IN THE COURT OF APPEALS OF IOWA

No. 5-425 94-963

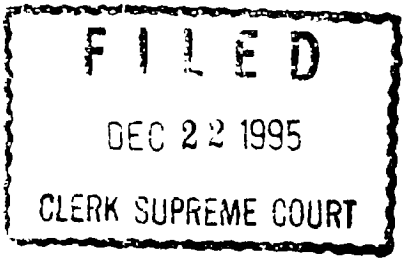
DANIEL M. MEHNER,

Applicant-Appellant.

vs.

STATE OF IOWA,

Respondent-Appellee.



Appeal from the Iowa District Court for Scott County, James R. Havercamp, Judge.

Daniel Mehner appeals from a district court ruling denying his application for postconviction relief. **AFFIRMED.**

Robert E. Weinberg of Wells, Bowman & Smith, Davenport, until his withdrawal, and then Kyle D. Williamson, for appellant.

Thomas J. Miller, Attorney General, Thomas G. Fisher, Jr., Assistant Attorney General, William E. Davis, County Attorney, and Realff Ottesen, Assistant County Attorney, for appellee.

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

SACKETT, P.J.

Applicant-appellant Daniel M. Mehner appeals the district court order denying his application for postconviction relief. Mehner was charged and convicted following a jury trial of two counts of delivery of cocaine and one count of possession of cocaine with intent to deliver. He claimed he received ineffective assistance of trial counsel and appellate counsel. We affirm the district court decision.

On February 28, 1990, and March 15, 1990, the Scott County Sheriff's Department used an informant to purchase cocaine from Susan Merideth at her residence, which was a trailer house on property she owned. On each occasion, Merideth went to a trailer on the back of her property and returned with cocaine.

Immediately after the second buy, police officers conducted a search, pursuant to a search warrant, of Merideth's property. When officers entered the trailer on the back of her property, they yelled out, "Sheriff's Department -- Search Warrant." Officers found Mehner had been living in this trailer. Cocaine and over $10,000 in cash, including money used to make the first buy, were found in the trailer.

A jury found Mehner guilty of the crimes charged. The district court sentenced him to a term of imprisonment not to exceed ten years on one charge of delivery of cocaine. Mehner was sentenced to a term of imprisonment not to exceed twenty years on the second charge of delivery of cocaine. The penalty on this charge was enhanced because Mehner had a firearm in his possession at the time of the offense. He was sentenced to a term of imprisonment not to exceed twenty years on

the possession with intent to deliver charge. This charge also had an increased penalty due to firearm possession. The court ordered all three of these sentences to be served consecutively. A fine of $10,000 was also imposed for each charge.

Mehner appealed. The supreme court affirmed his conviction. *State v. Mehner*, 480 N.W.2d 872 (Iowa 1992).

On October 21, 1992, Mehner filed a petition for postconviction relief. He claimed he received ineffective assistance of trial counsel and appellate counsel. Mehner had the same attorney for his trial and on appeal. He claimed his attorney was ineffective in (1) failing to argue the two charges which arose on March 15, 1990, should be merged for purposes of sentencing; (2) failing to argue there was insufficient evidence to support his conviction of delivery of cocaine on February 28, 1990; and (3) failing to challenge the results of the search based on the sheriff's department's violation of the knock and announce rule. The district court denied Mehner's request for postconviction relief. He now appeals.

I. A proceeding for postconviction relief is a civil action and is triable at law. *Overton v. State*, 493 N.W.2d 857, 858 (Iowa 1992). Where a postconviction applicant asserts violations of constitutional safeguards, such as the right to counsel, an appellate court makes its own evaluation of the totality of the circumstances in a de novo review. *Jones v. State*, 479 N.W.2d 265, 271 (Iowa 1991).

An applicant is generally barred from assigning grounds for relief which were not asserted on direct appeal. *See Collins v. State*, 477 N.W.2d 374, 376 (Iowa 1991).

However, a claim of ineffective assistance of counsel may be raised for the first time in a postconviction proceeding if the applicant establishes by a preponderance of the evidence sufficient reason for not having raised the issue previously and also establishes prejudice resulting from the alleged errors. *Id.*

To establish a claim of ineffective assistance of counsel, an applicant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied him or her a fair trial. *Caldwell v. State*, 494 N.W.2d 213, 214 (Iowa 1992). Representation by counsel is presumed competent, and a postconviction applicant has the burden to prove by a preponderance of the evidence that counsel was ineffective. *Jones*, 479 N.W.2d at 272.

Concerning deficiency of performance, the ultimate test is whether counsel's performance was within the range of normal competency. *See Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989). Improvident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily amount to ineffective assistance of counsel. *Kane v. State*, 436 N.W.2d 624, 627 (Iowa 1989).

Concerning proof of prejudice, applicant must show counsel's failure worked to his substantial and actual disadvantage to the end that there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Brewer*, 444 N.W.2d at 83.

II. Mehner claims he received ineffective assistance because his counsel did not argue the two counts which arose on March 15, 1990, should be merged for

purposes of sentencing. Count II of the trial information alleged delivery of cocaine on March 15, 1990. This count arose from the delivery of the cocaine which was sold to the informant. Count III of the trial information alleged possession of cocaine with intent to deliver on March 15, 1990. This count is based on the cocaine found in the trailer where Mehner was living.

