IN THE COURT OF APPEALS OF IOWA

No. 0-015 / 99-12
Filed March 15, 2000

STATE OF IOWA,

Appellee,

vs.

ROOSEVELT SCOTT,

Appellant.

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CLERK SUPREME COURT

Appeal from the Iowa District Court for Woodbury County, James D. Scott and Dewie J. Gaul, Judges.

Roosevelt Scott appeals his convictions on charges of possession of cocaine with intent to deliver, failure to affix a drug tax stamp, and maintaining a vehicle for possessing, using or selling controlled substances. **AFFIRMED IN PART; REVERSED IN PART.**

Linda Del Gallo, State Appellate Defender, and John P. Messina, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Thomas S. Mullin, County Attorney, and James J. Katcher, Assistant County Attorney, for appellee.

Heard by Mahan, P.J., and Zimmer, and Vaitheswaran, JJ.

ZIMMER, J.

Roosevelt Scott appeals his convictions on charges of possession of cocaine with intent to deliver, failure to affix a drug tax stamp, and maintaining a vehicle for possession, use or sale of controlled substances. We affirm in part and reverse in part.

On August 4, 1998, around midnight, Iowa State Trooper David Eral made a routine traffic stop of defendant's vehicle near Sioux City. Trooper Eral had noticed a license plate frame was obscuring the validation sticker on the license plate. Upon closer observation, Eral also saw Scott was not wearing a seatbelt and the vehicle windows appeared to be excessively tinted. Scott was accompanied by a passenger, Annabel Sustaita.

Eral asked for Scott's license and registration. Scott produced them but acted nervous. Eral ordered Scott out of the car and asked him to step back to the patrol vehicle so he could issue a citation. As they walked back, Eral noticed a utility knife protruding from Scott's right rear pants pocket. Eral took the knife from the pocket and upon doing so, noticed what appeared to be a digital scale in the same pocket. Eral seized the scale and conducted a pat-down of Scott. Trooper Eral discovered large wads of rolled-up cash in Scott's front pants pockets, an amount later ascertained to be in excess of $6,000. In the squad car, Eral examined the scale, noticing an odor of marijuana, the presence of a white, powdery residue, and the fact the scale measured in grams. At that time, Eral also received information over state radio regarding Scott's criminal history, which included numerous entries for assault and weapons and drug violations.

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Eral commenced a search of the vehicle, after issuing Scott a citation for the plate violation. Sustaita was ordered out of the vehicle and patted down. She consented to a search of her purse and Eral found approximately 20 grams of a controlled substance in two baggies. Other officers arrived at the scene at that time, including Sioux City Police Officer David Brasselero with a drug dog. Brasselero entered the vehicle to roll up the windows in preparation for the dog sniffing the car and he bumped a flashlight stuck between the front seats. The top came off, revealing a large bag containing what appeared to be cocaine powder. During the full vehicle search, officers also found a cellular telephone and three boxes of ammunition.

Both Scott and his passenger were arrested and charged with multiple drug offenses. Scott was charged with possession of cocaine base with intent to deliver as an habitual offender in violation of Iowa Code sections 124.401(1)(b)(3) and 902.8 (1997) (count I); failure to affix drug tax stamp on the count I drugs as an habitual offender in violation of Iowa Code sections 453B.1, 453B.12, and 902.8 (count II); possession of cocaine with intent to deliver as an habitual offender in violation of Iowa Code sections 124.401(1)(c)(2) and 902.8 (count III); failure to affix drug tax stamp on count III drugs as an habitual offender (count IV); and keeping a vehicle for possessing or selling controlled substances in violation of Iowa Code section 124.402(1)(e), also known as the "crack house" statute, and section 124.401(2)(a) (count V). Sustaita was charged with the first four counts, however, her case was eventually severed and she was acquitted of all charges.

Scott's defense counsel filed a motion to suppress, challenging only the legality of Eral's stop of the car. The trial court denied the motion and the case

proceeded to trial on November 16, 1998. On November 18, the jury returned a guilty verdict on counts III, IV and V, and not guilty on counts I and II. Scott admitted his habitual offender status and was sentenced.

