

IN THE COURT OF APPEALS OF IOWA

No. 3-228 / 92-611

FILED

OCT 28 1993

CLERK SUPREME COURT

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STATE OF IOWA,

Appellee,

vs.

MARK KUYKENDALL,

Appellant.

Appeal from the Iowa District Court for Lee County,
William L. Dowell, Judge.

The defendant appeals his conviction and sentence,
following a jury trial, for delivery of a controlled
substance and for being an habitual offender. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia
Reynolds Lapointe, Assistant State Appellate Defender, for
appellant.

Bonnie J. Campbell, Attorney General, Thomas G. Fisher,
Jr., Assistant Attorney General, Michael P. Short, County
Attorney, and David Andrusyk, Assistant County Attorney,
for appellee.

Heard by Oxberger, C.J., and Schlegel and Hayden, JJ.
Donielson, J., takes no part.

SCHLEGEL, J.

The defendant, Mark Kuykendall, appeals his conviction and sentence, following a jury trial, for delivery of a controlled substance and for being an habitual offender. He contends the district court erred in: (1) refusing his request for a jury instruction on the lesser-included offense of possession of a controlled substance; and (2) failing to consider waiving the mandatory minimum sentence. Kuykendall also claims he received ineffective assistance of counsel.

Mark Strode, a confidential police informant, contacted the sheriff's office in Lee County and told officials he could buy cocaine from Mark Kuykendall. An electronic transmitting device was placed on Strode, and he was given \$300. Officer McKeehan and Sergeant Dubson followed Strode and listened to his activities in their patrol car. A microcassette recorder was used to record the transmissions. The officers observed and heard Kuykendall sell one-eighth ounce of cocaine to Strode for \$300. Kuykendall was charged with delivery of a controlled substance.

At trial Kuykendall requested the court to submit an instruction on possession as a lesser-included offense of delivery of a controlled substance. The court refused to do so, and Kuykendall was found guilty. At the sentencing hearing the defendant requested a suspended sentence and probation, arguing that the conviction was his first under

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Iowa Code section 204.413 and that the nature of the crime was nonviolent. He also admitted to being an habitual offender. Kuykendall was sentenced to a term not to exceed fifteen years and to serve the mandatory minimum one-third of that sentence. Kuykendall appeals. We affirm. Our scope of review is for the correction of errors of law. Iowa R. App. P. 4.

Kuykendall first contends the district court erred in refusing to submit the defendant's requested jury instruction concerning possession of a controlled substance. He claims that possession of a controlled substance is a lesser-included offense of delivery of a controlled substance and, therefore, must be submitted for the jury's consideration in accordance with State v. Jeffries, 430 N.W.2d 728 (Iowa 1988). We conclude the district court did not err by refusing to submit the requested instruction.

The Jeffries court announced Iowa's strict statutory-elements approach to the lesser-included offense doctrine as follows:

[U]nder the legal test the lesser offense is necessarily included in the greater offense if it is impossible to commit the greater offense without also committing the lesser offense. State v. Redmon, 244 N.W.2d 792, 801 (Iowa 1976). If the lesser offense contains an element not required for the greater offense, the lesser cannot be included in the greater. This is because it would be possible in that situation to commit the greater without also having committed the lesser. [Citation omitted.] In using this test, we look to the statutory elements rather

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than to the charge or the evidence. [Citation omitted.]

Id. at 740.

In State v. Grady, 215 N.W.2d 213 (Iowa 1974), the court considered the question of whether possession is a necessary legal element of delivery. Id. at 214. The Grady court concluded that "possession is not a necessary legal element of delivery." Id. Because the lesser offense of possession of a controlled substance contains an element (possession) not required for the greater offense of delivery of a controlled substance, it is possible to commit the greater without also having committed the lesser. Consequently, under the strict statutory-elements test articulated in Jeffries, the offense of possession of a controlled substance does not constitute a lesser-included offense of delivery of a controlled substance. The district court in the present case realized this and properly denied the defendant's request to submit the possession instruction.

Next, Kuykendall argues the district court abused its discretion by not waiving the mandatory minimum sentence provided for in Iowa Code section 204.413 by finding mitigating circumstances under Iowa Code section 901.10. In order to show an abuse of discretion, one generally must show that the court exercised its discretion "'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" State v. Blackwell, 238 N.W.2d 131, 138

(Iowa 1976) (quoting Weeks v. Burnor, 326 A.2d 138, 140 (Vt. 1974)).

Our review of the record reveals the district court considered all of the mitigating circumstances which the defendant enumerates in his appeal. These factors include: (1) the nonviolent nature of his crime; (2) the cost of incarceration; and (3) the need for rehabilitation.¹ In addition, the trial court stated the following reasons for incarcerating the defendant and for requiring him to serve the mandatory minimum sentence:

First of all, your age, in that you are not a youthful offender. Secondly, you have previously been incarcerated and have been afforded the benefits of probation and parole. Thirdly, you have a substantial prior record of convictions for felonies as well as misdemeanors. You also lack an established work history. Also the Court takes into consideration the recommendations of the Lee County Attorney's Office and the Eighth Judicial District Department of Correctional Services.

Finally, Mr. Kuykendall, the Court also notes the nature of the offense that we are dealing with, which is delivery of cocaine, and that such offense, if continued, poses a substantial threat to the community.

The district court clearly did not abuse its discretion in deciding not to waive the mandatory minimum sentence when sentencing this defendant.

Finally, Kuykendall claims he received ineffective assistance of trial counsel due to trial counsel's failure

1. Defendant also claims, as a mitigating circumstance, that this was his first conviction under Iowa Code section 204.413. This factor is not a mitigating circumstance; it is a statutory requirement under section 901.10 prior to waiving the mandatory minimum sentence.

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to: (1) hire an expert to examine the audio tape the State submitted as evidence against him; and (2) call certain witnesses which the defendant requested on his behalf. Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. State v. Mulder, 313 N.W.2d 885 (Iowa 1981); State v. Nebinger, 412 N.W.2d 180, 191-92 (Iowa App. 1987). However, we conclude it is appropriate to resolve the ineffective assistance claim in the current case on direct appeal.

In State v. Wagner, 410 N.W.2d 207 (Iowa 1987), the court stated:

To preserve claims of ineffectiveness assistance of counsel for postconviction review, a defendant must make some minimal showing from which this court can assess the potential viability of his or her claim. State v. White, 337 N.W.2d 517, 519 (Iowa 1983). 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.

Id. at 215.

Here, Kuykendall has merely made a bald assertion that his trial counsel was ineffective. The defendant "has made no attempt to demonstrate why further proceedings are necessary or what he hopes to establish by them. He provides no definitive instances of possible prejudice

flowing from counsel's challenged actions." Wagner, 410 N.W.2d at 215. Accordingly, we find no basis upon which to preserve this issue for postconviction review.

In accordance with the preceding discussion, we affirm the defendant's conviction and sentence.

AFFIRMED.