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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0079**

State of Minnesota,
Respondent,

vs.

Steven Brian Bashans,
Appellant.

**Filed July 9, 2018
Affirmed
Rodenberg, Judge**

McLeod County District Court
File No. 43-CR-15-196

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael K. Junge, McLeod County Attorney, Zachary L. Lyngaas, Assistant County Attorney, Glencoe, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Adam Lozeau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Halbrooks, Judge; and
Florey, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

Appellant Steven Brian Bashans appeals from the postconviction court's denial of his petition alleging that his trial counsel was ineffective for failing to challenge the search warrant authorizing law enforcement to search appellant's house. We affirm.

FACTS

The Renville County Sheriff's Office received an unusually large number of reports of theft crimes during the fall of 2014, including thefts of trailers and recreational vehicles. The items reported stolen included an air compressor, an air hose and air-compressor attachments, snowmobile dollies, a trailer, a Yamaha jet ski,¹ a ShoreLand'r trailer, two snowmobiles, and a large fuel tank.

On January 29, 2015, Renville County Sheriff's Investigator Jason Mathwig arrested appellant's son, J.B., for an unrelated offense. In a postarrest interview, J.B. said that he and appellant had committed the reported thefts. J.B. explained that he and appellant went to an abandoned farm site and stole a trailer and an air compressor matching the descriptions of those previously reported as stolen. J.B. also told the investigator that appellant had stolen a Yamaha jet ski, two snowmobiles, and a fuel tank, all matching the descriptions of those previously reported stolen. J.B. said that some of the property was at

¹ The search warrant application identified this vehicle as a "2007 Yamaha VX Sport Jet Ski," and the parties use the term "jet ski" in their briefs. Although Jet Ski® is a registered trademark of Kawasaki (<http://www.kawasakienginesusa.com/legal-notices/kawasaki-trademarks>), we use the term here to be consistent with the language used by the parties and the district court.

appellant's residence. He reported seeing one of the snowmobiles on the stolen trailer in appellant's driveway. J.B. also stated that he saw the Yamaha jet ski and fuel barrel in appellant's detached garage within the previous two weeks. He stated that appellant was "parting out"² the jet ski, but did not know what appellant had done with the parts he had removed from the machine. At Investigator Mathwig's direction, a state trooper drove past appellant's house. The trooper reported seeing a covered snowmobile on a trailer in appellant's driveway.

Investigator Mathwig prepared an application for, and the district court signed, a warrant to search appellant's house, detached garage, and the curtilage around appellant's residence. The search warrant stated that Investigator Mathwig had reason to believe that a number of stolen items would be located at the property to be searched. Specifically, the search warrant identified a Yamaha jet ski, a ShoreLand'r trailer, a three- to four-gallon air compressor, an air hose, air compressor attachments, snowmobile dollies, two Arctic Cat vehicles, a portable fuel tank, and "papers or receipts showing constructive residency" as the objects of the search.

Law enforcement executed the search warrant. Investigator Mathwig found appellant inside the house. Appellant told Investigator Mathwig that he lived alone and was the only person inside the house. Investigator Mathwig asked appellant if there were any weapons inside the house. Appellant said that he had some firearms, and told Investigator Mathwig that there was a shotgun in a case in the pantry and three more

² The parties agree that this term means that appellant was removing parts of a machine, presumably to sell.

firearms upstairs under the bed. Appellant also told the officers he knew he was not supposed to have firearms, apologized, and said that he was trying to sell the firearms.

The state charged appellant with one count of felon in possession of a firearm and one count of receiving stolen property. Appellant pleaded guilty to the felon-in-possession charge in exchange for dismissal of the receiving-stolen-property charge, and was sentenced. Months later, appellant petitioned for postconviction relief, alleging that his guilty plea was not intelligent because he was induced to plead guilty by the belief that his sentence would be lower than the statutory minimum of 60 months. The postconviction court granted appellant's petition for relief and vacated his guilty plea, reinstating the original charges.

Appellant requested a contested omnibus hearing "to challenge the issuance of the search warrant . . . on the grounds that there was not sufficient probable cause for the issuance of that warrant in the first instance." Appellant's trial counsel said he thought that "it would be a disservice to [appellant] if we simply rolled over on that issue at this point without having heard testimony from the officer."

At the contested omnibus hearing, appellant withdrew his challenge to the search warrant. Appellant's trial counsel stated:

[A]fter looking . . . more closely on exactly what the Court relied on in the issuance of that search warrant, it appears to me, as an officer of the court, that there is no legitimate argument to make that the Court mistakenly issued that search warrant and, in fact, there's no probable cause . . . or a lack of probable cause in that particular situation. So I believe that proceeding with a hearing to challenge probable cause at this point would be a waste of time.

Appellant’s attorney added that he thought it was “exceedingly unlikely” that appellant would prevail on that argument, “to the point where it’s not advisable to move forward with the hearing at this point.” The district court told appellant that if he chose not to proceed with the hearing, he would be waiving his right to challenge the search warrant. The district court asked appellant if he wished to waive that challenge, and appellant said that he did.

