IN THE COURT OF APPEALS OF IOWA

No. 1-709 / 11-0134
Filed November 23, 2011

STATE OF IOWA,
Plaintiff-Appellant,

vs.

PETER WHATELEY KLAICH,
Defendant-Appellee.

Appeal from the Iowa District Court for Story County, Steven P. Van Marel, District Associate Judge.

Peter Klaich appeals from his conviction for serious misdemeanor marijuana possession, claiming error on evidentiary rulings by the district court and ineffective assistance of counsel. **AFFIRMED.**

Matthew G. Whitaker and Janelle L. Neibuhr of Whitaker, Hagenow, GBMG, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Stephen Holmes, County Attorney, and Bryan J. Barker, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Tabor, JJ.

TABOR, J.

Peter Klaich appeals from his conviction for serious misdemeanor marijuana possession. He contends the district court should have suppressed the evidence found in his hotel room and abused its discretion in overruling evidentiary challenges to the drug evidence. Klaich also claims his attorney did not provide him with effective assistance with respect to the presentation of witnesses and moving for a new trial.

The district court believed the officer's testimony Klaich consented to the search of his hotel room; we defer to that credibility finding and affirm the suppression ruling. Because we find no abuse of discretion in the district court's admission of the drug evidence over the defendant's objections based on the minutes of evidence and chain of custody, we also affirm the evidentiary rulings. Finally, because a more fully developed record would assist us in deciding whether his counsel's performance fell below professional norms and prejudiced the defendant, we preserve those claims for postconviction proceedings.

I. Background Facts and Proceedings

An employee of the Holiday Inn Express called Ames police on the evening of July 1, 2010, complaining about the smell of marijuana smoke coming from one of the guest rooms. Officers Blake Marshall and Mike Arkovich responded to the call. They knocked on the door of room 116, which was registered to Peter Klaich. While waiting for an answer, they could hear the sound of what turned out to be air freshener being sprayed in the hotel room.

Eventually, sixty-one-year-old Klaich opened the door. The officers explained why they were there and asked if they could look around the hotel room. Klaich agreed and stepped aside to allow the officers to enter the room. Once inside, they discovered a burnt roach clip, a marijuana cigarette, a grocery sack containing two baggies of marijuana, and an empty baggie lined with what appeared to be marijuana residue in a suitcase. All together, the officers found about nine grams of marijuana. According to Officer Marshall, Klaich admitted to smoking marijuana, telling the officers that it helped ease his chronic back pain.

On July 29, 2010, the State charged Klaich with possession of marijuana, a serious misdemeanor in violation of Iowa Code section 124.401(5) (2009). On October 1, 2010, Klaich filed a motion to suppress the evidence found in his hotel room. At an October 27, 2010 hearing, the court heard differing versions of the warrantless search from Officer Arkovich and Klaich. Explicitly finding the officer's version more credible, the court denied the motion to suppress in an order issued on November 29, 2010.

On November 30, 2010, the court held a jury trial. The State offered testimony from Officer Marshall and evidence technician Mark Wheeler to establish the possession charge. The defendant objected to the admission of the marijuana found in his hotel room, alleging that the State did not provide him proper notice of Officer Marshall's testimony concerning its chain of custody. The court admitted the evidence.

The defendant called his former girlfriend, Chris Bowman, and Bowman's friend to testify. Klaich also took the stand in his own defense, telling the jurors

that he did not know the marijuana was in his hotel room. He claimed his girlfriend smoked in the room before he arrived there. He also said he told the officers that the smell drawing the complaint was not from marijuana smoke, but probably from a bag of “immature compost” he kept in the refrigerator for his environmental work. The jury returned a verdict of guilty.

The State and the defense both recommended the defendant receive a deferred judgment given his lack of criminal history and his professional achievements. But the district court rejected that recommendation and sentenced Klaich to the mandatory minimum sentence for marijuana possession. The court reasoned that Klaich was “not young” and “not immature” and at trial “obviously blamed other people for what happened.”

Klaich appeals on several grounds.

II. Did Klaich voluntarily consent to the search?

A. Legal principles governing consent searches

Both the Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution protect citizens from unreasonable searches and seizures.[1] *State v. Reinders*, 690 N.W.2d 78, 81 (Iowa 2004). A warrantless search is unconstitutional unless it falls within a recognized exception. *Id.* at 83. Consent searches are one exception to the warrant requirement. *State v. Reinier*, 628 N.W.2d 460, 464–65 (Iowa 2001).

