IN THE COURT OF APPEALS OF IOWA

No. 6-190 / 05-0905
Filed May 10, 2006

BRIANA EDWARDS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Woodbury County, John Ackerman, Judge.

Petitioning for postconviction relief, Briana Edwards contends her trial and appellate attorney provided ineffective assistance of counsel. **AFFIRMED.**

Martha M. McMinn, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Craig Jorgensen, County Attorney, and Jill Pitsenbarger, Assistant County Attorney.

Considered by Sackett, C.J., and Vogel and Mahan, JJ.

SACKETT, C.J.

Applicant-appellant, Briana Edwards, was convicted of third-degree theft, in violation of Iowa Code sections 714.1 and 714.2(3) (2001), following a jury trial. Police officers, executing a search warrant, found a stolen bicycle in her apartment. Applicant contends her trial and appellate attorneys were ineffective in not challenging the search warrant because the warrant application contained no information stolen property might be found in applicant's apartment. The State recognizes that the issue was raised by applicant's counsel at trial but not by her counsel on direct appeal or her postconviction attorney in the district court. The State advances that the claim was properly rejected by the trial court and, consequently, the claim has no merit. We affirm.

SCOPE OF REVIEW. We review claims of ineffective assistance of counsel de novo. *State v. Hischke*, 639 N.W.2d 6, 8 (Iowa 2002); *State v. Belken*, 633 N.W.2d 786, 794 (Iowa 2001).

BACKGROUND. On October 3, 2002, Sioux City police officer Brad Downing applied for a warrant to search applicant's apartment. In his application he recited that applicant lived at the address and he had observed people he knew who used illegal drugs going to and from the apartment. The application further stated the officer had arrested another occupant of the apartment a week earlier and that person had a large amount of methamphetamines. The warrant also included information the officer received from an informant. The informant was seen leaving the applicant's apartment in a minivan which was stopped for a traffic violation and the informant had six grams of marijuana and he was eating marijuana. The informant said he bought the marijuana from the applicant and

that he purchased marijuana and methamphetamines from applicant at her apartment on other occasions.

The warrant application did not contain any information showing stolen property might be found in applicant's apartment. However, the officer asked for authorization to search for specified drugs and specified things used by drug dealers as well as weapons, money, and stolen property. The warrant issued authorized a search for the requested items, including stolen property.

Upon entering the apartment the officers who executed the warrant saw a large amount of merchandise, including more than one bicycle. While executing the warrant they examined the bicycles to check serial numbers on the bicycle frames and learned from a computerized data base that at least one of the bicycles had been stolen.

Applicant's trial attorney filed a motion to suppress evidence of the bicycles found, advancing in part that the warrant application did not generate probable cause to believe stolen property would be found in applicant's apartment and the serial number of the bicycle was not in plain view. The district court overruled the motion finding "the officers observed the stolen bicycles and their serial numbers in plain view." The challenged evidence was admitted at trial and applicant was convicted and sentenced to two years in prison.

Applicant appealed and an assistant appellate defender was appointed to represent her. He filed a motion for leave to withdraw advancing the warrant permitted a search for stolen property, the district court found the serial numbers were in plain view to the officers searching, the amount and nature of items in the apartment at the time of the search led the officers to believe the property was

stolen, and the examination of the property to determine its status was reasonable and within the contemplation of the warrant. The supreme court dismissed the appeal as frivolous.

Applicant then filed a pro se application for postconviction relief contending generally that she had been subjected to an illegal search. A new attorney was appointed to assist applicant. The State denied the allegations in the application, contended applicant had waived her claims, and asked for summary disposition of the application. Three days before the hearing on the State's motion, applicant's attorney asked to withdraw because of a disagreement he had with her. At the hearing applicant described her claims and her attorney stated he did not believe applicant had a case. The postconviction court found applicant's claims were without merit or had been addressed in the criminal trial court's ruling on applicant's post-trial motions. The State's motion for summary disposition was granted and her attorney was allowed to withdraw. Applicant appeals with new counsel.

