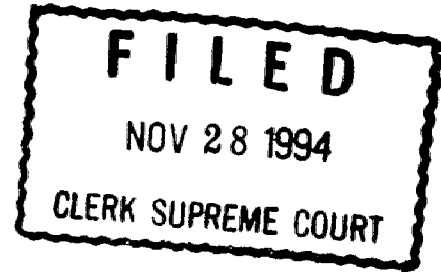


IN THE COURT OF APPEALS OF IOWA

No. 4-338 / 93-1078



STATE OF IOWA,

Appellee,

vs.

WALLACE ANDRE JACKSON,

Appellant.

Appeal from the Iowa District Court for Clinton County,
David H. Sivright, Judge.

Wallace Jackson appeals from his conviction, following
a jury trial, of possession with intent to deliver a
controlled substance. **AFFIRMED.**

John O. Moeller, Davenport, for appellant.

Bonnie J. Campbell, Attorney General, Mary Tabor,
Assistant Attorney General, Lawrence H. Schultz, County
Attorney, and Bruce A. Ingham, Assistant County Attorney,
for appellee.

Heard by Donielson, C.J., and Cady and Huitink, JJ.

CADY, J.

Defendant Wallace Jackson (Jackson) appeals his conviction for possession of a controlled substance with the intent to deliver in violation of the Iowa tax stamp provisions. Iowa Code § 204.401 (1)(c)(2)(b), 421A.3, 421A.12 (1991). He raises issues concerning the issuance of the search warrant and the sufficiency of the evidence at trial. He also asks that any ineffective assistance of trial or appellate counsel claims be preserved for a postconviction relief action. Finding no merit in Jackson's contentions, we affirm.

On February 11, 1993, a district associate judge issued a warrant to search an apartment at 205 1/2 Second Avenue South in Clinton and any occupants in the apartment. The judge acted upon an application supplied by Officer Randy Meier. Meier's application listed information supplied by a named informant and a confidential informant. Meier also indicated the apartment was a crack house. He described seeing a person exit a vehicle, enter the apartment, and return to the vehicle in under three minutes.

When the officers executed the warrant, Jackson peered through some mini-blinds then disappeared. The officers broke down the door and found three occupants. Jackson was ordered to lie down on the living room floor. The officers discovered a balloon containing sixty packages of cocaine within arm's reach of Jackson. They also found an accounting ledger in the living room which apparently

listed drug transactions. The police then searched Jackson and found \$114 in food stamps and \$717 in cash. Jackson was not an eligible food stamp recipient.

The State charged Jackson with possession with intent to deliver crack cocaine and failure to affix a drug tax stamp. Jackson filed a motion to suppress all evidence seized pursuant to the search warrant. He argued the officer failed to provide sufficient reliable facts to justify issuing the warrant.

In particular, he claimed (1) the named informant, an admitted crack addict, was not credible and the officer misrepresented his credibility, (2) the confidential informant's information was too stale and unreliable to corroborate the named informant's testimony, (3) the activity observed by the officer was entirely consistent with lawful activity, and (4) the warrant was too broad. The district court denied the motion.

At trial, Jackson moved for a judgment of acquittal based on the alleged insufficiency of the evidence on the elements of possession and the intent to deliver. The district court overruled the motion. The jury found Jackson guilty, and the district court entered judgment and imposed consecutive sentences. On appeal from the resulting convictions, Jackson renews his challenges to the legality of the search warrant and to the sufficiency of the evidence.

I. Search Warrant

We review de novo because Jackson challenges the search warrant on constitutional grounds. State v. Seiler, 342 N.W.2d 264, 266 (Iowa 1983). We are limited in our review to a consideration of only that information, reduced to writing, which was actually presented to the magistrate at the time application for the warrant was made. State v. Weir, 414 N.W.2d 327, 329 (Iowa 1987). We may not consider other relevant information in the record which was not presented to the magistrate. State v. Seager, 341 N.W.2d 420, 426 (Iowa 1983). We have a duty to give deference to the magistrate's finding. Weir, 414 N.W.2d at 330. Due to the preference for warrants, doubts are resolved in favor of their validity. Id.

