IN THE COURT OF APPEALS OF IOWA

No. 7-592 / 06-1472
Filed December 12, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CENECA RONELE JOHNSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire, Judge.

Defendant appeals from his conviction following a jury trial for robbery in the second degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson and James Tomka, Assistant Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, William E. Davis, County Attorney, and Amy K. Devine, Assistant County Attorney, for appellee.

Heard by Vogel, P.J., and Mahan and Zimmer, JJ.

ZIMMER, J.

Ceneca Romele Johnson appeals from his conviction following a jury trial of robbery in the second degree. He claims the district court erred in finding his motion to suppress evidence obtained from an allegedly invalid search warrant was barred by the doctrine of res judicata. He further claims the district court violated his Sixth Amendment right to counsel by limiting the involvement of his standby counsel at trial. We affirm.

I. Background Facts and Proceedings.

On the morning of November 10, 2004, at about nine o'clock, Gary Thompson was getting ready to let his dogs outside when he noticed a strange car parked in front of his house. Thompson observed a man he later identified as Johnson get out of the car and walk towards the Metrobank in Davenport. Johnson was wearing a stocking cap and gloves, and he was carrying a white plastic bag. Thompson continued to watch the man because he "looked nervous." Thompson became suspicious, so he noted the description of the car and wrote down the license plate number.

Johnson returned to the car from the direction of the bank a short time later. Johnson and Thompson came "face-to-face" with one another near the car. Johnson was carrying "two bags full" of what Thompson assumed to be money. He pointed a weapon at Thompson and ordered him to turn around and walk away. After Johnson drove away, Thompson flagged down a passing police car. He reported what he had observed and gave the officer the license plate number of the car Johnson was driving.

The officer relayed the information given to him by Thompson to officers at the scene of a robbery that had been reported at Metrobank. Three tellers and the bank's branch manager were in the bank at the time of the robbery. The tellers observed a man they later identified as Johnson enter the bank at approximately nine in the morning on November 10. Johnson approached one of the tellers and told her to fill a white plastic bag he handed her with "fifties and hundreds" while pointing a gun at her. The teller filled the bag with money and gave it to Johnson, who walked out of the bank.

The police located a car matching the description given to them by Thompson and arrested Johnson in a nearby apartment. The car was registered to Lawrence Johnson, who informed the police "he was in the process of selling [the car] to Ceneca Johnson." Lawrence had last seen Johnson and his car the night before the robbery. After obtaining a search warrant for the apartment, the police discovered a BB pistol in the water tank of the toilet and a duffel bag containing a large sum of money equaling that reported taken from the bank during the robbery.

Johnson was charged with robbery in the first degree. He filed a motion to suppress evidence claiming the search warrant was not supported by probable cause. He argued the search warrant application failed to establish the credibility of Lawrence Johnson and an unnamed informant. Following a hearing, the district court denied Johnson's motion to suppress. The case proceeded to trial where Johnson represented himself with the assistance of standby counsel. The jury found Johnson guilty of robbery in the first degree, and he was sentenced to an indeterminate term not to exceed twenty-five years. Johnson appealed. We

reversed his conviction and remanded for a new trial based on our determination he was prejudiced by an erroneous jury instruction. *State v. Johnson*, No. 05-0558 (Iowa Ct. App. May 10, 2006).

On remand, Johnson continued to represent himself with the assistance of standby counsel. He filed a second motion to suppress evidence on August 3, 2006, again arguing the search warrant was not supported by probable cause because the application failed to establish the credibility of Lawrence Johnson. He also argued for the first time that he had standing to challenge the warrant as an overnight guest in the apartment and that the search warrant affidavit contained false statements. The district court denied Johnson's second motion to suppress on the basis of res judicata.

Johnson was found guilty of robbery in the second degree following his second jury trial. During the trial, the district court told standby counsel he could not assist Johnson unless Johnson requested him to do so. The district court denied Johnson's motion for a new trial and sentenced him to an indeterminate term not to exceed ten years.

Johnson appeals. He claims the district court erred in denying his August 3, 2006 motion to suppress evidence obtained from an allegedly invalid search warrant based on the doctrine of res judicata. He further claims the district court violated his Sixth Amendment right to counsel by limiting the involvement of his standby counsel at trial.

