IN THE COURT OF APPEALS OF IOWA

No. 8-653 / 98-0266

FILED
JAN 27 1999
CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

JAMES WESLEY EPPS, SR.,

Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Bobbie M. Alpers, Judge.

Defendant appeals from his conviction for possession of a controlled substance with the intent to deliver. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Robert P. Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, William E. Davis, County Attorney, and Realff Ottesen, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink, Streit, Vogel, and Mahan, JJ. Zimmer, J., takes no part.

MAHAN, J.

Defendant James Wesley Epps, Sr., appeals his conviction for possession of a controlled substance with intent to deliver, in violation of Iowa Code section 124.401(1)(c). Defendant claims he received ineffective assistance of counsel during his criminal trial. We affirm.

On September 24, 1997, Davenport police officers executed a search warrant at a residence occupied by defendant and Jody Redinius. Officers found eight individually packaged rocks of crack cocaine, more than $1400 in cash, a scale, and a pager. Epps and Redinius were charged with possession of a controlled substance with intent to deliver.

Epps' defense counsel, Russell Dircks, received information from Redinius' counsel which led him to believe there had been previous purchases of crack cocaine from the residence by a confidential informant and these purchases did not involve Epps. During cross-examination of Officer Paul Sikorski, Dircks asked about these previous purchases. Sikorski testified one of the purchases had been made from Epps. Dircks then asked to see the written reports made at the time of the drug purchases to determine whether Sikorski could be impeached based on the written reports. The district court reviewed the reports *in camera* and determined there was no basis for impeachment.

Epps was convicted of possession of a controlled substance with intent to deliver. He now appeals, claiming he received ineffective assistance of counsel at his criminal trial.

Our review of an allegation of ineffective assistance of counsel is de novo. *Cox v. State*, 554 N.W.2d 712, 714 (Iowa App. 1996). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied defendant a fair trial. *Bettis v. State*, 547 N.W.2d 635, 637 (Iowa App. 1996).

Epps asserts defense counsel breached an essential duty when he elicited testimony which was damaging to the defense. Epps contends the testimony was prejudicial because the State had only circumstantial evidence he was involved in drug dealing.

Although defense counsel based his cross-examination of Sikorski on incorrect information, this does not rise to the level of ineffective assistance of counsel. Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance. *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996).

Furthermore, we find Epps was not prejudiced by his counsel's performance. There was overwhelming evidence to show Epps was involved in the sale of crack cocaine. Epps was found in a bedroom which also contained a scale, a pager, a piece of paper with drug notes, cash, his wallet, and personal papers. The individually packed rocks of crack cocaine and more cash were found in another bedroom in the residence. We determine Epps has failed to show he received ineffective assistance of counsel based on the issue raised in this appeal.

Epps also claims he received ineffective assistance of counsel based on defense counsel's failure to: (1) fully investigate the charges; (2) call witnesses who could have offered exculpatory evidence; (3) adequately cross-examine witnesses; and (4) communicate with defendant. There is not sufficient evidence to consider these issues on direct appeal and we conclude they should be preserved for postconviction relief proceedings.

We affirm Epps' conviction for possession of a controlled substance with intent to deliver.

AFFIRMED.