IN THE COURT OF APPEALS OF IOWA

No. 8-152 / 07-0677
Filed April 30, 2008

STATE OF IOWA
Plaintiff-Appellee,

vs.

WALTER HOSKINS IV,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, James C. Bauch (suppression) and George L. Stigler (trial), Judges.

Defendant appeals his convictions for possession of a controlled substance (cocaine) with intent to deliver, failure to affix a drug tax stamp, and possession of marijuana. **CONVICTIONS AFFIRMED; SENTENCES VACATED IN PART AND AFFIRMED IN PART.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brad P. Walz, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Baker, J., and Brown, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

BROWN, S.J.

Walter Hoskins IV asserts several challenges to the admission of evidence arising from a search and subsequent seizure of controlled substances. We affirm as to the search and seizure issues, but vacate the resulting sentence, in part.

I. Background Facts & Proceedings

On the evening of July 4, 2006, Waterloo police officers noticed Walter Hoskins IV and his cousin, Daytron Wise, in front of their grandmother's house shooting off fireworks.[1] Officers Matt McGeough and Steve Bose went to the home due to this illegal activity and because there were outstanding arrest warrants for both men. Hoskins and Wise were arrested. A search incident to arrest revealed Hoskins had $174 in cash, Wise had $210, and both men had cell phones on them. As they were being placed in the back of a patrol car, Hoskins yelled at the officers not to go in the house because his grandmother, Alberta Hoskins, was sleeping.

The officers knocked on the door, and then knocked on windows in an effort to alert whomever was inside that they were taking Hoskins and Wise to the police station, but no one responded. The officers then went around the outside of the house attempting to rouse someone when officer Bose saw baggies stuffed inside a detached drain pipe. He pulled out the baggies and saw several of them had corners that were missing. There was no mud or debris on

[1] Under Iowa Code section 727.2 (2005) it is a simple misdemeanor to use or explode fireworks.

the baggies. The corners of baggies are often used as packaging for illegal drugs.

The officers gathered up the fireworks in the yard and on the porch as evidence for a fireworks violation charge. From the porch, officer McGeough smelled the distinct and strong odor of marijuana. The door of the house was open, but the screen door was closed. Through the screen door officer McGeough saw a box of fireworks just inside the door. He opened the door to collect the fireworks, and saw two baggies of marijuana and a baggie of crack cocaine in a planter beside the door. The officers seized the illegal drugs.

While the officers were present, Alberta returned home. Hoskins told her not to let anyone inside the home, and she refused the officers' request to search the home. The officers had activated a recorder in the patrol car, and one of the men said, "they haven't found it yet." Hoskins had previous felony convictions for drug-dealing in 2004. In April and May of 2006, officer McGeough had received information of drug dealing by Hoskins in Waterloo.

Sergeant Mark Meyer of the Tri-County Drug Task Force prepared an application for a search warrant of the house. A judge signed the search warrant. A search was conducted on July 5, 2006, which revealed large quantities of crack cocaine and marijuana, scales, cell phones, and baggies with torn corners.

Hoskins was charged with possession of a controlled substance (cocaine) with intent to deliver, failure to affix a drug tax stamp, and possession of a controlled substance (marijuana) with intent to deliver. Hoskins filed a motion to

suppress. He claimed the evidence obtained by the warrantless entry into the home should be suppressed. He also claimed that the illegal entry tainted the application for a search warrant, and the evidence obtained as a result of the search should be suppressed.

Evidence as outlined above was presented at the suppression hearing. The district court determined evidence of the illegal drugs found in the planter should be suppressed. Concerning evidence seized as a result of the search warrant, the court concluded, "Excluding the reference to drugs seized by police initially, the court does find that the remaining untainted evidence [in the warrant affidavit] is substantial enough to constitute probable cause to issue the search warrants in this case." The court determined the evidence seized as a result of the search warrant was admissible.

