IN THE COURT OF APPEALS OF IOWA

No. 3-632 / 92-0684

FILED
MAR 24 1994
CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

LEVI ROY HAMILTON
a/k/a JOHN BLACK,

Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Lawrence H. Fautsch, Judge.

The defendant appeals from his convictions for possession with intent to deliver more than fifty grams of a substance containing a cocaine base, possession with intent to deliver cocaine hydrochloride, possession of cocaine hydrochloride with intent to manufacture and two counts of failure to affix a drug tax stamp. **AFFIRMED.**

Paul T. Shinkle of Gottschalk & Shinkle, Cedar Falls, 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.

Heard by Schlegel, P.J., Habhab, J., and McCartney, S.J.*, but decided by Donielson, C.J., Hayden, Sackett, Habhab, Cady, and Huitink, JJ.

*Senior judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

HABHAB, J.

The defendant, Levi Roy Hamilton, appeals from his convictions for possession with intent to deliver more than fifty grams of a substance containing a cocaine base, possession with intent to deliver cocaine hydrochloride, possession of cocaine hydrochloride with intent to manufacture and two counts of failure to affix a drug tax stamp. We affirm.

Hamilton and three co-conspirators were engaged in the sale of cocaine. A search of Hamilton's residence revealed a large rock of crack cocaine, $3000 in Hamilton's back pocket, a scale and razor blades. A search of the hotel room of one of the co-conspirators revealed eight approximately one ounce packages of powder cocaine, and $3000 in cash. The State also found a duffel bag containing the name "John Black," which Hamilton apparently used as an alias.

Hamilton was subsequently convicted, following a jury trial, of five drug-related crimes: (1) possession with intent to deliver more than fifty grams of a substance containing a cocaine base in violation of Iowa Code section 204.401(1)(b)(3) (1991);[1] (2) possession of ten or more dosage units of a cocaine base without affixing the appropriate drug tax stamp in violation of section 421A.12;[2] (3) possession with intent to deliver cocaine

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1. Iowa Code chapter 204 (1991) has been transferred to Iowa Code chapter 124 (1993).

2. Iowa Code chapter 421A (1991) has been transferred

hydrochloride in violation of section 204.401(1)(c); (4) possession of seven or more grams of cocaine hydrochloride without affixing the appropriate drug tax stamp in violation of section 421A.12; and (5) possession of cocaine hydrochloride with the intent to manufacture in violation of section 204.401(1)(c). The court entered judgment and sentenced Hamilton on each of the convictions. Hamilton appeals.

On appeal, Hamilton claims there was insufficient evidence to find he was in possession of ten or more doses of cocaine as required to penalize him for failure to affix a drug tax stamp. See Iowa Code § 421A.1(3)(c). The State relied upon the one large rock of crack cocaine to make up the ten doses. A State's witness testified the rock in Hamilton's possession was not for individual consumption. A rock the size of the one in Hamilton's possession would make over 200 twenty-dollar rocks. Hamilton claims that since there was only one rock, the rock was only one dosage unit, not ten. The State claims Hamilton failed to preserve error on these issues.

Even if we assume Hamilton has preserved error, we find his claim has no merit. Iowa Code section 421A.1(6) defines "dosage unit" as "the unit of measurement in which a substance is dispensed to the ultimate user. Dosage unit

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to Iowa Code chapter 453B (1993).

includes, but is not limited to, one pill, one capsule, or one microdot." Id. (emphasis added). We find substantial evidence supports the jury's verdict that the one large rock when dispensed to the ultimate user would be "ten or more dosage units."

Hamilton also claims that if the large rock of crack may be divided for purposes of applying the drug tax stamp statute, then the statute is unconstitutionally vague. A criminal statute "must give a person of ordinary intelligence fair warning of what is prohibited, and, in order to avoid arbitrary and discriminatory enforcement, it must provide an explicit standard for those who apply it." State v. Ryan, 501 N.W.2d 516, 518 (1993) (quoting State v. Speck, 242 N.W.2d 287, 290 (Iowa 1976)). We perceive no lack of fair notice of the conduct prohibited. We find the statute is not unconstitutionally vague.

Hamilton next claims the State could not properly prosecute and punish him for all three drug offenses because they 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).

