IN THE COURT OF APPEALS OF IOWA

No. 6-525 / 05-0757
Filed September 7, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DENNIS KEITH PETERSEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Audubon County, Jeffrey L. Larson (suppression hearing), and James M. Richardson (trial), Judges.

Defendant appeals following conviction and sentence for possession of methamphetamine with intent to deliver while in possession of a firearm, and conspiracy to possess methamphetamine with the intent to deliver. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Stephan Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, and Francine O'Brien Andersen, County Attorney, for appellee.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

ZIMMER, J.

Dennis Petersen appeals following conviction and sentence for possession of methamphetamine with intent to deliver while in possession of a firearm, in violation of Iowa Code sections 124.401(1)(b)(7) and 124.401(1)(e)(3) (2003), and conspiracy to possess methamphetamine with the intent to deliver, in violation of sections 124.401(1)(b)(7) and 706.1.[1] We affirm Petersen's convictions and preserve his ineffective assistance of counsel claims for a possible postconviction proceeding.

I. Background Facts and Proceedings.

Dennis Petersen was involved in a dispute with his brothers Kenny and Scott. The brothers arranged to meet on October 2, 2004, at the Chadwick Truck Stop (CTS), located in Audubon, Iowa, to settle the matter. Several members of the Petersen family were present, and a fight that began between Petersen and Kenny eventually involved not only Scott but the brothers' parents. During the altercation Petersen drew a .22 caliber six shot revolver from his back pocket.

Chief Deputy Sherriff Jacob Matthews arrived at the scene after dispatch received a 911 call stating that a fight was in progress at CTS and that a gun was involved. Deputy Matthews secured the revolver and searched Petersen for weapons. He found pepper spray in Petersen's back pocket.

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[1] The jury in fact found Petersen guilty of one count of "Manufacture, and/or Possess with Intent to Manufacture and/or Deliver, Methamphetamine" while possessing a firearm, and one count of "Conspiracy to Manufacture, and/or Possess with Intent to Manufacture and/or Deliver, Methamphetamine." However, in his motion for a new trial and for judgment of acquittal Petersen characterized his convictions as possession with intent to deliver and conspiracy with intent to deliver, and has modeled his arguments accordingly. We therefore limit our analysis to these alternatives, which are the alternatives most consistent with the evidence in this case.

Deputy Matthews also conducted a visual inspection of the cab of Petersen's semi tractor,[2] which was parked in the middle of the CTS parking area with the driver's side door open. Deputy Matthews observed a holster laying on the driver's side seat and a box of ammunition between the seats. He asked Petersen who the gun belonged to, and Petersen admitted the gun was his. Deputy Matthews confirmed that Petersen did not have a permit to carry a concealed weapon or to purchase a firearm.

Deputy Matthews transported Petersen to the sheriff's department and applied for a warrant to search his home, pickup truck, and semi. A warrant was issued allowing officers to search those areas for "firearms and accessories, ammunitions, pepper spray, or other weapons or items used for weapons," and a number of other specifically identified items related to the possession, transportation, ordering, purchase, or distribution of firearms. Officers executed the search warrant at all three locations but, due to a manpower shortage, were unable to do so until several hours after Petersen's arrest.

Officers allowed one of Petersen's relatives to move the semi off to the side of the parking area. When officers departed CTS, the semi was locked. However unbeknownst to law enforcement, Gina Stork, an acquaintance of Petersen, was in the sleeper portion of the semi. Stork had accompanied Petersen on a two-week trip, and the pair had returned to Audubon immediately before the confrontation at CTS. Stork remained in the semi until sometime after

[2] The semi tractor was owned by Larry Boyens, but was driven by Petersen, and had the name "Petersen" painted on the door to the cab.

officers initially left the scene, but before they returned to execute the search warrant. According to Stork, when she left the semi she did not lock it.

