IN THE COURT OF APPEALS OF IOWA

No. 0-147 / 98-2299
Filed May 31, 2000

JEFFREY A. BRIGGS,
a/k/a PIGGY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

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CLERK SUPREME COURT

Appeal from the Iowa District Court for Pottawattamie County, James E. Heckerman, Judge.

Applicant Jeffrey Briggs appeals the dismissal, after trial to the court, of his application for post-conviction relief. He contends the trial court erred in (1) ruling his claims were not properly preserved for postconviction proceedings, and (2) in finding trial counsel was not ineffective in failing to call certain witnesses. He also contends post-conviction relief counsel was ineffective for failing to challenge trial counsel's failure to object to certain jury instructions. **AFFIRMED**.

Drew H. Kouris, Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney General, Richard Crowl, County Attorney, and Troyce Wheeler, Assistant County Attorney, for appellee.

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

MILLER, J.

Applicant Jeffrey Briggs appeals the dismissal, after trial to the court, of his application for postconviction relief. He contends the trial court erred in (1) ruling his claims were not properly preserved for postconviction proceedings, and (2) in finding trial counsel was not ineffective in failing to call certain witnesses. He also contends postconviction relief counsel was ineffective for failing to challenge trial counsel's failure to object to certain jury instructions. We affirm.

I. Background Facts and Proceedings

Briggs's convictions are a result of two controlled drug buys set up by a confidential informant. Briggs first came to the attention of police from anonymous complaints of drug activity at his residence. Dave Borwick, a confidential informant, subsequently came to police with information Briggs was dealing drugs. He testified he wanted to assist police in curbing drug activity because he did not believe in drugs, and his brother died in an accident where drugs were a contributing factor.

On November 1, 1994, Borwick arranged for Officer Joseph Hothersall to buy drugs from defendant. The buy was successful. Borwick arranged a second successful drug buy from Briggs one day later.

At the subsequent jury trial, Briggs relied upon the defense of entrapment. Nonetheless, Briggs was convicted of one count of delivery of methamphetamine (less than five grams), in violation of Iowa Code section 124.401(1)(c)(6) (Count I), and two counts of delivery of cocaine (less than 500 grams), in violation of Iowa Code section 124.401(1)(c)(2)(b) (Counts II and III). Briggs was ordered to serve a term of imprisonment not to exceed ten years on each count, with the

sentences on Counts I and II to run concurrently with each other, and the sentence on Count III to run consecutively to them.

Briggs appealed the convictions to the supreme court. After reviewing the record, his court-appointed appellate counsel filed a motion to withdraw pursuant to Iowa Rule of Appellate Procedure 104. Briggs filed a resistance, but the supreme court dismissed his direct appeal as frivolous on August 12, 1996. Briggs then filed this petition for postconviction relief, contending trial counsel was ineffective for failure to (1) call certain witnesses, (2) object to leading questions, (3) take depositions of the expert witnesses and confidential informant, and (4) present a defense of diminished capacity. The postconviction trial court dismissed his application after evidentiary hearing, noting the supreme court order dismissing his direct appeal preserved no ground for postconviction relief, but addressing his claims and finding no merit in them. Briggs appeals.

II. Scope and Standard of Review

Generally, an appeal from denial of an application for postconviction relief is reviewed for errors of law. *Harpster v. State*, 569 N.W.2d 594, 596 (Iowa 1997). However, when as here, the applicant raises constitutional issues, we review "in light of the totality of the circumstances and the record upon which the postconviction court's ruling was made." *Id.* (quoting *Giles v State*, 511 N.W.2d 622, 627 (Iowa 1994)). This "totality of the circumstances" review is the functional equivalent of a de novo review. *Key v. State*, 577 N.W.2d 637, 639 (Iowa 1998).

III. Error Preservation

In addition to rejecting Briggs' postconviction claims on the merits, the postconviction trial court also noted the supreme court's order had preserved no ground for postconviction relief. Briggs contends this was error, and he suffered prejudice because the "trial court may have speculated that Briggs attack on this trial counsel was an afterthought and this may have undermined Briggs' complaints."

Generally, a postconviction relief applicant is required to show sufficient reasons why any ground for relief asserted in a postconviction relief application was not previously asserted on direct appeal. *Bledsoe v. State*, 257 N.W.2d 32, 33-34 (Iowa 1977). If the burden is not met, the grounds may not be asserted in a postconviction relief application. *Id.* However, where the direct appeal is dismissed pursuant to Iowa R. App. P. 104, and the applicant had filed a resistance to the rule 104 motion, the *Bledsoe* rule of error preservation does not apply, and an applicant may then bring claims in a postconviction relief proceeding that were not raised on appeal. *Bugley v. State*, 596 N.W.2d 893, 896 (Iowa 1999). We agree with Briggs his claims raised on postconviction relief were preserved for postconviction relief proceedings because he resisted dismissal. However, the postconviction trial court addressed the merits of these claims and Briggs was not prejudiced in any manner by the trial court merely noting the supreme court's dismissal order preserved no ground for postconviction relief.

