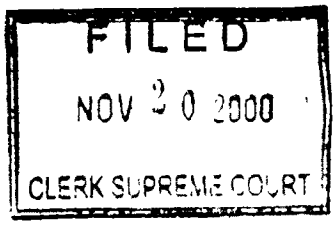
IN THE COURT OF APPEALS OF IOWA

No. 0-463 / 99-1098
Filed November 20, 2000



STATE OF IOWA,
Appellee,

vs.

DANNY JAMES FISHER,
Appellant.

Appeal from the Iowa District Court for Benton County, Thomas L. Koehler (suppression hearing), L. Vern Robinson (hearing on minutes of testimony), Douglas S. Russell (sentencing), Judges.

Defendant appeals the judgment and sentence entered upon the district court ruling finding him guilty of second-degree theft in violation of Iowa Code sections 714.1(1), 714.1(2), and 714.2(2) (1997). **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, David C. Thompson, County Attorney, and Karen Duncan, Assistant County Attorney, for appellee.

Heard by Streit, P.J., and Vogel and Miller, J.J.

VOGEL, J.

Danny James Fisher appeals his conviction and sentence for theft in the second degree in violation of Iowa Code sections 714.1(1), 714.1(2), and 714.2(2) (1997). Fisher argues his counsel was ineffective for failing to timely file a motion to suppress. We agree and reverse.

Background facts. Fisher was suspected in an arson case involving four fires in the Marengo area. On November 11, 1998, Belle Plaine police officer Ronald Tippett was assisting an Iowa County sheriff and deputy in executing a search warrant on the residence of Fisher, his father, Rod Fisher, and his grandmother, Earlene Fisher. The warrant was being served to further the investigation of the fires and authorized a search for "accelerants, combustible materials, ignition sources and/or their containers." Unrelated to the fires, the Belle Plaine High School had reported to the police department in September that several items had been stolen, including two boom boxes, two video cameras, a bicycle, a teacher's grade book and an Apple computer.

While officers were completing their search of Fisher's bedroom, they discovered and seized items they believed had been stolen from the Belle Plaine High School. The inventory of items seized listed the following: an Apple key board, mouse and pad, blood pressure cuff kit, two encyclopedias, two AC video adaptors, battery charger, RCA battery, two video cameras, and a Koss boom box. Later that day, Fisher's father called the police and voluntarily turned over an Apple computer and monitor. On November 18, 1998, during a police

interview, Fisher admitted he had bought the items knowing they had been stolen.

Prior to his trial, Fisher filed a motion to suppress both the stolen items seized under the search warrant and the statement made in the police interview. The trial court denied the motion, finding the officers were legally present to execute the search warrant and the incriminating nature of the seized items was immediately apparent to officers, allowing the seizure to fall under the plain view exception to the Fourth Amendment. Fisher was subsequently found guilty of theft in the second degree in violation of Iowa Code sections 714.1(1), 714.1(2) and 714.2(2) (1997) in a bench trial on the minutes. He now appeals the denial of his motion to suppress.

Scope of review. In assessing alleged violations of constitutional rights, our standard of review is de novo. *State v. Washburne,* 574 N.W.2d 261, 263 (Iowa 1997). We conduct an independent evaluation of the totality of the circumstances as shown by the entire record. *State v. Astello,* 602 N.W.2d 190, 195 (Iowa App. 1999). In reviewing the district court's ruling on a motion to suppress, we consider both the evidence presented during the suppression hearing and that introduced at trial. *State v. Orozco,* 573 N.W.2d 22, 24 (Iowa 1997). An adverse ruling on a motion to suppress will preserve error for our review. *State v. Breuer,* 577 N.W.2d 41, 44 (Iowa 1998).

Ineffective assistance of counsel. Fisher filed his motion to suppress forty-two days after his arraignment. This was contrary to Iowa Rule of Criminal Procedure 10(4), which requires motions to be filed no later than forty days after

arraignment. Without a showing of good cause pursuant to Iowa Rule of Criminal Procedure 10(3), this tardiness is fatal to his motion. Therefore, Fisher raises this issue on appeal claiming his counsel was ineffective by not filing the motion to suppress in a timely manner.