During the search of the semi tractor later that night, police discovered approximately forty grams of "ice" methamphetamine, a pure form of methamphetamine that is not typically manufactured in the area and has a street value of $100 to $200 per gram. Police also discovered drug paraphernalia, including eleven glass pipes, a small shovel that can be used to divide up quantities of drugs, and plastic bags. One of the glass pipes was found in a red sports bag, along with a number of items that were later identified as belonging to Stork. The methamphetamine, shovel, and all the remaining pipes were discovered inside a blue sports bag. The pipes were wrapped in paper towels, and the methamphetamine was inside two plastic bags that had been placed inside a mismatched pair of socks. The blue bag also contained men's and women's clothing. Stork admitting using both bags to carry her belongings to and from the shower during her trip with Petersen. Additional drug-related paraphernalia, including plastic bags, baby powder, and paper towels similar to that wrapped around the glass pipes, was seized from Petersen's home.

Petersen was charged with the possession and conspiracy counts noted above, as well as weapons and assault charges.[3] He moved to suppress the evidence seized from his home and the semi, asserting the warrant was not supported by probable cause and, alternatively, that even if the warrant was itself valid, the seizure of items related to the drug charges was not authorized by the

[3] Petersen was also charged with going armed with intent in violation of sections 708.1 and 708.8, assault causing serious injury in violation of sections 708.1 and 708.2, and carrying weapons in violation of section 724.4.

warrant or any exception to the warrant requirement. The court denied the motion, finding the warrant was supported by probable cause and that all the evidence was either seized pursuant to the search warrant or was in plain view.

Following trial, a jury found Petersen guilty on all counts, and he was sentenced accordingly. Petersen appeals from his convictions for possession with intent and conspiracy. He contends (1) the district court erred in denying his motion to suppress, (2) the court erred in denying his motion for judgment of acquittal because his convictions for possession of methamphetamine with intent to deliver and conspiracy to possess methamphetamine with the intent to deliver were not supported by substantial evidence, and (3) his trial counsel was ineffective for failing to object to certain testimony.

II. Motion to Suppress Evidence.

We conduct a de novo review of the court's denial of Petersen's motion to suppress. *State v. Freeman*, 705 N.W.2d 293, 297 (Iowa 2005). However, to the extent Petersen challenges the existence of probable cause to support the search warrant, we do not make an independent determination of probable cause. *State v. Green*, 540 N.W.2d 649, 655 (Iowa 1995). Rather, we decide only whether the issuing judge had a substantial basis for concluding probable cause existed. *Id*. "Close cases must be resolved in favor of upholding warrants, as public policy is promoted by encouraging officers to seek them." *Id*. Upon such review, we conclude the court did not err in denying the motion to suppress.

Petersen first asserts the warrant did not satisfy the Fourth Amendment's requirement of "particularly describing the . . . things to be seized," and that "[b]ecause of the overly broad, non-specific nature of the [warrant] application,

the affiant was unable to demonstrate a nexus between the things to be seized and the commission of the crime." We reject both contentions.

Probable cause to issue a search warrant exists when "a reasonable person would believe a crime was committed on the premises or that evidence of a crime could be located there." *State v. Simpson*, 528 N.W.2d 627, 634 (Iowa 1995). The issuing judge must make "a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . 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, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983). The warrant application must demonstrate an adequate nexus between the criminal activity, the place to be searched, and the items to be seized. *See State v. Gogg*, 561 N.W.2d 360, 365 (Iowa 1997) (considering "'the type of crime, the nature of the items involved, the extent of the defendant's opportunity for concealment, and the normal inferences as to where the defendant would be likely to conceal the items'" (citation omitted)).