II. Scope and Standards of Review.

Our review of the district court's denial of Johnson's motion to suppress evidence obtained from an allegedly invalid search warrant in violation of the

Fourth Amendment is de novo. *State v. Seager*, 571 N.W.2d 204, 207 (Iowa 1997).

We review the district court's limitations on standby counsel's involvement at trial for an abuse of discretion. *State v. Cooley*, 468 N.W.2d 833, 837 (Iowa Ct. App. 1991); *cf. State v. Rater*, 568 N.W.2d 655, 657 (Iowa 1997) (conducting a de novo review of defendant's Sixth Amendment right to counsel and self-representation claims).

III. Discussion.

A. Motion to Suppress.

Johnson claims the district court erred in applying the doctrine of res judicata to deny his motion to suppress at his second trial. The State, on the other hand, argues Johnson was not prejudiced by the court's error, if any, in denying the motion on the basis of res judicata because the motion was without merit.[1] Assuming, arguendo, that the district court incorrectly applied the doctrine of res judicata in denying Johnson's motion to suppress, we find upon our de novo review that the search warrant was valid.

Under the Fourth Amendment of the United States Constitution, a search warrant must be supported by probable cause. *State v. Gogg*, 561 N.W.2d 360, 363 (Iowa 1997). A totality of the circumstances standard is used to determine whether probable cause has been established. *State v. Davis*, 679 N.W.2d 651, 656 (Iowa 2004). "The existence of probable cause to search a particular area

[1] Although not raised as an argument in its brief, the State asserted at oral argument that Johnson did not have standing as an overnight guest to challenge the search warrant. We need not and do not address the State's argument in this regard due to our conclusion that Johnson's challenges to the search warrant are without merit.

depends on whether a person of reasonable prudence would believe that evidence of a crime might be located on the premises to be searched." *Id.* The judge issuing the warrant must make a "'practical, common-sense decision, whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information,' probable cause exists." *Gogg*, 561 N.W.2d at 363 (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983)). "In reviewing the court's determination, we draw all reasonable inferences to support a court's finding of probable cause." *Davis*, 679 N.W.2d at 656. Due to our preference for warrants, any doubts are resolved in favor of their validity. *State v. Weir*, 414 N.W.2d 327, 330 (Iowa 1987).

In Johnson's August 3, 2006 motion to suppress, he argued Detective William Thomas made a "misleading statement in his affidavit which suggests that . . . Gary Thompson, saw the alleged perpetrator enter a bank" in violation of *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). In order to succeed on this ground, Johnson must establish Detective Thomas made "deliberately false statements in the warrant application or acted in reckless disregard for the truth." *State v. Green*, 540 N.W.2d 649, 656 (Iowa 1995).

Johnson does not argue Detective Thomas made deliberately false statements in the warrant application. Instead, he contends the detective's statement that "[t]he witness [Thompson] watched the suspect walk towards the Metro Bank" was made with reckless disregard for the truth because it suggested Thompson actually saw Johnson enter the bank. First, we do not believe the

statement misleadingly indicates that Thompson saw Johnson enter the bank. Rather, the statement accurately conveys what Thompson testified that he witnessed: "I . . . noticed him walking down the street towards the bank."

Second, in order to prove Detective Thomas made the statement with reckless disregard for the truth, Johnson must show the detective had serious doubts as to the veracity of the informant's statement or the circumstances evince obvious reasons to doubt the veracity of the allegations. *State v. Niehaus*, 452 N.W.2d 184, 187 (Iowa 1990). Nothing in the record suggests that Detective Thomas entertained doubts as to the veracity of Thompson's statement, or that the detective should have deduced the statement was possibly untruthful. Moreover, Johnson appears to be claiming the statement was simply "misleading" rather than untruthful. We find Johnson has not met his burden to prove Detective Thomas made statements in support of his warrant application in reckless disregard of the truth.