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[1] Klaitch does not argue the state constitutional provision affords him more protection than its federal counterpart. *See State v. Lewis*, 675 N.W.2d 516, 522–23 (Iowa 2004). Accordingly, we will interpret the two provisions as having the same scope and effect. *See id.*

The defendant incorrectly asserts in his brief that the prosecution has the burden to prove his consent by clear and convincing evidence. "[A] preponderance of the evidence by the state is sufficient to establish exceptions, including consent, to the 'per se unreasonable' status of a warrantless search." *State v. Folkens*, 281 N.W.2d 1, 3 (Iowa 1979) (disavowing "language from earlier cases imposing the higher standard of proof").

An officer does not always need to obtain verbal consent to search. *Reinier*, 628 N.W.2d at 467. A person with authority to consent may do so by gestures or non-verbal conduct. *Id*.

Klaich's claim that police officers violated his right to be free of unreasonable searches and seizures raises a constitutional issue, calling for de novo review by our court. *Reinders*, 690 N.W.2d at 82. When analyzing alleged violations of constitutional rights, we independently evaluate the totality of the circumstances appearing in the record. *Id.* The record includes evidence presented both at the suppression hearing and at trial. *State v. Vincik*, 436 N.W.2d 350, 353 (Iowa 1989). Although we are not bound by them, we defer to the district court's fact finding because that judge has a far greater ability to assess the credibility of witnesses. *Reinders*, 690 N.W.2d at 82.

B. Application of law to Klaich's situation

When he answered the knock on his hotel room door, the uniformed police officers told Klaich about the hotel manager's complaint. According to Officer Arkovich, they asked Klaich if they could search his room for marijuana and he responded: "Sure." Klaich then stepped aside as the officers entered the room.

Klaich testified the officers did not ask permission to enter or search, but simply walked into the room when he turned away to retrieve the bag of compost from the refrigerator.

Our supreme court has recognized the authority of police officers to request consent to enter and search a residence in the course of investigating a complaint. *See Reinier*, 628 N.W.2d at 466 (describing encounter as "knock and talk"). The problem in *Reinier* was that the police used intimidation, implied they had authority to search, and minimized the consequences of the defendant's admission to having drugs. *Id.* at 469. Klaich does not contend that his consent was coerced; rather, he contends that the officers are not credible in their testimony that he agreed to their search.

Klaich aims his credibility argument at discrepancies between Officer Marshall's testimony at trial and Officer Arkovich's testimony at the suppression hearing. In particular, he claims their testimony differed on these points: the smell coming from Klaich's hotel room, the ability to see into the room from the doorway, who searched the room, and the sequence of events during the search.

Klaich argues we owe no deference to the district court's credibility finding because the district court could not compare Officer Marshall's trial testimony with Officer's Arkovich's suppression testimony when ruling on the suppression motion. The case law cited in Klaich's brief does not support his argument. It is true that where the district court does not make factual findings, there is nothing to which we can defer. *See Conklin v. Conklin*, 586 N.W.2d 703, 707 (Iowa

1998). But in deciding the suppression issue in Klaich's case, the district court expressly stated:

> There is a dispute in testimony as to whether or not consent was given and the Court's ruling is based upon credibility of each witness.
>
> In assessing credibility, the Court looks at many factors including the witnesses' interest in the outcome of the case, their candor, bias and whether their testimony is reasonable and consistent with other evidence that is believed. The police were called to the hotel for a complaint involving the smell of marijuana, not the smell of manure. One would assume the hotel manager knew the difference between the two. The police arrived outside the defendant's room to investigate a potential crime. They were not looking for Mr. Klaich. The evidence found in the defendant's room by the officers is consistent with the complaint by the hotel manager. When all factors are considered, Officer Arkovich's testimony is more credible than the defendant's.