Scott appeals. First, he contends his trial counsel was ineffective for failing to challenge the searches and seizures that followed the stop of the vehicle. Second, Scott maintains the trial court erred by allowing Sustaita to testify in his trial that she had been acquitted of the charges based on the same incident. In his third claim of error, Scott contends his trial counsel was also ineffective for failing to challenge jury instructions and sufficiency of the evidence on count V, the charge of keeping a vehicle for the purpose of possessing or selling controlled substances.

I. Scope of Review. We review ineffective assistance of counsel claims de novo. *State v. Westeen,* 591 N.W.2d 203, 207 (Iowa 1999). We review rulings on admissibility of evidence for an abuse of discretion. *State v. Predka,* 555 N.W.2d 202, 204 (Iowa 1996).

II. Ineffective Assistance of Counsel—Failure to Challenge Post-Stop Searches and Seizures. Scott maintains his trial counsel should have challenged the searches and seizures that occurred after the traffic stop and not just the stop itself. Scott claims the seizure of the utility knife, scale and cash from his person was illegal as was the pat-down that revealed them. He also argues the subsequent search of his vehicle was fruit of these illegalities.

Scott must demonstrate two elements to succeed on his claim of ineffective assistance: (1) counsel failed to perform an essential duty; and (2) this failure resulted in prejudice. *Westeen,* 591 N.W.2d at 207 (citation omitted). Ordinarily,

such claims are preserved for postconviction relief, however, where the record is adequate, we address them on direct appeal. *Id.* We consider the record adequate. *See id.* (addressing ineffective assistance claim on direct appeal).

Scott's trial counsel was not ineffective because the issue would have had no merit even if it had been raised. *See id.* The pat-down and vehicle search were incident to citation. On September 30, 1998, counsel filed the motion to suppress challenging the validity of the stop. The jury trial commenced in November of 1998. Until *Knowles v. Iowa,* 525 U.S. 113, 119 S. Ct. 484, 142 L. Ed. 2d 492 (1998), was decided in December of 1998, the search incident to citation was constitutional in Iowa. *See, e.g., State v. Knowles,* 569 N.W.2d 601 (Iowa 1997). Therefore, it would have been fruitless to challenge any police conduct after the initial stop; if the stop and citation were valid, then the search incident to citation was valid. *See id.* at 602; *State v. Meyer*, 543 N.W.2d 876, 878-879 (Iowa 1996). Trial counsel filed a motion in arrest of judgment and a motion for a new trial on December 9, 1998, one day after the United States Supreme Court issued its decision. The motion for new trial raised the issue of the constitutionality of the search incident to citation. We can hardly fault counsel for failing to earlier argue what appeared to be a meritless issue in Iowa.

Furthermore, even if defense counsel had raised the issue earlier, there is no reasonable probability the result would have been different because the good faith exception to the Fourth Amendment exclusionary rule would have applied. In *Illinois v. Krull,* 480 U.S. 340, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987), the United States Supreme Court refused to apply the Fourth Amendment exclusionary rule to

evidence obtained by police who acted in reasonable reliance on a statute that was later declared unconstitutional. We agree with the district court that Trooper Eral's search incident to citation did not require suppression because he acted pursuant to a statute that had not yet been declared unconstitutional. We conclude Scott's trial counsel was not ineffective for failing to challenge the post-stop conduct of police.

III. Evidence of Sustaita's Acquittal. Scott contends the district court erred by allowing Sustaita to testify she had been acquitted of similar charges arising out of the same incident. The State called her as a witness at Scott's trial. Her testimony essentially disclaimed ownership of the drugs found in the vehicle and accused Scott of planting the drugs in her purse and in the flashlight found between the seats. On cross-examination, defense counsel focused on her past drug use and suggested it would have been difficult for Scott to have put the drugs in her purse and the flashlight, especially since he did not know they were going to be pulled over. Ultimately, it was implied that Sustaita had stored the drugs in those places. It was only on redirect that the State asked Sustaita about the outcome of her trial. On appeal, the State contends the acquittal was introduced, not as substantive evidence of Scott's guilt, but to aid the jury in assessing Sustaita's credibility once it was put into question on cross-examination. Defendant responds by arguing the credibility finding of another jury is not relevant.

