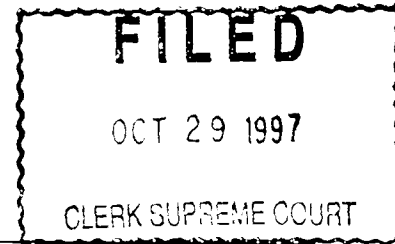


IN THE COURT OF APPEALS OF IOWA

No. 7-448 / 96-1095

000445

STATE OF IOWA,
Plaintiff-Appellee,
vs.
TIMOTHY JAMES LANG,
Defendant-Appellant.



STATE OF IOWA,
Plaintiff-Appellee,
vs.
DONALD J. LANG,
Defendant-Appellant.

Appeal from the Iowa District Court for Wapello County, Dan F. Morrison,
Judge.

Defendants appeal from judgment and sentences entered for production of
Marijuana, in violation of Iowa Code section 124.401(1)(c)(5) (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Christopher Cooklin, Assistant
State Appellate Defender, for appellant Timothy Lang.

H. Michael Neary of the H. Michael Neary Law Office, P.C., Ottumwa, for
appellant Donald Lang.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney
General, Victoria Siegel, County Attorney, and John Courter and Ron Kelly,
Assistant County Attorneys, for appellee.

Considered by Cady, C.J., and Huitink, and Vogel, JJ.

CADY, C.J.

Donald and Timothy Lang appeal their judgments and sentences for production of marijuana. They argue their due process rights were violated when the State destroyed evidence. The Langs additionally assert they were denied effective assistance of counsel. We affirm.

The events giving rise to this case began when drug task force officers conducted an aerial surveillance of a rural marijuana patch. Officers discovered several people harvesting and loading marijuana into a van. They seized the van containing the marijuana and the Langs were subsequently charged with manufacturing marijuana.

An inventory of the van revealed twenty-five large plastic garbage bags full of marijuana, and two large bundles of marijuana in a jacket. An officer testified the bags and bundles contained plant leaves as well as branches. Although the officer conceded some stalks could have been present, he did not recall observing any whole plants or main stalks. Photographs of the marijuana confirm the officer's testimony. The marijuana seized by the officers weighed approximately 420 pounds. Additional testimony indicated a mature marijuana plant yields between 2 and 2.2 pounds of useable marijuana.

The marijuana seized by the officers was kept in storage. After a period of time, however, it began to decompose. It produced a foul odor and began to omit smoke. After obtaining permission from superiors, including the county attorney, the

officers burned the marijuana. They did not seek prior permission from the district court. The destruction occurred before the trial information was filed, and the Langs or their counsel were not given notice of the destruction.

The district court found the Langs guilty of manufacturing marijuana following a trial. They were sentenced to an indeterminate term not to exceed ten years. On appeal they argue the burning of the marijuana constituted bad faith destruction of exculpatory evidence in violation of their due process rights, and the district court erred in overruling their motion to suppress the evidence and dismiss the charges. They also assert they were denied effective assistance of counsel due to counsel's failure to timely object to the destruction of the marijuana.

I. Due Process

We review constitutional claims de novo. *State v. Morgan*, 559 N.W.2d 603, 606 (Iowa 1997); *State v. Romeo*, 542 N.W.2d 543, 551 (Iowa 1996).

Generally, to prove a due process violation based on destruction of evidence, the claimant must show: (1) a proper defense request for the evidence; (2) the evidence was material; and (3) the evidence would have been significantly favorable to the defendant. *State v. Hulbert*, 481 N.W.2d 329, 334 (Iowa 1992). This three part rule, known as the *Brady* test, is satisfied in two related but dissimilar circumstances: (1) intentional destruction of material exculpatory evidence; and (2) bad faith destruction of material *potentially* exculpatory evidence. *State v. Craig*, 490 N.W.2d 795, 796 (Iowa 1992). Under the second circumstance, the third prong of the *Brady*

test is replaced with a bad faith requirement because lost evidence which is merely potentially exculpatory could never satisfy the last prong. *Id.* Thus, the failure of the State to preserve potentially useful evidence does not constitute a denial of due process unless the defendant can show bad faith. *State v. Atley*, 564 N.W.2d 817, 821 (Iowa 1997); *see also Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 337, 102 L. Ed. 281, 289 (1988). Nevertheless, the duty to preserve evidence is limited to evidence that might be expected to play a significant role in the suspect's defense. *California v. Trombetta*, 467 U.S. 479, 488-89, 104 S. Ct. 2528, 2534, 81 L. Ed. 413, 422 (1984); *see State v. Dulaney*, 493 N.W.2d 787, 791 (Iowa 1992). The evidence must also contain an exculpatory value that was apparent *before* destruction of the evidence occurred and be of a nature that the defendant would be unable to obtain comparable evidence. *Trombetta*, 467 U.S. at 488-89, 104 S. Ct. at 2534, 81 L. Ed. at 422.

