

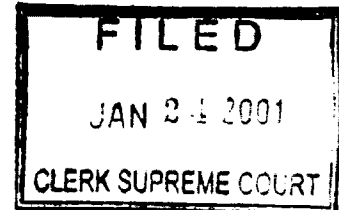
IN THE COURT OF APPEALS OF IOWA

No. 0-727 / 00-41
Filed January 24, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

THEODORE ALLEN, JR.,
Defendant-Appellant.



Appeal from the Iowa District Court for Polk County, Artis Reis, Judge.

Theodore Allen appeals from his conviction for aiding and abetting the delivery of a controlled substance in violation of Iowa Code section 124.401(1)(c)(3) (1999). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Tricia A. Johnston, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, John Sarcone, County Attorney, and Stephanie Cox, Assistant County Attorney, for appellee.

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

VAITHESWARAN, J.

Theodore Allen, Jr. appeals his conviction for aiding and abetting in the delivery of crack cocaine. Allen maintains (1) his trial counsel rendered ineffective assistance by failing to make a record to establish his knowing and voluntary waiver of a jury trial and (2) the evidence was insufficient to support his conviction. We affirm.

I. Background Facts and Proceedings

Allen was standing on a street corner when Des Moines undercover police officers approached him. One of the officers indicated he was interested in buying a \$20 rock of crack cocaine. Allen got into the officers' vehicle and said he would take them to a neighborhood where he could get what they needed. In response to an officer's request, he also indicated he could get a \$40 rock of crack. After arriving at the neighborhood, Allen approached and spoke to one individual, then another. Officers were unable to hear the substance of either conversation, although one of the officers did hear the word "no" in the first conversation. After the second conversation, an individual named Ray Wilson came toward the officers, asked them what they needed, and placed a rock in one of the officers' hands. Allen was standing next to the officers during this transaction but did not participate in the negotiations or the transfer of drugs.

The State charged Allen with conspiracy to deliver a controlled substance and delivery of a controlled substance. See Iowa Code § 124.401(1)(c)(3) (1997). According to the district court's final ruling, Allen appeared in open court and waived his right to a jury trial. The court found Allen guilty of aiding and

abetting the delivery of a controlled substance and sentenced him to a prison term not to exceed ten years. This appeal followed.

II. Jury Trial Waiver

Iowa Rule of Criminal Procedure 16(1) provides that "[c]ases required to be tried by jury shall be so tried unless the defendant voluntarily and intelligently waives a jury trial in writing and on the record...." This right is absolute. *State v. Henderson*, 287 N.W.2d 583, 586 (Iowa 1980). Allen contends his trial counsel did not ensure his jury trial waiver was knowing and intelligent and, accordingly, rendered ineffective assistance. We generally preserve ineffective assistance of counsel claims for postconviction proceedings to permit development of the record and to afford defense counsel a chance to respond to the allegations. See *State v. Ruesga*, ___ N.W.2d ___, (Iowa 1999).

The parties agree the trial record here contains no written jury trial waiver, recorded statement or colloquy concerning Allen's waiver of his right to a jury trial. We preserve the issue for postconviction relief to allow defense counsel an opportunity to respond to Allen's charge that he was ineffective in failing to make a record on this issue.

III. Sufficiency of Evidence

Allen next challenges the sufficiency of the evidence to support his conviction for aiding and abetting the delivery of a controlled substance. The State concedes Allen preserved error on his sufficiency of the evidence claim by timely moving for a judgment of acquittal. We will uphold a district court's denial of a motion for judgment of acquittal if there is substantial record evidence to support the defendant's conviction. *State v. McPhillips*, 580 N.W.2d 748, 752

(Iowa 1998). Evidence is substantial if it could convince a rational fact finder of the defendant's guilt beyond a reasonable doubt. *State v. Hopkins*, 576 N.W.2d 374, 377 (Iowa 1998). We consider all the record evidence, not just the evidence supporting guilt, but view the evidence in the light most favorable to the State. *Id.*

Iowa Code section 124.401(1) states:

Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with the intent to manufacture or deliver, a controlled substance, a counterfeit substance, or a simulated controlled substance, or to act with, enter into a common scheme or design with, or conspire with one or more other persons to manufacture, deliver, or possess with the intent to manufacture or deliver a controlled substance, a counterfeit substance, or a simulated controlled substance.

Iowa Code section 703.1, dealing with aiding and abetting, states :

All persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense or aid and abet its commission, shall be charged, tried and punished as principals. The guilt of a person who aids and abets the commission of a crime must be determined upon the facts which show the part the person had in it, and does not depend upon the degree of another person's guilt.