Hoskins also filed a motion in limine seeking to exclude the statement, "they haven't found it yet." He claimed the statement referred to the illegal drugs found in the planter, and because that evidence was inadmissible, the statement should be inadmissible also. The court found it was not readily apparent whether the statement referred to the illegal drugs found in the planter, other illegal drugs found in the home, or any other contraband. The court concluded the jury "can then make its determination as to what finding 'it' meant."

The jury returned a verdict finding Hoskins guilty of possession of a controlled substance (cocaine) with intent to deliver, failure to affix a drug tax stamp, and possession of marijuana. The court denied Hoskins's post-trial motions. Hoskins was sentenced to a term of imprisonment not to exceed 100

years on the delivery charge, five years on the tax stamp charge, and 180 days in jail on the possession charge, all to be served concurrently. Hoskins appeals his convictions and sentence.

II. Motion to Suppress

Hoskins contends the district court should have suppressed all of the evidence seized as a result of the search warrant because absent the improperly seized illegal drugs, the search warrant was not supported by probable cause. He asserts that without the illegal drugs the officers did not have enough evidence to request a search warrant, and moreover would not have even thought to request one.

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures. *State v. Shanahan*, 712 N.W.2d 121, 131 (Iowa 2006). The Fourth Amendment is applicable to the states through the Fourteenth Amendment. *Id.* We review constitutional challenges de novo, independently evaluating the totality of the circumstances. *Id.*

Under the Fourth Amendment, a search warrant must be supported by probable cause. *State v. Gogg*, 561 N.W.2d 360, 363 (Iowa 1997). "The existence of probable cause to search a particular area depends on whether a person of reasonable prudence would believe that evidence of a crime might be located on the premises to be searched." *State v. Davis*, 679 N.W.2d 651, 656 (Iowa 2004). The totality of the circumstances is considered in determining probable cause and close questions regarding the existence of probable cause are resolved in favor of the warrant. *Id.* There must be evidence of a nexus

between the alleged criminal activity, the things to be seized, and the place to be searched. *Id.* If a warrant is not supported by probable cause, evidence seized pursuant to the warrant must be suppressed. *State v. Seager*, 571 N.W.2d 204, 210 (Iowa 1997). Although an evidentiary hearing was held on the suppression motion, in determining whether there was probable cause to issue the warrant "we are limited to consideration of only that information, reduced to writing, which the applicant presented to the court at the time of the application for the warrant." *Gogg*, 679 N.W.2d at 656.

Evidence which has been illegally seized may not be considered in determining whether there is probable cause for a search warrant. *State v. Naujoks*, 637 N.W.2d 101, 111 (Iowa 2001). There are exceptions, however, to this rule. *Seager*, 571 N.W.2d at 211. The independent source doctrine and its related inevitable discovery doctrine are examples of situations in which evidence may be admitted even though tainted by an illegal search. *See State v. McGrane*, 733 N.W.2d 671, 681 (Iowa 2007). If an exception applies, the evidence is admissible because to exclude the evidence would "put the police in a worse position than they would have been in absent any error or violation." *Nix v. Williams*, 467 U.S. 431, 443, 104 S. Ct. 2501, 2509, 81 L. Ed. 2d 377, 387 (1984).

We must, therefore, consider whether the untainted information, considered by itself, establishes probable cause for a search warrant. *McGrane*, 733 N.W.2d at 681. "If the lawfully obtained information amounts to probable cause and would have justified issuance of the warrant, apart from the tainted

information, the evidence seized pursuant to the warrant is admitted." *Naujoks*, 637 N.W.2d at 113 (quoting *James v. United States*, 418 F.2d 1150, 1151 (D.C. Cir. 1960)). We must also consider whether the officers' "decision to seek the warrant was prompted by what they had seen during the initial entry." *Murray v. United States*, 487 U.S. 533, 542, 108 S. Ct. 2529, 2536, 101 L. Ed. 2d 472, 483 (1988).

