IN THE COURT OF APPEALS OF IOWA

No. 0-031 / 09-0616
Filed March 10, 2010

KENNY CHRIS HEMM,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Wapello County, Joel D. Yates, Judge.

Kenny Hemm appeals the district court decision denying his application for postconviction relief. **AFFIRMED.**

Michael O. Carpenter of Gaumer, Emanuel, Carpenter & Goldsmith P.C., Ottumwa, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber and Douglas Hammerand, Assistant Attorneys General, and Allen Cook, County Attorney, for appellee State.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

DANILSON, J.

Kenny Hemm appeals the district court decision denying his application for postconviction relief. He alleges he received ineffective assistance of trial counsel. We affirm.

I. Background Facts and Proceedings.

Hemm was arrested for a chain of incidents that occurred on April 16 and 17, 2000, involving fires at his residence and two motor vehicles. Our May 24, 2006 ruling on Hemm's direct appeal in *State v. Hemm*, No. 04-1419 (Iowa Ct. App. May 24, 2006) contains a factual background regarding the incident, which we reiterate in part:

> The victim of this gruesome homicide was Larry Pippenger, a wheel chair bound paraplegic. Although he didn't live with Hemm, Pippenger was to have spent the night of April 16-17, 2000 in Hemm's house in Eldon, Iowa.
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> Authorities responded to a 911 call at 2:09 a.m. on April 17, 2000. They found Hemm's house engulfed in fire. No one was found in the home. A second 911 call at 3:11 a.m. reported a car fire at the home of Hemm's mother and stepfather in Eldon. Arriving, the officers found Hemm's car on fire and Hemm in the house.
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> Hemm related a rather bizarre chain of events. He said he awoke in his home and discovered the fire. He ran out of the house, noting that Pippenger, who had been sleeping on the couch in the living room, was not there, but his wheel chair was outside on the ground. Hemm saw a van driving away and he pursued it until he realized his own car was on fire. He turned around, drove past his own burning house to his mother's and stepfather's house. He apparently didn't tell them about the fires, but one of them discovered Hemm's car was burning and reported it. At various times Hemm related somewhat inconsistent versions of this scenario to different investigators.
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> Later that morning another car fire was reported at an abandoned house outside Eldon [on River Road]. Pippenger's body was found in that burning vehicle. He had been decapitated, dismembered, and his genitals had been placed in his mouth. His hands and feet were never located.

Hemm was charged with murder in the first degree, in violation of Iowa Code section 707.2(1) (1999), and arson in the second degree, in violation of section 712.3. The State alleged Hemm killed Pippenger in his home, set fire to the house to cover up the killing, then moved the body to a vehicle outside Eldon and later set it on fire. In April 2001, the jury convicted Hemm of both crimes.

On direct appeal, this court found error on several evidentiary issues, reversed Hemm's conviction, and remanded to the district court for a new trial. *See State v. Hemm*, No. 01-0805 (Iowa Ct. App. Feb. 12, 2003). At Hemm's second trial, the jury again returned guilty verdicts on both charges: murder in the first degree and arson in the second degree. The trial court subsequently entered a judgment of conviction on both counts and sentenced him accordingly.

Hemm's conviction was affirmed on direct appeal. *See State v. Hemm*, No. 04-1419 (Iowa Ct. App. May 24, 2006). On October 2, 2006, Hemm filed a pro se application for postconviction relief. On December 12, 2006, Hemm's counsel filed an amended petition, alleging ineffective assistance of counsel. Following a hearing on February 4, 2007, the district court denied Hemm's application. Hemm now appeals.

II. Scope and Standard of Review.

We review postconviction relief proceedings for errors at law. Iowa R. App. P. 6.907 (2009); *Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008). Under this standard, we affirm if the court's fact findings "are supported by substantial evidence and if the law was correctly applied." *Harrington v. State*, 659 N.W.2d 509, 520 (Iowa 2003). Claims concerning alleged constitutional violations, including ineffective-assistance-of-counsel claims, are reviewed de novo. *Id.*;

see also State v. Decker, 744 N.W.2d 346 (Iowa 2008). We give weight to the lower court's determination of witness credibility. *Millam*, 745 N.W.2d at 721.

III. Merits.

To establish a claim of ineffective assistance of counsel, a defendant must prove (1) counsel failed to perform an essential duty and (2) prejudice resulted to the extent it denied the defendant a fair trial. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). A defendant's failure to prove either element by a preponderance of the evidence is fatal to a claim of ineffective assistance. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003).