In addition, a search warrant must be reasonably specific. *State v. Todd*, 468 N.W.2d 462, 467 (Iowa 1991). A warrant will not be upheld if the description of items to be seized is "'so broad and vague it necessarily clothed the warrant-executing officers with interdicted discretion regarding items to be seized.'" *Munz v. State*, 382 N.W.2d 693, 699 (Iowa Ct. App. 1985). However, a description is "sufficiently particular" if it allows law enforcement

> reasonably to ascertain and identify the things to be seized. When a warrant affiant has probable cause but cannot give an exact description of the materials to be seized, a warrant will generally be upheld if the description is as specific as the circumstances and the nature of the activity under investigation permit.

Todd, 468 N.W.2d at 467.

The warrant application in this case set forth Deputy Matthews's personal knowledge of the events of that day, including Petersen's illegal possession of weapons and Petersen's admission the firearm had been in his semi. It also contained information provided by Petersen's wife regarding the presence of firearms in their jointly owned residence. Finally, the application set forth Deputy Matthews's knowledge, based on his training and experience as a police officer, regarding the type of items relating to the possession, purchase, and transfer of weapons often found in the residence and other locations occupied by a "weapons enthusiast," including paper and electronic records and information, and secured asset locations such as safe deposit boxes and safes.

When this information is viewed in a common-sense manner, including all reasonable inferences that support a finding of probable cause, *Gogg*, 561 N.W.2d at 364, it provides an adequate nexus between the alleged criminal activity of illegal weapons possession, Petersen's residence and vehicles, and the description of items to be seized. Moreover, the descriptions of items were as specific as circumstances permitted, and allowed officers to reasonably ascertain and identify the things to be seized.

Probable cause to issue this particular warrant is not lacking, as Petersen suggests, merely because many of the items described in the warrant, including "records, credit card statements, or receipts," items related to secured asset locations, and various forms of paper and electronic information, are commonly found in personal residences. The common and unremarkable nature of the

items to be seized can defeat probable cause under certain circumstances, such as when a warrant application attempts to establish a causal nexus through information a defendant's home contains property similar to that involved in a crime. *See Gogg*, 561 N.W.2d at 365. In such cases, where the items are of the kind commonly found in personal residences, and there is no evidence the items in the defendant's possession are unusual or unique, there is no reason to believe those items are the same as those involved in the particular crime. *Id*. at 366. Thus, the nexus between the criminal activity, the place to be searched, and items to be seized is lacking. Here, in contrast, evidence of Petersen's illegal possession of weapons, combined with the deputy's knowledge that the items sought could provide evidence regarding Petersen's possession, purchase, or transfer of illegal weapons, provides an adequate causal nexus.

Petersen also asserts officers exceeded the scope of the warrant when they seized the glass pipes and methamphetamine from the blue sports bag located in the sleeper section of the semi. He contends officers were not justified in believing they would discover weapons or related accessories inside of the socks or within the paper-wrapped glassware. We conclude this contention is also without merit.

The reasonableness of the officer's actions "'must be judged from the perspective of a reasonable officer on the scene . . . .'" *Bailey v. Lancaster*, 470 N.W.2d 351, 359 (Iowa 1991) (quoting *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 1871, 104 L. Ed. 2d 443, 455 (1989)). Petersen himself notes the nature of the items within the paper and socks was not readily apparent, beyond the fact the paper was wrapped around some kind of glass, and the

socks were "heavy" and appeared to contain plastic bags. Significantly, the warrant encompassed items of various sizes, and any number of these—including ammunition, keys, film, cell phones, audio tapes, and electronic and digital media—could have been contained within the paper or socks. Under the circumstances, it was not unreasonable for the officers to believe the paper and socks could contain an item covered by the warrant. *See Munz*, 382 N.W.2d at 699 (concluding scope of warrant not exceeded where areas searched were "legitimate locations . . . given the size of the objects to be seized"). When the search revealed the paper and socks contained incriminating and illegal items, the officers were authorized to seize those items even though they were not covered by the warrant. *See State v. Swaim*, 412 N.W.2d 568, 575 (Iowa 1987). The court did not err in denying Petersen's motion to suppress.

