent to deliver in violation of Iowa Code section 204.401(1)(d), failure to affix a drug tax stamp in violation of Iowa Code sections 421A.3 and 421A.12,, operating while intoxicated in violation of Iowa Code section 321J.2 and driving a motor vehicle while license revoked in violation of Iowa code section 321J.21.

Winters appeals.

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I. Sufficiency of Evidence

Winters argues there is insufficient evidence to support his conviction for operating while under the influence. He points to the fact that Trooper Ostbloom did not perform the horizontal gaze nystagmus until after the marijuana was found. He also notes the absence of testimony regarding Winters' physical appearance which would support the conclusion that he was operating while under the influence.

Our standard of review is well settled. A verdict will be upheld where there is substantial evidence to support the charge. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id. The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence at trial, not just the evidence that supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980).

Both Trooper Ostbloom and Trooper Hansen detected a strong smell of marijuana inside the vehicle. Winters failed the horizontal gaze nystagmus test, which indicated he had been using either marijuana or alcohol. Zig-Zag rolling papers, typically used for rolling marijuana

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cigarettes, were found in a jacket in the vehicle. Winters' hands smelled of the same marijuana odor the troopers initially detected in the vehicle. Finally, Winters' refused to supply a urine sample at the police station. Based on these facts, we find a factfinder could rationally conclude, beyond reasonable doubt, Winters' operated a motor vehicle under the influence of marijuana. We affirm the trial court's denial of Winters' motion for judgment of acquittal.

II. Ineffective Assistance of Counsel

Winters next argues he was denied effective assistance of counsel. Winters points to his counsel's failure to object to testimony regarding his invocation of his right to silence. He also argues he received ineffective assistance because of trial counsel's failure to challenge the charging of Winters with both possession with intent to deliver and failure to affix a drug tax stamp. The State responds that Winters failed to prove that counsel breached his duty or that he suffered prejudice.

Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly ineffective attorney the opportunity to explain his or her conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). We

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conclude there is an inadequate record for us to adjudicate the defense claim. We therefore preserve defendant's ineffective assistance of counsel claim for a later proceeding.

III. Sentencing

Finally, Winters argues that the sentencing court erred by failing to merge his sentences for possession with the intent to deliver and failure to affix a drug tax stamp.

Our supreme court recently addressed this issue in State v. Gallup, 500 N.W.2d 437, 445 (Iowa 1993). In Gallup, the court determined the legislature intended cumulative punishment of violations of section 204.401(1)(b)(3) (the delivery offense) and section 421A.12 (the drug tax stamp offense). Id. Thus, the court concluded, "Because the legislature intended cumulative punishment, no double jeopardy violation is present in this case. For that reason, section 701.9 is not applicable and no merger is required." Id.

We conclude Winters' claim falls squarely within the court's holding in Gallup. We affirm the district court's refusal to merge Winters' sentences.

AFFIRMED.