IN THE COURT OF APPEALS OF IOWA

No. 0-569 / 98-1368
Filed November 20, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DONALD LEE OLSON,
Defendant-Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Jack Levin, Judge.

Donald Lee Olson appeals the district court's judgment and sentence, pursuant to a jury's verdict, convicting him of being a felon in possession of a firearm in violation of Iowa Code section 724.26 (1997), and possession of a controlled substance schedule I and II in violation of Iowa Code section 124.401(5). **AFFIRMED.**

Kenneth J. Weiland, Jr. of Weiland Law Firm, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, John P. Sarcone, County Attorney, and James Ward, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Mahan and Vaitheswaran, JJ.

MAHAN, J.

Donald Lee Olson appeals the district court's judgment and sentence, pursuant to a jury's verdict, convicting him of being a felon in possession of a firearm in violation of Iowa Code section 724.26 (1997), and possession of a controlled substance schedule I and II in violation of Iowa Code section 124.401(5). He contends the trial court erred by admitting into evidence his affidavit of indigent status as proof of his address, because he was not represented by counsel at the time he prepared and signed it. He argues the evidence did not establish he ever exercised dominion or control over the firearms. Finally, he contends his trial counsel was ineffective because he failed to raise the issue of the validity of the officers' search. We affirm.

Olson was at the apartment of Wendy Randleman, his girlfriend, when officers arrived pursuant to a narcotics complaint. Randleman answered the door. The officers identified themselves, and asked if they could search the residence. Randleman allowed the officers to step into the residence. Officers handed her a consent form. She read the form and asked officers if she could let somebody else read it. She left the room to show the form to Olson. The officer told Randleman the person in the other room could come out and talk to him. Officers asked to follow. According to one officer, Randleman never gave him any indication she did not want him to follow her. The officer followed Randleman for reasons of officer safety. Officers observed drug paraphernalia in the apartment as they followed Randleman.

A search warrant was issued. Officers found drugs, drug paraphernalia, a handgun and a shotgun. They arrested Olson. A trial information filed March 2, 1998, charged Olson with receipt, transportation, and/or dominion and control of a firearm by a felon (count 1), in violation of section 724.26; possession of a schedule II controlled substance (count 2), in violation of section 124.401(5); and possession of a schedule I controlled substance (count 3) in violation of section 124.401(5). Olson filed a pretrial motion to suppress, based on an insufficient warrant. The court denied Olson's motion. A jury found Olson guilty on all three counts. The court sentenced Olson to serve two one-year sentences (counts 2 and 3) and one five-year sentence (count 1), to run concurrently. Olson appeals.

Admission of Evidence. We review Olson's constitutional claims de novo. *State v. Godbersen*, 493 N.W.2d 852, 854 (Iowa 1992). Olson claims the requirement he complete an affidavit of indigency for the purpose of the appointment of counsel violated his Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel. Because Olson's address was an issue at trial, he claims the "statement" of his address in the affidavit was inculpatory evidence. Therefore, Olson argues, he should have been allowed to consult with an attorney prior to signing the affidavit, or it should not have been admitted into evidence.

For an objection to be timely it must ordinarily be made at the earliest opportunity, once the basis of the objection becomes apparent. *State v. Thongvanh*, 398 N.W.2d 182, 187 (Iowa App. 1986). Failure to make timely objection or motion to strike showing reason for delayed objection will preclude a

party from later claiming error in admission of testimony. *State v. Binkley*, 201 N.W.2d 917, 919 (Iowa 1972).

At trial, Olson objected to the introduction of the affidavit based on prejudice. Olson raised the constitutional issues for the first time in his motion for new trial. Olson's objection comes too late. The expansion of his trial objection in his post-trial motion is inadequate to preserve error for appellate review.

Even if Olson had properly preserved error on this issue, we conclude his claim is without merit. During custodial interrogation an accused must be advised of certain constitutional rights. *Miranda v. Arizona*, 384 U.S. 436, 444-45, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706-07 (1966). A *Miranda* warning is not triggered, however, unless there is both custody and interrogation. *State v. Davis*, 446 N.W.2d 785, 788 (Iowa 1989).

Police words or actions "normally attendant to arrest and custody" do not constitute interrogation. *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 1689-90, 64 L. Ed. 2d 297, 308 (1980). Questions asking for a suspect's name, address, height, weight, eye color, date of birth, or age constitute "biographical data necessary to complete booking or pretrial services." *Pennsylvania v. Muniz*, 496 U.S. 582, 601, 110 S. Ct. 2638, 2650, 110 L. Ed. 2d 528, 552 (1990). Because such questions are reasonably related to police administrative concerns, they fall outside the scope of *Miranda*. *Id.* at 601-02, 110 S. Ct. at 2650, 110 L. Ed. 2d at 552; *see also State v. Mannion*, 414 N.W.2d 119, 122 (Iowa 1987) (inquiries normally attendant to arrest and custody do not require *Miranda* warnings); *State v. Beatty*, 305 N.W.2d 496, 498-99 (Iowa 1981)

(identifying information not barred by failure to give *Miranda* warnings); *Van Hoff v. State*, 447 N.W.2d 665, 672 (Iowa App. 1989) (custodial interrogation does not include non-custodial investigatory questioning, basic identification questioning, or general on-the-scene questioning).

