IN THE COURT OF APPEALS OF IOWA

No. 0-472 / 99-1288
Filed October 13, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

NANETTE HORTON,
Defendant-Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Black Hawk County, Joseph Moothart, District Associate Judge.

Defendant appeals from the judgment and sentence entered following her conviction of possession of a controlled substance (cocaine), in violation of Iowa Code section 124.401(5) (1997). Defendant contends (1) her trial counsel was not effective, and (2) the district court erred by failing to include in its sentencing order an accounting of her credit for time served. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Stephan J. Japuntich, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Denise A. Timmins, Assistant Attorney General, Thomas J. Ferguson, County Attorney, Randall Jackson and Danielle Davis, Assistant County Attorneys, for appellee.

Considered by Sackett, C.J., and Streit and Vaitheswaran, JJ.

SACKETT, C.J.

Defendant-Appellant, Nanette Horton, appeals from the judgment and sentence entered following her conviction of possession of a controlled substance (cocaine), in violation of Iowa Code section 124.401(5) (1997). Defendant contends (1) her trial counsel was not effective, and (2) the district court erred by failing to include in its sentencing order an accounting of her credit for time served. We affirm.

On October 21, 1998, the State filed a trial information charging the defendant with the above-referenced offense. *See* Iowa Code § 124.401(5) (1997). Attached to the information were minutes of testimony that listed an "unknown laboratory technician" employed by the Waterloo Police Department, an "unknown evidence technician" and "unknown criminalist" both employed by the Division of Criminal Investigations. The minutes were not amended before trial to name by name the technicians or criminalist. At trial Keith Smith was called and identified as the technician who handled the evidence in this case. Smith provided the foundation for the admission of State's exhibit A listing the drugs and paraphernalia seized from defendant at the time of her arrest. Smith further provided the foundation for the admission of exhibit B, a laboratory report identifying the substance seized from defendant as cocaine.

Defendant contends trial counsel was ineffective for failing to object to the admission of State's exhibit A, exhibit B, and the testimony of Investigator Keith Smith. Defendant argues the State's exhibits and Investigator Smith's testimony are hearsay, prejudicial evidence and outside the minutes of testimony, and if the

proper objection had been made, the testimony and exhibits would not have been admitted in evidence.

An ineffective assistance of counsel claim implicates constitutional rights. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999). Therefore, our review is de novo. *State v. Miller*, 590 N.W.2d 724, 725 (Iowa 1999). While we generally preserve such claims for postconviction relief proceedings, we will consider them on direct appeal where the record is adequate to address the issue. *Schminkey*, 597 N.W.2d at 788. To prevail on a claim of ineffective assistance of counsel, a defendant must prove his or her counsel failed in an essential duty and prejudice resulted. *State v. Phillips*, 580 N.W.2d 748, 754 (Iowa 1998). An ineffective assistance of counsel claim may be disposed of if defendant fails to prove either prong. *State v. Query*, 594 N.W.2d 438, 445 (Iowa App. 1999). Defendant has the burden to show his counsel was ineffective by a preponderance of the evidence. *State v. Allen*, 565 N.W.2d 333, 336 (Iowa 1997). In doing so, defendant must overcome the strong presumption his attorney's actions were reasonable under the circumstances. *State v. Shumpert*, 554 N.W.2d 250, 254 (Iowa 1996). Miscalculated tactics or mistakes in judgment do not necessarily amount to ineffective assistance of counsel. *Jones v. State*, 479 N.W.2d 265, 272 (Iowa 1991). The ultimate test is whether under the entire record and totality of the circumstances, counsel's performance was within the normal range of competency. *Meier v. State*, 377 N.W.2d 204, 206 (Iowa 1983).

We first address defendant's claim her trial counsel was ineffective in not objecting to the admission of State's exhibits A, B and the testimony of Investigator Keith Smith as being outside the minutes of testimony.