To prove counsel breached an essential duty, a defendant must overcome a presumption that counsel was competent and show that counsel's performance was not within the range of normal competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). Although counsel is not required to predict changes in the law, counsel must exercise reasonable diligence in deciding whether an issue is worth being raised. *State v. Dudley*, 766 N.W.2d 606, 620 (Iowa 2009). In accord with these principles, we have held that counsel has no duty to raise an issue that has no merit. *Id.* To prove prejudice resulted, a defendant must show there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001).

Because counsel has no duty to raise a meritless issue, the validity of Hemm's constitutional claim must be determined. *See Dudley*, 766 N.W.2d at 620. "If his constitutional challenges are meritorious, we will then consider

whether reasonably competent counsel would have raised these issues and, if so, whether [Hemm] was prejudiced by his counsel's failure to do so." *See id*.

In this case, Hemm contends his trial counsel was ineffective in failing to file a motion to suppress the evidence seized during the execution of the two search warrants issued for Hemm's house and garage on April 17 and 21, 2000. He contends the warrants were "obviously and facially defective" and his counsel therefore breached an essential duty by failing to challenge them. Hemm alleges he was prejudiced by this omission because there was a "reasonable probability that the suppression of the evidence seized during the execution of the search warrants would have changed the outcome of the trial."

The Fourth Amendment to the Constitution of the United States provides that no warrants shall be issued unless "supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." U.S. Const. Amend IV; *see also* Iowa Const. art. I, § 8 (Iowa's counterpart to the Fourth Amendment of the United States Constitution). "A major objective of this amendment is to prohibit the use of a 'general' warrant and avoid 'a general, exploratory rummaging in a person's belongings.'" *State v. Malloy*, 409 N.W.2d 707, 709 (Iowa Ct. App. 1987) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S. Ct. 2022, 2038-39, 20 L. Ed. 2d 564, 583 (1971)). "[E]vidence obtained in violation of the fourth amendment may not be used in criminal proceedings against the victim of an illegal search and seizure." *State v. Mehner*, 480 N.W.2d 872, 875 (Iowa 1992).

Hemm argues the warrants that authorized the searches were not "sufficiently particular" in describing the evidence that police were to search for

and seize. Hemm analyzes several cases in support of his argument that the warrants in the instant case were unconstitutional. He contends the warrants at issue allowed officers to conduct merely a "general search," and thereby did not limit the discretion of the officers executing the warrants or give sufficient notice of the objects of the search.

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 [or her], . . . 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. *See 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 to reasonably 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 (citations omitted).

A. April 17 Warrant.

The April 17, 2000 warrant was obtained very early in the investigation—before officers discovered the burned car on River Road and Pippenger's remains within the car. At the time the warrant was obtained, officers merely knew that Hemm's house and Hemm's car had both caught on fire within an hour, and that Pippenger (who was staying at Hemm's house that night) was missing. Officers were suspicious of Hemm, however, because his stories were not consistent and his clothes were clean with no sign he had been around the fires, although he claimed he awoke to find his house completely on fire and that his car had been burning while he drove it. The warrant authorized officers to search Hemm's house and garage for:

> Any and all materials relevant and useful to the investigation of the possible intentional setting of the fire at 306 Elm St. Also any evidence and information relevant to the whereabouts of Larry K. Pippenger.

Evidence seized pursuant to this warrant included a plastic shower curtain with three smears of blood containing DNA matching Pippenger's and a piece of blanket matching a second piece of blanket that was later found with Pippenger's decapitated head.

The affidavit supporting the warrant application set forth Deputy Sheriff Justin Klodt's personal knowledge of the investigation, including the fact that Fire Chief Donald Harness believed the fire at Hemm's residence was non-accidental. The affidavit contained information relating that Hemm had supposedly driven his burning vehicle in search of Pippenger for approximately an hour, before arriving at his mother's house where firefighters found the vehicle fully engulfed in flames. The affidavit also set forth information regarding Hemm's refusal to come to the sheriff's office later that evening to discuss the whereabouts of Pippenger and the nature of the two fires, and Hemm's statements that there was a ten-thousand dollar "hit" out on Pippenger.

Given the nature of the circumstances that existed at the time the warrant was executed, it would have been impossible for the officers to be more specific as to what type of evidence they were seeking. *See Malloy*, 409 N.W.2d at 708. Officers knew that two fires, likely non-accidental, had occurred. Pippenger was missing, and Hemm's house was the last place he had been seen. Officers had reason to be suspicious of Hemm and to believe Pippenger was a victim of some crime. However, at that time, officers did not yet have enough information to say what crime had been committed or by whom.

Under the facts of this case, we conclude the warrant authorizing officers to search for and seize "any evidence and information relating to the whereabouts of Larry Pippenger" was sufficiently particularized. This language essentially seeks to search for the person or body of Larry Pippenger or evidence of the whereabouts of either. A similar description was approved in the case of a missing person in *United States v. Hibbard*, 963 F.2d 1100, 1101 (8th Cir. 1992).