A. The district court found there was sufficient untainted evidence in the search warrant application to support the search warrant.[2] We agree with the district court's conclusion that there was sufficient evidence, apart from the improperly obtained evidence of illegal drugs, to lead a person of reasonable prudence to believe that evidence of a crime might be located on the premises to be searched. *See Davis*, 679 N.W.2d at 656. The application points out Hoskins's prior history of drug dealing,[3] that he had a substantial amount of cash on him, and a large quantity of plastic baggies with the corners cut off were found outside the house. Each of these factors is consistent with drug dealing. We conclude the search warrant was supported by probable cause.

B. Hoskins also claims the officers would not have sought a search warrant if it were not for the illegal drugs found during the improper entry into the home. Even if probable cause exists for a search warrant, the evidence must be suppressed if the officers would not have applied for a search warrant absent the

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[2] The State claims the district court erred by suppressing the drug evidence found in the planter. The State did not appeal, and we do not consider this issue. A party that neither appeals nor cross-appeals is not entitled to greater relief than it was accorded by the district court. *See Randolph Foods, Inc. v. McLaughlin*, 253 Iowa 1258, 1277, 115 N.W.2d 868, 879 (1962).

[3] Prior criminal record for relevant offenses may be considered on question of probable cause. *See* 2 Wayne R. LaFave, *Search and Seizure* § 3.2(d) at 51-52 (3rd ed. 1996)

improperly obtained information. *See McGrane*, 733 N.W.2d at 682 (citing *Murray*, 487 U.S. at 542, 108 S. Ct. at 2536, 101 L. Ed. 2d at 483).

Sergeant Meyer testified:

> Q. In regards to this – in your involvement in this case, if you have a – if you had the situation with the surrounding statements made by the defendant, cash found, plastic baggies found around the residence along with the other information, would it be natural to attempt to obtain a search warrant for this residence regardless of whether there were fireworks or not present? A. Yes.
> Q. Why is that? A. Just because of the past information, intelligence that myself and other police officers have had on both these individuals besides what was found outside the house.

On cross-examination, sergeant Meyer conceded that while evidence of the illegal drugs certainly helped, there was more that led to the application for the search warrant. He also testified that they considered the previous information about Hoskins and Wise, the baggies found outside the home, the statements by the defendants while in the squad car, the fireworks seen just inside the door, and the money and the cell phones found on the defendants. We conclude sergeant Meyer's testimony supports a finding that the officers would have requested a search warrant even if they had not first improperly entered the home and viewed illegal drugs.

III. Ineffective Assistance of Counsel

Hoskins also contends that information in the search warrant application of drug dealing in April and May of 2006 was not sufficiently reliable to provide probable cause for the search warrant. He also claims the evidence was too stale to provide a basis for the July 4, 2006 search warrant request. Furthermore, he claims the officers were not legally in a position to see the

baggies which were outside the house, and so evidence of the baggies should be excluded from the search warrant application.

Hoskins did not raise these issues before the district court, and they have not been preserved for our review. *See State v. Lewis*, 675 N.W.2d 516, 521 (Iowa 2004). Hoskins raises an alternative argument on appeal, stating that if these issues were not preserved, this was due to ineffective assistance of counsel. In order to prove ineffective assistance of counsel, Hoskins must show counsel's performance was defective, and the defective performance prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 685 (1984).

A. The warrant application contained statements that officer McGeough received information in April and May of 2006 that Hoskins had been selling crack cocaine in the Waterloo area. Hoskins asserts the application does not contain any statements to show the information received by the officer was reliable.

Section 808.3 provides that where a search warrant contains information from an informant, the application or sworn testimony "must establish the credibility of the informant or the credibility of the information given by the informant." Section 808.3 places a mandatory duty on a judge or magistrate to make findings that an informant is credible. *State v. McPhillips*, 580 N.W.2d 748, 752 (Iowa 1998).