It is the suppression ruling that Klaich asks us to review. While we may consider the State's evidence produced in support of the exception to the warrant requirement at both the motion hearing and at trial, *see Carroll v. United States*, 267 U.S. 132, 162, 45 S. Ct. 280, 288, 69 L. Ed. 543, 555 (1925), the district court's ruling is static from the time of the hearing, unless a party asks that the suppression issue be revisited. Klaich did not ask the district court to reconsider its suppression ruling following Officer Marshall's trial testimony. Accordingly, we are not prohibited from giving deference to the district court's original credibility findings in the suppression ruling.

Moreover, even when we compare the testimony of the two officers, we do not find the divergence touted by Klaich. Both officers testified to smelling cigarette smoke coming from room 116. Officer Marshall testified at trial that he could see from the doorway the window was open. At the suppression hearing,

Officer Arkovich testified “the way [Klaich] was standing in the door we couldn’t really see too far into the room,” but Arkovich did not directly address any observation about the window. Both officers testified that Officer Marshall found the drug paraphernalia and the marijuana while Officer Arkovich stood by Klaich, who was sitting on the bed. Nothing about the officers’ slightly different recollection of events would have caused the district court to question their honesty. In our de novo review of the record, we agree the officers provided a more believable version than Klaich did.

On appeal, Klaich asserts it would not make sense for “a well-educated man, knowing that another person had recently been smoking marijuana in his hotel room without his permission, would consent to a search of his room without a search warrant.” We find this explanation for the marijuana smell to be at odds with Klaich’s separate claim the smell was actually coming from his “immature compost” sample. Reading Klaich’s argument, “we are tempted to paraphrase Shakespeare’s much quoted line and say: ‘the witness doth protest too much.’” *See Benson v. Custer*, 236 Iowa 345, 358, 17 N.W.2d 889, 895 (1945). Looking at the record as a whole, we conclude Klaich voluntarily consented to the officers’ entry and search and agree with the district court’s decision to deny his motion to suppress.

III. Did the district court abuse its discretion when ruling on objections concerning the minutes of evidence and chain of custody?

Klaich raises two related evidentiary claims: the first concerning the State’s minutes of evidence and the second concerning the State’s chain of

custody for the marijuana seized from his hotel room. He contends the district court abused its discretion in overruling his objection to Officer Marshall's testimony as beyond the scope of the minutes of evidence. We review this issue for abuse of discretion. *State v. Hayes*, 532 N.W.2d 472, 476 (Iowa Ct. App. 1995). To show an abuse of discretion, the defendant must show that the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Id.*

Klaich also asserts the State did not show which officer maintained possession of the marijuana evidence. "The district court has considerable discretion in determining whether the State has shown the chain of custody necessary for admission of physical evidence." *State v. Biddle,* 652 N.W.2d 191, 196 (Iowa 2002). We review the admission of chain-of-custody evidence for an abuse of discretion and will overturn a ruling only if there is a clear abuse of discretion. *Id.*

The State's original minutes of evidence indicated that both Officer Marshall and Officer Arkovich would testify "as to all chain of custody matters." Officer Arkovich's report, pasted into the minutes, stated that the marijuana and paraphernalia "were placed in evidence." The State's notice of additional minutes included the anticipated testimony of evidence technician Wheeler and Officer Arkovich. Wheeler's minute said he would testify in accordance with his attached laboratory report; the attached report said he received the marijuana to test "from M. Arkovich." Officer Arkovich's minute said he would testify that "he personally delivered evidence in this incident" to Wheeler for testing.

At trial, the State called Officer Marshall to testify instead of Officer Arkovich. When the State offered the drug evidence into the record through Officer Marshall's testimony, defense counsel objected, arguing, "Pursuant to the additional minutes, this officer is not the one that was involved in the chain of custody." The district court admitted the evidence subject to the State proving the rest of the chain of custody. Officer Marshall testified that he was the person who transported the drugs to the police station and deposited them in the evidence vault for later testing. Officer Marshall said the lab report was inaccurate in suggesting that the drugs were received from his partner Officer Arkovich.

Technician Wheeler testified that while his lab exhibit said that he received the drugs from Officer Arkovich, the chain-of-evidence section on the Ames Police Department property form showed the marijuana went from Klaich to Officer Marshall and from Officer Marshall to the "drug box" at the police station. Wheeler also testified that the seal on the evidence bag containing the marijuana was signed by Officer Marshall. Wheeler explained that the lab report likely included Arkovich's name because Officer Arkovich wrote the incident report. Given Wheeler's explanation, we cannot find that the district court abused its discretion in admitting the drug evidence.

