IN THE COURT OF APPEALS OF IOWA

No. 3-008 / 91-1774

FILED
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CLERK SUPREME COURT

000409

STATE OF IOWA,

Appellee,

vs.

MARTIN WAYNE STONER,

Appellant.

Appeal from the Iowa District Court for Jasper County, Dale B. Hagen, Judge.

The defendant appeals his conviction, following a jury trial, of possession with intent to deliver a controlled substance (cocaine) in violation of Iowa Code section 204.401(1) (1989). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Elizabeth E. Quinlan, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Martha E. Boesen, Assistant Attorney General, and James R. Wilson, County Attorney, for appellee.

Considered by Schlegel, P.J., and Sackett and Habhab, JJ.

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SCHLEGEL, P.J.

The defendant, Martin Wayne Stoner, appeals his conviction, following a jury trial, of possession with intent to deliver a controlled substance (cocaine) in violation of Iowa Code section 204.401(1) (1989). He contends the district court erred in: (1) permitting an expert witness to testify that the amount of cocaine seized was indicative of distribution rather than personal use; and (2) admitting evidence of a forfeiture action against cash seized from him. Stoner also argues his trial counsel rendered ineffective assistance by failing to object to cross-examination regarding his application for appointment of counsel.

Police executed a search warrant at an apartment where Stoner resided with his girl friend, at least on occasion. During the search, the police seized over ninety-eight grams of cocaine, two scales, baking soda, a cutting agent, and $1,882 in cash. As a result of the search, Stoner was charged with and was later convicted of possession with intent to deliver cocaine.

At trial, detective Dodds was questioned as a state expert witness. The defendant complains that during the examination of detective Dodds, the trial court erred in permitting Dodds to give his opinion about the cocaine being of a greater quantity than that which one would possess for personal use. The following interrogation and proceedings are the basis of the defendant's complaint:

Q. [COUNTY ATTORNEY WILSON] And how is it that the drugs seized are significant in the drug trafficking business? A. In drug trafficking you have to have a product, which is the drugs, and when you are trafficking a lot of times you need to have a large amount of the product, which there was a large amount of cocaine seized at this location during the search warrant.

Q. Is the amount--you say a large amount. Is that significant in contrast to say personal use? A. Yes, very. There is a very significant difference between the amount that we seized on this search warrant and what would be used for personal use.

At this point, defense counsel interposed the following objection:

MR. KNOPF: Object to this. This person is not qualified to render that opinion. There is--no proper foundation has been laid as to--from previous testimony as to actually how much cocaine was even present. It was tested to contain cocaine, but is not pure cocaine.

The objection was overruled and the witness answered:

A. In--from mostly my training and experience and talking to people that use cocaine, a gram to a gram and a half a day would be a large amount, a very large amount of drugs used by somebody that has a heavy cocaine habit.

The interrogation continued:

Q. And based upon the same training and experience, the amounts now into evidence of cocaine that were seized that night, would they indicate other than personal usage?

Defense counsel objected as follows:

MR. KNOPF: Object again as leading and suggestive and no proper foundation laid for this witness to testify.

The objection was overruled and detective Dodds answered:

A. Due to the large amount that was seized during the search warrant, it would indicate that this drug was for--intended for distribution and not all of it was intended for personal use.

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The State argues that the objections made by the defendant were insufficient to preserve the issue for appeal. Under the reasoning of Grismore v. Consolidated Products Co., 232 Iowa 328, 5 N.W.2d 646 (1942), the question asked and the answer given were improper. In State v. Nimmo, 247 N.W.2d 228 (Iowa 1976), an almost identical situation arose. In that case, a police officer was asked if a quantity of marijuana that was found would be for personal use or for sale. Id. at 229-30. The witness was permitted to testify that the amount found in defendant's possession "would be quite a bit more than a person would have on hand and for personal use." Id. at 230. Concerning a quantity of phenobarbital, the witness was asked if the amount found could be considered for personal use or transfer to others, to which, after objection, he answered, "This is far in excess of what a person would have even with a prescription in his residence." Id.

In Nimmo, the supreme court reversed the conviction of possession with intent to deliver controlled substances. Id. at 231. In that case, following the offending questions, the defendant objected that the questions called for an opinion on "the ultimate issue for the jury to decide." Id. at 230.

> [A] witness may not express an opinion on the subject of a defendant's intent to deliver no matter how expert he is. Such testimony violates the principle that a witness may not express an opinion on a question of law or mixed law and fact.

