

IN THE COURT OF APPEALS OF IOWA

No. 1-957 / 09-1535
Filed February 1, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LLOYD VERNON JENKINS,
Defendant-Appellant.

Appeal from the Iowa District Court for Sioux County, Robert J. Dull,
District Associate Judge.

Lloyd Jenkins appeals his conviction and sentence for failure to comply
with sex registry requirements. **AFFIRMED.**

Philip Mears, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney
General, Coleman J. McAllister, County Attorney, and Jared R. Weber, Assistant
County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

Lloyd Jenkins appeals his conviction and sentence for failure to comply with sex registry requirements in violation of Iowa Code sections 692A.7(1), 692A.2, and 692A.3 (2007). Under the rubric of ineffective assistance of counsel claims, he argues his trial counsel was deficient in failing to challenge the jury instructions and a search warrant, and in other respects. We affirm.

I. Background Facts and Proceedings.

In 2002, Jenkins was convicted in Iowa of a criminal offense requiring him to register as a sex offender. In 2006, while incarcerated at the Fort Dodge Correctional Facility, Jenkins first registered as a sex offender in Iowa. Upon his release from incarceration, he moved to Missouri and registered there as a sex offender.

In the spring of 2008, Jenkins came to Iowa looking for work. He found part-time employment laying carpet for Steven Linn. Jenkins stayed at Linn's Hawarden farm while working the carpet-laying jobs. Jenkins said he had worked three jobs and stayed at the farm for three days on one occasion, three days on another, and four days on another. He said he never stayed in Iowa more than five days at a time and he went back to Missouri every weekend.

On March 30, 2008, a Hawarden police officer stopped to render aid to a motorist upon observing a car with a flat tire. One of the occupants of the car was Jenkins. Jenkins told the officer he worked with Steve Linn and was living with him at the Hawarden farm. On April 19, 2008, Jenkins was stopped by another Hawarden police officer for a traffic violation. Jenkins told the officer he

had been coming up to Hawarden for work, staying during the week and returning to Missouri on the weekends.

At trial, Linn testified he had a job for Jenkins in early April. He thought Jenkins arrived on April 8 and worked on a tile job and stayed the night at the farm. The next day, a Friday Linn thought, Jenkins helped with the grouting. Jenkins left for Missouri the following day. Linn had two more jobs for Jenkins. The following week Jenkins did three days of tiling work and then returned to Missouri because the job was not ready for the carpet laying. He returned to Iowa and finished the carpet laying. Linn testified Jenkins was never in Iowa for more than five consecutive days. He recalled Jenkins staying at the farm “probably, two or three times total.”

On April 26, 2008, the Sioux County Sheriff’s Office applied for a search warrant to search the farm for indicia of occupancy or residence by Jenkins and any personal property owned or stored by Jenkins “demonstrating that [Jenkins] is a resident of [the farm], including any bedding or other items showing where [Jenkins] sleeps.” The warrant was issued, and the farm was searched on April 27. Jenkins was not present. A number of his personal effects and documents were seized. Charges were filed, and an arrest warrant was issued.

On April 28, Jenkins completed a Missouri offender registration change of address form indicating a change of address from his Missouri address to the Hawarden farm effective May 8, 2008. Then on May 13, 2008, Jenkins showed up at the Sioux County Sheriff’s Office and completed a sex offender registration form listing the farm as his address. He was taken into custody, arrested, interviewed, and later charged by trial information with failure to comply with sex

registry requirements in violation of Iowa Code sections 692A.7(1), 692A.2, and 692A.3 (2007).¹

He was tried by jury and found guilty of failing to register as a sex offender. He was sentenced to an indeterminate term of incarceration not to exceed two years and was fined and assessed costs. Jenkins appeals.

II. Discussion.

Jenkins claims his trial counsel was ineffective in numerous respects. We review claims of ineffective assistance of counsel de novo. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). Although we generally preserve such claims for postconviction relief, where the record is sufficient to address the issues, we may resolve the claims on direct appeal. *Id.* We find the record here is adequate to address the majority of Jenkins's claims, but we preserve two for postconviction relief.

In order to establish a claim for ineffective assistance of counsel, Jenkins must demonstrate his trial counsel (1) failed to perform an essential duty and (2) prejudice resulted. *Anfinson v. State*, 758 N.W.2d 496, 499 (Iowa 2008). If either element is not met, his claim will fail. *Id.* There is a strong presumption counsel's representation fell within the wide range of reasonable professional assistance, and Jenkins is not denied effective assistance by counsel's failure to raise a meritless issue. *State v. Graves*, 668 N.W.2d 860, 881 (Iowa 2003). To

¹ Because the alleged criminal acts occurred in 2008, the prosecution was brought under the provisions of the 2007 Iowa Code. During the 2009 legislative session, the Iowa General Assembly enacted a comprehensive revision of the sex offender registry laws in Chapter 692A. See 2009 Iowa Acts ch. 119 (codified at Iowa Code §§ 629A.101-.130 (2009 Supp.)). The chapter was further revised in 2010. See 2010 Iowa Acts chs. 1104, 1043, 1074, 1192, & 1193 (codified at Iowa Code §§ 692A.101-.130 (2011)). Since this case predates these revisions, all statutory references are to the 2007 Iowa Code.

demonstrate prejudice, Jenkins must show that “but for the counsel’s unprofessional errors, the result of the proceeding would have been different.”