In rejecting Klaich's claims, we consider the purpose underlying the prosecution's duty to prove a chain of custody and to provide minutes of evidence. Proof of the chain of custody guards against tampering, substitutions, and alterations of physical evidence. *State v. Collier*, 372 N.W.2d 303, 308 (Iowa

Ct. App. 1985). This record shows that Officers Marshall and Arkovich were both present when the marijuana was discovered in the hotel room and divided up the tasks of writing the incident report and transporting the drugs after Klaich's arrest. We see no danger on this record that the marijuana seized from Klaich's room was not the same marijuana tested by Wheeler. The district court did not abuse its discretion in overruling the chain-of-custody objection.

The State is required to file minutes of evidence with the trial information so that the accused can prepare a defense based on "a full and fair statement of the witness' expected testimony." Iowa R. Crim. P. 2.5(3). The purpose of the rule is to "eliminate most claims of foul play." *State v. Bennett*, 503 N.W.2d 42, 47 (Iowa Ct. App. 1993). Klaich argues that he suffered "legitimate surprise" when Officer Arkovich did not testify. The minutes of evidence do not guarantee that the State will call a certain witness to testify. Rather, the minutes are intended to alert the defendant generally to the source and nature of the evidence against him. *See State v. Lord*, 341 N.W.2d 741, 743 (Iowa 1983). Officer Marshall's minute noted that he was expected to testify as to chain-of-custody matters. We find no abuse of discretion in the trial court's overruling of the defense objection.

Even if Klaich could rightly claim he was surprised when Officer Marshall testified that he was the officer who dropped off the marijuana for testing—given that the notice of additional minutes attributed that expected testimony to Officer Arkovich—Klaich is unable to show he was prejudiced by the State's mistake. Klaich suggests on appeal that the State's decision to elicit the chain-of-custody

testimony from Officer Marshall instead of Officer Arkovich scuttled the defense plans to impeach Officer Arkovich's credibility. The defendant cannot show that he was prejudiced by the lack of opportunity to impeach a witness who was not called to testify. *See generally State v. Turner*, 345 N.W.2d 552, 557 (Iowa Ct. App. 1983) (finding no error in court's refusal to take judicial notice of minute of testimony of missing State's witness). Because the State was able to establish the chain of custody without the testimony of Officer Arkovich, we find Klaich was not prejudiced by the incorrect information in the notice of additional minutes.

IV. Did Klaich receive effective assistance of counsel?

The defendant claims that his representation at trial was deficient in four respects: (1) counsel called Chris Bowman to the stand despite the risk that she would not provide favorable testimony; (2) counsel did not call Officer Arkovich as a witness despite the prospect of contradicting the testimony of Officer Marshall; (3) counsel failed to offer the defendant's negative drug test results; and (4) counsel withdrew the motion for new trial before the court could rule on it. Klaich also argues he suffered from the cumulative effect of counsel's errors.

We review these claims of ineffective assistance de novo because they have their basis in the Sixth Amendment to the United States Constitution. *See State v. Vance*, 790 N.W.2d 775, 785 (Iowa 2010). To establish ineffective assistance of counsel, a defendant must prove by a preponderance of the evidence both trial counsel's failure to perform an essential duty, and resulting prejudice. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Dudley,* 766 N.W.2d 606, 620 (Iowa 2009).

We presume counsel's performance falls within a range of reasonable professional assistance. *State v. Ondayog*, 722 N.W.2d 778, 785 (Iowa 2006).

What in hindsight Klaich views as missteps by his trial attorney, during the heat of trial could be considered tactical decisions. Because "[i]mprovident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily amount to ineffective assistance of counsel," postconviction proceedings are often necessary to discern the difference between improvident trial strategy and ineffective assistance. *Id.* at 786 (citations omitted). Appellate courts "do not delve into trial tactics and strategy 'when they do not appear to have been misguided.'" *Id.* We think a more fully developed record, including the testimony of trial counsel, would assist a court in deciding whether counsel's performance fell below reasonable professional norms and resulted in prejudice to the defendant. We preserve the defendant's claims of ineffective assistance of counsel for postconviction proceedings.

AFFIRMED.