III. Substantial Evidence.

Petersen also asserts that his possession with intent and conspiracy convictions are not supported by substantial evidence. We review these claims for the correction of errors at law. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997). We uphold the jury's verdict if the record reveals evidence that would allow a rational trier of fact to find the defendant guilty beyond a reasonable doubt. *Id*. In making this determination, "[w]e view the evidence in the light most favorable to the verdict," including all reasonable inferences. *State v. Gay*, 526 N.W.2d 294, 295 (Iowa 1995). Weighing the evidence and assessing the credibility of witnesses are matters left to the jury, and not this court on appeal. *See State v. Wells*, 629 N.W.2d 346, 356 (Iowa 2001); *State v. Button*, 622 N.W.2d 480, 483 (Iowa 2001).

A. Possession with Intent to Deliver.

In order to prove Petersen possessed the methamphetamine with the intent to deliver the State had to prove three elements: (1) Petersen knowingly possessed methamphetamine, (2) he knew the substance was methamphetamine, and (3) he possessed the methamphetamine with the specific intent to deliver it. *See* Iowa Code § 124.401(1)(b)(7); *State v. Scalise*, 660 N.W.2d 58, 63 (Iowa 2003). Petersen contends the State failed to prove the first element, his knowing possession of the methamphetamine.

To prove unlawful possession of a controlled substance, the State must prove the defendant "'(1) exercised dominion and control [i.e., possession] over the contraband, (2) had knowledge of its presence, and (3) had knowledge that the material was a controlled substance.'" *State v. Bash*, 670 N.W.2d 135, 137 (Iowa 2003) (citation omitted). Because the methamphetamine was not found on Petersen's person, the State was required to prove his constructive possession of the drugs. *State v. Carter*, 696 N.W.2d 31, 38-39 (Iowa 2005). Because the methamphetamine was found in an area accessible to both Petersen and Stork, Petersen's "'knowledge of the presence of the substances on the premises and [his] . . . ability to maintain control over them . . . will not be inferred but must be established by proof.'" *Id.* at 39 (citation and emphasis omitted). Constructive possession will be found when "'all of the facts and circumstances . . . allow a reasonable inference that the defendant knew of the [controlled substance's] presence and had control and dominion over [it].'" *Id*. at 39-40.

Here, the methamphetamine was found in Petersen's vehicle, in a bag containing Petersen's clothing. *See id*. at 39 (noting relevance of these factors).

In addition, Stork denied knowledge of the drugs, or that she owned the socks within which the drugs were secreted. *See id.* at 40 (same). We are mindful of that other factors support Stork's constructive possession of the drugs, including her use of the bag in which they were found. However, there is no requirement that constructive possession of a controlled substance be exclusive to the defendant. When we view the evidence in the light most favorable to State, we conclude it is sufficient to permit a reasonable inference Petersen knew of the drugs' presence and had control and dominion over them. We accordingly affirm his conviction for possession of methamphetamine with intent to deliver.[4]

B. Conspiracy.

In order to find that Petersen conspired to possess methamphetamine with the intent to deliver, the State was required to demonstrate four elements. *See State v. Speicher*, 625 N.W.2d 738, 741 (Iowa 2001); *see also* Iowa Code § 706.1(1)-(4). Only the first of these—that Petersen agreed with one or more persons, in this case Stork, that one or both of them would deliver methamphetamine—is at issue on appeal.[5] Petersen contends there is

[4] Petersen also asserts there was insufficient evidence to support possession because it is possible someone, such as one of his family members, planted the methamphetamine in the semi while it was sitting unlocked at CTS. As the State points out, there is no affirmative evidence the drugs were planted, and the nature and location of the evidence seized by law enforcement supports the conclusion that the methamphetamine belonged to someone in the semi. Moreover, the mere fact that someone had the opportunity to plant the methamphetamine does not require reversal of Petersen's conviction. The question on appeal is not whether the jury could have reached a different conclusion, but whether the evidence, when viewed in the light most favorable to the State, supports the conclusion the jury actually reached. *State v. Turner*, 630 N.W.2d 601, 610 (Iowa 2001).

