IN THE COURT OF APPEALS OF IOWA

No. 2-458 / 11-0621
Filed July 25, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JASON MATTHEW KENSETT,
Defendant-Appellant.

Appeal from the Iowa District Court for Henry County, Michael J. Schilling (motion to suppress) and Cynthia H. Danielson (trial and sentencing), Judges.

The defendant appeals his conviction and sentence for drug-related offenses asserting the district court erred in denying his motion to suppress and his attorney rendered ineffective assistance. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Benjamin M. Parrott, Assistant Attorney General, Darin Stater, County Attorney, and Ed Harvey, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Tabor and Bower, JJ.

VOGEL, P.J.

The defendant, Jason Matthew Kensett, appeals the district court's ruling finding him guilty of manufacturing more than five grams of methamphetamine, a class B felony, in violation of Iowa Code section 124.401(1)(b)(7) (2009), and possessing anhydrous ammonia and lithium with the intent that the products be used to manufacture methamphetamine, both class D felonies, in violation of Iowa Code section 124.401(4)(b). Kensett asserts the district court erred in denying his motion to suppress evidence obtained through an invalid search warrant. He also claims counsel rendered ineffective assistance in challenging the validity of the search warrant. For the reasons stated below, we affirm the district court's denial of Kensett's motion to suppress, and thereby, affirm Kensett's conviction and sentence.

I. BACKGROUND AND PROCEEDINGS.

On July 2, 2009, law enforcement executed a search warrant at the residence of Jason Kensett, uncovering methamphetamine and evidence of methamphetamine manufacturing. During the execution of the search warrant and after being advised of his Miranda rights, Kensett lead Deputy Sheriff Jason Sutton around the property including all of the outbuildings pointing out the methamphetamine lab and the drugs he kept in his bedroom inside the home. Kensett advised Sutton he was solely responsible for the methamphetamine-making activities. He claimed the methamphetamine was for personal use, though he also admitted to trading the substance to others in exchange for ephedrine or pseudoephedrine pills. Kensett was arrested and charged with manufacturing more than five grams of methamphetamine, possession of

anhydrous ammonia and lithium with the intent to manufacture methamphetamine, and trafficking stolen weapons.[1]

Kensett's counsel filed a motion to suppress the evidence claiming law enforcement provided false information to the issuing magistrate regarding a confidential informant (CI1). Specifically his counsel challenged the magistrate's finding that the information provided by CI1 was credible because it was against the penal interests of the informant. He also challenged the magistrate's finding that CI1 was credible based on corroboration provided from another confidential informant (CI2) who was not identified in the application. The motion to suppress proceeded to a hearing on December 3, 2010. The district court ultimately denied the motion to suppress finding "Kensett failed to carry his burden to establish an improper representation of any kind by law enforcement about the confidential informant." The court also found that while the confidential informant did not give information that was against his penal interests, the application "contained plenty of evidence of the credibility of the informant['s] . . . information." The court found just because the magistrate made specific findings that were both inaccurate and unnecessary under the current law "does not lessen the quantum of evidence of credibility contained within the four corners of the warrant application."

Following the court's denial of his motion to suppress, Kensett waived his right to a jury trial and proceeded to a bench trial on March 8, 2011. The court found Kensett guilty on all three counts and sentenced Kensett on April 22, 2011, to a term of incarceration not to exceed twenty-five years on the manufacturing

[1] The trafficking-stolen-weapons charge was dismissed by the State prior to trial.

charge, and a term of incarceration not to exceed five years on the possession of anhydrous ammonia and lithium charges. The sentences were ordered to run concurrently, and the court imposed the applicable fines and surcharges. Kensett appeals claiming the district court erred in denying his motion to suppress and his trial counsel rendered ineffective assistance.

II. SCOPE OF REVIEW.

We review de novo Kensett's challenge to the probable cause supporting the search warrant. *State v. Gogg*, 561 N.W.2d 360, 363 (Iowa 1997). However, our task is to simply decide whether the issuing judge had a substantial basis for concluding probable cause existed. *Id*. In making this determination, we are "limited to consideration of only that information reduced to writing, which was actually presented to the [judge] at the time the application was made." *Id*.