Anfinson, 758 N.W.2d at 499.

A. Jury Instructions.

Jenkins claims his trial counsel was ineffective in failing to object to the jury instructions given in this case. He argues the instructions given were incorrect statements of the law. We disagree.

Under Iowa Code section 692A.3, a sex offender who has either established a residence or changed a residence must notify the sheriff within five days of the establishment or change of residence. Here, the trial information alleged:

[Jenkins] on or between March 30, 2008, and April 27, 2008, in Sioux County, Iowa, failed to comply with Sexual Offender Registry Requirements by failing to register location of residence with the Sheriff’s Office of the residence county within five days of changing person’s residence by person, in violation of Iowa Code §§ 692A.7(1), 692A.2, 692A.3.

The relevant portions of Iowa Code section 692A.3 provide:

1. A person required to register under this chapter shall register with the sheriff of the county of the person’s residence within five days of establishment of residence in this state A sheriff shall accept the registration of a nonresident of the county if the person is required to register is . . . employed on a full-time or part-time basis in the county.

2. A person required to register under this chapter shall, within five days of changing residence within a county in this state . . . notify the sheriff of the county in which the person is registered of the change of address

3. A person required to register under this chapter shall register with the sheriff of a county in which residence has been newly established and notify the sheriff of the county in which the person was registered, within five days of changing residence to a location outside the county in which the person was registered. . . .

4. A person required to register under this chapter shall notify the sheriff of the county in which the person is registered, within five days of changing residence to a location outside the state, of the new residence address

Subsection (1) applies when an offender first establishes a residence in Iowa.

Subsection (2) applies to a change of residence by an offender who, already registered in an Iowa county, changes residences within that county.

Subsection (3) applies to a change of residence by an offender who, already registered in one Iowa county, newly establishes a residence in another Iowa county, and subsection (4) applies to a change of residence by an offender who

moves out of the State of Iowa. “‘Residence’ means the place where a person sleeps, which may include more than one location, and may be mobile or transitory, including a shelter or group home.” Iowa Code § 692A.1(8).

The trial information did not indicate which subsection of section 692A.3 Jenkins was alleged to have violated. Under the facts presented, it would seem that subsection one is the applicable subsection as Jenkins was registered in the State of Missouri, not Iowa, at the time he started staying at the Hawarden farm. But rather than incorporate subsection one’s “establishment of residence” language, the trial information instead references “changing a person’s residence,” language used in subsections two, three and four.

At trial, the State’s theory of prosecution was that the moment Jenkins slept just one night in Sioux County, no matter what his circumstances were or what his intent, the requirement to register within five days was triggered. Jenkins’s theory of defense was that he did not have to register so long as he did not sleep in Sioux County for five consecutive nights.

No uniform instructions were available to the court or parties and at the time of trial, the Iowa Supreme Court had not yet provided any guidance as to how the statute's terms were to be interpreted. The marshalling instruction² given by the district court stated:

The State must prove all of the following elements for Failure to Register as a Sexual Offender:

1. [Jenkins] was required to register with Iowa's sex offender registry.³
2. Between March 30, 2008, and April 27, 2008, [Jenkins] changed his residence. The jury does not have to agree as to a specific date so long as the jurors unanimously agree that the date falls within that range of dates.
3. [Jenkins] did not notify the Sheriff of the County in which he was residing within five days for changing his residence in writing on a form provided by the Sheriff.

If the State has proved all of the elements, [Jenkins] is guilty of Failure to Register as a Sexual Offender. If the State has failed to prove any one of the elements, [Jenkins] is not guilty of Failure to Register as a Sexual Offender.

The court's instruction defining "residence" mirrored the statutory definition set forth in section 692A.1(8).

The substance of Jenkins's complaint is that the marshalling instruction erroneously referenced "changing" a residence, rather than "establishing" a residence. He asserts this is an "initial registration" case, not the "change of residence" case as was set out in the trial information and marshalling instruction. Neither "establish" nor "change" are defined in the statute. "Change"

² As its marshalling instruction, the district court adopted an instruction contained in our unpublished opinion in *State v. Chitwood*, No. 06-0421 (Iowa Ct. App. Feb. 28, 2007). In *Chitwood*, this court set forth the marshalling instruction utilized by the district court in that case. However, the instruction itself was not an issue before the court, and we neither approved nor disapproved of the instruction's language. Further, it is noted that *Chitwood*, unlike the case at hand, involved an intra-county change of residence by the offender, and the definition of "residence" was not in issue.