In *Hibbard*, the warrant sought to search for "[a]ny evidence or fruits of any crime that may have occured [sic] concerning the were abouts [sic] or whether foul play is involve in the disappearance of Shelly Ramsey." *Id*. The court noted that Ramsey had been missing for six days and had last been seen by the defendant. *Id*. In finding that the issuing judge had a substantial basis for authorizing the search of the defendant's residence the court noted:

> The purpose of the particularity requirement is to prevent a general exploratory rummaging through a person's belongings. "We review the specificity of the search warrant under a 'practical accuracy' standard; the degree of specificity may vary according to the circumstances and type of items sought." *United States v. Pillow*, 842 F.2d 1001, 1004 (8th Cir. 1988) (other citations omitted). Here, the search warrant limited the search to locating Shelly Ramsey or any evidence relating to her. Considering the circumstances of the case, we conclude that the warrant satisfied the practical accuracy standard.

Id. (internal citations omitted).

Similarly, the April 17 warrant in this case was as specific as circumstances permitted. The warrant limited the officers' discretion to search to locate Larry Pippenger or any evidence relating to him. *Id*.; *see also Todd*, 468 N.W.2d at 467.

In regard to the language concerning the "investigation of a possible intentional setting of the fire," such a catchall phrase does not cause the warrant to fail where one or more items sought have been particularly described. *See Todd*, 468 N.W.2d at 467. Because the item or items sought were sufficiently

described relative to Larry Pippenger, the warrant description is not overly broad by the inclusion of the catchall phrase. *See id*.[1]

For these reasons, we find that a motion to suppress the April 17 warrant would have been meritless. Hemm's trial counsel had no duty to file a meritless motion. *See Dudley*, 766 N.W.2d at 620. Because Hemm has failed to show counsel failed to perform an essential duty, we find his claim for ineffective assistance of counsel as it relates to the April 17 warrant must fail. *See Polly*, 657 N.W.2d at 465.

B. April 21 Warrant.

The April 21, 2000 warrant[2] was obtained after officers had made several critical findings, which gave investigators a better idea what they were looking for at Hemm's house and garage. At 11:09 a.m. on April 17, 2000, officers received a report about a car fire at an unoccupied farmhouse on River Road outside Eldon. Firefighters put out the fire and indicated that it had not been burning long before it was reported, and that it had been started intentionally using accelerants. The badly burned remains of Pippenger's body were on the front seat. Pippenger had been decapitated, and his head was wrapped in a garbage bag and a piece of blanket. He had been stabbed in the heart, his arms and legs had been sawed off, and his genitals had been amputated and were stuffed in his mouth. Along with Pippenger's body, a hacksaw, a miter saw, and the head of a

[1] We note that even without a warrant, fire officials were authorized to reenter the residence for a reasonable time to investigate the cause of the fire after it had been extinguished. *Michigan v. Tyler*, 436 U.S. 499, 510, 98 S. Ct. 1942, 1950, 56 L. Ed. 2d 486, 509 (1978).

[2] Evidence seized pursuant to this warrant included a number of hacksaw blades but no hacksaw, a miter box but no miter saw, and no hammer (although Hemm had reported having a hammer in his possession at his house on April 16 that he had used to work on Pippenger's car).

hammer were also found in the burned car. The warrant authorized officers to search Hemm's house and garage for: "Any and all materials relevant and useful to the investigation of the fire at 306 Elm Eldon and the death of Larry Pippinger."

We find that, given the nature of the circumstances that existed at the time the warrant was executed, it would have been possible for the officers to be more specific as to what type of evidence they were seeking. *See, e.g.*, *Malloy*, 409 N.W.2d at 708. By April 21, 2000, officers knew there were saw marks on the bones of Pippenger's arms and legs, and that a hacksaw and miter saw had been discovered in the burned car. Further, in a meeting with an insurance investigator on April 20, 2000, Hemm indicated he had used a hammer while working on Pippenger's car on April 16, 2000. These facts led officers executing the April 21 warrant to expect to find "either the presence of some saws or some items that might indicate that the saws that we found in the car might have originated in that location," or more specifically, "a hand miter saw, a hacksaw and hammer."

We therefore conclude the April 21 warrant authorizing officers to search for and seize "[a]ny and all materials relevant and useful to the investigation of the fire at 306 Elm Eldon and the death of Larry Pippinger" was too broad and not sufficiently particularized as circumstances then permitted. *Hibbard*, 963 F.2d at 1101; *see also Todd*, 468 N.W.2d at 467.

