IN THE COURT OF APPEALS OF IOWA

No. 6-613 / 05-1398
Filed September 21, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT JOSEPH PREHM,
Defendant-Appellant.

Appeal from the Iowa District Court for Wright County, David R. Danilson (motion to suppress) and Kurt L. Wilke (sentencing), Judges.

Robert Prehm appeals the judgment and sentence entered following a jury verdict finding him guilty of second-degree arson, second-degree burglary, and third-degree burglary. **AFFIRMED IN PART; SENTENCES VACATED AND REMANDED FOR RESENTENCING.**

Linda Del Gallo, State Appellate Defender, and Robert Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kristin Guddall, Assistant Attorney General, Eric R. Simonson, County Attorney, and Barbara Godbout, Assistant County Attorney, for appellee-State.

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

EISENHAUER, J.

Robert Prehm appeals the judgment and sentence entered following a jury verdict finding him guilty of second-degree arson, second-degree burglary, and third-degree burglary. He contends his counsel provided ineffective assistance in arguing his motion to suppress and the district court failed to give adequate reasons for imposing consecutive sentences.

Prehm's convictions arose from events on the evening of December 12, 2003. Fire was set to a Clarion home. A law enforcement officer observed footprints in the snow near the home at around 8:25 p.m. At 8:45 that same evening, Prehm arrived at Patrick Dillon's home in a panicked state. He told Dillon he had set the fire, stating it was the fourth fire he had set. Prehm asked Dillon for his shoes so law enforcement would not be able to discover his involvement with the arson. When Dillon refused his request, Prehm stated he would go to the home of Kurt Kirstein and borrow shoes from him.

Dillon called police and told them what Prehm had said. He agreed to wear a recording device and later the same evening he met with Prehm. With the police listening, Prehm admitted he obtained shoes from Kirstein and reiterated that he had set the fire in question and three other fires that night. He claimed he started the fire because of debt he owed to a Mexican drug cartel and threatened he would burn down Kirstein's home if necessary.

Following their conversation, officers obtained search warrants for Prehm's apartment and Kirstein's home. They discovered Kirstein's shoes in Prehm's apartment. Although Prehm claimed he had just bought them, the shoes had been issued to Kirstein while in prison and had his name inside them.

In Kirstein's home, officers found boots with gasoline on them. In the garage they discovered a soap bottle with traces of gasoline. Kirstein stated he had not given Prehm permission to go into his home or take his shoes, and did not know if the boots they discovered belonged to Prehm.

On January 26, 2004, Prehm was charged with second-degree arson, second-degree burglary, and third-degree burglary. He filed a motion to suppress the evidence discovered in the execution of the search warrants. A hearing was held. Although the motion was untimely, the district court rejected the motion on the merits. Following a June 2005 trial, Prehm was found guilty on all three counts. He was sentenced to two ten-year terms of incarceration to be served consecutively, and a five-year term of incarceration to be served concurrently.

Prehm first contends his trial counsel was ineffective in arguing the motion to suppress. Although the searches of his apartment and Kirstein's home occurred at approximately 1:44 a.m. and 2:20 a.m. respectively, the time stamp on the warrant indicated the magistrate faxed it to the Clarion Police Department at 2:58 a.m. Prehm argues counsel breached an essential duty when he failed to obtain the magistrate's phone records to prove the search warrants were obtained after the searches occurred.

We normally preserve ineffective assistance claims to allow development of the record concerning counsel's conduct. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). However, if the record is sufficient we may decide the issue on direct appeal. *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006). Here we conclude the record is sufficient to decide this issue. We review claims of

ineffective assistance of counsel de novo. *State v. McBride,* 625 N.W.2d 372, 373 (Iowa Ct. App. 2001). To establish an ineffective assistance of counsel claim a defendant must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. *Wemark v. State,* 602 N.W.2d 810, 814 (Iowa 1999). The defendant has the burden of proving both elements of his ineffective assistance claim by a preponderance of the evidence. *Ledezma v. State,* 626 N.W.2d 134, 145 (Iowa 2001).

Assuming arguendo that counsel failed to perform an essential duty, we conclude Prehm has failed to show he was prejudiced by counsel's failure to procure the magistrate's phone records. Counsel did obtain police department phone records and offered exhibits to show the timing of the endorsements on the search warrant and the search.[1] Lieutenant Brian Jensen testified at the suppression hearing that he was present when the warrant applications were faxed to the magistrate. Lieutenant Jensen testified that the application for warrants were faxed to the magistrate at 1:05 a.m. and re-faxed at 1:08 a.m. and 1:21 a.m. He testified that he then received the warrant and the searches were conducted. Lieutenant Jensen further testified that the time stamps on the fax machine were inaccurate because he had obtained the police department's phone records to verify when the faxes occurred. Three other law enforcement offices also testified at the hearing, claiming they had the warrants prior to conducting the searches. The trial court found the evidence proved the searches were conducted after the warrants were issued. Given the evidence presented at the suppression hearing and the overwhelming evidence of defendant's guilt,

[1] Counsel was apparently confused about the magistrate's phone number, but this confusion was corrected at the hearing.

particularly his admissions recorded by the police, we conclude Prehm has failed to show how he was prejudiced by counsel's failure to obtain the magistrate's phone records.

Prehm also contends the district court erred in failing to state on the record its reasons for sentencing Prehm to consecutive sentences. The district court must "state on the record its reason for selecting the particular sentence." Iowa R. Crim. P. 2.23(3)(*d*). The court must provide specific reasoning regarding why consecutive sentences are warranted in the particular case. *State v. Jacobs,* 607 N.W.2d 679, 690 (Iowa 2000). The State concedes and we agree the district court failed to state any reasons on the record for the sentences imposed. Accordingly, the sentences are vacated and we remand to the district court for resentencing.

AFFIRMED IN PART; SENTENCES VACATED AND REMANDED FOR RESENTENCING.