Id.; see also State v. Ogg, 243 N.W.2d 620, 621 (Iowa 1976); Grismore v. Consolidated Products Co., 232 Iowa 328, 361, 5 N.W.2d 646, 663 (1942).

In the present case, the state contends the defendant has failed to preserve any claimed error. This contention goes to the sufficiency of the objections made by defendant.

> "The general rule is that unless the reasons for an objection are obvious one attempting to exclude evidence whether the attempted exclusion is by objection or motion has the duty to indicate the specific grounds to the court so as to alert the judge to the question raised and enable opposing counsel to take proper corrective measures to remedy the defect, if possible."
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> Error may not ordinarily be predicated on an order overruling an inadequate objection. See Rule 103, Uniform Rules of Evidence. The burden of invoking a reason for exclusion of evidence is on the objector. State v. Bruckner, 214 N.W.2d 164, 168 (Iowa 1974).
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> Because the function of an objection is to invoke a rule of evidence to regulate admission of proof at trial, it is sufficient if it alerts the trial court to the principle sought to be invoked. "In determining the formal sufficiency of an objection, it is enough if the substance of the defective feature of the evidence offered is made clear by any choice of language. Care must be taken that the objection strike at the very heart of the infirmity." Ladd, Objections, Motions and Foundation Testimony, 43 Cornell Law Quarterly, 543, 551 (1958).

Nimmo, 247 N.W.2d at 231 (quoting State v. Clay, 213 N.W.2d 473, 476-77 (Iowa 1973)); see also State v. Fingert, 298 N.W.2d 249, 254 (Iowa 1980).

Nimmo instructs us that in an inquiry such as this one, where defendant seeks to limit evidence on a matter of law

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or matters of mixed law and facts, "a party must make an objection sufficient to alert the trial court that the inquiry is not a proper subject of opinion testimony." (Emphasis added.) Nimmo, 247 N.W.2d at 231. See State v. Johnson, 224 N.W.2d 617, 622 (Iowa 1974).

It is against the decision in Nimmo and similar cases that we must determine the sufficiency of the objections in this case. Some of those cases are illustrative of the situation in this case. In State v. Lehr, 258 N.W.2d 158, 160 (Iowa 1977), the court stated:

> The gist of defendant's contention in this court is that the question posed asked about a matter which was not a proper subject of expert testimony. We need not decide whether that objection would have been good; it was not made. [Citations omitted.] Hence we do not sustain this assignment of error.

In State v. Oppedal, 232 N.W.2d 517 (Iowa 1975), the police officer witness was asked if the quantity of drugs seized was for personal use. Id. at 524. Defense counsel objected that the question called for an opinion and conclusion of the witness and that an inadequate foundation had been laid establishing his qualification as an expert in the field. Id. This was overruled. Id. The court said:

> Defendant's counsel did not object to the question on the ground that intent to sell is an improper subject for expert testimony, but on appeal he urges this ground as a basis for reversal.

Id. The objection was held to be inadequate to preserve the error for appeal. Id.

Oppedal was reversed on other grounds, id., but because of a likely retrial, the court discussed the question further, stating:

> However, intent to deliver is an essential element of the crime charged in this case, and permitting a witness to testify directly that he had an opinion that a quantity of drugs was possessed by the defendant "with intent to deliver" is tantamount to permitting the witness to testify he had an opinion as to the ultimate fact of defendant's guilt or innocence.

Id.

In State v. Horton, 231 N.W.2d 36 (Iowa 1975), the defendant made the following objection:

> [T]he hypothetical does not assume all of the facts in the record. And it assumes facts, again, that are not in the record. For the further reason that this calls for an opinion and conclusion of the witness, no proper foundation laid [sic].

Id. at 38.

In State v. Maurer, 409 N.W.2d 196 (Iowa App. 1987), this court responded to an objection by holding that it properly preserved the issue for review. Id. at 197-98. In that case, the objection was as follows: "He [the witness] has given an opinion as to ultimate fact in this case to which no expert can give such an opinion . . . ." Id. at 197. Our court held that this objection properly preserved the issue for review, saying: "It clearly relates to the expert's opinion and the fact it is not a proper subject of testimony." Id. at 198. In the instant case, we hold that the objections were insufficient to preserve the issue for appeal. The questions were clearly

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objectionable under Grismore and Nimmo, but the objections did not call the attention of the court and counsel to the deficiency. In addition, the first objection was late, and counsel made no effort to strike the answer on proper grounds. The trial court was correct in overruling these objections.