Johnson's motion to suppress also asserts the magistrate failed to establish the credibility of Lawrence Johnson before issuing the search warrant. Iowa Code section 808.3 (2003) "requires the magistrate to make a finding that the informant or the informant's information appears credible for reasons specified by the magistrate." *State v. Peck*, 517 N.W.2d 230, 232 (Iowa Ct. App. 1994). However, our supreme court has held that the required findings of section 808.3 apply only to confidential informants. *Weir*, 414 N.W.2d at 331. A magistrate is not obligated to make specific references to the credibility of a named informant or the reliability of the information provided by that named informant. *Peck*, 517 N.W.2d at 232. Furthermore, it is significant that Johnson

does not argue the information provided by Lawrence Johnson is not truthful. Thus, "requiring the magistrate to make express findings on the credibility of" Lawrence Johnson or the information he provided would not have aided Johnson. *See Weir*, 414 N.W.2d at 331.

Finally, our review of the totality of the circumstances surrounding the warrant documents convinces us that a sufficient basis existed to support the magistrate's finding of probable cause to issue the search warrant. *See id.* (stating our inquiry does not end with the simple fact the informant in the affidavit was named); *State v. Groff*, 323 N.W.2d 204, 206 (Iowa 1982) (stating the remedy for a false statement in a warrant application is excision of the statement and examination of the remaining contents to determine whether probable cause exists). We therefore affirm the district court's order overruling Johnson's motion to suppress.

B. Standby Counsel.

Johnson argues the trial court erred in limiting the participation of standby counsel after he elected to represent himself at trial.

"In a state criminal trial, a defendant has a Sixth and Fourteenth Amendment right under the United States Constitution to self-representation." *Rater*, 568 N.W.2d at 658 (citing *Faretta v. California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 2527, 45 L. Ed. 2d 562, 566 (1975)). Before the right to self-representation attaches, a defendant must voluntarily, clearly, and unequivocally elect to proceed without counsel by knowingly and intelligently waiving his Sixth Amendment right to counsel. *Rater*, 568 N.W.2d at 658. The trial court must enlighten the defendant as to "'the dangers and disadvantages of self-

representation'" before accepting a defendant's request to proceed pro se. *Id.* (quoting *Faretta*, 422 U.S. at 835, 95 S. Ct. at 2532, 45 L. Ed. 2d at 572).

In order to help avoid the pitfalls associated with self-representation, the trial court may appoint "standby counsel" to assist a pro se defendant in his defense, even over the defendant's objections. *Faretta*, 422 U.S. at 834 n.46, 95 S. Ct. at 2541 n.46, 45 L. Ed. 2d at 581 n.46. Although standby counsel is recommended when a defendant elects to proceed pro se, provision of standby counsel is not constitutionally required. *Cooley*, 468 N.W.2d at 836; *see also State v. Hutchison*, 341 N.W.2d 33, 41 (Iowa 1983). The purpose of standby counsel is to aid the defendant if and when he requests help, and to be available to represent the defendant should he desire to terminate his self-representation. *Faretta*, 422 U.S. at 834 n.46, 95 S. Ct. at 2541 n.46, 45 L. Ed. 2d at 581 n.46; *see also State v. Martin*, 608 N.W.2d 445, 451 (Iowa 2000).

The Supreme Court in *McKaskle v. Wiggins*, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984), outlined the limits that should be placed on unsolicited participation by standby counsel in order to ensure that the Sixth Amendment right to self-representation set forth in *Faretta* is upheld. However, the Court did not address what limits, if any, could be placed on standby counsel's desired participation during the course of the trial. *McKaskle*, 465 U.S. at 182, 104 S. Ct. at 953, 79 L. Ed. 2d at 135-36.[2]

[2] The Court in *McKaskle*, 465 U.S. at 182, 104 S. Ct. at 953, 79 L. Ed. 2d at 136, did state, "Participation by counsel with a *pro se* defendant's express approval is, of course, constitutionally unobjectionable." The Court, however, was not approving unlimited participation by standby counsel at trial. *McKaskle*, 465 U.S. at 182, 104 S. Ct. at 953, 79 L. Ed. 2d at 136. Instead, the Court explained that a defendant who invites the participation of counsel may not later claim that counsel improperly interfered with the

In this case, the district court repeatedly admonished standby counsel to stop prompting questions during the questioning of witnesses and limited his participation during argument. Johnson contends he gave his standby counsel a standing request for legal advice, and he argues the "district court had no right to limit standby counsel's" solicited involvement at his trial. For the reasons that follow, we do not agree.

