IN THE COURT OF APPEALS OF IOWA

No. 0-152 / 99-0390
Filed May 31, 2000

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LOWELL A. NEILL,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Charles L. Smith III, Judge.

Lowell Neill appeals from a judgment entered upon his conviction for delivery of a controlled substance and tax stamp violation, pursuant to Iowa Code sections 124.401(1)(b)(7) and 453B.1(3)(a) (1997), following a jury trial. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Robert P. Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, Richard Crowl, County Attorney, and Jeffrey TeKippe, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

MAHAN, J.

Defendant, Lowell Neill appeals his conviction, following a jury trial for one count of delivery of a controlled substance and one count of failure to affix a drug tax stamp. Neill contends (1) the district court erred in refusing to provide an audiotape player to the jury so they could listen to an exhibit during deliberations, and (2) he received ineffective assistance of counsel during his criminal trial. We affirm.

Patrick Clark, a paid confidential informant, mentioned to Officer James Springman of the Council Bluff's police department that Neill may be a potential drug dealer. At Officer Springman's request, Clark made arrangements with Neill to buy methamphetamine (meth). It was agreed the transaction would take place at Clark's residence. On June 15, 1998, the day the sale was to take place, Neill went to Clark's house where Officer Springman was introduced to him as Clark's friend. Clark went into his house while Officer Springman went to his car with Neill. Neill sold approximately half an ounce of a white powdery substance in a small medicine bottle to Officer Springman. This transaction was recorded by Officer Springman through a body wire and transmitter he was wearing. Assurances were made by Neill as to the quality of the meth. Neill was charged with delivery of a controlled substance and failure to affix a drug tax stamp. This white powder was confirmed to be meth by forensic chemist Jerry Smith.

At trial, the two-minute audiotape of the drug transaction between Officer Springer and Neill was played to the jury without objection. At some point during jury deliberations, the jury foreman submitted to the judge the following question:

"May we have a tape player so that we can listen to the tape evidence again?" The judge's response was "no". Neill was convicted and now appeals.

I. The Jury's Request for a Tape Player. On evidentiary issues, we review for abuse of discretion. *State v. Most*, 578 N.W.2d 250, 253 (Iowa App. 1998). In order to show an abuse of discretion, one generally must show the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Goodson*, 516 N.W.2d 30, 33 (Iowa App. 1994).

The trial court denied the jury's request for a tape player during deliberations. Neill contends this was error. The State argues the defendant did not preserve error on this issue. We are unable to tell by the record whether error was preserved. However, we will review this issue.

Iowa Rule of Criminal Procedure 18(5)(e) does not prohibit the trial court from allowing a jury to use a tape recorder in the jury room when the tape has been received into evidence. *State v. Gathercole*, 553 N.W.2d 569, 575 (Iowa 1996). Conversely, it does not require the trial court to allow the use of a tape recorder. *Id.* Neill concedes in deciding this issue the "trial court possessed considerable discretion to either grant or deny the jury's request to use a tape recorder." *Id.* (citing *State v. Baumann*, 236 N.W.2d 361, 366 (Iowa 1975)). The trial court applied its discretion in considering whether to grant or deny the jury's request. The court denied the request. We do not find an abuse of discretion in this decision.

II. Ineffective Assistance of Counsel. We review claims of ineffective assistance of counsel de novo. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996).

Ordinarily we reserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). "Even a lawyer is entitled to his day in court, especially when professional reputation is impugned." *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). We will resolve ineffective assistance of counsel claims on direct appeal when the record is adequate to decide the issue. *State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998). However, only in "rare circumstances will the trial record alone be sufficient to resolve the claim." *State v. Rawlings*, 402 N.W.2d 406, 408 (Iowa 1987).

Neill claims he was deprived of his right to effective of assistance of counsel when his trial attorney failed to (1) move for a judgment of acquittal to preserve the issue of sufficiency of the evidence, and (2) object to irrelevant evidence who's probative value was far outweighed by its prejudicial effect. He alleges this evidence included possession of drugs which is proof of another crime. We conclude the record in this case is insufficient for us to address Neill's claim in this direct appeal. We therefore affirm his convictions and preserve the ineffective assistance of counsel claim for possible postconviction relief action. See *State v. Bass*, 385 N.W.2d 243, 245 (Iowa 1986).

AFFIRMED.

Vogel, P.J., concurs; Miller, J., concurs in part and dissents in part.

Miller J. (Concurs in part and dissents in part)

I concur in part and dissent in part. I concur in the affirmance of the defendant's convictions. In doing so I concur in rejecting the claim the trial court abused its discretion in responding, "No," to the jury's request for a tape player, but disagree with the majority's reason for doing so. I concur in the decision to preserve for a possible postconviction relief proceeding the claim trial counsel was ineffective by failing to object to certain evidence. I dissent from the decision to preserve the claim trial counsel was ineffective by "failing" to move for judgment of acquittal, and would resolve that claim adversely to the defendant on direct appeal. In doing so I would clearly reject the defendant's apparent claim that any failure to move for judgment of acquittal is a breach of an essential duty.

Abuse of discretion claim.

The defendant claims the trial court abused its discretion by answering, "No," when the jury asked if it could have a tape player to listen to the tape again. No further record was made concerning the question or the court's response. The majority rejects the defendant's claim on the ground the trial court applied its discretion in considering whether to grant or deny the jury's request. I agree the defendant's claim should be rejected. However, it should not be on the basis that the trial court applied its discretion, for the record does not demonstrate an exercise of discretion. Rather, the rejection should be on the basis the defendant did not preserve error on this claim.