We review Kensett's claim that the application was not statutorily sufficient for correction of errors at law. *State v. Myers*, 570 N.W.2d 70, 72 (Iowa 1997). In addition, we review de novo Kensett's claim that counsel rendered ineffective assistance. *Everett v. State*, 789 N.W.2d 151, 155 (Iowa 2010).

III. MOTION TO SUPPRESS.

The search warrant was submitted to the magistrate on July 1, 2009. Appended to the application was "Attachment A," which detailed the law enforcement investigation and the information supplied by CI1 and CI2. The attachment stated that on June 6, 2009, Deputy Sutton reported to the scene of a single vehicle roll-over accident where Kensett was the driver and only occupant of the vehicle. During the accident, items were thrown from the vehicle including a fanny pack containing marijuana and a garden hose with an anhydrous tank

adapter. Kensett spoke with Deputy Sutton at the scene of the accident and indicated an acquaintance of his cooked methamphetamine in small batches. "Kensett stated that he also cooks small batches because of the mess it makes with a big batch." In addition, Kensett implicated the acquaintance in a series of burglaries in the area.

The warrant attachment also described Deputy McNamee's encounter with CI1 on the afternoon of June 30, 2009.[2] Deputy McNamee reported to the scene of a suspicious person and found CI1 in possession of cold pills and lithium cell phone batteries. After his arrest, CI1 agreed to cooperate with law enforcement and told the officers the pills were to be delivered to Kensett to manufacture methamphetamine. CI1 indicated the methamphetamine was made at Robert Barnes's house in Salem, Iowa. Officers confirmed the number in the informant's cell phone belonged to Barnes. CI1 stated he was at the house the day before he was arrested and had watched Kensett make a batch of methamphetamine, assisting Kensett with the cooking process. The informant described in detail the house and all of the outbuildings involved in the manufacturing process. He also relayed information that Kensett was involved in the recent burglaries and had in his possession a large welder, dark in color, on a black cart with wheels. CI1 stated the welder was recently moved to the Barnes property after the police executed a search warrant on another storage unit rented by Kensett.

[2] The application indicated the encounter with the confidential informant occurred on June 30, 2006. This appears to be a typographical error as all other dates referenced were in 2009.

Deputy McNamee included in the attachment information that corroborated some of the informant's statements. McNamee confirmed that a local company had reported a welder on a cart stolen, which matched the general description provided by the informant. He also confirmed law enforcement had executed a search warrant on Kensett's storage unit in May of 2009, which uncovered chemicals consistent with manufacturing methamphetamine. McNamee related that in October of 2008, a canine alerted to Kensett's vehicle and items commonly associated with manufacturing methamphetamine were found in the vehicle, including: burnt foil, a spoon with white powder residue, Coleman fuel, a camp stove, coffee filters, and coffee bean grinder with a powder residue. Finally, the attachment stated CI2 confirmed to law enforcement that CI1 had been providing pseudoephedrine pills to Kensett in exchange for methamphetamine.

McNamee noted in the warrant form application that CI1 was reliable because he "is a person of truthful reputation," "has no motivation to falsify the information," "has otherwise demonstrated truthfulness," "has not given false information in the past," and "has been corroborated by law enforcement personnel." The magistrate in the endorsement for the search warrant indicated the informant or information appears credible because "the disclosure of information was against the informant's penal interests" and "the information has been corroborated, specifically *another confidential information corroborated CI's information*. *CI2's name was disclosed to magistrate. From information provided and CI2 would have knowledge provided to law enforcement*." The italicized language was handwritten onto the form.

Kensett claims the attachment to the warrant application did not provide sufficient corroboration of CI1's information. He asserts law enforcement failed to include any facts obtained from an independent investigation in order to corroborate CI1's testimony. Instead, Kensett asserts the court had to assume the statements CI1 made were true in order to determine CI1's credibility. Kensett also claims from a plain reading of the attachment, it is clear the information CI1 provided is not against his penal interests because it is no more incriminating than the crime he had already been charged with—possession of precursors with the intent to manufacture methamphetamine.