Although Iowa has not specifically addressed the subject, it is well-established in federal courts that the acquittal or conviction of a codefendant is not admissible as substantive proof of a defendant's guilt. *See, e.g., United States v. Mitchell,* 1 F.3d 235, 240 (4th Cir. 1993) (citation omitted). A defendant's jury must resolve questions of credibility and not rely on what another jury has found. *Id.*

Such evidence raises the concern that a defendant might be convicted based upon the disposition of the charges against a codefendant, rather than upon an individual assessment of his or her own personal culpability. *Id.*

However, evidence of a codefendant's conviction, guilty plea, or acquittal is not automatically inadmissible. The Eighth Circuit has permitted its use, considering such factors as:

> whether the court gave the jury a limiting instruction, whether there was a proper purpose in introducing the [evidence] . . . , whether the [evidence] was improperly emphasized or used as substantive evidence of guilt, and whether the introduction of the [evidence] was invited by the defense counsel.

United States v. Jones, 145 F.3d 959, 964 (8th Cir. 1998) (citations and quotations omitted); *United States v. Rogers,* 939 F.2d 591, 594 (8th Cir. 1991). If the codefendant testifies at trial, introduction of such evidence has a "proper purpose": to provide the factfinder appropriate information with which to assess the witness' credibility. *See United States v. Sanders,* 95 F.3d 449, 454 (6th Cir. 1996); *see also Rogers,* 939 F.2d at 594-595 (permitting use of a co-offender's guilty plea during cross-examination when defense counsel opened the door for such impeachment); *United States v. Kroh,* 915 F.2d 326, 331 (8th Cir. 1990) (noting admissibility of codefendant's guilty plea, even in prosecution's direct examination of witness, as evidence of the witness' credibility).

While normally the Eighth Circuit has required a limiting instruction to accompany such evidence, the failure to give one is not plain error where defense counsel did not request it and the prosecution did not highlight the evidence of the disposition of the codefendant's case to the jury. *Rogers,* 939 F.2d at 595. Furthermore, the Eighth Circuit has noted that even in circumstances where such

evidence would normally be inadmissible, it may be used on redirect examination to clarify an issue that was opened up by the defense on cross-examination. *Kroh,* 915 F.2d at 332.

We conclude the evidence of Sustaita's acquittal was admissible. The State did not ask about her acquittal until its redirect examination. The defense invited the issue during cross-examination by implying Scott could not have hid the drugs and they belonged to Sustaita. While a limiting instruction should usually be given, one was not requested and the evidence was not unduly emphasized by the State. We affirm on this issue.

IV. Failure to Challenge Instructions and Sufficiency of the Evidence on "Crack House" Charge. Scott contends this issue is controlled by *State v. Westeen,* 591 N.W.2d 203. Count V of the trial information charged Scott with a violation of Iowa Code section 124.402(1)(e) (1997),[1] which proscribes keeping or maintaining a vehicle for illicit drug purposes. Scott contends his trial counsel failed to argue there was no evidence his vehicle was kept or maintained for the substantial purpose of drug activity. He also points out counsel did not object to the instructions which did not inform the jury of the substantial purpose or 'continuity' requirement.

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[1] That section provides:

> 1. It is unlawful for any person:
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> . . .
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> e. Knowingly to keep or permit the keeping or to maintain any premises, store, shop, warehouse, dwelling, temporary, or permanent building, vehicle, boat, aircraft, or other temporary or permanent structure or place, which is resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances, or which is used for keeping, possessing or selling them in violation of this chapter.