[5] The State was further required to prove that Petersen entered into the agreement with the intent to deliver methamphetamine, that he and/or Stork committed an overt act in

insufficient evidence to support the existence of any agreement between himself and Stork. We cannot agree.

The agreement "need not be formal or express, but may be a tacit understanding; the agreement may be inherent in and inferred from the circumstances, especially declarations, acts, and conduct of the alleged conspirators." *State v. Casady*, 597 N.W.2d 801, 805 (Iowa 1999). Because a conspiracy is by nature clandestine, it will often rest upon circumstantial evidence and inferences drawn from that evidence. *Id*. at 804-05. We must indulge in "[a]ll legitimate inferences arising reasonably and fairly from the evidence" to support a verdict of conspiracy. *Id*. at 804-05 (citation omitted). However, the evidence must show more than Stork's mere presence at the scene or association with Petersen, because "without proof of any involvement from which to infer agreement, this essential element of the offense rests on nothing but conjecture and speculation." *See Speicher*, 625 N.W.2d at 742-43.

When we review the evidence in light of all legitimate inferences, we conclude it is sufficient to establish more than Stork's mere association with Petersen or her simple proximity to the contraband. Given the location of the various drug-related items, Stork's extended presence in the semi up to and including Petersen's arrest, the presence of Stork's possessions in the red beg, the presence of women's clothing in the blue bag, and Stork's admission that she had used both the bags, it is reasonable to infer Stork was not only aware of the drugs and drug paraphernalia located in the semi, but that she exercised at least

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furtherance of the delivery of methamphetamine, and that Stork was not a law enforcement agent or working with law enforcement when the conspiracy began. *Id*.

joint possession over some or all of the items. In light of the remaining record, including the fact that the amount of the methamphetamine and the number of glass pipes was inconsistent with personal use, a jury could reasonably infer a tacit agreement between Stork and Petersen to possess the methamphetamine with an intent to deliver. We accordingly affirm Petersen's conspiracy conviction.

IV. Ineffective Assistance of Counsel.

Finally, Petersen asserts his trial counsel was ineffective for eliciting or failing to object to (1) officer testimony that it is not unusual for methamphetamine users to have a high level of sexual activity and that sexual content was found on two cell phones as well as on a laptop computer that belonged to Stork; (2) testimony from Petersen's wife that Petersen "knew what methamphetamine was" because eight years ago she found a "powdery substance" on the visor mirror in Petersen's pickup truck and in 2003 had found a burnt piece of foil with Petersen's paperwork; (3) officer testimony that police had seized a radar detector and scanner from the semi tractor, that it was illegal for truck drivers to possess these items, and that the scanner was tuned to a police frequency and was therefore being used illegally; and (4) Stork's invocation of her Fifth Amendment rights in front of the jury.

To establish ineffective assistance of counsel, Petersen must prove both that his attorney's performance fell below "an objective standard of reasonableness," and "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed.2d 674, 693 (1984). Typically, ineffective assistance of counsel claims are preserved for a possible postconviction proceeding, to allow a full development of

the record regarding counsel's actions. *State v. DeCamp*, 622 N.W.2d 290, 296 (Iowa 2001). We address such a claim on direct appeal only where the record establishes that either (1) as a matter of law the defendant cannot prevail on the claim asserted or (2) both prongs of the *Strickland* test are satisfied, and a further evidentiary hearing would not change the result. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003).

We find the record insufficient to resolve Petersen's ineffective assistance of counsel claims. We accordingly preserve those claims for a possible postconviction proceeding.

V. Conclusion.

We have considered all of Petersen's contentions, whether or not specifically discussed. We affirm Petersen's convictions and preserve his ineffective assistance of counsel claims for a possible postconviction proceeding.

AFFIRMED.