Appellant pleaded guilty to receiving stolen property, stipulated that a prior conviction rendered him ineligible to possess a firearm and that he had previously been convicted of being a felon in possession, and proceeded to a jury trial on the felon-in-possession charge. The jury found appellant guilty, and the district court sentenced appellant.

Appellant timely appealed. We granted appellant’s motion to stay the direct appeal and remand for postconviction proceedings. Appellant then petitioned for postconviction relief alleging that his trial counsel was ineffective for not having challenged the search warrant. The postconviction court denied appellant’s petition for relief.

This appeal followed.

D E C I S I O N

A criminal defendant has the right to “effective assistance of counsel.” *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984). To succeed on a claim that trial counsel was ineffective, a defendant must show that trial counsel’s performance “(1) fell below an objective standard of reasonableness (performance prong), and (2) that a reasonable probability exists that the outcome would have been different but for counsel’s

errors (prejudice prong)” to succeed on an ineffective-assistance-of-counsel claim. *State v. Blanche*, 696 N.W.2d 351, 376 (Minn. 2005). We need not address both factors if either one is determinative. *Id.*

Trial counsel’s performance is judged using an objective standard of “representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances.” *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004) (quotation omitted). “An attorney’s failure to raise meritless claims does not constitute deficient performance and cannot provide the basis for a claim of ineffective assistance.” *State v. Dickerson*, 777 N.W.2d 529, 535 (Minn. App. 2010) (citing *Schleicher v. State*, 718 N.W.2d 440, 449 (Minn. 2006)).

“We review ineffective assistance of counsel claims de novo because they involve mixed questions of law and fact.” *Blanche*, 696 N.W.2d at 376. “We review legal issues de novo. However, our review of factual matters is limited to whether there is sufficient evidence in the record to sustain the postconviction court’s findings.” *State v. Blom*, 682 N.W.2d 578, 624 (Minn. 2004) (quotation and citations omitted). This standard applies when an appeal from a postconviction order merges with issues from a stayed direct appeal. *Id.* We review the postconviction court’s credibility determinations using the clearly erroneous standard. *Bobo v. State*, 860 N.W.2d 681, 684 (Minn. 2015). Findings are clearly erroneous only if the reviewing court is “left with the definite and firm conviction that a mistake has been made.” *State v. Roberts*, 876 N.W.2d 863, 868 (Minn. 2016).

Appellant argues that his trial counsel provided ineffective assistance when he failed to raise a probable-cause challenge to the search warrant that led to the discovery of

firearms in his home. A defendant claiming ineffective assistance of counsel based on a failure to litigate a constitutional issue must show that the issue has merit and would affect the outcome of the case. *See Kimmelman v. Morrison*, 477 U.S. 365, 381, 106 S. Ct. 2574, 2586 (1986).

The Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. 1, § 10. A search warrant may be issued by a neutral and detached magistrate only upon a finding of probable cause. *State v. Harris*, 589 N.W.2d 782, 787 (Minn. 1999). When determining whether probable cause supported the issuance of a search warrant, we do not engage in de novo review. *State v. McGrath*, 706 N.W.2d 532, 539 (Minn. App. 2005), *review denied* (Minn. Feb. 22, 2006). Instead, our “only consideration is whether the issuing judge had a substantial basis for concluding that probable cause existed.” *State v. Fawcett*, 884 N.W.2d 380, 384 (Minn. 2016) (quotation omitted). A substantial basis in this context means a “fair probability,” given the totality of the circumstances, “that contraband or evidence of a crime will be found in a particular place.” *State v. Zanter*, 535 N.W.2d 624, 633 (Minn. 1995) (quotation omitted). We afford “great deference” to the issuing judge’s finding of probable cause. *State v. Wiley*, 366 N.W.2d 265, 268 (Minn. 1985).

Our review “is limited to the information presented in the warrant application and supporting affidavit.” *Fawcett*, 884 N.W.2d at 384-85. “[Appellate courts] must consider the totality of the circumstances alleged in the supporting affidavit and must be careful not to review each component of the affidavit in isolation.” *Id.* at 385 (quotation omitted).

“[T]he critical question is whether the totality of facts and circumstances described in the affidavit would justify a person of reasonable caution in believing that the items sought were located at the place to be searched.” *State v. Ruoho*, 685 N.W.2d 451, 456 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004). We recognize “that doubtful or marginal cases should be largely determined by the preference to be accorded to warrants.” *Fawcett*, 884 N.W.2d at 385 (quotation omitted).

