IN THE COURT OF APPEALS OF IOWA

No. 1-413 / 10-0533
Filed June 15, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MAMO DEMETRIUS SMITH,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Bobbi M. Alpers, Judge.

Mamo Smith appeals from the judgment and sentence entered following a jury trial on three drug-related charges and child endangerment. **AFFIRMED.**

Gary K. Koos, Bettendorf, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Michael J. Walton, County Attorney, and Kelly Cunningham, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

SACKETT, C.J.

Mamo Smith appeals from the judgment and sentence entered following a jury trial on three drug-related charges and child endangerment. He contends counsel was ineffective in failing to file a motion to suppress evidence obtained from his residence from the execution of a search warrant. We affirm.

Background. Following an investigation, police obtained and executed a search warrant on defendant's residence. He was charged with three drug-related offenses and child endangerment. Defense counsel did not file a motion to suppress. At the beginning of trial, counsel made an oral motion in limine:

> Given the failure to add any other witnesses on the State's behalf, as the minutes indicate, the officers' basis for their search warrant and for their investigation of Mr. Smith came as a result of information received from a confidential source, and they claim that they also did a controlled buy from Mr. Smith utilizing . . . that confidential source, and we would ask the court to restrict the State through its witnesses from making any comment or reference to any information gained as a result of that confidential source. . . .
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> . . . For the record, I would request that anything found as a result of the search warrant that was issued as stated pursuant to confidential information from a confidential source be excluded from the record.

The district court overruled and denied the motion.

Following trial, defendant, pro se, filed a motion for new trial, motion to dismiss, motion to replace trial counsel, and a motion to suppress. At the time originally set for sentencing, the court considered the motion to replace counsel and continued sentencing for about a week to allow new counsel to take over. At sentencing, his new attorney, who also represents defendant in this appeal, argued defendant's pro se motions, as did defendant. The court denied the

motion for new trial, and stated the motion to dismiss and the untimely motion to suppress would be more appropriately addressed in an appellate proceeding.

Scope of Review. Review of claims of ineffective trial counsel, a claim with constitutional dimensions, is de novo. *State v. Ortiz*, 789 N.W.2d 761, 764 (Iowa 2010). Normally ineffective-assistance-of-counsel claims are brought in postconviction relief actions. "To prove ineffective assistance, the defendant must demonstrate by a preponderance of evidence that '(1) his trial counsel failed to perform an essential duty, and (2) this failure resulted in prejudice.'" *Id.* (quoting *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006)). "We will address such claims on direct appeal only if we determine the development of an additional factual record would not be helpful and one or both of these elements can be decided as a matter of law." *State v. Dudley*, 766 N.W.2d 606, 620 (Iowa 2009). We may dispose of an ineffective-assistance-of-counsel claim if the defendant fails to meet either the breach-of-duty or the prejudice prong. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 699 (1984); *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

Merits. Defendant contends his trial counsel was ineffective in not filing a motion to suppress evidence obtained as a result of the search warrant. Defendant states correctly that "if a motion to suppress had been filed and was ruled upon favorably for the defendant, the entire fruits of the search would have been inadmissible." As evidence that trial counsel's performance "fell below the standard required of attorneys," defendant points to counsel's attempt "to backdoor a motion to suppress by orally raising a motion in limine," but not

requesting a suppression hearing. Defendant asserts we should reverse "[b]ecause of Counsel's own position that he believes there is grounds to suppress evidence and his failure to file a motion to suppress."

The State argues the record is insufficient and this claim should be preserved for postconviction relief proceedings. Because the record before us contains the application for the search warrant with supporting documents, the magistrate's endorsement, and the search warrant, we believe the record is sufficient for us to address defendant's claim on direct appeal. If we can determine "whether the issuing judge had a substantial basis for concluding probable cause existed" to issue the search warrant, then we can decide the prejudice prong as a matter of law. *See Dudley*, 766 N.W.2d at 620.

The Fourth Amendment requires probable cause to support a search warrant. *State v. Gogg*, 561 N.W.2d 360, 363 (Iowa 1997). The test to determine whether probable cause exists to issue a search warrant is:

> whether a person of reasonable prudence would believe a crime was committed on the premises to be searched or evidence of a crime could be located there. Probable cause to search requires a probability determination that (1) the items sought are connected to criminal activity and (2) the items sought will be found in the place to be searched.