The application does not show the source of the information received by officer McGeough, or establish any basis concerning the credibility of this

source.[4] The information should have been disregarded by the magistrate.[5] *See State v. Birkestrand*, 239 N.W.2d 353, 358 (Iowa 1976) (finding information should be disregarded when the search warrant application "discloses neither the source of this information nor any details which would establish its credibility").

Assuming ineffective assistance due to counsel's failure to raise these issues at the suppression hearing, we determine he has failed to show he was prejudiced by counsel's performance. Hoskins must show a reasonable probability existed that, but for defense counsel's errors, the result of the proceeding would have been different. *See State v. Maxwell*, 743 N.W.2d 185, 196 (Iowa 2008). Even if the information that Hoskins was involved in drug dealing in April and May 2006 is disregarded, as noted above, there was sufficient information to support a finding of probable cause for the search warrant. Hoskins has not shown the district court would have granted his motion to suppress if this issue had been raised before that court.

B. Hoskins also claims the information that he had been selling crack cocaine in the Waterloo area in April and May of 2006 was too stale, and should not have been considered to support probable cause for the search warrant. *See State v. Gogg*, 561 N.W.2d 360, 367 (Iowa 1997) (noting information to support a

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[4] The judge checked off a statement, "Sworn testimony indicates this informant has given reliable information on previous occasions." The record does not show, however, whether sworn testimony was given, or if it was, what was stated. Thus, the record does not contain any proof that credibility for the informant or informants was established by sworn testimony. We must therefore look solely at the application.

[5] It is not clear whether the magistrate relied on the information received in April and May 2006, or Hoskins's convictions for drug dealing in 2004, or both. The judge stated, "Search warrant supported by knowledge of officers concerning past history of individuals located at residence as well as habits and actions of those dealing drugs in community."

search warrant should be current and not too remote in time); *State v. Randle*, 555 N.W.2d 666, 670 (Iowa 1996) (same). For the reasons noted above, Hoskins was not prejudiced by counsel's failure to challenge this information at the suppression hearing.

C. Hoskins further asserts he received ineffective assistance due to counsel's failure to challenge evidence the officers found baggies in a detached drainpipe in the yard of the home where he was shooting off fireworks. Hoskins claims the officers could not properly search the curtilage of the home because he had already been placed under arrest and was in the back of the patrol car. He states the officers did not have a valid reason to walk around the outside of the home. The State agrees that the yard surrounding the home was part of the protected curtilage of the home. *See State v. Lewis*, 675 N.W.2d 516, 524 (Iowa 2004).

The evidence shows officers had observed Hoskins engaging in criminal activity – exploding fireworks in violation of section 727.2. The officers then properly came onto the property to arrest Hoskins. The officers gathered up the fireworks which were in plain view as evidence to support a fireworks violation charge. *See State v. Nitcher*, 720 N.W.2d 547, 554 (Iowa 2006) (noting evidence in plain view provides an exception to the search warrant requirement of the Fourth Amendment).

It was after 9:00 p.m. when the officers arrived at the residence and arrested Hoskins and Wise. Officer McGeough testified the front door was wide open, although the screen door was closed. Hoskins told officers his

grandmother was sleeping inside the house.[6] Rather than leave an elderly woman asleep in the house with the front door open at night, the officers attempted to contact someone inside the house to tell them they were leaving with Hoskins and Wise. The officers knocked on the door several times, but got no response. Then one of the officers walked to the side of the house to find a bedroom window, and in doing so saw a detached piece of drainpipe laying on the ground with several clear plastic baggies sticking out.

One of the factors we consider in determining whether there has been a Fourth Amendment violation is whether the officers' intrusion was justified by a legitimate reason for being on the premises unconnected with a search directed against a defendant. *See State v. Legg*, 633 N.W.2d 763, 767 (Iowa 2001). We view this from an objective standard, not the officers' actual motivations. *Lewis*, 675 N.W.2d at 522.

