IN THE COURT OF APPEALS OF IOWA

No. 0-007 / 98-2098
Filed February 23, 2000

STATE OF IOWA,

Appellee,

vs.

WILLIE MAE POLLARD,

Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Scott County, Douglas C. McDonald, Judge.

Willie Mae Pollard appeals her conviction of possession of a controlled substance. **AFFIRMED.**

Derek G. Jones of Anderson & Nelson, Rock Island, Illinois, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney General, William E. Davis, County Attorney, and Alan R. Havercamp, Assistant County Attorney, for appellee.

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

ZIMMER, J.

The defendant, Willie May Pollard, appeals her conviction following a jury trial for possession of a controlled substance (crack cocaine) in violation of Iowa Code section 124.401(1)(c)(1997). On appeal, she claims the trial court erred by overruling her motion in limine. She also asserts her trial counsel was ineffective for failing to object to certain testimony offered at trial. We affirm her conviction.

I. Background Facts and Proceedings. On June 24, 1998, the Davenport police department executed a search warrant on a residence owned by Suzanne Barnes. While securing the residence, Officer Paul Sikorski observed Willie May Pollard in the living room sitting next to Barnes. Officer Sikorski saw defendant moving something around in her mouth and noted she was nervous. Because a common hiding place for narcotics is the mouth, Sikorski grew suspicious and took Pollard to the kitchen to find out what she had in her mouth.

Once in the kitchen, Sikorski asked Pollard to spit out the object. Pollard mumbled that she did not have anything in her mouth. Sikorski testified he could see something green in the defendant's mouth that appeared to be wadded up currency. When it looked as though Pollard was trying to swallow, Sikorski grabbed her neck and told her to spit it out. Pollard then placed her right hand in front of her mouth, removed the object, and dropped it underneath the kitchen table. According to Sikorski, she pretended to swallow the item while putting it in her hand, then opened her mouth and said something like "ha, ha, I swallowed it."

Officer Sikorski took Pollard back to the living room and returned to the kitchen where he found the item that had been dropped—a rock of crack cocaine covered by a moist five-dollar bill and a one-dollar bill. Nothing else was found

under the kitchen table. Lab tests revealed the substance in the defendant's mouth was in fact crack cocaine.

On July 17, 1998, a trial information was filed, charging Pollard with possession of crack cocaine. At trial, Pollard denied she had crack cocaine in her mouth and explained that her loose dentures might have given the appearance she was hiding something in her mouth. Following trial on October 26, 1998, the jury returned a guilty verdict.

Pollard appeals. She contends the district court erred in overruling her pre-trial motion in limine to exclude testimony regarding the basis of the search warrant. She also contends her trial attorney rendered ineffective assistance of counsel by failing to raise a rule 404(b) objection to Sikorski's testimony regarding previous drug raids at the Barnes' residence.

II. The Motion in Limine. Pursuant to Iowa Rules of Evidence 402 and 403, Pollard sought to exclude testimony concerning indicia of drug trafficking at the Barnes' residence, including the reason for the execution of the search warrant. The district court ruled the jury was entitled to know the officers were at the home pursuant to a warrant and they were looking for drugs. During trial, Sikorski also testified about his assistance with prior drug raids at the Barnes' residence.

We review rulings on admissibility of evidence for an abuse of discretion. *State v. Predka*, 555 N.W.2d 202, 204 (Iowa 1996). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Iowa R. Evid. 401. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . ."

Iowa R. Evid. 403. Rule 403 does not render all prejudicial evidence inadmissible, only *unfairly* prejudicial evidence. *State v. Howell,* 557 N.W.2d 908, 912 (Iowa App. 1996).

Pollard claims the testimony regarding prior drug raids at the Barnes' residence was irrelevant and unfairly prejudicial. We disagree. Evidence explaining why the police were executing a search warrant is relevant background information. As the trial court noted, the jury was entitled to know how officers came to be there, whether the Barnes' residence was a known drug house, and why Sikorski's attention was drawn to the defendant's actions. We conclude the evidence explaining the officers' presence at the Barnes' residence passes the relevancy threshold.