While Olson was "in custody" for purposes of *Miranda*, the completion of an affidavit of indigency for purposes of the appointment of counsel was not designed to investigate the crimes charged or Olson's involvement in them. The requirement Olson complete the affidavit in order to obtain counsel did not violate his constitutional rights.

In addition, the State could use the "statement" of Olson's address in the affidavit of indigency for impeachment purposes. *Michigan v. Harvey*, 494 U.S. 344, 350-52, 110 S. Ct. 1176, 1180-81, 108 L. Ed. 2d 293, 302-04 (1990) (prosecution may use statements taken in violation of defendant's Fifth or Sixth Amendment rights to impeach defendant's false or inconsistent testimony). The State introduced the evidence at issue during rebuttal testimony, after defendant had presented his case. During Olson's case, Randleman testified he did not reside at the apartment. The State properly used the affidavit to impeach her testimony. We affirm the trial court on this issue.

Sufficiency of the Evidence. We review Olson's challenge to the sufficiency of the evidence for errors at law. Iowa R. App. P. 4. The standards governing a challenge to the sufficiency of the evidence are well established:

> When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the state, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record. Direct and

> circumstantial evidence are equally probative so long as the evidence raises "a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture." It is necessary to consider all the evidence in the record and not just the evidence supporting the verdict to determine whether there is substantial evidence to support the charge. Substantial evidence means evidence which would convince a rational factfinder [sic] that the defendant is guilty beyond a reasonable doubt.

State v. Mills, 458 N.W.2d 395, 397 (Iowa App. 1990) (quoting *State v. Wheeler*, 403 N.W.2d 58, 60 (Iowa App. 1987)). The jury is free to believe or disbelieve any testimony as it chooses and to give weight to the evidence as in its judgment such evidence should receive. *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). The very function of the jury is to sort out the evidence and "place credibility where it belongs." *Id.*

Olson argues the evidence did not establish beyond a reasonable doubt he lived at the residence where the firearms were found. Therefore, he contends, there was not sufficient evidence to establish he exercised dominion or control over a firearm.

To establish dominion and control of a firearm by a felon, the State was required to prove: (1) the defendant knowingly had a firearm under his dominion and control, and (2) defendant was previously convicted of a felony. The jury instructions included the definition of "dominion and control": ownership or right to the firearm and the power or authority to manage, regulate or oversee its use; or "possession." The court instructed the jury "possession" could be actual or constructive. Constructive possession occurs when a person who is not in actual possession, but has knowledge of the presence of something, has the authority or right to maintain control of it either alone or together with someone else.

Olson based his defense at trial on a denial that he lived at the residence where police found the drugs and firearms, thereby denying constructive possession of the items. Randleman testified Olson was not a resident of the apartment, and Randleman was the owner of the firearms. She testified a handgun, found in a lingerie drawer, was hers and Olson did not know it was there. She did not tell Olson about the shotgun, and he did not know it was in the apartment.

The State presented circumstantial evidence to rebut Olson's denial of "dominion and control" over the firearms. Olson was in the bedroom of the apartment when police arrived. He told police he would not consent to a search of the residence. Officers found Olson at the residence when they arrested him several days after the issuance of an arrest warrant. Officers found men's underwear in the dresser drawers in the room where Olson was found. Olson listed the apartment address as his residence on financial affidavits for the appointment of counsel. A bail bondsman observed Olson use a key to retrieve mail from the apartment's mailbox. The guns were found in the room where Olson was discovered in the apartment.

The jury chose to believe the State's evidence over the testimony of Randleman. Sufficient evidence existed for the jury to reach its verdict. We affirm the trial court on this issue.

Ineffective Assistance of Counsel. We review claims of ineffective assistance of counsel de novo. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996).

Ordinarily we reserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). "Even a lawyer is entitled to his day in court, especially when professional reputation is impugned." *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). We will resolve ineffective assistance of counsel claims on direct appeal when the record is adequate to decide the issue. *State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998).

The defendant bears the burden of demonstrating ineffective assistance of counsel. *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997); *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994); *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996). A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). An ineffective assistance of counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

Olson claims his counsel was ineffective for failing to raise the issue of the method used by the State to obtain probable cause for a search warrant. He contends the officers entered the residence without permission and without probable cause. Therefore, the officers obtained probable cause for the search warrant illegally, and the evidence seized should have been suppressed.

We conclude the record in this case is insufficient for us to address Olson's claim of ineffective assistance of counsel in this direct appeal. Therefore, we preserve the ineffective assistance of counsel claim for possible postconviction relief action, so the facts can be further developed.

AFFIRMED.