FILED
JUN 24 1977
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Appellee,	)	Filed June 24, 1977
v.	)	
JAMES JOSEPH JACOBS,	)	151/58612
Appellant.	)	

Appeal from Hardin District Court - Edward J. Kelley, Judge.

Defendant appeals his conviction for possession of a controlled substance with intent to deliver, § 204.401(1), The Code, on the ground of ineffective assistance of counsel. Affirmed.

Richard C. Turner, Attorney General, and Jim R. Sween, Hardin County Attorney, for appellee.

John P. Roehrick of Des Moines, for appellant.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Defendant James Jacobs appeals from a conviction and sentence imposed for possession of cocaine with intent to deliver contrary to section 204.401(1), The Code. The only basis assigned for reversal is alleged ineffective assistance of defendant's trial counsel in deprivation of defendant's rights under the sixth and fourteenth amendments to the federal constitution. We affirm.

In State v. Massey, 207 N.W.2d 777, 779-80 (Iowa 1973), our Supreme Court abandoned the "farce and mockery of justice" standard in favor of a test based upon whether in all the circumstances counsel's performance was within the range of normal competency. This test has been subsequently applied in Zacek v. Brewer, 241 N.W.2d 41, 51 (Iowa 1976); State v. Townsend, 238 N.W.2d 351, 357 (Iowa 1976); State v. McCray, 231 N.W.2d 579, 581 (Iowa 1975); Wycoff v. State, 226 N.W.2d 29, 32 (Iowa 1975); State v. Dee, 218 N.W.2d 561, 563 (Iowa 1974); Ogden v. State, 215 N.W.2d 335, 337 (Iowa 1974). We consider defendant's several claims of inefficacy in light of that standard.

I. Trial strategy. Initially, defendant complains that his trial counsel employed an ill-advised trial strategy and, in the process, ignored a greatly superior strategy. This is based upon the assertion that the best strategy would have been to rely upon defendant's lack of intent to deliver the cocaine, thereby limiting his conviction, if any, to an indictable misdemeanor. Such contention ignores the fact that the State had available the testimony of an accomplice, which, if believed, established that defendant planned to divide the controlled substance among three people and to "trade" some or all of his share for a quantity of amphetamine.

Faced with this evidence we cannot fault the strategy which defendant's trial counsel chose. This was to seek suppression of the evidence which tended to corroborate the accomplice's testimony and otherwise rely upon the inability of the State to provide

such corroboration as is required by section 782.5, The Code. Failing in this effort counsel then sought to discredit the testimony of the accomplice by showing personal interest as a result of a plea bargain with respect to potential charges against the witness.

Defendant further asserts that the motion for directed verdict which his counsel made in his behalf was inadequate for not asserting the failure of the State of establish requisite intent. As previously noted, there was sufficient evidence of intent to present a jury issue if the accomplice's testimony was corroborated. Counsel's motion adequately raised the corroboration requirements of section 782.5, The Code. We also reject the contention that a special instruction on intent to deliver should have been requested. Delivery as defined in section 204.101(8), The Code, is an easily understood term. The standard instruction on intent given by the trial court was adequate to apprise the jury as to what it must find in order to return a conviction.

With respect to other fundamental trial strategies such as whether the defendant should testify or request an accommodation hearing we must conclude that these are largely matters of professional judgment. Such judgment on the part of counsel involve to a considerable extent the facts to which the defendant can truthfully testify -- a matter which does not appear of record. We note that a theory of accommodation delivery was inconsistent with defendant's trial theory and is also inconsistent with the theory he now contends should have been advanced at trial. On the record before us we cannot say that counsel's judgment was faulty in not having his client testify at either the trial of the principal charge or at a subsequent accommodation hearing.

II. Failure to cross-examine the accomplice. Defendant asserts that his trial counsel should have cross-examined the accomplice more extensively seeking to break down his testimony

as to the proposed division of the cocaine among three people. In making this contention it is urged that the accomplice's testimony was weak and that said testimony resulted from leading questions and repeated refreshment of the witness' recollection by confronting him with his sworn testimony given the county attorney pursuant to section 769.19, The Code.[1] Assuming the accomplice's testimony suffers from these infirmities, we cannot say that it would have been a superior strategy as a result of this situation to develop the witness' knowledge of the proposed delivery in more detail. By so proceeding the cross-examiner would have risked obtaining answers more unfavorable to his client than those which were given in response to the examination of the witness by counsel for the State.

III. Failure to preserve error. Defendant asserts that he was denied the opportunity of appealing the trial court's ruling on his pretrial motions to suppress evidence because he did not insist that a written ruling be filed on these motions prior to his conviction and sentence. Defendant does not seek to test this claim by advancing these issues on appeal so that this court can determine the preservation of error question in a traditional adversary setting. We note that the trial court, at the conclusion of the suppression of evidence hearing, made an oral ruling on the record denying the motion. Such ruling would ordinarily be sufficient to preserve error on the evidentiary issues inhering therein.

1 It is also claimed that counsel should have acted to prevent the State from using the witness' prior testimony to refresh his recollection. No basis for doing so has been made to appear.

IV. Failure to conduct adequate pretrial discovery. It is asserted that defendant's trial counsel failed to conduct sufficient pretrial discovery. The record shows that prior to trial the depositions of the sheriff and two deputy sheriffs were taken in an effort to develop the issues raised in a pretrial motion to suppress evidence of the cocaine taken from the person of defendant's accomplice. This was the controlled substance upon which the State relied to obtain defendant's conviction. In view of the defendant's strategy previously discussed we cannot say that the facts mandated further pretrial discovery. There were obviously fifth amendment obstacles to deposing the accomplice prior to trial. Defendant cites the introduction into evidence at trial of scales previously unknown to his trial counsel as an indication that discovery was not adequate. When the scales were produced counsel promptly sought and obtained a hearing out of the presence of the jury raising the issue of its admissibility. The admissibility of the scales was challenged on the same grounds which were involved in defendant's pretrial hearing on suppression of other evidence. The factual foundation for the objection to the scales was the same as that relied upon at the pretrial hearings. The trial court overruled the defendant's motion to suppress the scales. No effort is made on this appeal to predicate error on this ruling. It is not apparent how defendant was prejudiced as a result of counsel's failure to know about the scales prior to trial.

In conjunction with the admissibility of the scales defendant asserts that his counsel should have objected to his written waiver of Miranda rights and written consent to the search of his automobile being shown to the jury. No basis for suppressing this evidence has been made to appear other than those objections which were unsuccessfully urged to the drugs and the scales.

V. Other contentions. Lastly, we give brief consideration to the claims that trial counsel was incompetent for failing to object to certain hearsay evidence and in stipulating that the substance in question was cocaine. The only area where the failure to object to evidence appears to have any significance is with respect to certain hearsay testimony of a deputy sheriff concerning reports from an informant that the trip which defendant and his companion made from Eldora to Cedar Falls on the day he was arrested pertained to "drug traffic." While timely objection might have kept this evidence out it was cumulative of other admissible evidence and did not identify defendant's role, if any, in the trip. With respect to the stipulations as to chemical analysis, such stipulations are not uncommon and no prejudice to defendant appears therefrom.

Upon our consideration of the entire trial record in light of the specific claims of inefficacy now advanced by the defendant we conclude that he has failed to demonstrate a deprivation of his constitutional right to effective assistance of counsel. We find no basis for reversal and affirm the judgment of the trial court. Affirmed.