IV. Merits

A. The Law

To establish an ineffective assistance of counsel claim, the applicant must show that "(1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom." *State v. Miles*, 344 N.W.2d 231, 233-34 (Iowa 1984). The test of ineffective assistance of counsel focuses on whether the performance by counsel was reasonably effective. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1994). The applicant must show that performance fell below an objective standard of reasonableness so that counsel failed to fulfill the role in the adversary process that the Sixth Amendment envisions. *Id.* The test is the same for both trial counsel and any subsequent counsel. *Schertz v. State*, 380 N.W.2d 404, 414 (Iowa 1985).

A presumption exists that counsel is competent and that counsel's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995) (citing *Strickland*, 466 U.S. at 689-90, 104 S. Ct. at 2065-66, 80 L. Ed. 2d at 693-94). The applicant must overcome this presumption and has the burden of proving by a preponderance of the evidence both of the two elements of such a claim. *Id.*; *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989). Improvident trial strategy, miscalculated tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective counsel. *State v. Aldape*, 307 N.W.2d 32, 42 (Iowa 1981). To warrant a finding of ineffective assistance of counsel, the circumstances must include an affirmative factual basis demonstrating counsel's inadequacy of representation. *Id.*

We may dispose of an ineffective assistance of counsel claim if the applicant fails to prove either the breach of duty or the prejudice prong of such a claim. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

B. Failure to Call Additional Witnesses

Briggs contends on this appeal trial counsel was ineffective for failing to call certain witnesses to "follow through" on his defense of entrapment. As noted above, the confidential informant testified he was helping the police in this matter because he had an older brother who had died in a drug-related motorcycle crash. At trial, Briggs's strategy to support his theory of entrapment was to attack the confidential informant's motives and credibility.

Three witnesses were called by Briggs in furtherance of this goal. Joseph Lungren testified Borwick and Briggs had a confrontation where Borwick told Briggs, "You haven't seen the end of this." Lungren also testified Borwick was a drug dealer and was always trying to get someone to buy drugs from him. Arnold Olsen testified that Borwick bragged about setting people up, including Briggs, and also testified Borwick was a drug dealer. Robert Woodard testified (1) Borwick was involved in the occult, and (2) Borwick could, at times, be extremely forceful in trying to sell drugs.

Briggs now complains trial counsel did not follow through on the entrapment defense and was ineffective for failing to call four more witnesses. Our review of the anticipated testimony of these four witnesses, however, shows they would not have provided evidence substantially different in kind or degree than that provided by the witnesses who did testify.

Briggs's trial counsel testified during postconviction relief proceedings some potential witnesses could not be located and other potential witness's testimony would have been merely cumulative. He felt others lacked credibility, or would not do well under cross-examination. Further, he felt some of the proposed witnesses lacked first-hand knowledge or for other reasons were not competent to testify. In his opinion, to "simply have a parade of witnesses isn't going to be good strategy. . . . So from a strategy standpoint I didn't feel necessary or I felt it would be counter-productive to call all the witnesses that [defendant] wanted me to call." We find trial counsel's strategy was reasonable, and far from improvident. We therefore reject Briggs's first ineffective assistance of counsel claim.

C. Failure to Challenge Jury Instructions

Briggs contends postconviction trial counsel was ineffective for failure to argue trial counsel in the criminal case was ineffective for failing to challenge a certain jury instruction. The scope and standards of review in reviewing postconviction trial counsel's actions are the same as in reviewing trial counsel's actions. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998).

The district court has a duty to instruct fully and fairly on the law regarding all issues raised by the evidence. Iowa R. Crim. P. 18(5)(f); *State v. Liggins*, 557 N.W.2d 263, 267 (Iowa 1996). The court may phrase the instructions in its own words as long as the instructions given fully and fairly advise the jury of the issues it is to decide and the law which is applicable. *Id.* When a single instruction is challenged, it will be judged in context with other instructions relating to the criminal charge, not in isolation. *Id.* Any error in jury instructions

must be prejudicial to warrant reversal. *State v. Countryman*, 572 N.W.2d 553, 561 (Iowa 1997).

The trial court instructed the jury on entrapment as follows:

> The defendant claims he was "entrapped." The State must prove by evidence beyond a reasonable doubt the defendant was not entrapped.
>
> "Entrapment" occurs when a law enforcement officer causes the commission of a crime by using persuasion or other means likely to cause a normally law-abiding person to commit the crime. Conduct merely providing an opportunity to commit a crime does not amount to entrapment.
>
> You should consider the conduct of the law enforcement officer and the defendant. This includes dealings leading up to the crime, the interaction between the agent and the defendant, and the defendant's response to conduct of the agent. These shall be considered in deciding what the effect of the agent's conduct would be on a normally law-abiding person.
>
> If the State has proved beyond a reasonable doubt that the defendant was not entrapped, he is guilty. However, if the State has not disproved the defense of entrapment, the defendant is not guilty.

(Emphasis added).

Briggs contends the instruction given by the court is misleading because "the jury could have been misled into believing that it was the law enforcement officer (Officer Hothersall) rather than the agent (Borwick) who was doing the entrapping." He further contends the prejudice to Briggs is obvious because his sole defense was entrapment and he was entitled to an accurate and consistent instruction that would specifically direct the jury to study the conduct between Borwick and the defendant. However, the test of prejudice is whether, but for the claimed error, there is a reasonable probability the result would have been different. *State v. Hopkins*, 576 N.W.2d 374, 380 (Iowa 1998).

