IN THE COURT OF APPEALS OF IOWA

No. 8-276 / 97-0949

STATE OF IOWA,

Plaintiff-Appellee,

vs.

ROBERT LEROY JOHNSON, JR.,

Defendant-Appellant.

FILED
SEP 30 1998
CLERK SUPREME COURT

Appeal from the Iowa District Court for Lee County, Harold Bainter, Judge.

Defendant appeals from a judgment and sentence entered upon his conviction of two counts of furnishing a controlled substance to an inmate. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Mary Tabor and Douglas Hammerand, Assistant Attorneys General, and Michael Short, County Attorney, for appellee.

Considered by Sackett, P.J., and Huitink and Mahan, JJ.

MAHAN, J.

This is an appeal by a defendant seeking to overturn his conviction on two counts of furnishing a controlled substance to an inmate in violation of Iowa Code section 719.8. We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

Robert Johnson, Jr. was charged with two counts of furnishing marijuana to a fellow inmate, Craig Gardner, at the Ft. Madison Penitentiary. Gardner had agreed to become an informant in exchange for a reduction of prison disciplinary charges against him. Gardner testified Johnson and Dennis Stewart had sold him marijuana at the prison. Gardner turned the marijuana over to prison officials. Johnson was convicted of the crime charged. He now appeals.

I. Prior to trial, defense counsel filed a motion for the appointment of an expert to examine Gardner to determine if he was competent to testify. Gardner suffers from schizoid bipolar manic depressive disorder and sometimes has hallucinations. The district court denied this request for an expert. In the alternative, defense counsel sought to have an expert appointed to help explain Gardner's medical records to defense counsel. No specific ruling on this request was made.

Johnson now claims he received ineffective assistance due to trial counsel's failure to obtain a ruling on his alternative motion. He asserts he had a right to an expert for this purpose.

Our review of an allegation of ineffective assistance of counsel is de novo. *Cox v. State*, 554 N.W.2d 712, 714 (Iowa App. 1996). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied defendant a fair trial. *Bettis v. State*, 547 N.W.2d 635, 637 (Iowa App. 1996).

We find Johnson has failed to show his defense counsel did not perform an essential duty. He has not established there was a reasonable probability the trial court would have granted his request for an expert to review Gardner's medical records. An indigent criminal defendant is entitled to the appointment of an expert only where such services are necessary in the interests of justice. *State v. Barker*, 564 N.W.2d 447, 450 (Iowa App. 1997). Here, even without the assistance of an expert, defense counsel was able to successfully cross-examine Gardner about his mental illness. Gardner admitted he sometimes had trouble determining what was reality and that he suffered from delusions.

Furthermore, Johnson has not shown he was prejudiced by defense counsel's performance. The question of Gardner's credibility was for the jury to decide. Johnson has not shown an expert's evaluation of Gardner's medical records would have assisted defense counsel to the extent it would have changed the jury's decision regarding credibility. We find Johnson has failed to show he received ineffective assistance of counsel under the facts presented here.

II. Johnson contends the State failed to present sufficient evidence to support his conviction on Count I. The facts regarding this count are as follows. Johnson and Stewart approached Gardner about buying marijuana. Gardner sent $50 to an associate of Stewart. One day in the dining hall, Gardner saw Johnson and Stewart, and Stewart gave Gardner a signal. Gardner followed the two men to a remote area of the penitentiary, where Stewart gave Gardner a package of marijuana. Johnson was present when the marijuana was delivered.

We find there was sufficient evidence connecting Johnson with the crime. Substantial evidence of aiding and abetting may include either active participation in the crime or in some manner encouraging it prior to or at the time of its commission. *State v. Lewis*, 514 N.W.2d 63, 66 (Iowa 1994). Johnson knew of the planned drug transaction in advance. He saw Stewart give the signal and accompanied him to the area where the marijuana was delivered. We find there is sufficient evidence Johnson aided and abetted in Count I.

We affirm Johnson's conviction for furnishing a controlled substance to an inmate. Costs of this appeal are assessed to Johnson.

AFFIRMED.