Police officers may approach a residence and knock on the door to speak to someone about a police investigation. *See State v. Breuer*, 577 N.W.2d 41, 48-49 (Iowa 1998). If no one responds to the knock, the officer may walk around the home to look for another door. *Id.* (citing *United States v. Daoust*, 916 F.2d 757, 758 (1st Cir. 1990) ("[T]here is nothing unlawful or unreasonable about going to the back of the house to look for another door, all as part of a legitimate attempt to interview a person."); *United States v. Anderson*, 552 F.2d 1296, 1300 (8th Cir. 1977) (finding officers could proceed to the rear of the house after receiving no answer at the front door).

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[6] Hoskins's statement was subsequently proven to be untrue. His grandmother returned home a few minutes later.

The officers did not violate the Fourth Amendment by knocking on the front door, and when no one answered, walking to the side of the house in an attempt to contact someone inside. Even if defense counsel had raised this issue at the suppression hearing, the district court would have concluded the evidence of the baggies was properly considered by the judge in granting the search warrant application. Hoskins cannot meet the prejudice prong of *Strickland.*

IV. Motion in Limine

Hoskins contends the district court should have granted his motion in limine regarding the statement, "they haven't found it yet." The district court denied Hoskins's motion in limine. The court also overruled Hoskins's objections to the statement made during the trial. Hoskins claims the statement refers to the illegal drugs in the planter, and that since evidence of the drugs was suppressed, the statement should also be determined inadmissible. He points out that officer McGeough testified at the suppression hearing, "One of them said something about they haven't found it yet, and then you heard – I believe it was Mr. Wise said it's in the plant."

The United States Supreme Court has stated:

> [T]he exclusionary rule also prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes 'so attenuated as to dissipate the taint.'

Murray, 487 U.S. at 536-37, 108 S. Ct. 2533, 101 L. Ed. 2d at 480 (citation omitted). Thus, testimonial evidence concerning evidence acquired during an illegal search is inadmissible. *Seager*, 571 N.W.2d at 210.

An error of constitutional magnitude does not mandate a new trial if the error is harmless beyond a reasonable doubt. *State v. Boley*, 456 N.W.2d 674, 678 (Iowa 1990). We weigh the probative force of the evidence admitted in the case against the erroneously admitted evidence. *State v. Simmons*, 714 N.W.2d 264, 275 (Iowa 2006). We consider "whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *State v. McConnelee*, 690 N.W.2d 27, 33 (Iowa 2004) (citation omitted).

A necessary part of the State's case was establishing Hoskins possessed illegal drugs. The statement was presented as relevant evidence to show Hoskins's constructive possession of other illegal drugs found in the home. Even if we assume without deciding that the testimony should have been excluded, we find the admission of the defendant's statements to be harmless beyond a reasonable doubt. *See State v. Peterson,* 663 N.W.2d 417, 430-35 (Iowa 2003) The jury was never told about the illegal drugs that were found in the planter and so the jury would not have construed the statement, "they haven't found it yet," to refer to that evidence. Further, the evidence was overwhelming even without the statement. We conclude the jury's verdict was not attributable to the statement in question. Therefore, any alleged error was harmless beyond a reasonable doubt.

V. DARE Surcharge

Hoskins asserts, and the State agrees, the district court improperly imposed a drug abuse resistance education (DARE) surcharge on his conviction for failure to affix a drug tax stamp. Section 911.2 provides that a DARE surcharge must be assessed "if a violation arises out of a violation of an offense provided for in chapter 321J or chapter 124, division IV." Failure to affix a drug tax stamp is a violation of section 453B.12.

We vacate the ten dollar DARE surcharge for the offense of failure to affix a drug tax stamp. The remaining terms of Hoskins's sentences are affirmed.

CONVICTIONS AFFIRMED; SENTENCES VACATED IN PART AND AFFIRMED IN PART.