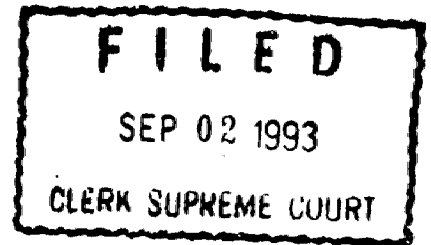


IN THE COURT OF APPEALS OF IOWA

No. 3-227 / 92-592



000991

STATE OF IOWA,

Appellee,

vs.

DELVONTE WILLIAMS,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, L. D. Lybbert, Judge.

Defendant appeals his convictions, following a jury trial, for possession of a controlled substance with intent to deliver and failure to affix a drug tax stamp.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, and Sheryl Soich, Assistant Attorney General, for appellee.

Heard by Donielson, P.J., and Sackett and Habhab, JJ.

HABHAB, J. 000992

Defendant, Delvonte Williams, appeals his convictions, following a jury trial, for possession of a controlled substance with intent to deliver and failure to affix a drug tax stamp. Williams claims he received ineffective assistance of counsel because his trial counsel failed to: 1) object to testimony concerning his alleged gang activity; and 2) object to the drug tax stamp charge on double jeopardy, self-incrimination, and due process grounds. Williams also claims the trial court imposed an illegal sentence in violation of Iowa Code section 701.9 (1991) by failing to merge the two crimes.

Acting pursuant to a search warrant, police officers secured and searched a home where it was believed a large amount of drugs was located. One car sped away before the perimeter could be secured. Once in the house, the police arrested six people, including the defendant, Delvonte Williams. The police eventually seized drug paraphernalia and a small amount of crack cocaine from the house. The search of Williams' person revealed \$1444 in cash and a set of car keys. The police then obtained a search warrant for the car.

During the search of the car, the police found a briefcase containing \$105 in food stamps, \$10,800 in unstamped crack cocaine, \$8600 in cash, a .380 semiautomatic handgun, and a windbreaker with \$1448 in the pocket.

The State charged Williams with possession of a controlled substance with intent to deliver and failure to affix a drug tax stamp. The matter proceeded to a joint jury trial with one other codefendant.

The jury found Williams guilty on both counts. The court entered judgment on the jury's verdict and sentenced Williams accordingly. Williams appeals. We affirm.

I. Improper Opinion Testimony.

Williams' first claim is that his trial counsel was ineffective because he failed to object to evidence offered to demonstrate Williams' membership in a gang.

During trial, the State introduced testimony concerning the gang participation of Williams' friend, Donovan Shields, who the State alleged was involved with Williams in the running of a crack house. The State also introduced testimony from another officer that indicated the sale of drugs is a primary source of income for gangs. The State also asked the officer whether the fact the defendant wore baggy clothes indicated he was a member of a gang. Williams' defense counsel did not object to this testimony.

Our ultimate concern in claims of ineffective assistance is with "the fundamental fairness of the proceeding whose result is being challenged." State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987) (quoting Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). We review de novo the totality

of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. Id. at 131. The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. Id. at 131-32 (citation omitted).

The first prong requires an affirmative factual basis demonstrating the alleged inadequacy of representation to be set forth. Hinkle v. State, 290 N.W.2d 28, 31 (Iowa 1980). When addressing the second prong of a claim of ineffective assistance of counsel, prejudice, we require the defendant to show that counsel's failure to perform an essential duty worked to the client's actual and substantial disadvantage and thereby constituted "a denial of the accused's due process right to a fair trial, a fundamental miscarriage of justice, or an equivalent constitutional deprivation." State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). The test to determine whether specified errors of counsel have resulted in prejudice to this degree is that the defendant must show there is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984).

We need not decide whether Williams' trial counsel should have objected to the testimony because we find that

Williams has failed to show he was prejudiced. The references to gang membership were brief. Most references did not refer to Williams, but referred to Williams' friend, Donovan Shields. In addition, we find the evidence against Williams was overwhelming.

We find no evidence that there was a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. Williams has not shown that his trial counsel was ineffective in his failure to object to references to gang membership.

II. Constitutional Challenges to 421A.

Williams next claim is that his trial counsel was ineffective by not challenging Iowa Code chapter 421A (1991) on the grounds it violated the double jeopardy, privilege against self-incrimination, and due process clauses.

Recently, our supreme court held that chapter 421A does not violate the privilege against self-incrimination, the double jeopardy clause, or the due process clause of the Constitution. State v. Gallup, 500 N.W.2d 437 (Iowa 1993). Accordingly, we find Williams' trial counsel was not ineffective by his failure to raise these constitutional issues.

III. Failure to Merge the Sentences.

The trial court sentenced Williams to two separate terms on the counts of delivery of a controlled substance and distribution of a controlled substance without a tax stamp. Williams final claim is that the district court erred in failing to merge the two sentences.

Our supreme court recently addressed this identical issue in Gallup. Id. It held that "in the event of conviction on both offenses, district courts should not apply the merger provision of [Iowa Code] section 701.9 but should, instead, render sentence on each conviction." Id. at 19.

We find the district court did not err in refusing to merge the sentences.

AFFIRMED.

Donielson, P.J., concurs; Sackett, J., specially concurs.

SACKETT, J. (specially concurring)

000997

I concur in the result; however, I would reserve defendant's claim of ineffective assistance for postconviction. I am not ready to say on this record defendant was not prejudiced by the introduction of evidence connecting him with gang membership.