Pollard also contends any probative value that evidence of earlier drug raids may have had was substantially outweighed by the danger of unfair prejudice. Pollard argues it was likely to rouse the jury's natural instinct to punish people associated with illegal drug trafficking. *E.g., State v. Liggins,* 524 N.W.2d 181, 188-89 (Iowa 1994) (noting evidence of cocaine delivery and distribution is inherently prejudicial and appealed to jury's instinct to punish drug dealers) (citation omitted). We find the defendant's reliance on *Liggins* misplaced. Although the court in *Liggins* concluded evidence of cocaine delivery and distribution was inherently prejudicial, the defendant in *Liggins* was charged with kidnapping, not a drug crime.

That is not the case here. Unlike the defendant in *Liggins*, Pollard was charged with a drug crime. The fact that officers were executing a warrant at a known drug house helps explain why she was trying to hide drugs. We conclude no unfair prejudice results from evidence that she was in a known drug house when

she was discovered hiding drugs in her mouth. The trial court did not abuse its discretion by allowing evidence of the execution of prior search warrants.

Even assuming the trial court erred by admitting evidence of prior warrants, any error was harmless. The test for harmless error that is not of constitutional dimension is whether it sufficiently appears the rights of the complaining parties have been injuriously affected or the party has suffered a miscarriage of justice. *State v. Williams*, 574 N.W.2d 293, 298 (Iowa 1998).

Evidence of Pollard's guilt was compelling. Officer Sikorski observed her move an item around in her mouth. After taking her aside to investigate, he saw the item was a green piece of wadded paper under her tongue. She eventually spit the item into her hand and dropped it on the floor. Sikorski personally recovered the item. Subsequent tests revealed the item was crack cocaine weighing 1.14 grams. Furthermore, Pollard's testimony that her false teeth made it appear that she had something in her mouth was dubious at best. In view of the other compelling evidence of defendant's guilt, we find Pollard has not suffered any miscarriage of justice.

We also note that evidence of previous drug raids was not unduly emphasized at trial. The testimony was presented in the context of background information explaining the officers' presence. The search warrant application was not admitted into evidence for the jury's examination. Finally, the State did not contest Pollard's testimony that she had not been present during the execution of prior warrants. We conclude any error from the admission of evidence of previous drug raids was harmless.

III. Ineffective Assistance of Counsel. Defendant claims her trial counsel rendered ineffective assistance by failing to raise a rule 404(b) objection to the testimony regarding prior drug raids.

We review ineffectiveness claims de novo. *State v. Westeen,* 591 N.W.2d 203, 207 (Iowa 1999). To establish an ineffective assistance of counsel claim, the defendant must show: (1) counsel failed to perform an essential duty and (2) prejudice resulted therefrom. *Irving v. State,* 533 N.W.2d 538, 540 (Iowa 1995). In proving the first prong, the defendant faces a strong presumption that the performance of counsel falls within the wide range of reasonable professional assistance. *See State v. Hepperle,* 530 N.W.2d 735, 739 (Iowa 1995) (citation omitted). The second prong of the test is satisfied if a reasonable probability exists that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Davis v. State,* 520 N.W.2d 319, 321 (Iowa App. 1994).

Iowa Rule of Evidence 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In this case, the State did not try to establish Pollard was involved in the prior raids. In addition, rule 404(b) contemplates the admission of evidence of prior bad acts committed *by the defendant. See State v. Nelson,* 480 N.W.2d 900, 904 (Iowa App. 1991). This testimony was simply relevant background information. Consequently, a rule 404(b) analysis is inappropriate. Because a rule 404(b) objection would have

been meritless, counsel had no duty to raise it at trial. *See Westeen*, 591 N.W.2d at 207 (stating counsel need not raise a meritless issue).

Furthermore, Pollard's encounter with Officer Sikorski provides compelling evidence of her guilt of possession of a controlled substance. We agree with the State's contention that the outcome of Pollard's trial would not have been different, even if the evidence of previous drug raids and the execution of this search warrant had not been presented to the jury. Pollard has failed to demonstrate either a breach of an essential duty or prejudice.

IV. Conclusion. We have considered all claims raised by Pollard and find them meritless. We affirm Pollard's conviction.

AFFIRMED.