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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-282 / 91-879

STATE OF IOWA,

Appellee,

vs.

MICHAEL RICHARD GEERDES,

Appellant.

Appeal from the Iowa District Court for Kossuth County, Tom Hamilton, Judge.

Michael Geerdes appeals from his conviction, following a jury trial, of possession of and manufacture of a controlled substance. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia J. Cone-Fisher, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Bruce Kempkes and James Ramey, Assistant Attorneys General; and William McNertney, County Attorney, for appellee.

Considered by Oxberger, C.J., and Donielson and Habhab, JJ.

DONIELSON, J.

On October 24, 1989, officers of the Kossuth County Sheriff's Department searched Michael Geerdes's home pursuant to a search warrant. The officers found a plate of marijuana in the oven and placed Geerdes under arrest for possession of marijuana. The officers continued to search Geerdes's home after his arrest. The officers seized several bags containing marijuana, loose marijuana, residue, roaches, and paraphernalia for smoking marijuana. Forty-nine marijuana plants were found growing in Geerdes's backyard.

By trial information, the State charged Geerdes with possession with the intent to deliver a controlled substance and with manufacturing of a controlled substance. On September 19, 1990, following a jury trial, Geerdes was found guilty of both counts.

On September 24, 1990, Geerdes filed a motion for a new trial and arrest of judgment. Geerdes argued the State failed to produce exculpatory evidence in violation of a court order which gave Geerdes the right to inspect all photographs. Geerdes argued one particular photograph contradicted the testimony of Sergeant Kevin Van Otterloo, the State's witness, who testified the marijuana found in Geerdes's backyard appeared to be well maintained. Geerdes also argued Van Otterloo's testimony regarding a large picked marijuana plant contradicted his testimony in the minutes of evidence. Geerdes did not object to this

testimony. Geerdes argued this testimony exceeded the motion in limine and denied him a fair trial. Finally, Geerdes argued the jury verdict was not sustained by the evidence.

On May 15, 1991, the district court ruled there was sufficient evidence for a jury to find Geerdes guilty, even in the absence of the evidence which Geerdes challenged. The district court found no prosecutorial misconduct and concluded the alleged exculpatory photograph would not have likely influenced the jury's decision. Based upon these findings, the district court overruled Geerdes's objections.

The district court sentenced Geerdes to five years for manufacturing a controlled substance and six months for possession of a controlled substance. The court ordered the two sentences to run concurrently.

Geerdes now appeals. He again argues he was denied due process by the State's failure to produce the allegedly exculpatory photograph of the marijuana plants. Next, he argues he was provided ineffective assistance of counsel by counsel's failure to timely object to a portion of Van Otterloo's testimony which exceeded the scope of the minutes of evidence. Finally, Geerdes contends the district court erred in failing to grant his motion for directed verdict or, in the alternative, his motion for new trial.

When a defendant is alleging error involving a constitutional right, such as here, we make an independent evaluation of the totality of the relevant circumstances to determine if such an error was made. Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975); State v. Jeffries, 417 N.W.2d 237, 239 (Iowa App. 1987). Our standard of review is de novo. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

I. **Prosecutorial Misconduct in Failing to Produce Exculpatory Evidence.** Geerdes first contends he was denied due process by the State's failure to produce exculpatory evidence before trial.

The State argues Geerdes's argument, on appeal, should not be expanded to include any constitutional grounds. In his motion for a new trial which was submitted to the district court, Geerdes alleged the denial of a fair trial. As the denial of a fair trial implicates due process, we will address this claim.

Under Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196, 10 L. Ed. 2d 215, 216 (1963), the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilty or punishment. This rule applies to both exculpatory and impeachment evidence. State v. Anderson, 410 N.W.2d 231, 233 (Iowa 1987).

While the photograph may have had some impeachment potential with regard to Officer Otterloo, the State's

refusal to provide this photograph to Geerdes does not rise to the level of a Brady violation (nor constitutes prosecutorial misconduct) because it was not constitutionally "material" to the defense. In United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481, 494 (1987), the United States Supreme Court held "evidence is material only if there is a reasonable probability that, had the evidence been disclosed . . . the result of the proceeding would have been different."

Geerdes alleges the photograph showed marijuana plants growing in clumps. At trial, Geerdes introduced the testimony of three witnesses who described the area where the marijuana plants were growing as "weedy" and "junky." The photograph simply would have been consistent with this testimony and would have added nothing to the evidence about the backyard. In addition, Geerdes admitted the photograph was "not particularly clear."

Therefore, we do not believe the mere addition of this photograph to trial would have resulted in a reasonable probability of a different outcome. It is highly unlikely that the introduction of the photograph would have had any influence on the jury's verdict. The district court did not err in denying Geerdes a new trial on the grounds that the State did not provide him with this photograph.

II. Ineffective Assistance of Counsel. Geerdes argues he was provided ineffective assistance of counsel by

counsel's failure to timely object to a portion of Van Otterloo's testimony which exceeded the scope of the minutes of evidence.

Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly ineffective attorney the opportunity to explain his or her conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978).

We conclude there is an inadequate record for us to adjudicate the defense claim without counsel's explanation for his conduct. The failure to object to this testimony may be in keeping with the defense strategy which only defense counsel can explain. We therefore preserve defendant's ineffective assistance of counsel claim for a later proceeding.

III. **District Court's Denial of Geerdes's Motions for Directed Verdict or, for a New Trial.** Geerdes' final contention is that the district court erred in failing to grant his motion for directed verdict or, in the alternative, his motion for new trial with respect to the manufacture of a controlled substance charge.

Our standard of review is well settled. A verdict will be upheld where there is substantial evidence to support the charge. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could

convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id. The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence at trial, not just the evidence that supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980).

Here, the evidence produced at trial, taken in the light most favorable to the State, may reasonably lead to the inference that Young manufactured a controlled substance. This evidence includes proof that officers seized the following from Geerdes's residence: a metal tray, covered with marijuana, found in an oven; rolling papers; several plastic bags filled with marijuana; and a screen (used to break marijuana down into small pieces). In addition, a total of forty-nine growing marijuana plants were found in a five-by-nine-foot patch in Geerdes's backyard. This evidence easily leads to an inference beyond the personal use of marijuana.

We find there was substantial evidence to support the verdict and that the motions for a directed verdict and for a new trial were properly denied.

The costs of this appeal are taxed to Geerdes.

For all reasons stated, the judgment of the district court is affirmed.

AFFIRMED.