The State is required to file minutes of testimony of each witness expected to testify at trial. Iowa R. Crim. P. 5(3). The minutes must be filed with the trial information and supply a "full and fair statement" of the anticipated testimony. *Id.* The purpose of the rule is to eliminate claims of foul play and provide an accused meaningful information from which a defense may be prepared. *State v. Wells*, 522 N.W.2d 304, 307 (Iowa App. 1994); *State v. Walker*, 281 N.W.2d 612, 613 (Iowa 1979). The obligation to provide a "full and fair statement" does not require the State to use precision in composing the expected testimony of each witness named in the minutes. *State v. Ellis*, 350 N.W.2d 178, 181 (Iowa 1984). The "full and fair statement" standard mandates the prosecutor to adequately alert the defendant to the source and nature of the testimony, and place defendant on notice of the need for further investigation of the particular details of the witness's expected testimony. *State v. Lord*, 341 N.W.2d 741, 743 (Iowa 1983).

The minutes of testimony alerted defendant to the substance of the testimony it planned on presenting at trial and the qualifications though not the name of the person who would testify. Smith testified in conformity with the minutes. Additionally the minutes gave defendant sufficient information to identify the witness by name with minimal additional investigation. The minutes made it clear the witness worked for the Waterloo Police Department. Furthermore, had the defendant objected to the testimony at trial on grounds the witness was not identified by name it is reasonable to assume the district court would have allowed the State to amend the information to specify Smith's name there being nothing that would indicate such an amendment would have prejudiced the rights of defendant or charged a wholly new and different offense.

See Iowa R. Crim. P. 4 (8)(a), (e); *State v. Braun*, 495 N.W.2d 735, 741 (Iowa 1993). The amendment including Investigator Smith's name would have merely enlarged the previous minutes and not have changed the substantive basis of the testimony set forth in the original minutes. The defendant has failed to show that she was prejudiced by her counsel's failure to object to the State's failure to specifically list Investigator Smith as the unknown lab technician.

We next address defendant's claim her trial counsel was ineffective for failing to object to State's exhibit B as hearsay. Code section 691.2[1] provides that reports from the state criminalistics laboratory are admissible if they are determined to be relevant. *State v. Casady*, 597 N.W.2d 801, 806 (Iowa 1999). The lab report is relevant because it confirms the substance defendant possessed was cocaine. This fact is essential and relevant to prove the State's case against defendant. The defendant did not request that an employee or technician testify in person at trial regarding the substantive details of the report. Therefore, the trial court properly allowed the report to be received into evidence. Defendant's trial counsel was not ineffective for failing to object to its admission.

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[1] Iowa Code § 691.2 (1999) provides in relevant part:

> " . . . [A]ny report, or copy of a report, or the findings of the criminalistics laboratory shall be received in evidence, if determined to be relevant, in any court, preliminary hearing, grand jury proceeding, civil proceeding, administrative hearing, and forfeiture proceeding in the same manner and with the same force and effect as if the employee or technician of the criminalistics laboratory who accomplished the requested analysis, comparison, or identification had testified in person.
>
> A party or the party's attorney may request that an employee or technician testify in person at the criminal trial, administrative hearing, or forfeiture proceeding on behalf of the state or the adverse agency of the state, by notifying the proper county attorney . . . at least ten days before the date of the criminal trial . . .".

Defendant also contends the trial court erred by failing to include "an accounting of defendant's credit for time served in the sentencing order." Our review of a challenge to a trial court's application of a sentencing statute is for corrections of errors at law. *State v. Stephenson*, 608 N.W.2d 778, 784 (Iowa 2000); *State v. Edgington*, 601 N.W.2d 31, 32 (Iowa 1999). The State argues the trial court need not expressly state defendant will receive credit for time served because section 901.6 operates to include credit for time served in defendant's sentence calculated pursuant to section 903A.5 as a matter of law.

A recent Iowa Supreme Court case has rejected the defendant's contention the trial court must, at sentencing or as part of a written judgment entry, announce the credit to which the defendant is entitled for time served. *See State v. Hawk*, ___ N.W.2d ___, ___ (Iowa 2000). Neither the plain language of Iowa Code section 901.6 nor the practicalities of sentencing dictate such a requirement. *Id.* Based upon the recent decision in *Hawk* the defendant's argument is without merit.

AFFIRMED.