Mehner claims these two counts are really part of the same offense and he should not be subjected to two punishments for one offense. He relies on the case of *State v. Williams*, 305 N.W.2d 428, 430 (Iowa 1981), which concerned a defendant charged with delivery of a controlled substance, possession with intent to deliver, and conspiracy to deliver. The supreme court determined the three counts charged three means of violating the same code section, Iowa Code section 204.401(1), and they were not separate offenses. *Id.* at 434. The court concluded judgment on the three convictions should be vacated and the case remanded for resentencing for one offense. *Id.*

In the more recent case of *State v. Bundy*, 508 N.W.2d 643, 644 (Iowa 1993), the court concluded a defendant could be sentenced for possession with intent to deliver and manufacture of a controlled substance, which are both violations of section 204.401(1), where the offenses were based upon different drugs. In *Bundy*, the defendant had some bagged marijuana, which supported his conviction for possession with intent to deliver, and some drying marijuana, which supported his conviction for manufacture. *Id.*

We determine the prohibition against multiple sentences in *Williams* addresses a situation where a defendant has possession of a controlled substance with intent to deliver and later delivers the same controlled substance. The evidence in the present case shows there were two separate packages of cocaine. One of Mehner's convictions is based on cocaine which he delivered to Merideth for sale. The second conviction is based on cocaine which he held in a safe in the trailer.

We conclude Mehner could be sentenced on each of these offenses and there is no merger of sentences. Therefore, Mehner has not shown ineffective assistance due to his counsel's failure to argue his sentences for possession of a controlled substance with intent to deliver and delivery of a controlled substance should be merged.

III. Mehner claims he received ineffective assistance due to his counsel's failure to argue there was insufficient evidence to support his conviction for delivery of a controlled substance on February 28, 1990. He states there is insufficient evidence to show his connection to the first drug sale. According to Mehner, the only evidence connecting him with the sale was $100 of the money used to purchase the cocaine on that date was in the trailer where he lived.

When a criminal defendant challenges the sufficiency of evidence to support a conviction, we review all the evidence in the record in a light most favorable to the State. *State v. Garr*, 461 N.W.2d 171, 173 (Iowa 1990). We must uphold the conviction if there is substantial evidence to prove beyond a reasonable doubt the

defendant committed the crime. *See State v. Frake*, 450 N.W.2d 817, 818 (Iowa 1990). Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. *State v. Robinson*, 288 N.W.2d 337, 338 (Iowa 1980).

There is sufficient evidence in the record to support Mehner's conviction. The evidence showed during the two cocaine sales Merideth went to the trailer where Mehner lived and returned with cocaine. Also, Mehner had money from the first sale in his trailer. This is sufficient to show Mehner delivered the cocaine which was sold to the informant on February 28, 1990.

IV. Mehner contends he received ineffective assistance because his counsel failed to raise an argument under the knock and announce rule. Iowa Code section 808.6 provides, in pertinent part:

> The officer may break into any structure or vehicle where reasonably necessary to execute the warrant if, after notice of this authority and purpose, the officer's admittance has not been immediately authorized. The officer may use reasonable force to enter a structure or vehicle to execute a search warrant without notice of the officer's authority and purpose in the case of vacated or abandoned structures or vehicles.

Iowa Code § 808.6 (1993). In the present case, officers yelled out, "Sheriff's Department --Search Warrant," as they entered the trailer. There was no evidence the officers knocked before they entered.

The knock and announce rule in section 808.6 embodies the reasonableness requirement for a Fourth Amendment search. *State v. Cohrs*, 484 N.W.2d 223, 225 (Iowa App. 1992). Two principle purposes underlie the knock and announce rule.

Id. One is to protect persons who might be injured by violent resistance to unannounced entries by law enforcement officers, and the other is to protect the householder's right of privacy for the few seconds between the time of announcement and actual entry to make an otherwise valid arrest or search. *Id.*

The knock and announce rule does not apply when no one is present in the premises to be searched. *State v. Farber*, 314 N.W.2d 365, 368 (Iowa 1982). The knock and announce rule allows an entry by reasonable force without knocking and announcing when notice would be futile, such as where the dwelling is abandoned, vacated, or deserted. *Id.* at 369. This exception applies even when the occupant is only temporarily absent. *Id.* Furthermore, the statute does not require officers to locate or bring in an absent owner. *Id.* at 370.

The reasonableness of an officer's entry depends upon the officer's knowledge at the time of entry. *Ker v. California*, 374 U.S. 23, 40 n.12, 83 S. Ct. 1623, 1633, 10 L. Ed. 2d 726, 742 (1963). The officers believed the trailer was unoccupied at the time they entered. The trailer and surrounding land was owned by Merideth. Officers knew Merideth was living in one trailer on the land, but they did not know anyone was living in the trailer where Mehner was found. There is no evidence showing the officers knew Mehner was in the trailer.

Mehner has not shown he received ineffective assistance due to his counsel's failure to argue officers had violated the knock and announce rule. We affirm the

decision of the district court denying Mehner's request for postconviction relief. Costs of this appeal are assessed to Mehner.

AFFIRMED.