³ Jenkins stipulated he was required to register with the Iowa Sex Offender Registry.

is commonly defined as “to make different in some particular.” Merriam-Webster’s Collegiate Dictionary 206 (11th ed. 2004). The law makes clear that a person may have more than one residence at a time. Iowa Code § 692A.1(8). Thus, a person who establishes a new residence has made his or her residence “different in some particular,” either because the new residence has replaced the old one, or because he or she now has two residences rather than one. In other words, in order to “change” residences, one must necessarily establish a new one. See Iowa Code § 692A.3(3). Within the context of the statute and the facts of this case, we see no meaningful difference in the instruction’s use of “changed his residence” and “changing his residence” instead of “establishment of residence.” Therefore, we find no error in the court’s marshalling instruction.

We recognize the law was misstated to the jury by the State during trial. A State’s witness opined, and the State argued, the five-day registration requirement was triggered upon sleeping in Iowa just one night, i.e. that a residence is established by sleeping in a place just one night. A month after Jenkins was tried, our supreme court concluded the “use of the term ‘sleeps’ in section 692A.1(8) in connection with the definition of ‘reside’ means habitual sleep in a home.” *Formaro v. Polk Cnty.*, 773 N.W.2d 834, 841 (Iowa 2009). In other words, an offender must habitually sleep in a place before it becomes his or her residence; just one night’s sleep is not enough to trigger the registration requirement.

Of course, no one had the benefit of the *Formaro* interpretation of the statute when the case was tried. Nonetheless, the jury instructions given to the jury did not embody the State’s interpretation of the statute. The court’s

instruction defining “residence” accurately reflected the statutory definition. The instruction is not contrary to *Formaro*. We conclude the instructions given to the jury did not improperly misstate applicable law. Further, any argument Jenkins makes relative to the instructions not specifically addressed here either has no merit or is not supported by persuasive authority. Jenkins has failed to establish his trial counsel was ineffective with regard to the jury instructions.

B. Search Warrant.

Jenkins next asserts his trial counsel was ineffective in failing to challenge the search warrant. Jenkins acknowledges the warrant application established two things: (1) that Jenkins was a sex offender who would have been required to register if he was residing in Sioux County, and (2) necessary probable cause was established to believe Jenkins had been staying at the Hawarden farm. He points out the application is silent as to Jenkins’s registration status. He states “[t]he real question for this court at this time is whether the failure to contain and put down in writing the statement that Mr. Jenkins was not registered at that address [the Hawarden farm address] is a fatal defect.” The State argues, “[a]lthough the application did not state that Jenkins had not registered at this address, the district court could infer that Jenkins had not complied with the registration requirement thus necessitating the need for the warrant.” In ruling on the issue upon order for limited remand from the supreme court, the district court concluded that when determining probable cause to search, “the magistrate may rely on reasonable common sense inferences from the information presented.” We agree.

In an attachment to the search warrant application, Deputy Sheriff Bergsma stated Jenkins was a sex offender required to register his address after having been convicted of third-degree sexual abuse in Lyon County, Iowa, in 2001. Bergsma also stated Jenkins was staying at the Hawarden farm address. Further, he went to the farm “to interview Jenkins as to whether he was residing at the place to be searched in violation of Iowa Code Chapter 692A.” Additionally he stated, “Iowa law is clear that a sex offender must register within five days of establishing residency in Sioux County.” The application does not specifically state that Jenkins had not registered his Hawarden farm address.

The Fourth Amendment requires probable cause to support a search warrant. See *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, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (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.

See also *Gogg*, 561 N.W.2d at 363-64. 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. *Gates*, 462 U.S. 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).

Against this backdrop, we conclude the application for the search warrant provided a “substantial basis” for the judge to conclude probable cause existed. See *Gogg*, 561 N.W.2d at 363. Jenkins has failed to prove his trial counsel was ineffective in failing to challenge the search warrant.

C. Claims Preserved For Postconviction Relief.

Jenkins asserts his trial counsel was ineffective in (a) stipulating that Jenkins “was required to register with the Iowa Sex Offender Registry,” and (b) failing to object to the testimony from a Department of Criminal Investigation investigator that sleeping one night in Iowa triggered the registry requirement. It is not clear from the record whether trial counsel had a reason for entering into the stipulation and for not objecting to the DCI investigator’s interpretation of the statute. See *State v. Wilkens*, 346 N.W.2d 16, 18 (Iowa 1984) (“[A]n attorney’s decision regarding strategy or tactics does not ordinarily provide an adequate basis for a claim of ineffective assistance of counsel. . . . When trial counsel makes a reasonable decision concerning strategy, we will not interfere simply because the chosen strategy does not achieve the desired result.”) Trial counsel should have an opportunity to explain his conduct and performance. We therefore choose to preserve these two claims for postconviction relief proceedings.

III. Conclusion.

We have carefully considered Jenkins’s remaining arguments of ineffective assistance of counsel and find them either meritless, not supported by authority, or Jenkins failed to prove prejudice. We accordingly affirm his conviction and sentence.

AFFIRMED.