The district court told standby counsel, Murray Bell, "If [the defendant] asks you for assistance, you give it to him. If he does not ask you for assistance you say nothing." The court's initial admonishment came after Bell prompted Johnson to make objections during the State's opening remarks. Bell objected to the district court's limitation on his participation at trial because Johnson had requested Bell's "assistance at any point I see a problem." Bell stated he had "merely been telling Mr. Johnson things I think he should consider doing or not doing during the course of this trial."

Upon review of the record in this case, we cannot say the district court abused its discretion in limiting standby counsel's participation in such a manner. The Court in *McKaskle* recognized that a trial judge is not required to permit "hybrid" representation, whereby both the pro se defendant and standby counsel are actively participating as defense counsel at trial. *McKaskle*, 465 U.S. at 183, 104 S. Ct. at 953, 79 L. Ed. 2d at 136; *see also Hutchison*, 341 N.W.2d at 41 (stating a defendant does not have an absolute right to both self-representation and assistance of counsel). Because a trial court has discretion in deciding

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defendant's Sixth Amendment right to self-representation. *Id.*; *see also Martin*, 608 N.W.2d at 452. Johnson is not making such a claim in this case.

whether to appoint standby counsel, the court must also necessarily have discretion "to place reasonable limitations and conditions upon the arrangement." *Cooley*, 468 N.W.2d at 837 (finding the trial court did not abuse its discretion in denying defendant's request that standby counsel be allowed to argue a motion in limine); *see also McKaskle*, 465 U.S. at 183, 104 S. Ct. at 953, 79 L. Ed. 2d at 136 ("A defendant does not have a constitutional right to choreograph special appearances by counsel."). We therefore reject Johnson's claim that the "district court had no right to limit standby counsel's role."

The trial court was consequently not required to allow Bell to interject whenever "he [saw] anything that [Johnson] may have overlooked" during the course of the trial. In fact, Johnson's desired expanded role for standby counsel at trial "could very well have created procedural complications and the potential for jury confusion as to counsel's status." *Cooley*, 468 N.W.2d at 837. The court's reasonable limitation on standby counsel's involvement during the course of the trial allowed counsel to fulfill his dual purpose "to act as a safety net to ensure that the litigant receives a fair hearing of his claim and to allow the trial to proceed without the undue delays likely to arise when a layman presents his own case," *Rater*, 568 N.W.2d at 658, while at the same time preserving "the jury's perception that the defendant is representing himself." *McKaskle*, 465 U.S. at 178, 104 S. Ct. at 951, 79 L. Ed. 2d at 133; *see also United States v. Einfeldt*, 138 F.3d 373, 378 (8th Cir. 1998) (stating the trial court's limitations on standby counsel's solicited involvement at trial was "a commendable effort to honor [the defendant's] decision to represent himself while providing him meaningful assistance of standby counsel").

We note the trial court did not prohibit Bell from assisting Johnson in "overcoming routine procedural or evidentiary obstacles to the completion of some specific task, such as introducing evidence or objecting to testimony." *McKaskle*, 465 U.S. at 183, 104 S. Ct. at 953, 79 L. Ed. 2d at 136. Nor did the court restrict Bell from "ensur[ing] the defendant's compliance with basic rules of courtroom protocol and procedure." *Id.*; *see also Spencer v. Ault*, 941 F.Supp. 832, 841 n.8 (N.D. Iowa 1996) (setting forth four functions standby counsel can serve). Instead, the court's admonishments to standby counsel were aimed towards ensuring the trial was conducted in an orderly manner. "[T]rial courts are given considerable latitude and freedom of action to control and ensure orderly process at trial." *Hutchison*, 341 N.W.2d at 42. Thus, in light of the foregoing, we cannot say the district court abused its discretion in limiting standby counsel's participation at trial. *Cooley*, 468 N.W.2d at 837.

IV. Conclusion.

Upon our de novo review, we reject Johnson's argument that the district court erred in denying his motion to suppress. We further conclude the district court did not abuse its discretion in placing restrictions on standby counsel's participation during the course of the jury trial. We therefore affirm Johnson's conviction.

AFFIRMED.