It is well-settled that the double jeopardy clause protects defendants against multiple punishments for the same offense. Jones v. Thomas, 491 U.S. 376, 381, 109 S. Ct. 2522, 2525, 105 L. Ed. 2d 322, 331 (1989). Thus, if one crime is a lesser-included offense of another, and a

defendant is convicted of both crimes, the double jeopardy clause may be violated. State v. Clarke, 475 N.W.2d 193, 194 (Iowa 1991) (citing State v. Jeffries, 430 N.W.2d 728, 734 (Iowa 1988)). Problems of double jeopardy do not arise, however, if the crimes involved are sufficiently distinct that dual conviction does not duplicate the defendant's punishment. Id.; see also Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306, 309 (1932).

We begin our analysis by applying the Blockburger legal elements test reaffirmed by our supreme court in Jeffries, 430 N.W.2d at 730. Under the Blockburger test, the offenses charged in count I and III are different offenses because each requires proof of an additional fact which the other does not.

To prove Hamilton guilty of count I, the State must prove Hamilton possessed more than five grams of a mixture or substance containing cocaine base, with the intent to deliver, as specified in Iowa Code section 204.401(1)(b)(3). To prove Hamilton guilty of count III, the State must prove Hamilton possessed cocaine hydrochloride with the intent to deliver, as specified in Iowa Code section 204.401(1)(c). Cocaine hydrochloride is not the same as cocaine base. Cocaine hydrochloride contains water soluble materials, while cocaine base is the drug in its purest form. Count I was based on the crack cocaine found at the house on Oak Street. Count III was

based on the cocaine in powder form found at Hamilton's motel room.

Hamilton also claims he may not be convicted of both possession of cocaine hydrochloride with intent to deliver and possession of the same cocaine hydrochloride with intent to manufacture. Both crimes are in violation of section 204.401(1)(c). He claims 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 this argument. The cocaine found in the motel room, however, was in eight separate packages totaling nearly 220 grams of powder cocaine. An officer testified the eight packages weighed approximately one ounce each. He stated this was consistent with delivery of cocaine in powder form to other dealers. Hamilton also possessed money in $100 denominations. The officer testified this was consistent with the sale of powder cocaine by the gram.

Evidence which supported count V (possession of cocaine with the intent to manufacture) includes the fact that Hamilton had just manufactured a rock of crack cocaine from an ounce of powder cocaine at the time he was arrested. There was also evidence that Hamilton was actively engaged in selling crack cocaine, which supports an inference that he was going to manufacture more crack cocaine from the powder cocaine.

Hamilton certainly could have intended to sell some of the cocaine as powder and to convert some of it into crack cocaine. The charges do not require Hamilton to have differing intents for the same cocaine. Therefore, charging him with two offenses is not inconsistent and does not violate double jeopardy. See also State v. Bundy, 508 N.W.2d 643, 644 (Iowa 1993) (double jeopardy clause did not bar separate convictions for possession and manufacture of marijuana, even though the possession and manufacture convictions were both in violation of 201.401(1)(d)).

Hamilton also asserts he received ineffective assistance of trial counsel. He appears to claim his counsel was ineffective in five ways: (1) failing to put Hamilton on the stand; (2) failing to challenge the prosecution of this matter based on his nationality; (3) failing to challenge the jury selection process; (4) failing to make a proper challenge to the sufficiency of the evidence; and (5) failing to properly prosecute the motion to suppress.

Resolution of the first three of these claims will depend upon facts which do not appear in the record. 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 so 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 or her conduct.

State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). We therefore preserve defendant's first three ineffective assistance of counsel claims for a later proceeding.

Hamilton's last two claims are the type that we can determine their validity from the existing record. However, Hamilton's allegations do not alert us to what specific defects he is claiming.

> To preserve claims of ineffective assistance of counsel for postconviction review, a defendant must make some minimal showing from which this court can assess the potential viability of his claim. Such a showing should not only demonstrate some need for further development of the record, but should indicate why the challenged actions are believed to have been ineffective and what prejudice is likely to have resulted from them. The bald assertion that certain acts constitute ineffective assistance of counsel will be insufficient to preserve the question for postconviction proceedings.

State v. Wagner, 410 N.W.2d 207, 215 (Iowa 1987) (citations omitted).

Hamilton has not made this minimal showing on his last two claims. We, therefore, do not preserve those two claims for further proceedings.

AFFIRMED.