IN THE COURT OF APPEALS OF IOWA

No. 0-783 / 99-1893
Filed March 14, 2001

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DONALD JAMES ALLBEE, JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Webster County, Joel E. Swanson, Judge.

The defendant appeals following his conviction for possession of methamphetamine with intent to deliver, as a second or subsequent offender. **AFFIRMED.**

Kurt John Stoebe, Humboldt, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Ron Robertson, County Attorney, and Timothy N. Schott, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Zimmer and Miller, JJ.

ZIMMER, J.

Donald James Allbee, Jr., appeals his conviction following a jury trial for possession of methamphetamine with intent to deliver, as a second or subsequent offender, in violation of Iowa Code sections 124.401(1)(c)(6), 124.411, and 902.9(3) (1999). He contends the trial court abused its discretion in excluding the testimony of a potential witness. He also maintains he was provided ineffective assistance of trial counsel in a number of respects. We affirm.

I. Background Facts and Proceedings. On February 10, 1999, law enforcement officers executed a search warrant on the residence of William Carlson and Kathy Smith in Fort Dodge, Iowa. Donald James Allbee, Jr., was on the premises when law enforcement officers arrived.

During their search, officers found two leather motorcycle jackets in the garage. One of the jackets was hanging on the handlebars of a motorcycle, and the other was located on a chair near the center of the garage. The jacket located in the center of the garage contained methamphetamine, plastic bags of marijuana, a scale, knife, measuring spoon, and hypodermic needle. Keys to the residence of Carlson and his girlfriend and to the girlfriend's car were also found in the jacket. The officers concluded the jacket belonged to William Carlson. Inside the coat, which was hanging on the motorcycle, officers found plastic bags of methamphetamine totaling just over three and one-half grams; an address book listing the addresses of Allbee's brother, mother, and grandmother, but not of Allbee himself; an appointment slip showing the date of Allbee's next appointment with his parole officer; and a receipt for a money order purchased by

Allbee to pay part of his parole enrollment fee. Neither Carlson nor Allbee claimed ownership of either leather coat. The charges filed later against Allbee were based on the items found in the coat hanging on the motorcycle. Carlson was charged based on the contents of the other jacket.

On March 26, 1999, Allbee was charged by trial information with possession of methamphetamine with intent to deliver as a second or subsequent offender. The State filed a motion to consolidate the trials of Allbee and Carlson. Allbee resisted the State's motion, asserting it "is possible that either defendant may choose to call the other as a witness at either defendant's trial." The district court ruled that a combined trial would be improper because of the potential for prejudice to either of the defendants.

Allbee's case was tried to a jury on September 8 and 9, 1999. On the first day of trial, Allbee filed a motion in limine seeking to exclude any testimony relating to his arrest on drug charges which occurred after the charges were filed in the present case. The trial court ruled that "subsequent offenses will not be brought up by the State in their case in chief unless . . . the door is opened by the defendant."

On the morning of the first day of trial, Allbee's trial counsel sought to amend his witness list by adding William Carlson as a witness. The State resisted, alleging the amendment was untimely. The trial court denied the request to amend the witness list and excluded Carlson from testifying that the jacket police believed belonged to Allbee actually belonged to him. Following trial, the jury found Allbee guilty as charged. The court sentenced Allbee to an indeterminate term not to exceed thirty years and fined him one thousand dollars.

Allbee appeals. He contends the trial court erred in excluding the testimony of William Carlson. He also asserts trial counsel was ineffective in failing to timely amend the witness list and move for a mistrial based on the State's alleged violation of his motion in limine barring mention of his subsequent arrest.

II. Exclusion of a Defense Witness for Untimely Notice. Allbee first contends the trial court abused its discretion when it excluded William Carlson from testifying. Iowa Rule of Criminal Procedure 12 imposes a notice requirement on a defendant who depose the State's witnesses. The defendant may depose all witnesses listed by the State in the trial information. Iowa R. Crim. P. 12(1). Rule 12(3) requires the defendant to file the names and addresses of all expected witnesses for the defense and imposes a continuing duty to disclose any additional witnesses. In determining whether the proposed witness was "expected," we apply the subjective test of the defendant's expectation. *State v. Braun*, 495 N.W.2d 735, 742 (Iowa 1993). In this case, evidence of the defendant's awareness of the potential use of Carlson as a witness is reflected in the defendant's resistance to the State's motion to consolidate the trials of defendant and Carlson. In his resistance, the defendant asserted "it is possible that either defendant may choose to call the other as a witness at either defendant's trial." Allbee surely would have had some awareness that his friend could provide testimony that the jacket containing methamphetamine, which police believed belonged to Allbee, actually belonged to Carlson.