Id. (citations and internal quotation marks omitted).

In our analysis on appeal, we do not independently determine whether probable cause existed to issue the challenged search warrant, but rather "merely decide whether the issuing judge had a substantial basis for concluding probable cause existed." *Id.* In determining whether a substantial basis existed for a finding of probable cause, we are "'limited to consideration of only that

information, reduced to writing, which was actually presented to the [magistrate] at the time the application for the warrant was made.'" *Id.* (quoting *State v. Godbersen*, 493 N.W.2d 852, 855 (Iowa 1992)).

> The facts and information presented to establish this finding need not rise to the level of absolute certainty, rather, it must supply sufficient facts to constitute a fair probability that contraband or evidence will be found on the person or in the place to be searched.

State v. Thomas, 540 N.W.2d 658, 662-63 (Iowa 1995).

Iowa follows the "totality of the circumstances" approach set forth in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983). Under the "totality of the circumstances" approach, probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. *Id.* at 243 n.13, 103 S. Ct. at 2335 n.13, 76 L. Ed. 2d at 552 n.13. Because there is a preference for warrants, doubtful cases are resolved in favor of their validity. *State v. Beckett*, 532 N.W.2d 751, 753 (Iowa 1995).

A warrant applicant must show a nexus between the criminal activity, the things to be seized and the place to be searched. *State v. Randle*, 555 N.W.2d 666, 670 (Iowa 1996). When information from a confidential source is involved, an affidavit must establish the credibility of the informant or the credibility of the information given. *See* Iowa Code § 808.3 (2009) ("The application or sworn

testimony supplied in support of the application must establish the credibility of the informant or the credibility of the information given by the informant.").

The affidavit of the officer applying for the search warrant described his experience and training. It provided the magistrate with the following information:

> 2. It has been the experience of Your Affiant that person(s) who possess and sell controlled substances frequently maintain records, controlled substances, [and] proceeds derived from the sale of controlled substances in their residences, on their person(s), and in their vehicles. Furthermore, it has been the experience of Your Affiant that person(s) who sell controlled substances or possess large amounts normally have controlled substances available for their customers.
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> 3. In August 2009 the Davenport Police Tactical Operations Bureau received information from a CS [confidential source] reference a black (Mamo Smith) was selling various amounts of crack cocaine from 241 S. Clark St Apt #4. With this information an investigation was started.
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> 4. Using this same CS a controlled buy of crack cocaine was conducted with the target in the 1400 block of Clay St within the last 72 hours. Surveillance was established in the 200 block of Clark St. Surveillance observed the target leave apartment #4 and enter a silver in color Chrysler PT cruiser with Iowa registration 174SWI and leave the area. Constant surveillance was maintained and the target was followed to the area of 1400 Clay St. The target met with the CS and delivered an amount of crack cocaine and left the area. Constant surveillance was maintained and the target returned to 241 S. Clark St Apt #4. The CS was searched prior to and after the purchase with no contraband located. The crack cocaine field tested positive using the Valtox tester.
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> 5. In running the utilities for 241 S. Clark St it shows CHHAYA Property Inc as the utility holder.
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> 6. In doing a criminal history on Mamo Smith he has had three convictions for delivery of a controlled substance in 1992, 2002, and 2006.

The officer also provided an attachment about the reliability of the confidential source, including that the source had provided information before that helped supply the basis for search warrants and that led to arrests, the information in the instant investigation had been corroborated by law

enforcement personnel, and past information from the source led to seizure of drugs and contraband.

The magistrate made specific credibility findings concerning the confidential source based on the officer's sworn testimony concerning the source's past reliability and the officer's attachment listing eight separate reasons why the source was reliable.

We conclude the application for search warrant provided a "substantial basis" for the magistrate to conclude probable cause existed. *See Gogg*, 561 N.W.2d at 363. Defendant's bare assertion that trial counsel believed there were grounds to suppress evidence is insufficient to overcome the evidence in the record supporting the validity of the search warrant. Defendant has failed to prove there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *DeVoss v. State*, 648 N.W.2d 56, 64 (Iowa 2002) (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698). Because defendant has failed to prove prejudice, his claim trial counsel was ineffective fails.

AFFIRMED.