

IN THE COURT OF APPEALS OF IOWA

No. 7-750 / 96-2286

STATE OF IOWA,
Appellee,

vs.

BRUCE EDWARD BURT,
Appellant.

000355

JAN 28 1998

Appeal from the Iowa District Court for Black Hawk County, Leonard D.
Lybbert, Senior Judge.

Bruce Burt appeals the judgment and sentence entered upon his conviction for delivery of a controlled substance, cocaine, in violation of Iowa Code section 124.401(1)(c) (1995). **AFFIRMED.**

Thomas G. Fisher, Jr. of Hogan & Fisher, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Shawn Wehde, Assistant County Attorney, for appellee.

Heard by Cady, C.J., and Sackett and Vogel, JJ.

VOGEL, J.

Bruce Burt appeals the judgment and sentence entered upon his conviction for delivery of a controlled substance, cocaine, in violation of Iowa Code section 124.401(1)(c) (1995). He contends he was denied effective assistance of counsel through his counsel's failure to: (1) raise an entrapment defense; (2) move for dismissal on the grounds that Burt's due process rights were violated; and (3) interview a potential defense witness. Burt also contends the district court abused its discretion in failing to grant his motion to reconsider his sentence. We affirm the district court and uphold Burt's conviction.

Background facts. Burt was convicted by a jury for delivery of a controlled substance. Evidence was presented by the State that Burt sold \$100 worth of cocaine to Dennis Azbill, who was working undercover for the police. Burt received an indeterminate ten-year sentence, from which he now appeals.

I. Ineffective assistance of counsel. In order for Burt to prevail on an ineffective assistance of counsel claim, he must prove by a preponderance of the evidence that 1) counsel failed to perform an essential duty; and 2) prejudice resulted. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). Burt must establish under the first prong of this test that counsel's performance was not within the normal range of competency. *Irving v. State*, 533 N.W.2d 538, 540 (Iowa 1995). Under the second prong of the ineffective assistance of counsel test, Burt must prove but for counsel's

error, the outcome of the trial would have been different. *Ray*, 516 N.W.2d at 865; *see Strickland v. Washington*, 466 U.S. 668, 694 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984).

Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. *State v. Pearson*, 547 N.W.2d 236, 241 (Iowa App. 1996). We depart from this preference if the record on direct appeal is sufficient to evaluate the merits of a defendant's ineffective assistance of counsel claim. *Id.* If not, we preserve the claim for postconviction proceedings so the facts may be developed. *Id.* This also gives the allegedly ineffective attorney the opportunity to explain his or her conduct. *Id.*

A. Entrapment defense. Burt faults his attorney for failing to raise an entrapment defense. After reviewing the record, we find the facts insufficient to rule on this issue. Accordingly, we preserve this issue for postconviction proceedings.

B. Due process claim. Burt further contends his counsel should have moved to dismiss the case on the grounds that his due process rights were violated by the conduct of the police in using Azbill as a confidential informant. He argues that Azbill had a vendetta against various people, including Burt, and yet the police failed to monitor Azbill's activities to make sure he was not acting improperly in setting up the stings.

Police investigative conduct violates the defendant's right to due process and entitles the defendant to dismissal of the charges against him provided the conduct is "outrageous and reprehensible." *State v. Pooler*, 255 N.W.2d 328, 330 (Iowa 1977). The level of outrageousness needed to prove a due process violation is "quite high." *United States v. Jensen*, 69 F.3d 906, 910 (8th Cir. 1995), *cert. denied*, ____ U.S. ____, 116 S. Ct. 1571, 134 L. Ed. 2d 669 (1996). It "is an extraordinary defense reserved for only the most egregious circumstances." *United States v. Sneed*, 34 F.3d 1570, 1577 (10th Cir. 1994).

A Waterloo police officer, Officer Knief, was engaged in surveillance unrelated to this case when he stopped Azbill's vehicle and found Azbill in possession of illegal drugs. Knief offered to recommend Azbill not be charged with possession if Azbill would act as a confidential informant. Knief wanted Azbill to help the police, "make cases against other individuals higher up in the ladder of drug distribution in Waterloo." Azbill accepted the offer. Azbill tried to make controlled buys from people he knew would sell drugs to him, including Burt. In setting up these controlled drug buys, Azbill admitted he targeted those drug dealers who had previously given him a bad deal in drug transactions.