This claim is also raised in the context of ineffective assistance. Trial did not take place until November, 1998. *Westeen* was not decided until March of 1999. We did not find trial counsel ineffective in section II of this opinion for failing to foresee a change in case law. However, unlike the search issue, the challenge here would not have been meritless because it was one of first impression. *Westeen* discussed the standard by which trial counsel is judged when the ineffectiveness issue involves the failure to raise an issue of first impression. In *Westeen,* the Iowa Supreme Court found that

> if a criminal statute has not yet been interpreted by our court and the prevailing interpretation of nearly identical statutes in other states is favorable to the defendant, there can be no strategic reason for failing to urge adoption of the favorable interpretation of the statute at trial. As the following discussion illustrates, we have previously held under similar circumstances that trial counsel's failure to raise an issue of first impression cannot be excused as a judgment call left to the discretion of trial counsel.

Westeen, 591 N.W.2d at 210. In this context, we ask "whether a normally competent attorney could have concluded that [this] question . . . was not worth raising." *Id.* (citations omitted).

In light of the *Westeen* analysis, we conclude defense counsel breached an essential duty when he failed to challenge the jury instructions and the sufficiency of the evidence on this charge. The Iowa Supreme Court has determined trial counsel renders ineffective assistance in this context where:

> (1) there were no Iowa cases that would have foreclosed the argument counsel was faulted for not making; (2) a review of the statute "would have lent substantial weight" to the defendant's argument; and (3) case law from other jurisdictions supported the defendant's position.

Westeen, 591 N.W.2d at 210 (citing *State v. Schoelerman,* 315 N.W.2d 67, 72 (Iowa 1982)). In *Westeen,* the supreme court concluded the keeping or maintaining element had never been interpreted before, other jurisdictions had uniformly required proof of continuous use and the legislature had instructed Iowa courts to construe the statute in uniformity with the law of other states. *Westeen,* 591 N.W.2d at 210-11. We can discern no viable strategic reason for failing to raise this issue.

Having concluded that trial counsel breached an essential duty, we turn to the prejudice prong of Scott's claim. Prejudice is shown where there is a reasonable probability the result would have been different. *Id.* at 211. We conclude, had this challenge been made, Scott would have been entitled to a judgment of acquittal on the 'crack house' charge. This charge requires proof that the use or possession of controlled substances was a "substantial purpose for having the [vehicle] and that such use was continuous to some degree and not merely incidental." *Id.* A single isolated occurrence of drug activity is not enough alone to prove the purpose for which the property is held or that such activity is intended to be ongoing. *Id.* However, "where there is other evidence of continuity and purpose, a single instance of illegal drug activity will support a conviction." *Id.*

Clearly, the State proved only one incident of drug-related activity in Scott's vehicle. Therefore, the State must have had other evidence to support a finding this activity was not an isolated occurrence. Otherwise, there is no distinction between the offense of possession and the crack house statute, a result potentially offensive to double jeopardy principles. *Id.* at 209. Scott points out the drugs were kept in

small, personal receptacles, not in large amounts spread throughout the vehicle. The scale and money were on Scott's person. There was no evidence demonstrating Scott had a history of using this vehicle to transport, deal or consume drugs. No transaction took place near or in the vehicle.

The State contends the evidence shows "the sale of drugs was an ongoing activity for the defendant." We agree. He did have a large amount of cash and a relatively large amount of cocaine. He also possessed other indicia of drug trading, including the scale, a knife, a cellular phone, and ammunition in the trunk of the car. The evidence does not show, however, that the sale of drugs was an ongoing activity *in the vehicle*. Although ammunition was found in the trunk, no weapon was found. There is no evidence of a drug transaction or use in the car on the night in question. Nothing indicated Scott used the vehicle to frequently transport drugs; the drugs were in rather obvious spots, not hidden in secret compartments that someone who frequently "muled" drugs in a vehicle might employ. The State did not show the use, possession or sale of drugs was a substantial purpose for having the car or that the vehicle's use for any of these purposes was continuous. The weakness of the State's evidence results in a reasonable probability the outcome on this charge would have been different if counsel had made the appropriate challenges. We reverse Scott's conviction on the violation of section 124.402(1)(e).

V. Conclusion. We affirm the judgments and sentences entered on counts III and IV. We reverse the judgment and sentence entered under count V of the trial information and remand for a dismissal of that count.

AFFIRMED IN PART; REVERSED IN PART.