IV. Prejudice.

If we have erroneously determined the validity of the April 17 warrant, and because we have determined that the April 21 warrant was overly broad under the circumstances, we consider and conclude Hemm has failed to prove that he

was prejudiced by his attorneys' failure to file motions to suppress. *Ledezma*, 626 N.W.2d at 142 ("If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently."). To establish prejudice, Hemm must prove a reasonable probability that, but for his counsel's failure, the result of the proceeding would have been different. *Maxwell*, 743 N.W.2d at 196. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Ledezma*, 626 N.W.2d at 143 (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984)).

Even without any of the evidence seized by the warrants, there was no reasonable probability of a different result. *See Ledezma*, 626 N.W.2d at 144. The evidence reflects that three fires were intentionally started within about seven hours. The first fire was at Hemm's home and was reported by a neighbor at 2:09 a.m. The second fire was in Hemm's vehicle and was reported by Hemm's step-father at 3:15 a.m. The third fire was the fire set in the inoperable vehicle behind an unoccupied farmhouse not far from the other two fires. Hemm's statements reflect that he had visited the farmhouse and was familiar with the location. This latter fire was reported at 11:30 a.m. and once extinguished, the body of Larry Pippenger was located within the car. Pippenger was stabbed to death and his body was mutilated.

Hemm had the time and opportunity to set each fire and kill Pippenger. Hemm was physically capable of carrying the body of Larry Pippenger. The evidence also reflects by Hemm's own statement that he was personally present when his house was on fire and he was at his mother's home when his vehicle

was on fire. Hemm was also the last person to see Pippenger alive and according to his statement, allegedly chased Pippenger's abductors several miles. Notwithstanding his house being on fire, his vehicle being on fire, or his alleged friend Larry Pippenger being abducted, not once did Hemm call 911 or report these incidents to law enforcement. Officers only learned that Pippenger was missing after they located Hemm and inquired about his home being on fire.

Hemm was also reluctant to talk to law enforcement and his own insurance agent regarding the facts. His version of the limited facts he did divulge were inconsistent and difficult to believe (such as Hemm driving his car several miles while it was burning or on fire and Hemm's unaccounted-for absence after his house fire was reported and before he arrived at his mother's residence). Pippenger's clothes were with his body although Hemm claimed they both had retired for the night prior to Pippenger's alleged abduction. However, the evidence reflected that Pippenger always slept naked due to getting bed sores (contradicting Hemm's claim of an abduction in the middle of the night). Iowa Department of Criminal Investigation agent Mike Hiles also testified that the fires in Hemm's home and vehicle would have been impossible to escape from based upon Hemm's version of the facts. Hemm's statements regarding the doors to his home being locked and the distance and time that he chased the alleged the abductors were also contradicted.

Hemm told law enforcement officers that there was a $10,000 "hit" out on Pippenger, which if true, may have served as his motive. Others who Hemm suggested may have had a motive to kill Pippenger all testified and either denied their involvement or had confirmed alibis. Additionally, Pippenger did not reside

with Hemm, but was simply an overnight houseguest. Any abductors would have had to have known Pippenger was at Hemm's house that night.

There was also evidence that the investigators found one incendiary can near Pippenger's body which appeared to be a Zippo cigarette lighter fluid container, and officers observed Hemm possessing a Zippo lighter the morning of the house fire. Finally, Hemm's statements lacking credibility and consistency, along with his suspicious actions, lend support to the other incriminating evidence. Thus, we conclude the evidence seized from both warrants was cumulative and there was no reasonable probability of a different result even disregarding the evidence obtained via the search warrants. Moreover, counsel is not ineffective for failing to attempt to exclude evidence which is "not likely to be outcome determinative." *State v. Carberry*, 501 N.W.2d 473, 477 (Iowa 1993); *see also State v. Reynolds*, 670 N.W.2d 405, 415-16 (Iowa 2003).

There is even a less probability of a different result when the prejudice prong is viewed solely in respect to the April 21 warrant, and on the basis that the April 17 warrant was valid. Clearly, the evidence seized pursuant to the April 21 warrant played a small role in the State's case against Hemm and was cumulative to other admissible evidence (such as that gathered under the April 17 warrant, including blood matching Pippenger's DNA in Hemm's house and part of a blanket that was later found wrapped around Pippenger's decapitated head) bearing on the same point: the evidence tended to connect Hemm to Pippenger's remains and the burned car found on River Road. *See, e.g.*, *State v. Shanahan*, 712 N.W.2d 121, 138 (Iowa 2006). In particular, with all the other above-mentioned evidence indicating Hemm's guilt in this case, the

hacksaw blades and miter box found at Hemm's residence were not likely to have changed the verdict.

V. Conclusion.

We conclude Hemm's counsel did not render ineffective assistance by not attempting to suppress the evidence seized during the execution of the two warrants.

AFFIRMED.