IN THE COURT OF APPEALS OF IOWA

No 6-476 / 95-1834

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

ROGER M. BODE,

Defendant-Appellant.

Appeal from the Iowa District Court for Lee County, Gary R. Noneman, Judge

Roger Bode appeals from his convictions, following a jury trial, for possession of marijuana and possession of methamphetamine in violation of Iowa Code section 124.401(3) (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and James G. Tomka, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, and Michael Short, County Attorney, for appellee.

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

HUITINK, J.

Defendant Roger M. Bode appeals his conviction and sentence following a jury trial on a charge of possession of marijuana and possession of methamphetamine in violation of Iowa Code section 124.401(3) (1993). We affirm.

On February 1, 1995, a confidential informant contacted a Lee County deputy sheriff to report that he had seen defendant Bode within the previous hour on Main Street in Keokuk, Iowa, in possession of fifteen packets of methamphetamine. The informant, who had provided reliable information to law enforcement in the past, was not paid for his services and was not acting in accordance with a plea bargain in any other case.

Within thirty minutes to one hour after the informant contacted the deputy, police located Bode in the 100 block of South 14th Street. A warrantless search of Bode yielded a small baggie containing methamphetamine and another small baggie containing marijuana. Bode was later found guilty of possession of these drugs and was sentenced to consecutive terms of six months on the marijuana charge and nine months on the methamphetamine charge.

Bode filed a motion to suppress the drug evidence claiming that he had been searched without probable cause. The court denied the motion finding that the information provided by the confidential informant furnished law enforcement officers with probable cause to search Bode for narcotics.

Bode challenges his conviction claiming ineffective assistance of counsel He argues his attorney breached an essential duty by failing to determine the identity of the confidential informant and cross-examining him at the suppression hearing Bode cites the informant's statement he possessed fifteen packets of methamphetamines when, in fact, only one bag of methamphetamines was discovered. This discrepancy, he argues, raises sufficient questions about the informant's credibility to negate the district court's probable cause determination.

Ordinarily, we preserve ineffective assistance of counsel claims for postconviction proceedings to allow counsel an opportunity to respond. *See State v. Taylor*, 310 N.W 2d 174, 179 (Iowa 1981). We will, however, depart from this preference because the record in this case is sufficient to dispose of Bode's claim. *See State v. Schoelerman*, 315 N.W.2d 192, 195 (Iowa 1982).

Our ultimate concern in claims of ineffective assistance of counsel is with the "'fundamental fairness of the proceeding whose result is being challenged.'" *State v. Risdal*, 404 N W 2d 130, 131 (Iowa 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. *Risdal*, 404 N.W.2d at 131.

To prevail on a claim of ineffective assistance, the defendant must show (1) his counsel failed to perform an essential duty, and (2) the failure prejudiced him. *Brewer*

v. State, 444 N.W.2d 77, 83 (Iowa 1989). The defendant has the burden to prove both of these elements by a preponderance of the evidence *Id.*; *Taylor v. State*, 352 N W.2d 683, 685 (Iowa 1984):

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984).

Based on our de novo review of the record, we find Bode has not established that his attorney breached any essential duty. Bode is unable to demonstrate that counsel could have successfully compelled the disclosure of the informant had he made the attempt. The State is privileged to withhold the identity of a person who furnishes information relating to violations of the law. *State v. Robertson,* 494 N.W.2d 718, 722 (Iowa 1993). In those cases where the defendant requests disclosure, we balance the State's interest in the privilege against the defendant's need for the informant's identity. *Id. at 723.* The defendant bears the burden of showing the necessity for disclosure. *Id.*

Bode argues that the disclosure of the identity of the informant would have allowed his counsel to cross-examine the informant on the discrepancy between the amount of narcotics the informant claimed Bode possessed and the amount the officers actually found when Bode was searched up to one hour later. Bode's argument fails because this discrepancy was already in evidence, making the informant's testimony

unnecessary Counsel had no duty to file a motion so obviously lacking any merit It is axiomatic that ineffectiveness of counsel may not be predicated on the filing of a meritless motion *State* v. *Ray*, 516 N W 2d 863. 866 (Iowa 1994)

Furthermore. there is no reasonable probability that the outcome of the suppression hearing would have been different had Bode's attorney elicited the identity of the informant and cross-examined him at the suppression hearing The informant stated that he had been in contact with Bode within the last hour and at that time Bode was in possession of fifteen packets of methamphetamine. About one-half hour to forty-five minutes later, Bode was stopped by police and was found in possession of one small baggie of methamphetamine and a small baggie of marijuana. It is reasonable to conclude that during the interval between Bode's encounter with the informant and his arrest. Bode may have sold most of the methamphetamine packets that he was carrying at the time the informant saw him. We find no basis for questioning the informant's veracity. Bode is unable to show that the officers were unreasonable in relying on the informant's tip and therefore lacked probable cause to search him. *See State* v. *Robertson,* 494 N W 2d at 724 Accordingly, Bode was not prejudiced by his attorney's failure to elicit the identity of the confidential informant.

We will not grant relief based on mere speculation that the identity of the informant would have lead to the exclusion of the drug evidence used to convict Bode. *See State v. Douglas,* 485 N.W.2d 619, 625 (Iowa 1992). Without more, Bode's

assertions will not support a finding of ineffective assistance of counsel Accordingly, we affirm Bode's conviction and sentence.

AFFIRMED.