IN THE COURT OF APPEALS OF IOWA

No. 6-387 / 95-1109

DONALD BRIGGLE,

Appellant,

vs.

STATE OF IOWA,

Appellee.

FILED
AUG 30 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Donald Briggle appeals from the district court order denying in part and granting in part his application for postconviction relief. **AFFIRMED.**

David L. Leitner of Leitner Law Office, Johnston, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, John P. Sarcone, County Attorney, and Steve Foritano, Assistant County Attorney, for appellee.

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

CADY, P. J.

The primary issue presented in this postconviction action is whether defense counsel rendered ineffective assistance to a defendant by failing to explain the consequences of a drug tax prior to the entry of a plea of guilty to the crime of failing to affix a drug tax stamp. We conclude defense counsel was not ineffective and affirm the decision of the district court.

Donald Briggle was charged on July 27, 1993, with conspiracy to deliver cocaine, conspiracy to deliver marijuana, possession with intent to deliver cocaine, possession with intent to deliver marijuana, possession of taxable substances without a tax stamp,[1] possession of a firearm by a felon and tampering with a witness. The charges followed the consensual search by Des Moines police officers of a house Briggle shared with his girlfriend.

Des Moines attorney Roger Owens represented Briggle. Owen's main objective was to avoid a sentence of incarceration for Briggle. This was accomplished by a Rule 9 plea agreement. Under the agreement, Briggle plead guilty to possession with intent to deliver cocaine, possession with intent to deliver marijuana, drug tax stamp violation and possession of a firearm as a felon. Briggle

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[1] Iowa Code § 453B.12 (1995) formerly § 421A.12, provides in part: " a dealer . . . possessing taxable substances without affixing the appropriate stamps . . . is guilty of a class "D" felony."

received suspended sentences totaling twenty-five years, with five years probation. The sentence was imposed September 1, 1993.

Briggle's probation was revoked on January 27, 1994 after he pled guilty to possessing crack cocaine. He was ordered to serve the suspended sentence.

On August 30, 1994, Briggle entered into an agreement with the Iowa Department of Revenue and Finance to pay a drug tax assessment of $7195.06.[2] The drugs found in Briggle's residence which resulted in the July 27, 1993 charges provided the basis for the assessment. The agreed assessment was a compromise from the original assessment of $14,419.64.

Briggle was not represented by counsel in the tax assessment proceedings. Owens had briefly mentioned to Briggle during the pendency of the prior criminal proceeding that the Department of Revenue and Finance officials would "be knocking on [his] door" to collect a drug tax, but Owens did not further consider the tax

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[2] Iowa Code § 453B.3 (1995), formerly § 421A.3, provides as follows: A dealer shall not possess, distribute, or offer to sell a taxable substance unless the tax imposed under this chapter has been paid as evidenced by a stamp, label, or other official indicia permanently affixed to the taxable substance. Taxes imposed on taxable substances by this chapter are due and payable immediately upon manufacture, production, acquisition, purchase, or possession by a dealer. If the indicia evidencing the payment of the tax imposed on taxable substances under this chapter have not been affixed, the dealer shall have the indicia permanently affixed on the taxable substance immediately after receiving the taxable substance. A stamp, label, or other official indicia shall be used only once and shall not be used after the date of expiration.

Iowa Code § 453B.9 (1995), formerly § 421A.9, provides in part: All assessments of taxes made pursuant to this chapter shall be considered jeopardy assessments or collections as provided in section 422.30. The director shall assess a tax, interest, and applicable penalties based on knowledge or information available to the director . . . .

assessment in negotiating the plea agreement. Owens never specifically advised Briggle prior to entering the plea of guilty he would later face a tax assessment proceeding as a result of the drugs seized from his residence. The plea of guilty was also entered before the State determined the precise weight of the marijuana seized from Briggle's residence. Later testing revealed the quantity to be less than one ounce.

Briggle initiated postconviction relief proceedings in October 1994. He claimed Owens was ineffective in failing to determine the quantity of marijuana seized by police and in failing to explain the tax consequences of failing to possess a tax stamp. He also claimed he was impermissibly punished twice by facing both taxation and criminal sanction for his drug activities.

The district court vacated the conviction for possession with intent to deliver marijuana. With consent of the parties, a substituted judgment and sentence was entered for possession of marijuana as an accommodation. The district court denied postconviction relief based on the failure to explain the consequences of the drug tax stamp law. The court also rejected the double jeopardy claim.

I. Ineffective Assistance of Counsel

We review claims of ineffective assistance of trial counsel de novo. *State v. Yaw*, 398 N.W.2d 803, 805 (Iowa 1987). All relevant circumstances are considered to determine if counsel failed to perform an essential duty and prejudice resulted from the failure to perform such a duty. *State v. Hrbek*, 336 N.W.2d 431, 436 (Iowa 1983).

II. Consequences of Guilty Plea

A criminal defense attorney generally has a duty to advise a defendant of the direct consequences of a plea of guilty prior to the entry of the plea. *See Mott v. State*, 407 N.W.2d 581, 583-84 (Iowa 1987). On the other hand, the failure of counsel to further advise a defendant about the collateral consequences of a plea will not typically support a claim for ineffective assistance. *Id.*

A fine line can exist between "direct" and "collateral"consequences of a plea. *State v. Warner*, 229 N.W.2d 776, 782 (Iowa 1975). The distinction, however, turns on whether the result at issue represents a definite, immediate and largely automatic effect on the range of punishment. *Id.*

The Iowa drug stamp tax statute is not a criminal penalty. *State v. Lange*, 531 N.W.2d 108, 117 (Iowa 1995). It imposes a tax on a drug dealer which is due and payable immediately upon the manufacture, production, acquisition, purchase or possession by the dealer. *Id.* See Iowa Code § 421A.3 (1995).[3] The tax is not conditioned on the commission of a crime, nor exacted only after an arrest. *Lange*, 531 N.W.201 at 116-17. It is a civil sanction. *Id.*

Accordingly, we conclude counsel did not render ineffective assistance by failing to advise Briggle of the consequences of the drug tax statute. The plea of

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[3] Now Iowa Code § 453B.3.

guilty entered by Briggle did not subject him to the drug tax liability. Rather, Briggle was subject to the tax independent of the outcome of the criminal prosecution.

III. Double Jeopardy

A defendant ordinarily will not be allowed to assert claims of trial error in postconviction proceedings which were not presented for review on direct appeal. *Washington v. Scurr*, 304 N.W.2d 231, 234 (Iowa 1981). Even issues of constitutional magnitude may not be addressed if not presented in the trial court. *Fryer v. State*, 325 N.W.2d 400, 405 (Iowa 1982).

Briggle claims the assessment of the drug tax following a conviction for failure to affix a tax stamp involving the same drugs violates the double jeopardy clause. This claim, however, was not raised at any time prior to the postconviction proceeding. Accordingly, it was not properly preserved. Nevertheless, since the drug stamp tax statute does not impose a criminal penalty, there is no double jeopardy violation when same drugs form the basis for both a drug tax stamp conviction and a civil tax assessment. *Lange*, 531 N.W.2d at 117.

AFFIRMED.