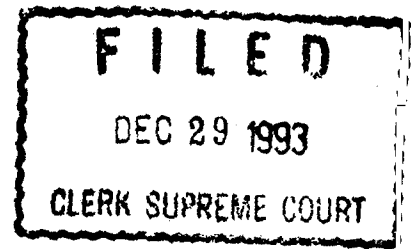


IN THE COURT OF APPEALS OF IOWA

No. 3-497 / 92-564



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STATE OF IOWA,

Appellee,

vs.

DANIEL DAVID ADAMS,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

The defendant challenges his convictions for two counts of possession with the intent to deliver a controlled substance, one count of possession with the intent to manufacture a controlled substance, and two counts of failure to affix a drug tax stamp. **AFFIRMED.**

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

Bonnie J. Campbell, Attorney General; Thomas S. Tauber, Assistant Attorney General; Thomas J. Ferguson, County Attorney; and Kim Griffith, Assistant County Attorney, for appellee.

Considered by Donielson, P.J., and Schlegel and Hayden, JJ.

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DONIELSON, P.J.

An investigation by a tri-county drug task force in Waterloo found the defendant, Daniel David Adams, involved in a conspiracy to provide cocaine to a crack house. The investigation revealed a large amount of cocaine would be kept in a hotel room. As the crack house required it, cocaine powder would be supplied to manufacture more crack cocaine. Adams was involved in this conspiracy with at least two other people. The task force finalized the investigation by the simultaneous execution of two search warrants, one at the hotel room and the other at the crack house.

The search of the crack house revealed a homemade crack pipe, two large chunks of crack cocaine, and a pack of aluminum foil apparently containing a cutting agent for cocaine. The search of the hotel room revealed a large sum of cash and eight aluminum foil packages containing cocaine. Adams was in the hotel room at the time the search warrant was executed.

The State charged Adams with possession of cocaine with intent to deliver, possession with intent to manufacture crack cocaine, possession with intent to deliver crack cocaine, and two counts of failure to affix a drug tax stamp. A jury found the defendant guilty of all charges and the trial court entered judgment on the jury's verdict. Adams appeals.

On appeal, Adams argues because his manufacture and delivery convictions were based upon the same cocaine, he could not logically be convicted of both. He asserts he cannot have multiple intents for the same cocaine. He therefore argues his sentences for manufacture and delivery were tantamount to being punished twice for the same offense, violating double jeopardy principles. He also argues the sentences for possession should have been merged into the drug tax stamp sentences because possession is a lesser included offense. Adams also raises various claims his trial counsel rendered ineffective assistance. The State claims Adams failed to preserve error on whether there was sufficient evidence to convict him of both delivery and manufacture. The State asserts the lesser included offense claim already has been resolved by the supreme court.

We normally review sentencing errors for an abuse of discretion. State v. Koenighain, 336 N.W.2d 237, 238 (Iowa App. 1984). An illegal sentence may be challenged at any time. Iowa R. Crim. P. 23(5)(a). Since appellant raises a constitutional issue of double jeopardy, however, we review de novo. State v. Clark, 475 N.W.2d 193, 194 (Iowa 1991).

Adams first argues he cannot have multiple intents for the same cocaine. If the amount at issue were the minimum necessary to sustain the charge, there might be some merit to his argument. The cocaine found in the motel room, however, was in eight separate packages totaling nearly 220

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grams. The crack cocaine found in the house weighed over 22 grams. A phone call received by an officer at the motel room spoke about purchasing another fractional amount of cocaine. The amended trial information, when amounts are specified in the charge, lists no amount greater than seven grams. Appellant certainly could have intended to sell some of the cocaine as powder and some to be converted to crack cocaine. The charges do not require appellant to have differing intents for the same cocaine. Therefore, charging him with two offenses is not inconsistent and does not violate double jeopardy.

Adams also argues the charges in the trial information concerning possession all describe different ways to commit the same offense -- drug trafficking. See Iowa Code § 204.401 (1991) (now § 124.401 (1993)); State v. Williams, 305 N.W.2d 428, 431 (Iowa 1981). Appellant's case, however, is distinct from Williams. The supreme court held that Williams could not be convicted and sentenced for an act violating section 204.401 and for conspiracy to do the act because conspiracy was just an alternative means of violating the statute. In this case, however, we find the charges are distinct and separate: possession with intent to deliver cocaine, possession with intent to manufacture crack cocaine, and possession with intent to deliver crack cocaine. The trial information charges conspiracy in the alternative for each of the three charges. Adams was not convicted of conspiracy and the underlying act. Rather, he

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was charged, convicted, and sentenced for three separate offenses. We find this does not constitute double punishment and does not violate double jeopardy.

Appellant next asserts Iowa Code section 701.9 requires the convictions and sentences for possession be merged into the drug tax stamp violations as lesser included offenses. See Iowa Code §§ 204.401 and 421A.12 (1991). We disagree. The supreme court recently addressed this issue in State v. Gallup, 500 N.W.2d 437 (Iowa 1993). The court performed the Blockburger legal elements test. Id. at 441-43 (discussing Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932) (adopted in Iowa in State v. Goff, 342 N.W.2d 830 (1983))). Although the court found possession under section 204.401 is a lesser included offense of section 421A.12, the court determined the intent of the legislature in passing chapter 421A was to authorize "cumulative punishment under two statutes. Regardless of whether those statutes proscribe the 'same' conduct under Blockburger." Gallup, 500 N.W.2d at 443. We find Gallup dispositive on this issue. Appellant could be sentenced for violations of both sections without offending double jeopardy or violating Iowa Code section 701.9.

For the reasons stated, we affirm the judgment and sentence of the trial court in all respects.

Adams also asserts he received ineffective assistance of trial counsel. He concedes none of the allegations is apparent in the record and the issues must be raised, if at

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all, in a postconviction proceeding. Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be developed. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly ineffective attorney the opportunity to explain his conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). We conclude there is an inadequate record for us to adjudicate defendant's claim without counsel's explanation for his conduct. We therefore preserve defendant's ineffective assistance of counsel claim for a later proceeding.

AFFIRMED.