Our review of the evidence leads us to conclude Briggs has not carried his burden, because (1) the instruction was not in error; and (2) entrapment did not occur as a matter of law.

First, the trial court's use of the term "law enforcement officer" rather than "law enforcement agent" and the subsequent references to "agent" were not error. Clearly, the instruction focused upon the conduct and actions of Officer Hothersall. One of the actions Officer Hothersall took was to employ a confidential informant, in this case, Borwick. Officer Hothersall also was directly involved in the first purchase of drugs from Briggs. Therefore, the jury necessarily had to consider the conduct of both Hothersall and Borwick in deciding whether Briggs was entrapped. The instruction given by the court also specifically stated in considering the conduct of the law enforcement officer and Briggs, the jury was to consider "dealings leading up to the crime, . . . , and the defendant's response to conduct of the agent." This portion of the instruction clearly required the jury to take into account Borwick's actions as "dealings leading to the crime," and how Briggs responded to Borwick's conduct. The jury instruction applied to the facts, adequately stated applicable law, was therefore not erroneous, and postconviction trial counsel did not fail to perform an essential duty by not claiming error in the entrapment instruction. *State v. Horness*, 600 N.W.2d 294, 298 (Iowa 1999) (holding defense counsel does not fail to perform an essential duty when counsel fails to raise a meritless claim).

Second, for the reasons that follow, even though the issue of entrapment was submitted to the jury, as a matter of law entrapment did not occur. Thus, even if the jury instruction was inadequate, Briggs suffered no prejudice.

Entrapment may occur "when a law enforcement agent induces the commission of the offense, using persuasion or other means likely to cause law-abiding persons to commit it." *State v. Babers*, 514 N.W.2d 79, 83 (Iowa 1994) (quoting *State v. Tomlinson*, 243 N.W.2d 551, 553 (Iowa 1976); *see also State v. Peterson*, 490 N.W.2d 53, 55 (Iowa 1992); 1 Iowa Criminal Jury Instructions 200.17 (1988). Our supreme court has stated that "merely providing the opportunity or facilities for the commission of crime does not constitute entrapment." *State v. Mullen*, 216 N.W.2d 375, 381 (Iowa 1974). Thus, entrapment must involve the use of excessive incitement, urging, persuasion, or temptation by law enforcement agents. *Babers*, 514 N.W.2d at 83. Examples of prohibited activity may "include extreme pleas of desperate illness, appeals based primarily on sympathy, pity, or close personal friendship, and offers of inordinate sums of money." *Babers*, 514 N.W.2d at 83 (quoting *State v. Mullen*, 216 N.W.2d 375, 383 (Iowa 1974). *See generally State v. Cooper*, 248 N.W.2d 908 (Iowa 1976); *State v. Baumann*, 236 N.W.2d 361 (Iowa 1975).

We use an objective test for the defense of entrapment. *Id.* To determine the sufficiency of the evidence we consider the transactions between the government agent and the defendant and the agent's conduct. *Id.* We may determine whether a defendant has established a defense of entrapment as a matter of law when there is no dispute as to the facts or the inferences to be drawn. *Id.*

For the reasons that follow, we find as a matter of law entrapment did not occur. On the night of the first drug buy, only seven minutes passed from when Borwick entered Briggs' residence to when Briggs came out to Officer

Hothersall's vehicle with methamphetamine and cocaine. Briggs then sold Officer Hothersall one small bag of methamphetamine and two small bags of cocaine for the sum of sixty dollars. Officer Hothersall asked Briggs if Briggs could get LSD for him, and Briggs said he would see if he could and to check with him later. The second buy a day later involved a gram of cocaine, for ninety dollars. On both occasions, Briggs stated his price, and immediately delivered drugs he already had on hand.

On the evening of the second buy Briggs was under the influence of a controlled substance when Borwick went into Briggs' residence. Briggs did not want to go out to the car to make the sale, so Borwick made the buy in the house. Briggs had a scale to weigh the drugs sitting on a footstool beside the couch. The drugs Briggs sold the second evening and the plastic baggies used to package them were also sitting on the footstool, right beside the scale. On this same evening and at the same time the cocaine was purchased, Officer Hothersall also purchased methamphetamine from another person who was present with Briggs at the residence.

There is no substantial evidence in the record that Borwick or Hothersall used any "excessive incitement, urging, persuasion, or temptation" to induce Briggs to sell drugs. To the contrary, the unrefuted and essentially unchallenged evidence shows that Briggs had two different controlled substances readily available to sell, had equipment and supplies on hand to weigh and package sold drugs, and readily sold and delivered drugs when asked. Because the trial court would not have been required to instruct the jury on entrapment, Briggs cannot have been prejudiced by the claimed error in the entrapment instruction and

postconviction counsel was not ineffective for not claiming trial counsel was ineffective by failing to object to the jury entrapment instruction.

AFFIRMED.