Burt urges us to believe police abused its discretion in allowing Azbill to "conduct a personal vendetta with the assistance of the power of the State." It is true that Azbill chose the people whom he would contact in an effort to arrange a

controlled buy. It is, however, irrelevant for due process purposes that enmity may exist between the informant and his target; it is a "showing of outrageous *misconduct*, not evidence about an officer's possible motives, that bars prosecution under the due process clause." *United States v. Edenfield*, 955 F.2d 197, 200 (11th Cir. 1993), *cert. denied*, 513 U.S. 818, 115 S. Ct. 76, ____ L. Ed. 2d ____; *accord United States v. Sanchez*, 32 F.3d 1002, 1005-06 (7th Cir. 1994), *cert. denied*, 513 U.S. 941, 115 S. Ct. 346, 130 L. Ed. 2d 302, *aff'd*, 73 F.3d 365 (7th Cir. 1995) (holding motives of informants seeking to help their own cause by facilitating capture of others resulting in drug offenses is irrelevant for purposes of due process). Thus, even if Azbill did have a personal vendetta against Burt and other possible targets, this does not rise to the level of outrageous conduct. *See Gunderson v. Schlueter*, 904 F.2d 407, 408-11 (8th Cir. 1990).

The record further reflects there were some regulatory mechanisms in place throughout the sting operation. Azbill was advised of all the rules he must comply with while working as a confidential informant. Officer Knief testified as to the standard rules:

There's a page and a half of them, no new violations, no drug use, no using coercive means to get people, no offering sexual favors in exchange for testimony, no lying, setting people up and then planting the stuff yourself, that kind of thing. It's pretty common sense rules.

After Azbill informed the police of the possible controlled buy from Burt, the officers searched Azbill and his car, provided him with money, and gave him further

instructions. Following the initial contact from Azbill to Burt, the police supervised the entire process. The actual transaction remained under both audio and video surveillance.

We are not therefore convinced the officers acted improperly and abused their discretion, not do we believe their actions rose to the high-threshold level constituting egregious, outrageous, and reprehensible conduct. We accordingly conclude defense counsel did not fail to perform an essential duty by not moving to dismiss this case. Counsel had no constitutional obligation to do so as Burt's due process rights were not violated.

Burt also claims that his attorney should have moved to dismiss the charge because Azbill's initial contact to Burt was not monitored and thus open for coercive tactics by Azbill. There is no evidence in the record to support Burt's assertion and, as such, trial counsel has no duty to so act.

C. Interview of witness. Burt next complains that his counsel failed to interview the passenger in his car at the time of the transaction with Azbill, and thus did not properly investigate his case. We find the record inadequate to resolve this issue and accordingly preserve it for postconviction proceedings.

II. Motion to reconsider sentence. Burt contends the district court abused its discretion in failing to grant his motion to reconsider his sentence. Burt alleges that

the record shows he has been a model prisoner and is a valuable asset to his family and community who would pose no risk if released.

There is no provision under Iowa Code section 902.4 allowing a defendant to file an application for reconsideration as Burt did in this case. However, having done so, does not convert the court's findings to an appealable ruling.

The trial court in this case considered the documents submitted by the Department of Corrections and Burt. The court found that “‘shock sentencing’ and reconsideration of the sentence under the provisions of Sec. 902.4 of the Code are not appropriate.” This was an exercise of the trial court’s discretion *not* to take action under the statute. It is not tantamount to a ruling reconsidering his sentence. *See State v. Dvorsky*, 356 N.W.2d 609, 611 (Iowa App. 1984) (“The fact that [certain letters and phone contacts] were considered by a conscientious trial judge in determining whether or not to exercise his discretion to reconsider the sentence does not turn the trial court’s ruling into a ruling reconsidering his sentence.”). To reconsider a defendant’s sentence, or to refuse to do so, is not subject to appeal. *See* Iowa Code § 902.4.

Having carefully considered the record before us on appeal, we preserve the ineffective assistance of counsel claims for postconviction proceedings, excepting the due process claim which we affirm. We find the trial court’s decision not to reconsider Burt’s sentence is not subject to appeal.

AFFIRMED.