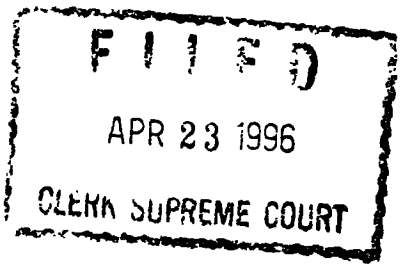
IN THE COURT OF APPEALS OF IOWA

No. 6-091 / 95-0496



000361

STATE OF IOWA,

Appellee,

vs.

THOMAS LEE MOORE,

Appellant.

Appeal from the Iowa District Court for Osceola County, James D. Scott, Judge.

Defendant appeals judgment and sentences, following jury trial, entered upon his convictions of delivery of a controlled substance and failure to affix a drug tax stamp. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Sharon R. Stevens, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, and Harold Dawson, County Attorney, for appellee.

Heard by Cady, P.J., Streit, J., and Peterson, S.J.*

*Senior judge from the first judicial district serving on this court by order of the Iowa Supreme Court.

STREIT, J.

After being arrested for OWI and possession of marijuana, Rod Julius met with police officers and agreed to make a controlled buy, wearing a wire. Julius telephoned Thomas Moore, the appellant, and asked if Moore had marijuana and/or narcotics for sale. Moore told Julius he would be getting some at a later date for resale. Julius contacted Moore several more times and was invited to Moore's residence on August 29, 1993. Julius was wired with a concealed microphone and radio transmitter. Officers gave Julius $1100 for the expected marijuana purchase. Throughout the controlled buy, Julius was under constant audio, but not visual, surveillance.

When Julius went to Moore's residence, Moore told Julius the marijuana would arrive soon and a half-pound would cost $1150. Moore then made a phone call. After the sound of a car door was heard, Moore told Julius to leave the residence for a short time. As Julius left, he saw two people approaching Moore's residence. Julius drove away, met with an officer, and returned to Moore's residence after about ten minutes. Upon Julius's return, Moore came out of his residence with a paper bag. Moore got into Julius's truck. Moore asked Julius to count the money. Moore then gave the paper bag to Julius which contained eight bags of marijuana. Moore stated the marijuana was dry and individually weighed, thanked Julius, and got out of the truck. Julius again met with officers and handed over the paper bag containing the eight bags of marijuana, none of which contained a tax stamp.

Moore was later arrested and charged with delivery of 199.2 grams of marijuana and failure to affix a drug tax stamp. The jury returned guilty verdicts on both charges, and the court entered judgment accordingly. Moore appeals claiming there is insufficient evidence to support his conviction. Moore further claims his trial counsel was ineffective in failing to request a theory-of-defense instruction based on *State v. Lott*, 255 N.W.2d 105, 108 (Iowa 1977), which noted aiding and abetting only the buyer cannot support a delivery charge.

I. Sufficiency of the Evidence.

Our scope of review is on assigned error only. Iowa R. App. P. 4. The standard of review in challenging the sufficiency of the evidence is well established. *State v. Lampman*, 342 N.W.2d 77, 81 (Iowa App. 1982). We will uphold a verdict where there is substantial evidence in the record tending to support the charge. *State v. Aldape*, 307 N.W.2d 32, 39 (Iowa 1981). Substantial evidence means evidence which would convince a rational fact finder the defendant is guilty beyond a reasonable doubt. *State v. LeGear*, 346 N.W.2d 21, 23 (Iowa 1984); *State v. Hall*, 371 N.W.2d 187, 188 (Iowa App. 1985).

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 that fairly and reasonably may be deduced from the evidence in the record. *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984); *Hall*, 371 N.W.2d at 188.

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." *State v. Hamilton*, 309 N.W.2d 471, 479 (Iowa 1981). 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. *Bass*, 349 N.W.2d at 500; *Hall*, 371 N.W.2d at 188.

Moore claims the evidence is insufficient to support his conviction for two reasons. First, he claims Julius's testimony was not reliable because it was not corroborated and his agreement with the police required him to try to convict Moore in exchange for dismissal of his own charges. Second, Moore claims the buy was not sufficiently "controlled" and the marijuana could have come from another source because Julius was not under visual surveillance during the entire period of the controlled buy.

We determine there is sufficient evidence in the record to support Moore's conviction. Audio surveillance allowed officers to monitor the conversation between Moore and Julius. The deputy monitoring the conversation testified Moore quoted a price for the marijuana. Julius testified Moore made a telephone call to someone requesting the person to bring marijuana to Moore's house. Julius also testified, when a car approached the residence, Moore told Julius to leave and come back later. When Julius parked his truck in front of Moore's residence upon his return, Moore came out

of the house with a paper bag in his hand and entered the truck. Julius testified he counted the money for Moore and Moore gave Julius the paper bag which contained marijuana. The deputy overheard this conversation and corroborated Julius's account. The jury could choose to believe the testimony of Julius and the deputy concluding the audio surveillance was adequate. *State v. Blair*, 347 N.W.2d 416, 420 (Iowa 1984) (the function of a jury in a criminal case is to sort the evidence presented and to place credibility where it belongs). The evidence was sufficient to allow the jury to rationally conclude Moore delivered marijuana to Julius.

II. Ineffective Assistance of Counsel.

Ordinarily, our review of postconviction relief proceedings is for errors of law. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction petitioner asserts violation of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. *Id.* Our ultimate concern in claims of ineffective assistance is with the "'fundamental fairness of the proceeding whose result is being challenged.'" *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)).

In order to prevail on such a claim, appellant bears the burden of proving by a preponderance of the evidence that (1) counsel failed to perform an essential duty and

(2) prejudice resulted. *See Risdal*, 404 N.W.2d 130, 131 (Iowa 1987); *Edman v. State*, 444 N.W.2d 99, 101 (Iowa App. 1989). In proving the first prong of this test, appellant must overcome the strong presumption counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency. *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987). To prove the second prong of this test appellant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*

Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. *State v. Mulder*, 313 N.W.2d 885 (Iowa 1981); *State v. Nebinger*, 412 N.W.2d 180, 191-92 (Iowa App. 1987). 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 conclude there is an inadequate record for us to adjudicate defendant's claim without counsel's explanation for his conduct. We preserve defendant's ineffective assistance of counsel claim for a later proceeding.

AFFIRMED.