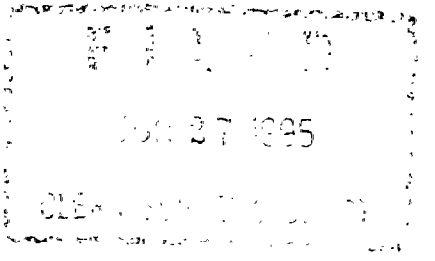
IN THE COURT OF APPEALS OF IOWA

No. 5-205 / 94-0418



TIMOTHY E. GRADFORD,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Thomas M. Horan, Judge.

Gradford appeals the district court's denial of his application for postconviction relief. **AFFIRMED.**

Philip B. Mears of the Mears Law Office, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, Denver D. Dillard, County Attorney, and Scott C. Peterson, Assistant County Attorney, for appellee.

Considered by Hayden, P.J., and Sackett and Cady, JJ.

SACKETT, J.

Defendant-appellant Timothy Gradford appeals from the district court's denial of his application for postconviction relief. Defendant contends his trial counsel was not effective when he failed to request a jury instruction distinguishing between aiding and abetting as a buyer and as a seller of a controlled substance. We affirm.

Defendant was convicted following a jury trial of delivery of a controlled substance in violation of Iowa Code section 204.401(1)(c) (1991). He appealed his conviction contending: (1) there was not substantial evidence to support, beyond a reasonable doubt, he had delivered cocaine, and (2) the State's chief witness, Billy Jo Collins, was not credible. The conviction was affirmed. *State v. Collins*, No. 91-1894 (Iowa Jan. 4, 1993).

Defendant subsequently filed this petition for postconviction relief which the trial court denied. He appeals.

The evidence supporting defendant's conviction came primarily from the testimony of Collins, an informant. Collins had agreed with law enforcement officials to contact a former boyfriend of hers, Mr. Thompkins, and ask to buy cocaine. Collins and Thompkins then contacted defendant who was found to have arranged for them to purchase cocaine. At trial, defendant's attorney argued the State did not prove its case against defendant. Direct appeal was taken and the issue raised was whether the State had proven defendant aided and abetted the sale of cocaine. The argument made in defendant's behalf was there is no aiding and abetting of a sale of a controlled

substance if the person has only aided and abetted the buyer. *See State v. Lott*, 255 N.W.2d 105, 108 (Iowa 1977). No jury instruction was requested on the distinction between aiding and abetting the person purchasing rather than selling cocaine. Counsel, on direct appeal, did not argue trial counsel was not effective in failing to request the instruction.

In this proceeding, defendant contends an instruction distinguishing between aiding and abetting as a buyer and as a seller should have been requested. Defendant contends his trial counsel was ineffective in not requesting the instruction. He further contends his appellate counsel, on direct appeal, was ineffective in not raising, as an issue on appeal, trial counsel's failure to request the instruction.

Ordinarily, our review of postconviction relief proceedings is for errors of law. *See 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. *Id.* This is the equivalent of de novo review. *Id.*

In order to prevail on such a claim, appellant must show by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *See State v. Risdal*, 404 N.W.2d 130, 131-32; *Edman v. State*, 444 N.W.2d 99, 101 (Iowa App. 1989). In evaluating counsel's performance, we presume counsel acted competently. *See Risdal*, 404 N.W.2d at 131.

The State appears to recognize, under the applicable law and the facts of this case, the instruction would have been proper. The State argues defendant's failure to raise the issue on direct appeal precludes him from raising it now. The State also advances defendant's trial counsel performed within a normal range of competency and his decision not to request the instruction was acceptable trial strategy and defendant has failed to show the required prejudice.

At the postconviction hearing, defendant's trial counsel testified he was familiar with the holding of *Lott*. He further testified the strategy he adopted was to attack the credibility of informant Collins. When Collins was identified as an informant, she was a patient at a mental health facility being treated for a manic-depressive disorder and was facing charges for writing checks on accounts where she did not have sufficient funds to cover them. Further, she gave inconsistent versions for what happened on the day of the drug purchase. Defendant's trial counsel testified he felt targeting the lack of Collin's credibility was a better defense and, if he had pursued an accommodation defense, defendant would have had to testify. He did not remember the specifics but felt something kept defendant off the witness stand.

The State also advances, if the instruction had been requested, there was no probability the trial result would have been different, and defendant did more than aid and abet the buyer.

The testimony was Collins and Thompkins told defendant Collins wanted to purchase a gram of cocaine and defendant responded he would go get it and directed

the two to a different location and traveled with them there. Defendant took $100 from Collins and went inside a house alone. He came out alone, and the three returned to their original meeting place, Thompkins's apartment house, where defendant and Thompkins spent time together. Thompkins then emerged and provided Collins, who had been waiting in the hallway, with three packages of cocaine.

We agree, defendant's trial attorney could have argued both that Collins lacked credibility and defendant was doing the buyer a favor. The trial attorney testified he did not feel he could be credible in making both arguments. A trial attorney's strategic decisions, even if not successful, do not prove the trial attorney is ineffective. *See State v. Tracy*, 482 N.W.2d 675, 679 (Iowa 1992). Defendant has failed to make the requisite showing to succeed on this petition for postconviction relief.

AFFIRMED.