A conviction on an aiding and abetting theory must be supported by substantial evidence the accused "assented to or lent countenance and approval to the criminal act either by active participation in it or by some manner encouraging it prior to or at the time of its commission." *State v. Jefferson*, 574 N.W.2d 268, 277 (Iowa 1997) (quoting *State v. Lewis*, 514 N.W.2d 63, 66 (Iowa 1994)). Guilt may be proven by circumstantial evidence. *State v. Lott*, 255 N.W.2d 105, 107 (Iowa 1977). While knowledge is essential, neither knowledge nor presence at the scene is sufficient to prove aiding and abetting. *Id.*

Where the crime charged is aiding and abetting the delivery of a controlled substance, our highest court has recognized a "procuring agent" defense. *Lott*,

255 N.W.2d at 107. Under this defense, one who aids only the person receiving the controlled substance cannot be guilty of delivery. *Id.*; cf. *State v. Zaruba*, 306 N.W.2d 772, 774 (Iowa 1981) (holding defense not applicable where defendant makes actual delivery of controlled substance); *State v. Brown*, 466 N.W.2d 702, 704 (Iowa App. 1990) (holding defense not applicable).

The procuring agent defense was successfully raised in *United States v. Moses*, 220 F.2d 166 (3rd Cir. 1955), a case cited in *Lott* and subsequent Iowa appellate court decisions. There, undercover agents came to a woman's apartment, told her they wished to buy drugs, and asked her where they could be obtained. *Id.* at 167. The woman responded she did not have any but her supplier would soon be over and she would be able to arrange for the purchase of drugs from him. *Id.* at 168-169. When the supplier arrived, she introduced the agents to him and told him they wished to purchase drugs. *Id.* at 169. The supplier asked the defendant whether the agents were "all right." *Id.* at 168. She said yes, stating she had seen the agents "over on the avenue." *Id.* The agents then discussed the amount and price with the supplier. *Id.* The defendant was present during these discussions but did not participate. *Id.* The agents subsequently met with the supplier and exchanged money for drugs. *Id.* The defendant was not present at these subsequent meetings. *Id.* The federal appeals court overturned the defendant's conviction on the ground she acted "solely at the behest of the prospective buyers and in their interest." *Id.* at 169.

The court stated

[t]here was nothing to show that she was associated in any way with the enterprise of the seller or that she and [sic] any personal or financial interest in bringing trade to him. Although appellant's conduct was prefatory to the sale, it was not collaborative with the seller.

Id. at 168.

We are unaware of any published appellate court decision of this State reversing a defendant's conviction based on the use of the procuring agent defense.¹ For example, in *Lott*, the Iowa Supreme Court distinguished *Moses* and affirmed Lott's conviction for aiding and abetting delivery of a controlled substance where Lott: (1) acknowledged his ability and willingness to supply drugs; (2) agreed to arrange a transaction; (3) made the initial contact with the seller; (4) called the seller later to confirm the arrangement; (5) accompanied the buyer to the apartment building; (6) made two trips alone to the seller's apartment to check on his readiness; (7) introduced the buyer to the seller; (8) remained through the transaction; and (9) vouched for the quality of the drugs. *Id.* at 108.

Similarly, in *Brown*, our court distinguished *Moses* and affirmed Brown's conviction for delivery of a controlled substance where the defendant: (1) initiated the transaction and acknowledged his ability and willingness to supply drugs; (2) pointed out the supplier; (3) informed the undercover police how they could get his supplier to pull over; (4) asked the officers about the amount of drugs they wished to purchase; and (5) told the officers to tell his supplier that he was serving them. *Brown*, 466 N.W.2d at 704.

Viewing the evidence in the light most favorable to the State as we must, we conclude the evidence is sufficient to support Allen's conviction for aiding and

¹Other jurisdictions and authorities have addressed the procuring agent defense and its continued viability. See *State v. Hecht*, 342 N.W.2d 721, 727-728 (Wis. 1984); *State v. Burden*, 948 P.2d 991, 994 (Ala. App. 1997); *State v. Ramirez*, 814 P.2d 227, 232 (Wash. App. 1991); *State v. Grace*, 812 P.2d 865, 868 (Wash. App. 1991); Parker, *An Argument for Preserving the Agency Defense as Applied to Prosecutions for Unlawful Sale, Delivery, and Possession of Drugs*, 66 Fordham Law Review 2649 (1998); Elaine M. Tomko, Annotation, *Criminality of Act Directing To, or Recommending, Source From Which Illicit Drugs May Be Purchased*, 34 A.L.R. 5th 125 (1995).

abetting delivery of a controlled substance. Allen got into the officers' vehicle, said he could find them crack, directed the officers to the neighborhood where they ultimately obtained crack, found the individual who supplied them with the crack and was present during negotiation of the sale. By this conduct, Allen assented or lent countenance or approval to the illegal delivery of drugs. Cf. *Lacy v. State*, 782 S.W.2d 556, 558 (Tex. App. 1989) (finding evidence sufficient where defendant led officers to apartment complex where officers completed drug transaction with unknown party). Accordingly, we affirm his judgment and sentence.

AFFIRMED.