Jackson asserts the search warrant fails on two grounds. First, there was not probable cause for its issuance and second, the warrant was ambiguous.

A. Probable Cause

In determining whether probable cause has been established for the issuance of a search warrant, the test is whether a person of reasonable prudence would believe a crime was being committed on the premises to be searched or evidence of a crime could be located there. Seager, 341 N.W.2d at 427 (citing State v. Iowa Dist. Court, 247 N.W.2d 241, 245 (Iowa 1976)). Probable cause to search requires a probability determination as to the nexus between criminal activity, the things to be seized and the place to be searched. Seager, 341 N.W.2d at 427. The quantum of

information needed to to establish probable cause is less than required for conviction. State v. Bousman, 387 N.W.2d 605, 609 (Iowa 1986). Mere suspicion, rumor or even strong reason to suspect a person's involvement with criminal activity, however, is inadequate to establish probable cause. Weir, 414 N.W.2d at 330.

Jackson asserts there was not probable cause for issuance of the warrant because the named informant, Archie Kisse, was not credible and Officer Meier misrepresented his credibility, the confidential informant's information was stale and unreliable, and the activity observed by Meier was entirely consistent with lawful activity.

1. Misrepresentation

Jackson contends Kisse lied in his statement to Meier and Meier recklessly disregarded the falsity of Kisse's statement in obtaining the warrant. Jackson asserts the district court should have allowed him to present evidence of Kisse's alleged falsehood at the evidentiary suppression hearing.

Kisse stated in his affidavit he was a crack cocaine addict, had purchased most of his crack from an apartment at 205 1/2 Second Avenue South, and had purchased crack there over twenty times in the last two months. He also stated he sold his wife's car for three rocks of crack. Jackson was prepared to present evidence that Kisse lied about selling his wife's car for crack and actually sold it for \$475 in cash. The district court, however, excluded the evidence.

Jackson bears the burden of establishing by a preponderance of the evidence that Meier made an intentional or material misrepresentation in obtaining the warrant. State v. Gillespie, 503 N.W.2d 612, 615 (Iowa App. 1993). If we find that Meier consciously falsified a material fact in his application for the warrant, or acted with a reckless disregard for the truth, then the offensive material must be deleted and the remainder of the warrant reviewed to determine whether probable cause existed. Id. (citing State v. Niehaus, 452 N.W.2d 184, 186-67 (Iowa 1990)).

The district court was correct in excluding the evidence from the suppression hearing. The relevant inquiry is on Meier, not Kisse. Jackson presented no proof that Meier knew or should have known Kisse lied about the sale of the car. Thus, Jackson has failed to show Meier acted with a reckless disregard for the truth or made an intentional misrepresentation to the district associate judge. Moreover, the sale of the car was a collateral issue. Even if it is deleted from the search warrant application the district associate judge would still have sufficient facts to determine whether a warrant should issue.

2. Credibility of the Named Informant

Jackson additionally asserts the information Kisse provided Meier was inherently unreliable because Kisse had a history of drug abuse and had consumed crack prior to giving the information.

Although the magistrate does not need to make express findings of credibility when a search warrant affidavit relies on hearsay from a named informant, "factors such as the veracity and basis of knowledge of such an informant are still relevant . . . when a reviewing court assess the 'totality of the circumstances.'" Weir, 414 N.W.2d at 331. When, as in the case before us, the informant has a history of drug abuse and has consumed drugs prior to providing information, the importance of the credibility factor is heightened and the information provided does not merit the presumptive reliability of information supplied by an ordinary citizen informant. See id. at 331-322. The, reviewing court must, therefore, look to other factors to resolve the issue of informant credibility. These include: whether the informant was named; whether the information furnished was against the informant's penal interest; whether the information was corroborated; whether the information was not public knowledge; whether the informant was trusted by the accused; and whether the informant directly witnessed the crime or fruits of it in the possession of the accused. Id. at 332.

