

**IN THE COURT OF APPEALS OF IOWA**

No. 9-122 / 08-1339  
Filed May 6, 2009

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**JEFFREY MARTIN HEMSATH,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Black Hawk County, Jeffrey L. Harris, District Associate Judge.

Hemsath appeals his judgment and sentence for possession of methamphetamine. **AFFIRMED.**

Thomas P. Frerichs of Frerichs Law Office, P.C., Waterloo, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Susan Swan and Jeremy Westendorf, Assistant County Attorneys, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Eisenhauer, JJ.

**VAITHESWARAN, J.**

We must decide whether trial counsel was ineffective in failing to timely file a motion to suppress evidence.

***I. Background Facts and Proceedings***

A Waterloo police officer stopped and searched Jeffrey Martin Hemsath. He found a baggie of methamphetamine in one of Hemsath's pockets.

The State charged Hemsath with possession of a controlled substance (methamphetamine). See Iowa Code § 124.401(5) (2005). Hemsath moved to suppress the items seized from him; the State countered that the motion was untimely. The district court elected to proceed with an evidentiary hearing. Following the hearing, the court agreed with the State that the motion to suppress was untimely. The court later denied Hemsath's motion to reconsider the ruling.

Hemsath's attorney withdrew from representing him, citing his failure to timely file the suppression motion. The case proceeded to a bench trial on the stipulated minutes of testimony. Hemsath's new attorney again urged the court to reconsider its previous ruling on the motion to suppress. The district court denied the request, found Hemsath guilty of possession of methamphetamine, and sentenced him accordingly.

***II. Analysis***

On appeal, Hemsath argues his trial attorney was ineffective in failing to timely file a motion to suppress the baggie of methamphetamine. Because the district court held an evidentiary hearing on the motion, we find the record

adequate to address this issue. *State v. Bowers*, 661 N.W.2d 536, 540 (Iowa 2003). Our review is de novo. *Id.*

To establish ineffective assistance, a defendant must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Prejudice in this context requires a showing of a reasonable probability that but for counsel's claimed errors, the result of the proceeding would have been different. *Id.* at 695, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

The State argues that there is no reasonable probability the motion to suppress would have succeeded, as the Waterloo police officer either had probable cause or reasonable suspicion to conduct the search of Hemsath. We find it unnecessary to address the probable cause argument because we are persuaded by the State's alternate reasonable suspicion argument.

An officer may conduct a warrantless pat-down search when the officer "is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others." *Terry v. Ohio*, 392 U.S. 1, 24, 88 S. Ct. 1868, 1881, 20 L. Ed. 2d 889, 908-09 (1968). "[T]he police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906. The facts must "be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Id.* 392 U.S. at 21-22, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906 (citation omitted).

The record reveals that the Waterloo police officer encountered Hemsath riding his bicycle after dark. Hemsath's bicycle was not equipped with lights or reflectors. The officer stopped Hemsath because of this city code violation. When the officer asked where he was coming from, Hemsath responded by identifying a different street than the area from which the officer had seen him coming. The officer noted that Hemsath was dry despite rain that would have soaked him had he been riding from the location he identified. The officer suspected that Hemsath did not disclose his actual location because he knew it to be a known drug area.

After the stop, Hemsath "kept stepping back" from the officer and "was sweating a lot" and "acting nervous." The officer asked Hemsath if he had any weapons. Hemsath said no. The officer said he intended to pat Hemsath down for weapons. He located a pocket knife in Hemsath's right front pants pocket, felt a lighter in his shirt pocket, proceeded to pull the lighter out believing it might contain knives, and discovered a baggie holding what appeared to be methamphetamine.

Hemsath's nervousness, his misstatement of his prior location, his denial that he possessed weapons, and the subsequent discovery of a pocket knife were "specific and articulable facts" that justified the warrantless pat-down search. Based on these facts, we conclude the *Terry* standard for a search was satisfied and there is no reasonable probability that a motion to suppress would have been granted. As Hemsath could not establish *Strickland* prejudice, his claim that counsel was ineffective in failing to file a timely motion to suppress necessarily fails.

We affirm Hemsath's judgment and sentence for possession of methamphetamine.

**AFFIRMED.**