Allbee contends Carlson's Fifth Amendment right against self incrimination would have been violated if Carlson had been required to give testimony before his case was resolved on the day before Allbee's trial. Allbee contends this contingency prevented the disclosure of Carlson as a defense witness at an earlier time. We disagree. Even if Allbee believed that Carlson would choose not to be deposed by asserting his Fifth Amendment right, Allbee could still have listed Carlson as the defense witness to comply with rule 12(3). This would have provided the State the opportunity to conduct such investigation regarding Carlson as it thought was necessary, even before learning of the substance of his testimony. In addition, either Allbee or the State could have sought continuances as necessary in the event Carlson was identified as a potential witness. Under the circumstances presented here, we conclude the inability to earlier depose Carlson does not excuse Allbee's failure to give timely notice of his potential testimony.

Iowa Rule of Criminal Procedure 12(4) provides sanctions for a defendant's failure to comply with witness disclosure requirements. The rule states:

> If the defendant . . . does not disclose to the prosecuting attorney all of the defense witnesses (except the defendant and surrebutal witnesses) at least nine days before trial, the court may order the defendant to permit the discovery of such witnesses, grant a continuance, or enter such other order as it deems just under the circumstances. It may, if it finds that no less severe remedy is adequate to protect the State from undue prejudice, order the exclusion of the testimony of any such witnesses.

Iowa R. Crim. P. 12(4).

The trial court excluded William Carlson's testimony for the defense. We review the record to determine if the court abused its discretion in doing so. The

sanctions under rule 12(4) are discretionary and will be reversed only if the trial court abuses its discretion. *See State v. Brown,* 397 N.W.2d 689, 698 (Iowa 1986). The trial court is not required to make specific findings that a sanction short of exclusion would not protect the State from undue prejudice, *State v. Babers,* 514 N.W.2d 79, 82 (Iowa 1994), although it is good practice for the trial court to do so.

William Carlson was not disclosed as a witness until the morning of trial with the jury waiting in the hall. The trial court noted the fact that Allbee did not make the required disclosure, despite knowing of Carlson's potential as a witness for at least four months. The court specifically mentioned the State's inability to depose Carlson. Allbee did not request that the trial be continued or delayed. We conclude it was not an abuse of discretion to exclude the testimony of Carlson under the circumstances.

III. Ineffective Assistance of Counsel. Allbee claims his trial attorney failed to provide effective assistance of counsel. He contends his trial attorney was ineffective for failing to amend the defense witness list nine days prior to trial and for failing to make timely motions for mistrial based on the State's alleged violation of a motion in limine and prosecutorial misconduct.

We review claims of ineffective assistance of counsel de novo. *State v. Allison,* 576 N.W.2d 371, 373 (Iowa 1998). Ordinarily we preserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct. *State v. Atley,* 564 N.W.2d 817, 833 (Iowa 1997). "However, they may be resolved on direct appeal when the record adequately addresses the issues."

State v. Martin, 587 N.W.2d 606, 609 (Iowa Ct. App. 1998). If not, we preserve the claim for postconviction proceedings so that the facts may be developed. *State v. Koenighain*, 356 N.W.2d 237, 238 (Iowa Ct. App. 1984). This gives the attorney an opportunity to respond to the defendant's charges. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978).

A. Motion for Mistrial. Prior to trial, Allbee moved in limine to bar any reference to his arrest that occurred after the incident for which he was being tried. The trial court ruled that the State could not introduce evidence of the arrest unless Allbee opened the door to the evidence. On direct examination, Allbee testified that he had been released from prison after six years of incarceration. The prosecutor then cross-examined Allbee on his prior convictions. On redirect, defense counsel questioned Allbee about his experience in prison, and Allbee testified that prison changes people. On recross-examination, the prosecutor asked Allbee how prison had changed him. Specifically, he asked Allbee if he was no longer involved in illegal activities to which Allbee answered in the affirmative. Allbee was then asked about his arrest on April 3, which had been the subject of the motion in limine. Allbee now contends his counsel was ineffective for failing to make a motion for a mistrial because of this exchange.

Based on the circumstances, we cannot find that Allbee was prejudiced by his counsel's failure to move for a mistrial based on the violation of the motion in limine. Counsel objected to the question about Allbee's arrest before any answer was elicited and the objection was sustained. Furthermore, in Jury Instruction No. 7, the jury was instructed that questions posed by the lawyers were not

evidence. A jury is presumed to follow its instructions. *State v. Simpson*, 438 N.W.2d 20, 21 (Iowa Ct. App. 1989). Therefore, "[c]autionary instructions are usually sufficient to remove any danger of prejudice." *Id.*

Because Allbee was not prejudiced by counsel's failure to request a mistrial, we find no merit in his claim of ineffective assistance of counsel.

B. Motion to Amend. Allbee also alleges his trial counsel was ineffective for failing to timely amend the witness list.

We conclude there is an inadequate record for us to adjudicate Allbee's claim without counsel's explanation of the full circumstances surrounding this specific claim of ineffectiveness. We therefore preserve for postconviction proceedings Allbee's claim of ineffective assistance of counsel based on counsel's failure to timely file a motion to amend the witness list.

The judgment of the district court is affirmed.

AFFIRMED.