Applying these criteria we conclude the warrant application and its attachments sufficiently demonstrated the credibility of Kisse and the information he supplied Meier. First, Kisse came forward and admitted he was a drug addict, and had recently purchased and used cocaine. Next, he supplied specific information about the location

of the drug sales which was corroborated by Meier's surveillance observations, and the confidential informant's statements. Finally, Kisse was a direct witness to numerous sales of cocaine and was apparently trusted by the individuals selling cocaine at the apartment.

3. Confidential Informant

Jackson contends the information provided to Meier by the confidential informant was unreliable and stale. The confidential informant was interviewed 126 days before the warrant was issued. The informant pointed out the apartment on 205 1/2 Second Avenue South and told an officer it was a place where crack was sold. The informant also stated he had seen crack sold there two days earlier. Additionally, Meier made express findings of the informant's credibility and the district associate judge endorsed these findings. See State v. Iowa Dist. Court, 472 N.W.2d 621, 623-24 (Iowa 1991). Using a checklist, Meier indicated the informant was a mature individual, had supplied information on eleven previous occasions, the past information had supplied the basis for one search warrant, the information had led to twelve arrests, and the informant had not given false information in the past.

Based on these specific findings, we conclude the confidential informant was a credible person. We next address the issue of staleness.

Information that the sale of drugs was made 126 days before the warrant application is not recent information. However, staleness of alleged facts in a warrant application is not determined by mere compilation of elapsed days. State v. Bean, 239 N.W.2d 556, 559 (Iowa), cert. denied, 429 U.S. 824 (1976). The magistrate must make a determination from all available information whether the evidence discloses a continuing offense that is likely to remain in operation for a period of time. Gillespie, 503 N.W.2d at 616.

To determine whether a continuing offense was shown, we look to the nature of the criminal activity, the length of the activity, and the nature of the property seized. Id.

The type of activity was drug sales. There was a likelihood the sales would continue for a period of time. The confidential informant stated he had seen crack sold at the apartment and it was known as a spot where crack dealers could be found. This information was corroborated by Kisse's statement, made one day before the warrant was issued, that he had purchased crack twenty times in the last two months at the same apartment identified by the confidential informant. Furthermore, the confidential informant's information was fairly specific. It named several people who sold crack from the apartment.

We conclude the affidavit establishes a continuing offense and the district associate judge properly considered the confidential informant's affidavit in

determining the existence of probable cause for the search.

4. Surveillance by the Officer

Jackson also contends the surveillance by Meier gives a mere suspicion of criminal activity and is insufficient to support a finding of probable cause. Shortly after midnight Meier observed a vehicle with three passengers stopped near the apartment at 205 1/2 Second Avenue South. One of the passengers entered the apartment and returned to the truck in only three minutes. Meier also testified that this was the type of behavior characteristic of someone purchasing drugs.

We agree with Jackson that the activity Meier observed might be equally consistent with innocent activity and standing alone it would be insufficient to support a finding of probable cause. However, Meier's surveillance was only one of a number of factors the district associate judge used in making his probable cause determination. Given all the circumstances set forth in the affidavit the judge could conclude evidence of illicit drug sales could be found at the apartment.

B. Ambiguity

Jackson asserts the warrants description of the person to be searched is ambiguous and the warrant therefore does not meet the specificity requirements of Iowa Code section 808.3 (1991). This section provides in relevant part: "The application shall describe the person, place, or thing

to be searched and the property to be seized with sufficient specificity to enable an independent reasonable person with reasonable effort to ascertain and identify the person, place, or thing."

The warrant application executed by Meier requested to search "any occupants of the westernmost second floor apartment located in the apartment/business building at the southwest corner of Second Avenue South and Second Street." for cocaine related evidence. Meier also included an attachment explaining his reason for requesting authority to search all occupants rather than naming a particular person. The attachment provided:

. . . when a person enters a house to purchase crack, it does not necessarily mean the tenant will be the crack seller. In the experience of both users and officers, it could be any of the occupants of the residence who are "holding" crack and doing the selling on this particular day. A particular location may become known as the "spot" where a crack dealer may be located. Crack dealers will then frequent this residence and take care of customers. Any person who is in the residence could be "holding" and be the person taking care of business that day. The information gained by affiant's interview's and debriefing is that the crack dealer will most often be carrying the crack on his or her person, as opposed to having it hidden or kept somewhere in the residence.

