IN THE COURT OF APPEALS OF IOWA

000461

No. 7-695 / 97-373

FILED
FEB 25 1998
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

ALBERTO LOZANO,

Appellant.

Appeal from the Iowa District Court for Woodbury County, Gary E. Wenell, Judge.

Alberto Lozano appeals from his convictions for possession of methamphetamine, failure to affix a drug tax stamp, and keeping premises for selling controlled substances. **AFFIRMED IN PART, AND REVERSED IN PART.**

Linda Del Gallo, State Appellate Defender, and Christopher Cooklin, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Thomas S. Mullin, County Attorney, and James J. Katcher, Assistant County Attorney, for appellee.

Considered by Cady, C.J., and Streit, and Vogel, JJ.

CADY, C.J.

This is an appeal by a defendant challenging his convictions for possession of methamphetamine, in violation of Iowa Code section 124.401, failure to affix a drug stamp tax, in violation of sections 453B.1 and 453B.12, and keeping premises for selling controlled substances, in violation of section 124.402. We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

On April 11, 1995, Alberto Lozano was a passenger in a vehicle which was stopped based on information from a confidential informant. Police officers found methamphetamine and a large amount of cash on Lozano's person. Lozano was arrested. While he was in jail, he told another inmate he had methamphetamine in his apartment. On April 14, 1995, officers searched the apartment and found methamphetamine.

A jury convicted Lozano of the crimes. The district court sentenced Lozano to a term of imprisonment not to exceed one year on the charge of possession of methamphetamine and a fine of $250. He was sentenced to a term of imprisonment not to exceed five years on the charge of failure to affix a drug tax stamp, and a term of imprisonment not to exceed two years on the count of keeping a premises for selling controlled substances, together with a fine of $500. The sentences were imposed concurrently. The court also imposed a fine of $5 on each of the three charges under section 911.2. Lozano has appealed.

I. Section 911.2 provides:

> An additional drug abuse resistance education surcharge of five dollars shall be assessed by the court if the violation arose out of a violation of an offense provided for in chapter 321J or chapter 124, division IV.

Lozano asserts the district court did not have authority to impose the drug abuse resistance education surcharge for a drug tax stamp violation, which comes under chapter 453B. The State admits there is no authority in section 911.2 to impose the surcharge of $5 for violations of chapter 453B.

We determine the $5 surcharge imposed for the failure to affix a drug tax stamp should be eliminated and we reverse that portion of Lozano's sentence. We affirm all other aspects of Lozano's sentence.

II. Lozano claims he received ineffective assistance of counsel because his trial counsel failed to file a motion to suppress. He asks to have this issue preserved for a postconviction action. We determine Lozano's claims of ineffective assistance of counsel should be preserved for postconviction proceedings where a more complete record may be developed.

We affirm Lozano's convictions and sentence, except for the $5 surcharge imposed for the failure to affix a drug tax stamp. We strike that reference from the judgment entry. Costs of this appeal are assessed to Lozano.

AFFIRMED IN PART, AND REVERSED IN PART.