Our review of an allegation of ineffective assistance of counsel is de novo. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa App. 1994). A claim of ineffective assistance of counsel requires a showing that: (1) counsel's performance fell outside the normal range of competency; and (2) the deficient performance so prejudiced the defendant as to give rise to a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992). In order to meet the first prong, defendant must overcome the strong presumption that counsel's actions were reasonable under the circumstances and fell within the normal range of competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). To succeed on the second prong, the defendant must show that counsel's failure worked to the defendant's actual and substantial disadvantage so that, but for counsel's error, the result of the proceeding would have been different. *Id.*

Claims of ineffective assistance of counsel are usually not adjudicated on direct appeal because the attorney charged with ineffectiveness has not had an opportunity to respond to the allegations. *McKettrick*, 480 N.W.2d at 56. We depart from this preference if the record on direct appeal is sufficient to evaluate the merits of a defendant's ineffective assistance of counsel claim. *State v. Nebinger*, 412 N.W.2d 180, 191-92 (Iowa App. 1987).

Fisher alleges his trial counsel was ineffective in failing to timely file the motion to suppress the seized evidence and subsequent admission within forty days from his arraignment. Although the trial court allowed a hearing to proceed and overruled Fisher's motion on the merits, we may affirm the trial court on any ground appearing in the evidence, including the late filing. *State v. O'Malley*, 593 N.W.2d 517, 519 (Iowa 1999). If we determine the motion to suppress should have been granted and Fisher was prejudiced by the inclusion of the seized items, we must find Fisher's trial counsel was ineffective.

Motion to suppress. Fisher alleges the trial court erred in overruling his motion to suppress the seized items and his subsequent statement, made to police during an interview regarding the stolen items. He contends the police, while executing the search warrant for the arson investigation, exceeded the bounds of the search warrant by searching for and seizing items the officers believed to be stolen from an area high school. The State asserts the officers discovered the stolen items under the plain view doctrine and, thus, the search and seizure was legal and did not violate Fisher's privacy rights under the Fourth Amendment to the Unites States Constitution.

The Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution protect individuals against unreasonable searches and seizures. *State v. Canas*, 597 N.W.2d 488, 492 (Iowa 1999). Searches and seizures conducted without prior approval by a judge or magistrate are per se unreasonable unless they fall within one of the exceptions to the warrant requirement. *Id.* When a defendant contests a search and seizure as

being outside the realm of a valid search warrant, the State has the burden to show that officers acted reasonably under one of the recognized exceptions to the warrant requirement. *State v. Predka,* 555 N.W.2d 202, 206 (Iowa 1996).

The plain view doctrine is an exception to the Fourth Amendment warrant requirement as a reasonable search. *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971); *State v. Chrisman,* 514 N.W.2d 57, 60 (Iowa 1994). Under this exception, the seizure of an object found in plain view is justified if two conditions are met: (1) the intrusion of the police was lawful and (2) the incriminating nature of the object was immediately apparent. *Horton v. California,* 496 U.S. 128, 136, 110 S. Ct. 2301, 2308, 110 L. Ed. 2d 112, 123 (1990). "Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." *Coolidge,* 403 U.S. at 466, 91 S. Ct. at 2038, 29 L. Ed. 2d at 583. The burden is on the State to prove the applicability of the plain view exception. *Chrisman,* 514 N.W.2d at 60.

Fisher does not dispute that the officers were lawfully on the premises with a valid search warrant for specific items related to the arson investigation. He does, however, contend the officers exceeded the scope of their search warrant by searching for and seizing the stolen items. Fisher further alleges the objects seized and identified as stolen property were not items of an immediately incriminating nature. *See Horton,* 496 U.S. at 136, 110 S. Ct. at 2308, 110 L. Ed.

2d at 123. The State claims the incriminating nature of the stolen items was immediately apparent as to the majority of the items found. It did, however, concede during oral arguments on appeal that both the encyclopedias and the blood pressure cuff kit did not immediately appear to be incriminating in nature. The search warrant for Fisher's premises allowed a search for "accelerants, combustible materials, ignition sources and/or their containers." We agree with the State that because matches or a lighter are relatively small items, the scope of the search warrant under an objective test was necessarily broader than if those small items were not listed. The scope of a search warrant must be analyzed using the objective standard, articulated by the supreme court as follows:

> Defendant questions the motive of the officer in lifting the rug. The issue, however, is not controlled by the officer's subjective state of mind. Instead it is determined by an objective assessment of the officer's actions in light of the facts and circumstances known to him. That "the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." Scott v. United States, 436 U.S. 128, 138, 98 S. Ct. 1717, 1723, 56 L. Ed. 2d 168, 178 (1978).

State v. Oliver, 341 N.W.2d 744, 746 (Iowa 1983). In other words, under the warrant, police could search all places small enough to conceal matches. Fisher asserts the police exceeded the scope of their search warrant by seeking out the stolen items from the high school. Because of the small items detailed in the warrant, the officers could legitimately conduct a thorough search of Fisher's

room and all of its contents. We find the officers did not exceed the scope of the search warrant.