Affidavits are tested in a common sense and realistic fashion. State v. Murphy, 470 N.W.2d 65, 66 (Iowa App. 1991). Elaborate specificity is not required. Id. We find Meier's explanation sufficiently clarifies his request to search "all occupants" and saves it from overbreadth.

In looking at the totality of the circumstances it is clear there was a logical and factual nexus between the evidence seized in the residence and Jackson.

II. Sufficiency of the Evidence

In his second major assertion of error, Jackson claims there was insufficient evidence of his possession and intent to deliver cocaine to support his conviction. He claims the trial court should have granted his motion for a directed verdict.

In reviewing a motion for a directed verdict based on insufficiency of the evidence in a criminal case, we view the evidence in the light most favorable to the State. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981). All of the evidence must be considered and all legitimate inferences which may be deduced from the evidence will be accepted. Id. A verdict will be upheld if there is any substantial evidence in the record to support the charge. State v. Ramirez, 485 N.W.2d 857, 860 (Iowa App. 1992). Substantial evidence is evidence that could convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. Id.

Evidence on the possession element is sufficient if it shows constructive possession. State v. Pierce, 240 N.W.2d 678, 679 (Iowa 1976). Constructive possession occurs when the defendant maintains "dominion and control of the place where the substances are found." State v. Parrish, 502 N.W.2d 1, 3 (Iowa 1993). This dominion and control can be

either direct or indirect. Id. It is direct when the defendant is in such close proximity to the substance as to be able to claim immediate dominion over it. Id.

Intent to deliver can be a difficult element to prove by direct evidence, and is often demonstrated with circumstantial evidence. Ramirez, 485 N.W.2d at 860. It may be inferred from the quantity of the substance and the manner in which the substance is wrapped or packaged. Id.

We find there is substantial evidence in the record to support a finding that Jackson possessed a large quantity of cocaine and intended to deliver it. When the officers executed the search warrant they discovered a balloon containing \$3,000 worth of cocaine within arm's reach of Jackson. The cocaine had been divided and individually packaged into numerous saleable portions. Additionally, Jackson had \$717 in cash and \$114 of food stamps on his person. He was not eligible to possess the food stamps. The state presented testimony that the stamps are often accepted as payment for illegal drugs. This evidence is sufficient to convince a rational trier of fact beyond a reasonable doubt that the defendant is guilty of possession of a controlled substance with intent to deliver. See Ramirez, 485 N.W.2d at 860.

III. Preservation of Post Conviction Relief Claims

Jackson makes a general request that any claims concerning ineffective assistance of counsel not considered by this court be preserved for post conviction relief

proceedings. Jackson does not articulate any specific instances of ineffectiveness.

A defendant is barred from asserting a claim of ineffective assistance of counsel in a postconviction proceeding unless the claim has been preserved for review by being made on direct appeal, or sufficient reason is shown for failing to raise it on appeal and it is further shown that actual prejudice resulted. Jones v. State, 479 N.W.2d 265, 271 (Iowa 1991). Consequently, it is understandable for appellate counsel to request our appellate courts to preserve claims of ineffective assistance of counsel in the course of the direct appeal. This request, however, must not be viewed as perfunctory or clerical.

When asserting ineffectiveness of counsel on appeal, at a minimum, the defendant should provide our appellate courts with enough information to make an initial assessment of defendant's contentions. State v. White, 337 N.W.2d 517, 519 (Iowa 1983). "We cannot base our holding on the bald assertion in a brief that counsel provided ineffective assistance in some undisclosed fashion." Id.

In this case, appellate counsel has failed to present enough information to enable us to assess the claim of ineffective assistance of trial counsel. Our obligation to determine preservation must be based on some articulated underlying facts. Thus, if Jackson pursues a postconviction proceeding, the post conviction court must

decide if Jackson has carried his burden to show a sufficient reason for not pursuing the ineffectiveness of counsel issue on this appeal. Id. at 520.

AFFIRMED.