We first consider whether law enforcement acted in bad faith when they destroyed the marijuana. The Langs claim they acted in bad faith by improperly storing the evidence. They assert the State's *Brady* duty to disclose exculpatory evidence encompasses a derivative duty of preservation of evidence. *See Deberry v. State*, 457 A.2d 744 (Del. 1983). We have not recognized the existence of such a derivative duty, but instead have found the destruction of potentially exculpatory perishable evidence by law enforcement officers after decomposition had begun does

not amount to bad faith. *State v. Atley*, 564 N.W.2d 817, 821-22 (Iowa 1997). We decline to adopt the rule espoused in *Deberry*.

The Langs also assert law enforcement acted in bad faith when they called a county attorney and a member of the media without contacting defense counsel, and by failing to obtain a court order for the destruction of evidence pursuant to Iowa Code section 124.506 (1993). Although law enforcement failed to observe all procedural formalities, their rationale for the destruction of the evidence, nonetheless, does not indicate bad faith. *See Atley*, 564 N.W.2d at 821 (court found no bad faith despite the State's failure to obtain a court order before destroying evidence). An officer testified the marijuana was destroyed because "it was basically starting to rot and starting to liquefy, and it was giving off an odor...and it ...started to smoke...I was concerned about spontaneous combustion." Further, an officer testified they had no place to store and dry such a large quantity of marijuana.

We next consider whether the marijuana in this case was exculpatory. To sustain a conviction for manufacturing marijuana under Iowa Code § 124.401(1)(c)(5) (1993) 50 kilograms or 110 pounds of marijuana are required. Marijuana does not include the stalk of the plant. Iowa Code § 124.101(17) (1993). *See State v. Martens*, No. 108\95-1876 (Iowa filed Sept. 17, 1997). (weight of marijuana stalks not included in calculating the weight of marijuana).

The Langs assert the destruction of the marijuana denied them material exculpatory evidence regarding the weight of the marijuana. The record, however,

indicates the officers counted 156 marijuana plants before they were harvested and only a few plants remained after the harvest was completed. Moreover, a calculation can be made based upon testimony that a mature marijuana plant yields between 2 and 2.2 pounds of useable marijuana. There was additional evidence that the bags of marijuana contained mostly leaves and branches. The officers also weighed the marijuana, revealing total weight of 420 pounds, with a 20 pound margin of error. Based on the evidence in the record, there was enough marijuana to meet the statutory requirement. Even assuming the marijuana contained extra branches, its total weight was approximately 420 pounds and the statute only required 110 pounds. We therefore find the evidence was neither exculpatory nor destroyed in bad faith.

II. Ineffective Assistance of Counsel

The Langs' ineffective assistance of counsel claim involves a constitutional challenge. Our scope of review, therefore, is *de novo*. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). Ordinarily, ineffective assistance of counsel claims are reserved for postconviction proceedings. *Id.*; see also *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). These claims may be resolved on direct appeal, however, when the record adequately addresses the underlying issues. *Ray*, 516 N.W.2d at 865.

To prevail on an ineffective assistance of counsel claim, the Langs must prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty; and (2) prejudice resulted. *Ray*, 516 N.W.2d at 865. The applicant must overcome the strong presumption counsel was competent and that counsel's error

worked to his actual and substantial disadvantage, creating a reasonable probability that but for the error the trial's result would have been different. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674, 699 (1984)). We often most efficiently dispose of the ineffective assistance of counsel claim by looking first to the question of prejudice. *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987).

The Langs claim prejudice resulted from counsel's failure to timely object to the destruction the marijuana. Based on our analysis revealing the marijuana to be neither exculpatory nor destroyed in bad faith, we find no prejudice could have resulted to the Langs. *See State v. Rice*, 543 N.W.2d 884, 888 (Iowa 1996) (counsel has no duty to raise a meritless issue).

For the reasons expressed, we affirm.

AFFIRMED.