“[A] sufficient ‘nexus’ must be established between the evidence sought and the place to be searched.” *State v. Yarbrough*, 841 N.W.2d 619, 622 (Minn. 2014). “[D]irect observation of evidence of a crime at the place to be searched is not required.” *Id.* “A nexus may be inferred from the totality of the circumstances.” *Id.* A number of circumstances inform a judge’s determination of whether such a nexus exists, including the type of crime, the nature of the items sought, the extent of a defendant’s opportunity for concealment, and normal inferences about where a defendant would usually keep such items. *State v. Pierce*, 358 N.W.2d 672, 673 (Minn. 1984). Courts interpret search-warrant applications “in a common-sense and realistic manner” when determining whether they “contain information which would warrant a person of reasonable caution to believe that the articles sought are located at the place to be searched.” *State v. Gail*, 713 N.W.2d 851, 858 (Minn. 2006) (quotation omitted).

Appellant argues that the search-warrant application to search for stolen property establishes a direct connection only to appellant’s detached garage and driveway, but not to appellant’s house. He argues that the type of crime and the items reported stolen are of

such a nature that the only normal inference is that these items would be stored in a garage or on a driveway, and that it would be unusual to keep them in a house.

The search-warrant application stated that J.B. told Investigator Mathwig that he helped appellant steal a trailer and an air compressor with accessories and that appellant had stolen a jet ski, two snowmobiles, and a fuel barrel from a truck. J.B. reported seeing one snowmobile and the trailer on appellant's driveway and the jet ski and fuel tank in appellant's detached garage. J.B. further stated that appellant had been "parting out" the jet ski and that he was unsure where the missing parts were located. J.B. did not report the location of the air compressor or its accessories.

The fact that J.B. neither said that he saw any stolen items in appellant's house nor specifically suggested that any of those items might be found in the house does not necessarily render the warranted search of the house unsupported by probable cause. *Yarbrough* makes clear that "direct observation of evidence of a crime at the place to be searched is not required" and that "[a] nexus may be inferred from the totality of the circumstances," including the type of crime, the nature of the items and where they would normally be kept, as well as the opportunity for concealment 841 N.W.2d at 622.

The postconviction court acknowledged that a number of the stolen items would, "due to their size or type[,] be expected to be found in a garage or shed." But the postconviction court also noted that several of the stolen items—the air compressor, air compressor accessories, and parts removed from the jet ski—could fit in smaller spaces. Appellant cites to a portion of *United States v. Ross* stating that "probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an

upstairs bedroom.” 456 U.S. 798, 824, 102 S. Ct. 2157, 2172 (1982). But while appellant argues that the nature of most of the items for which police were looking in this case are such that they would normally be kept in a garage or shed, we agree with the postconviction court that the smaller items and parts removed from the larger items could reasonably be kept inside a house.

But here, unlike in *Yarbrough*, a nexus cannot necessarily be inferred between the nature of the stolen items and appellant’s home. At least some of the stolen items here are not the sort of thing that one would almost invariably keep in a house, like a gun or drugs. 841 N.W.2d at 623. Therefore, we must also consider the type of crime and the opportunity for concealment in determining whether there was a sufficient nexus between the information and the place to be searched—the home. *Id.* at 622.

Appellant relies on *State v. Brennan*, 674 N.W.2d 200, 203 (Minn. App. 2000), for the proposition that, in cases where a warrant has been upheld despite no direct connection between the items and the defendant’s house, “the alleged crimes were by their nature ones where the defendant was likely to keep the contraband in question inside his house.” While a theft and, more specifically, a theft of vehicles and vehicle accessories, may not necessarily mean that the suspect has placed stolen items inside his house, most thefts usually involve some level of concealment of those items by the perpetrator. It is only reasonable to infer that a thief would make some effort to conceal the stolen items. And, in the context of these facts, appellant was in fact trying to conceal the stolen items; the jet ski and fuel tank were inside his garage and one of the two snowmobiles was covered with a tarp, on top of the stolen trailer, in appellant’s driveway. Appellant also had sufficient

opportunity to conceal the items. All of the reported thefts occurred between October and early November of 2014. J.B. was arrested and interviewed by law enforcement on January 29, 2015, and stated that he had last seen some of the items in appellant's garage and on the driveway on January 28, 2015. With more than two months passing between the last theft and when J.B. reported seeing the stolen items, appellant had ample opportunity to conceal them. And, as noted, police also knew from J.B. that appellant was "parting out" the jet ski.

Based on the totality of the circumstances, the inclusion of appellant's house in the premises to be searched was sufficiently supported by probable cause. Appellant was trying to conceal the fruits of his theft, had ample opportunity to do so, and the unaccounted-for stolen items and jet-ski parts would, without any leap of logic, reasonably be located in appellant's house. While no single fact establishes a nexus between the theft crimes and the residence, the totality of the known facts would lead a reasonably cautious person to infer that appellant had concealed some of the stolen items inside his house. On this record, and considering "the preference to be accorded to warrants," *Fawcett*, 884 N.W.2d at 385 (quotation omitted), there was a sufficient nexus between the stolen items and appellant's house.

Appellant's trial counsel was not ineffective for not having challenged the search, because the motion would have been unsuccessful. Trial counsel's performance is not deficient for failing to raise meritless claims. *Dickerson*, 777 N.W.2d at 535.

Affirmed.