Stoner next claims that if error has not been preserved on the opinion testimony, he should have a new trial because he was denied effective assistance of counsel. We have opined that the questions put to detective Dodds were objectionable. Whether we hold that counsel's failure to preserve that issue for appeal was the violation of an essential duty, defendant's claim of ineffective assistance of counsel must fail. We do not believe this claim must be deferred until postconviction proceedings. Claims of ineffective assistance of counsel are generally not considered on direct appeal, but are deferred for postconviction action. In this case, however, we can dispose of the claim on direct appeal. This is one of those "rare cases" where the trial record alone is sufficient to resolve the claim. State v. Rawlings, 402 N.W.2d 406, 408 (Iowa 1987).

In order to prevail on a claim of ineffective assistance of trial counsel, the record must show two conditions. "It must be shown that (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom." State v. Hrbek, 336 N.W.2d 431, 436 (Iowa

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1983) (quoting Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981)). A claim of ineffective assistance of counsel implicates defendant's constitutional rights, so the standard of review is de novo. Kellogg v. State, 288 N.W.2d 561, 563 (Iowa 1980).

In claims of ineffective assistance of counsel, when such claims are made on direct appeal, it is uniformly stated that the defendant bears the burden to prove "by a preponderance of the evidence" that counsel failed to perform an essential duty and that prejudice resulted. State v. Risdal, 404 N.W.2d 130, 131-32 (Iowa 1987). Most often, there is no chance to make any record beyond that which is made in the trial or in posttrial proceedings. To indicate that the defendant has the burden to prove those elements by a preponderance of the evidence would estop the appellate courts from making any decision on the issue of ineffective assistance of counsel on direct appeal. The test truly is, that from the record available to the appellate court on review, it is apparent that in order for a defendant to prevail on a claim of ineffective assistance of counsel the record must show, by a preponderance of the evidence, that counsel failed to perform an essential duty and that prejudice resulted. Preponderance of the evidence, as defined by Iowa Uniform Jury instructions, is evidence that is more convincing than opposing evidence and does not depend upon the number of witnesses testifying on one side or the other. Iowa Criminal Jury Instructions

100.12, Iowa Civil Jury Instructions 100.3. As stated by Blacks Law Dictionary, Third Edition:

> Preponderance rests with that evidence which, when fairly considered, produces the stronger impression, and has the greater weight, and is more convincing as to its truth when weighed against the evidence in opposition thereto.

We examine the record before us to determine whether in this case a preponderance of the evidence supports defendant's claim of ineffective assistance of counsel. Because both prongs of the inquiry must be supported by a preponderance of the evidence, we may determine the merits of defendant's claim by considering only whether he suffered prejudice from the claimed failure of counsel to perform an essential duty. Strickland v. Washington, 466 U.S. 668, 679, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 679 (1984). To demonstrate prejudice in this case, the record must show by a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

We have carefully examined the record in this case, and we determine that defendant did not suffer prejudice because of the answers permitted by detective Dodds. There was substantial evidence from defendant's girl friend, and from other sources, that the defendant was engaged in the sale or distribution of drugs. Even without the testimony of detective Dodds, it is clear that there was substantial evidence to support defendant's conviction. We find that

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defendant's claim of ineffective assistance of counsel is without merit.

Defendant claims that the trial court committed error in allowing, over a relevancy objection, testimony concerning the money seized from defendant and forfeited to the state. Defendant's claim in this regard is that the trial court abused its discretion in permitting such testimony. To demonstrate an abuse of discretion, the challenging party must show that the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Ramirez, 400 N.W.2d 588 (Iowa 1987). We do not find an abuse of discretion on the part of the court.

Finally, defendant claims he received ineffective assistance of trial counsel due to his counsel's failure to object to evidence that the defendant had court-appointed counsel. Because this claim arises on direct appeal, trial counsel has not had an opportunity to explain his reason for not objecting to the reference to court-appointed counsel. With respect to such a decision, counsel may well have had a strategic reason for failing to object to that line of inquiry. We reserve this claim for postconviction relief proceedings.

On the whole record before us, we affirm the conviction of the defendant on the charge of possession of cocaine, a schedule II controlled substance, with intent to deliver.

AFFIRMED.