IN THE COURT OF APPEALS OF IOWA

000485

No. 7-762 / 97-337

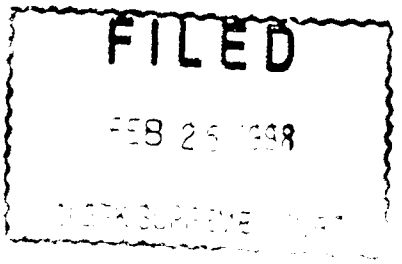
STATE OF IOWA,

Appellee,

vs.

MILTON FLENARD PEGGS,

Appellant.



Appeal from the Iowa District Court for Black Hawk County, Jon Fister, Judge.

Milton Peggs appeals from judgment and sentences entered for possession of marijuana and failure to affix a drug tax stamp. **AFFIRMED.**

Scott L. Hippen of the Hippen Law Office, Ames, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly Griffith, Assistant County Attorney, for appellee.

Considered by Cady, C.J., and Huitink, and Mahan, JJ.

CADY, C.J.

The defendant, Milton Peggs, pursuant to a plea agreement, pled guilty to possession of a controlled substance (marijuana)[1] and failure to affix a drug tax stamp.[2] The court sentenced the defendant to five years for the drug tax stamp charge and a concurrent sentence of six months for the possession charge. On appeal, the defendant argues the dual sentences violate his constitutional protection from double jeopardy and that his trial counsel was ineffective in failing to file a motion in arrest of judgment "on the ground there was no constitutional means by which the Defendant could have determined his liability to pay the drug tax and thereby acquire the requisite stamp in order to avoid criminal prosecution." We affirm by memorandum opinion pursuant to Iowa Supreme Court rule 9.

I. DOUBLE JEOPARDY

To the extent the defendant raises a constitutional claim, our review is *de novo*. *State v. Finnel*, 515 N.W.2d 41, 43 (Iowa 1994). To the extent he claims the sentence was illegal, our review is at law. *State v. Perez*, 563 N.W.2d 625, 627 (Iowa 1997).

The defendant did not raise the issue of double jeopardy in the district court. court. We cannot consider an issue for the first time on appeal, even if it is of constitutional dimension. *Patchette v. State*, 374 N.W.2d 397, 401 (Iowa 1985);

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[1] Iowa Code § 124.401(3) (1995). The charge was reduced from possession with intent to deliver pursuant to the plea agreement.

[2] Iowa Code § 453B.12, formerly 421A.12.

Davoren v. Iowa Employment Security Commission, 277 N.W.2d 602, 603 (Iowa 1979); *Lemon v. City of Muscatine*, 272 N.W.2d 429, 430 (Iowa 1978). Iowa Rule of Criminal Procedure 23(5) does not apply because the sentences imposed are not illegal. An illegal sentence is one not authorized by statute. *State v. Halliburton*, 539 N.W.2d 339, 343 (Iowa 1995); *State v. Kapell*, 510 N.W.2d 878, 879 (Iowa 1994).

Even if we were to conclude the defendant preserved error on this issue, we would reject his claim on the basis of our supreme court's controlling decisions in *Perez*, 563 N.W.2d at 627-28; *Halliburton*, 539 N.W.2d at 343-44; *Finnel*, 515 N.W.2d at 43; and *State v. Gallup*, 500 N.W.2d 437, 442-43 (Iowa 1993). Although possession is a lesser included offense of the drug tax offense[3], the supreme court has determined in these cases the legislature's intent to impose "multiple" punishments for the greater and lesser offenses does not violate a defendant's constitutional protection from double jeopardy[4].

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Customarily, ineffective assistance of counsel claims are preserved for postconviction proceedings. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). They may be resolved on direct appeal, however, when the record adequately addresses the

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[3] *State v. Franzen*, 405 N.W.2d 714, 717 (Iowa 1993) (possession is a lesser-included offense of the drug tax offense).

[4] *Perez*, 563 N.W.2d at 627-28; *Halliburton*, 539 N.W.2d at 343-44; *Finnel*, 515 N.W.2d at 43; and *Gallup*, 500 N.W.2d at 442-43.

issues. *Id.* We review claims of ineffective assistance of counsel *de novo*. *State v. Gregg*, 464 N.W.2d 431, 432 (Iowa 1990). To prevail in such a claim, the defendant must prove counsel failed to perform an essential duty and prejudice resulted. *State v. Terry*, 544 N.W.2d 449, 453 (Iowa 1996). Counsel has no duty to raise meritless claims. *See State v. Ray*, 516 N.W.2d 863, 866 (Iowa 1994); *Schertz v. State*, 380 N.W.2d 404, 409 (Iowa 1985). There is a presumption counsel acted competently. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

The defendant alleges his counsel was ineffective because counsel breached a "duty to recognize the lack of any constitutionally operable means by which the Defendant could determine if the Defendant was subject to the tax." The defendant cites no authority in support of this duty. His challenges to the drug tax stamp law revolve around the constitutionality of its application. The concern of self-determination of criminal activity has been addressed and rejected by the supreme court in *State v. Godbersen*, 493 N.W.2d 852, 857 (Iowa 1992). There is adequate protection for one complying with the requirements of chapter 453B to provide privacy so that many of the defendant's concerns are without merit.

The other issues relate to the imposition of the tax itself. In the case at hand, however, the court did not impose any tax, just the criminal sanctions. The imposition of the tax is separate from the criminal prosecution. *See State v. Shumpert*, 554 N.W.2d 250, 253-54 (Iowa 1996). We conclude the defendant's arguments concerning the statute are without merit. Therefore, defense counsel had

no duty to raise them in a motion in arrest of judgment. We find defense counsel did not fail to perform any essential duty.

We conclude the issues raised by the defendant are either addressed by this opinion or are without merit. Accordingly, we affirm the judgment and sentence of the district court.

AFFIRMED.