Fisher next argues, that even if a thorough search of his room was authorized by the warrant, the seized items did not immediately appear to be incriminating and, therefore, failed the plain view exception to the Fourth Amendment. In analyzing this argument, it is important to first note the actions taken by each officer while executing the search warrant. Sheriff Slockett remained in the kitchen during the search of Fisher's bedroom. Officer Tippett and Deputy Stineford entered and searched Fisher's bedroom. The record contains no indication of the order in which the items were observed, moved or seized. The record shows Deputy Stineford searched the closet where the video cameras were found. However, he did not testify at the suppression hearing. He apparently handed the cameras out of the closet to Officer Tippett, who was searching other parts of the bedroom.

Officer Tippett testified he thought, but was not certain, the video camera cases had "BPHS" written on them, reflecting their ownership by Belle Plaine High School. If he were certain of this fact, the plain view doctrine would support the seizure, because the incriminating nature of these cameras would have been immediately apparent. His uncertainty, however, as to whether the camera cases were marked ties into Sheriff Slockett's testimony that none of the items appeared incriminating to him as they were brought out to the kitchen. If an ite appears to be incriminating, it must do so when first viewed, not after discus it with other officers present. *Hicks v. Arizona,* 480 U.S. 321, 328, 107 S

1149, 1154, 94 L. Ed. 2d 347, 356 (1987). Further, we apply the same standard to seize an item under the plain view exception as we would if a warrant had been sought, that is probable cause. *See Hicks*, 480 U.S. at 327, 107 S. Ct. at 1153, 94 L. Ed. 2d at 355 (holding probable cause is necessary to seize contraband under the plain view exception). We are, therefore, left to determine if the officers had probable cause to seize the items. There was no testimony that the seized items displayed any indicia of ownership, with the possible exception of the video cameras. Deputy Stineford was the first one to see the cameras but did not testify; Officer Tippett's observations are less than certain; and Sheriff Slockett stated the items' incriminating nature was not immediately apparent. Based on this scant record, we can only find the officers had a reasonable suspicion, but not the requisite probable cause, to believe the seized items were stolen. The State did not meet the burden of proof necessary to justify a seizure of the items under the plain view exception to the Fourth Amendment. Therefore, the seized items should have been suppressed, along with the subsequent admission.

During oral arguments on appeal, Fisher claimed the items voluntarily turned over to police should likewise be suppressed from trial as "fruits of the poisonous tree." We find, however, the lack of police action and the intervening act of Fisher's father in voluntarily turning over the items have "so attenuated the causal connection as to dissipate the taint of the unlawful police action." *State v. Hamilton*, 335 N.W.2d 154, 158 (Iowa 1983). If a later action "results from 'an intervening independent act of a free will' the evidence is purged of its taint."

Reese v. State, 391 N.W.2d 719, 725 (Iowa App. 1986) (citing *Wong Sun v. United States,* 371 U.S. 471, 486, 83 S. Ct. 407, 416-17, 9 L. Ed. 2d 441, 454 (1963)). Accordingly, we find them to be outside the seized items and therefore the motion to suppress was properly overruled as to those items.

We find the State failed to meet its burden of proof for the second prong of the test under the plain view doctrine, that is to prove the immediately incriminating nature of the seized items. Accordingly, we find Fisher's trial counsel was ineffective in failing to promptly file the motion to suppress. Without the seized stolen items and Fisher's later statement to the police, the prosecutions' case would have been substantially weakened and the outcome would likely have been affected. *See State v. Atwood,* 602 N.W.2d 775, 784 (Iowa 1999). As such, we find Fisher was prejudiced by his attorney's failure to timely file the motion to suppress. Accordingly, we reverse Fisher's conviction insofar as it was based on the seized items and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED. Streit, P.J. and Vogel, J. concur; Miller, J. specially concurs.

MILLER, J. (special concurrence)

I concur in the result, but would reach that result on a somewhat different ground. The defendant asserts error in the trial court's overruling of his motion to suppress, and then argues that if we find that the late (by two days) filing of the motion precludes review of that issue on appeal we should address the issue as one of ineffective assistance of counsel. The majority reverses and remands on the ground that defense counsel was ineffective in failing to timely file a motion to suppress which was overruled but should have been sustained in large part. However, the State did not object to the late filing of the motion, the trial court held a full hearing on the motion, and the trial court prepared and filed a detailed written ruling on the motion. Under such circumstances the defendant cannot have suffered prejudice from the untimeliness of the motion and any claim of ineffective assistance must fail under the second, prejudice prong of such a claim. I would decide this appeal on the merits of the suppression ruling, not on the ground of ineffective assistance of counsel.