"Probable cause to issue a search warrant exists 'when the facts and circumstances presented to the judicial officer are sufficient in themselves to justify the belief of a reasonably cautious person that an offense has been or is being committed.'" *State v. Groff*, 323 N.W.2d 204, 212 (Iowa 1982) (citations omitted). The probable cause required must establish "(1) the items sought are connected to criminal activity and (2) the items sought will be found in the place to be searched." *Gogg*, 561 N.W.2d at 363. The assessment of probable cause is not to be an overly technical exercise. *Id*. at 364.

> 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 (1983). When reviewing the application, all reasonable inferences are drawn in support of the judge's finding of probable cause, and we give great deference to the judge's conclusion. *Gogg*, 561,

N.W.2d at 364. Because we give preference to searches pursuant to warrants, we resolve doubts in favor of the warrant's validity. *State v. Weir*, 414 N.W.2d 327, 330 (Iowa 1987). The amount of evidence needed to support probable cause is less than is required to support a conviction, but more than mere suspicion of criminal activity is needed. *Id*.

Iowa Code section 808.3 provides that the application or sworn testimony supporting the application "must establish the credibility of the informant or the credibility of the information given by the informant." When assessing the credibility of informants, we have relied on the following factors: (1) "whether the informant was named"; (2) "the specificity of facts detailed by the informant"; (3) "whether the information furnished was against the informant's penal interest"; (4) "whether the information was corroborated"; (5) "whether the information was not public knowledge"; (6) "whether the informant was trusted by the accused"; and (7) "whether the informant directly witnessed the crime or fruits of it in the possession of the accused." *Weir*, 414 N.W.2d at 332.

In applying these factors to the attachment supporting the application for the warrant, we agree with the district court that the application "contained plenty of evidence of the credibility of the informant['s] . . . information." While CI1 was not named and the information provided was not against his penal interests because of the plea agreement he had reached with the State, the information CI1 provided was very detailed with respect to the premises to be searched; the

police were able to corroborate some portions of the testimony[3]; the information was not public knowledge; the information indicated Kensett trusted CI1; and CI1 directly witnessed Kensett manufacture methamphetamine the day before CI1 was arrested.

Besides the information provided by CI1 connecting Kensett with manufacturing methamphetamine, the warrant application also detailed two encounters Kensett had with law enforcement where Kensett was found in possession of controlled substances and paraphernalia associated with manufacturing methamphetamine. In June of 2009, Deputy Sutton encountered Kensett after the roll-over accident and found a fanny pack containing marijuana and a garden hose with an anhydrous tank adapter. In October of 2008, a canine alerted to Kensett's vehicle where officers found burnt foil, a spoon with white powder residue, Coleman fuel, a camp stove, coffee filters, and a coffee bean grinder with a powder residue.

Considering the warrant application in the light most favorable to upholding the issuing judge's determination, we find the magistrate had a substantial basis for concluding probable cause existed to justify the search. We therefore affirm the district court's decision finding the magistrate properly complied with the statutory requirements when he issued the warrant and probable cause supports the warrant.

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[3] This corroboration included a phone number in CI1's phone belonging to Kensett's roommate, Robert Barnes; CI1's knowledge of a search warrant executed on Kensett's storage unit by the police months earlier; CI1's knowledge of the welder which had been reported to the police as stolen by a local business; and CI2's confirmation of the arrangement CI1 had with Kensett to provide pseudoephedrine pills in exchange for methamphetamine.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL.

Next, Kensett claims his counsel rendered ineffective assistance in failing to challenge the search warrant on the basis that law enforcement withheld information from the magistrate affecting the probable cause determination, namely that CI1 was suffering from methamphetamine withdrawal symptoms and schizophrenia at the time he gave his statement to police.[4] Kensett asserts that had counsel made the claim at the suppression hearing, the district court would have excised the information provided by CI1 from the application and would have found the warrant was no longer supported by probable cause.