> There are many instances in which the Supreme Court and other courts are required to exercise discretion. Any such determination has long been recognized as requiring an actual exercise of judgment upon the part of the court. To do so necessitates a

> consideration by the court of the facts and circumstances which are necessary to make a sound, fair and just determination.

State v. Hildebrand, 280 N.W.2d 393, 396 (Iowa 1979) (citing *State v. Jackson,* 204 N.W.2d 915, 916 (Iowa 1993), quoting from *In re Frazzita,* 147 N.Y.S.2d 11, 16-17 (Sup. Ct. 1955)). The record does not demonstrate any consideration by the trial court of facts or circumstances which would support or oppose the action it took, or which would support or oppose potential alternative courses ofaction. The absence of any record that the trial court considered any relevant facts or circumstances precludes a finding that the trial court applied its discretion.

Ineffective assistance of counsel claims.

The defendant claims his trial attorney failed to provide effective assistance by failing to move for judgment of acquittal and by failing to object to certain evidence. I agree the second of these claims should be preserved for a possible postconviction relief proceeding. However, the record is fully adequate to resolve the first, patently unmeritorious, claim on direct appeal and we should proceed to do so.

The defendant was tried on charges of delivery of methamphetamine and failure to affix a drug tax stamp to that methamphetamine. The charges arose out of a transaction arranged by an informant who was working for law enforcement. In that transaction the defendant sold and delivered methamphetamine to an undercover police officer. The informant had been doing similar, drug-related undercover work for various law enforcement agencies, beginning with the FBI, for sixteen years. He had a continuing relationship with the FBI for almost the entire sixteen years. During that thime he

had done similar work for the Nebraska State Highway Patrol, the South Dakota Black Hills Task Force, City of Omaha, and the City of Council Bluffs. He testified at trial. He was forty-six years of age, married with two children, and had been employed in the same job in a steel mill for almost six years at the time of the drug transaction involved in this case.

The court's instructions informed the jury of the several elements the State was require to prove on each charge, including the amounts of methamphetamine that had to be proved. The defendant had testified that the informant had threatened to burn the defendant's house down or harm the defendant and his family if he did not provide methamphetamine to a friend of the informant, and these threats were the reason he sold and delivered the methamphetamine to the undercover police officer. The court instructed the jury that an element the State was required to prove was that the defendant was not acting under compulsion. (The court instructed on this element not only on the delivery charge, but also on the drug tax stamp charge. There was no evidence whatsoever that anyone threatened or otherwise compelled the defendant to not affix required drug tax stamps. It is unclear why lack of compulsion was submitted as an element of the drug tax stamp charge.)

The defendant asserts there is no conceivable strategic or tactical reason why trial counsel would choose not to move for judgment of acquittal. He asserts trial counsel has a duty to make such a motion. He asserts trial counsel's "failure" to do so therefore constitutes failure to perform an essential duty, and thus satisfies the first prong of the two-prong test for a claim of ineffective assistance of counsel.

Contrary to the defendant's assertions, trial counsel does not have an absolute duty to move for a judgment of acquittal. This is because trial counsel has no duty to make meritless motions. *State v. Rice*, 543 N.W.2d 884, 888 (Iowa 1996). Defense counsel does not fail to perform an essential duty when counsel fails to do such things as raise claims, urge issues, or make objections or motions that have no merit. *See, e.g., State v. Horness*, 600 N.W.2d 294, 298 (Iowa 1999); *State v. McPhillips*, 580 N.W.2d 748, 754 (Iowa 1998). Further, every lawyer has the obligation not to make frivolous motions. *Board of Prof'l Ethics & Conduct v. Ronwin*, 557 N.W.2d 515, 520 (Iowa 1996). We should reject the defendant's apparent assertion that any "failure" to move for judgment of acquittal is a breach of an essential duty.

The defendant's claim that trial counsel has an absolute duty to move for judgment of acquittal is broad enough to also claim trial counsel had a duty to do so under the facts of this case. In his testimony the defendant acknowledged he had sold and delivered the methamphetamine to the undercover police officer. The only element of either charge that he contested was the State's assertion that he was not acting under compulsion. His testimony that he was compelled by threats to deliver the methamphetamine was directly contradicted by the testimony of the informant. The informant's testimony on this point was partially corroborated by the undercover police officer to whom the defendant delivered the methamphetamine. It was also arguably partially corroborated by the tape recording of the drug transaction itself.

A motion for judgment of acquittal must be overruled and a charge submitted to the jury if there is substantial evidence tending to support the

charge. *State v. Jones*, 289 N.W.2d 597, 600 (Iowa 1980). Evidence is substantial if a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Schmidt*, 588 N.W.2d 416, 418 (Iowa 1998). There clearly was substantial evidence tending to support the only contested element, lack of compulsion. The trial court would have been required to overrule any motion for judgment of acquittal. At worst, such a motion would arguably have been objectively frivolous. *See Cohen v. Iowa Dist. Ct.*, 508 N.W.2d 78, 82 (Iowa App. 1993) (describing the difference between a frivolous claim or defense in an "objective sense" and a "subjective sense"). If frivolous, trial counsel had an obligation not to make such motion. *Ronwin*, 557 N.W.2d at 520. At best, such a motion would have been meritless. Trial counsel therefore had no duty to make such a motion and did not fail to perform an essential duty by not doing so.