INEFFECTIVE ASSISTANCE OF COUNSEL. We assume without deciding that the claim applicant makes here has been preserved for our review. To prevail on a claim of ineffective assistance of counsel, applicant must demonstrate both ineffective assistance and prejudice. *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). Both elements must be proven by a preponderance of the evidence. *Id*. If a claim lacks one of the elements of an ineffective assistance of counsel claim, it is not necessary for us to address the other element. *Id*.

Applicant must first prove her attorney's performance was not within the normal range of competence. *State v. Gant*, 597 N.W.2d 501, 504 (Iowa 1999). We measure the attorney's performance by standards of reasonableness consistent with "prevailing professional norms." *Ledezma*, 626 N.W.2d at 142 (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 694 (1984)). We begin our analysis with the presumption her attorneys performed competently. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694-95. Claims of ineffective assistance of counsel are more likely to be found where counsel lacked diligence as opposed to the exercise of judgment. *Ledezma*, 626 N.W.2d at 142.

The focal question is whether applicant would have been successful if the claim raised in the trial court had been raised on appeal or in her postconviction proceeding.

The first question then is whether the issuing judge had a substantial basis for concluding probable cause existed for authorizing a search for stolen property. *State v. Gogg*, 561 N.W.2d 360, 363 (Iowa 1997); *State v. Green*, 540 N.W.2d 649, 655 (Iowa 1995). In determining whether a substantial basis exists for a finding of probable cause 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. *Gogg*, 561 N.W.2d at 363 (citing *State v. Godberson*, 493 N.W.2d 852, 855 (Iowa 1992)).

The State does not address this issue. Rather, the State contends the officers were justified in checking the serial numbers of the bicycle or bicycles

because drugs and money are small and could taped to the bicycle or inside its frame.

We are inclined to agree with the applicant that there was nothing in the information presented to the judge issuing the warrant which would present a substantial basis for a finding of probable case that stolen property would be on the premises. Having said that, we note as the State argues and the applicant does not contest, there was ample information presented to the judge issuing the warrant to support a finding of probable cause that illegal drugs, marijuana and methamphetamines would be on the premises. Consequently, the officers were legally in her apartment to search for these things. Therefore, the next question becomes whether the trial court correctly determined the bicycles and serial numbers were in plain view.

In arguing they were not, applicant relies heavily on the case of *Arizona v. Hicks*, 480 U.S. 321, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987). In *Hicks* a bullet was fired through the floor of defendant's apartment injuring a man in the apartment below. Thus, exigent circumstances justified an officer entering the apartment to search for the shooter, other victims, and weapons. *Hicks*, 480 U.S. at 323, 107 S. Ct. at 1151-52, 94 L. Ed 2d at 353. The officer, while in the apartment, saw expensive stereo components which he suspected were stolen and he recorded the serial numbers of some and moved others to check serial numbers. *Id*. The court determined no seizure occurred, for purposes of the Fourth Amendment, when the officer merely recorded serial numbers of stereo equipment he observed in plain view, but the officer's actions in moving equipment to locate serial numbers constituted a separate search, which had to

be supported by probable cause, notwithstanding the fact that the officer was lawfully present in the apartment where the equipment was located. *Id*.

The officer here testified he had to move the bicycles to find the serial numbers. Applicant contends this was a separate search. The issue is whether it produced an additional invasion of respondent's privacy interest. *See Illinois v. Andreas*, 463 U.S. 765, 771, 103 S. Ct. 3319, 3324, 77 L. Ed. 2d 1003, 1010 (1983).

The State contends it did not because the officers were legally searching for drugs, which they testified could be found in "pretty much any place you can think of." We reject applicant's reliance on *Hicks*, 480 U.S. 321, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987) to support her argument that the movement of the bicycles to see the serial numbers was a separate search. The officers acted properly in moving the bicycles to search for drugs, consequently, they were properly in possession of the bicycles containing the serial numbers. Thus, the plain view analysis of *Hicks,* which involves the extent to which officers can manipulate items in their presence but not their possession, is inapplicable. *See United States v. Watts*, 7 F.3d 122, 127 (8th Cir. 1993).

Therefore, we conclude defendant's ineffective assistance of counsel claims fail.

AFFIRMED.