In claiming his trial counsel was ineffective in failing to raise this issue before the district court, Kensett must prove counsel (1) failed to perform an essential duty and (2) prejudice resulted. *State v. Jorgensen*, 785 N.W.2d 708, 712 (Iowa Ct. App. 2009). If either element is lacking, the claim will fail. *Anfinson v. State*, 758 N.W.2d 496, 499 (Iowa 2008). We find in this case that Kensett has failed to prove the prejudice prong; and therefore, we need not address whether counsel breached an essential duty by failing to raise the issue.

To prove prejudice Kensett must prove "a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Lado v. State*, 804 N.W.2d 248, 251 (Iowa 2011). We find that even if the district court had been presented with a claim that law enforcement

[4] Kensett raises three ineffective-assistance-of-counsel claims but seeks for us to preserve two of the claims for postconviction relief proceedings. Under *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010), a defendant need not raise an ineffective-assistance-of-counsel claim on direct appeal in order to preserve it for postconviction relief proceedings. As the current record is inadequate, we will not address Kensett's other ineffective-assistance claims.

improperly withheld information relating to CI1's mental state, the result of the suppression hearing would have been the same—the district court would still have found probable cause to support the warrant application.

In *Franks v. Delaware*, 438 U.S. 154, 155–56 (2001) the Supreme Court held,

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires a hearing.

If at the hearing the allegedly false information is established by a preponderance of the evidence, and if, after the false material is set aside, probable cause does not support the warrant, the warrant is to be voided and the fruits of the search suppressed. *Franks*, 438 U.S. at 156.

This doctrine has also been applied to cases where law enforcement is alleged to have omitted crucial information from the application. *State v. Poulin*, 620 N.W.2d 287, 289 (Iowa 2000). However, when such omissions are established, the remedy is for the reviewing court to consider both the information in the warrant and the omitted information to determine if probable cause still exists. *Id*. The district court would not have, as Kensett argues, excised all information related to CI1 just because the law enforcement omitted the fact that he was suffering withdrawal symptoms and schizophrenia. Instead, the district court would have considered this information in conjunction with the rest of the information in the warrant application in its probable cause assessment.

Both of the law enforcement officers who took CI1's statement testified at the suppression hearing. Deputy McNamee testified that when the interview was conducted CI1 appeared "much calmer, much more sober, much more relaxed and with it" than when CI1 had been arrested the day before. Chief Harvey testified that during the interview CI1 "seemed fine. I mean he obviously was going through some withdrawal. I thought he was tracking, he was alert, he knew the names of the people. It was not like he was confused." This testimony indicates the law enforcement officers did not intentionally, knowingly, or recklessly omit concerns over CI1's mental state from the application presented to the magistrate, because they had no concerns. It also indicates that despite CI1's mental state, he was able to provide law enforcement officers with specific and detailed information.

While CI1's attorney, Richard Bell, testified at the suppression hearing that when he met with CI1 he "wasn't tracking very well," "was hearing voices," and "was basically out of it," this testimony alone does not establish that the information CI1 provided to support the warrant application should be deemed a nullity. The information CI1 provided was detailed and specific regarding Kensett's manufacturing operation. There was no indication in the information provided that the drug withdrawal or the mental illness affected CI1's ability to provide accurate information to the law enforcement officers. *See United States v. Scott*, 610 F.3d 1009, 1015 (8th Cir. 2010) (holding the district court did not err in denying the defendant a *Franks* hearing where the defendant failed to establish that the confidential informants' drug use affected their ability to provide accurate information for a search warrant). We find that had the omitted

information been presented along with all other information in the warrant application, the district court would have nonetheless determined probable cause existed to support the warrant. *See Poulin*, 620 N.W.2d at 289. We therefore find Kensett has failed to sustain the prejudice prong of his ineffective-assistance claim. As a result, we affirm his conviction and sentence.

AFFIRMED.