IN THE COURT OF APPEALS OF IOWA

No. 0-252 / 99-1039
Filed June 14, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KEITH ALAN ADAMS,
Defendant-Appellant.

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CLERK SUPREME COURT

Appeal from the Iowa District Court for Black Hawk County, Lawrence H. Fautsch and George L. Stigler, Judges.

Keith Alan Adams appeals from the court's judgment and sentence entered following his conviction of possession of a controlled substance with intent to deliver and failure to affix a drug tax stamp. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and James G. Tomka, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kim Griffith, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Vaitheswaran, JJ.

VAITHESWARAN, J.

A jury convicted Keith Adams of possession of methamphetamine with intent to deliver, in violation of Iowa Code section 124.401(1)(b) (1997) and failure to affix a drug tax stamp, in violation of Iowa Code section 453B.12. Adams appealed following entry of judgment and sentence. He contends (1) the district court should have suppressed evidence obtained from him after police stopped a truck in which he was riding and (2) his trial attorney furnished ineffective assistance. We affirm.

I. Background Facts and Proceedings

On September 24, 1998, an employee of a local motel notified the Waterloo Police Department that a person identifying himself as Jeremy Rutter insisted on checking into a room at about 6:30 A.M., after motel staff advised him no clean rooms were available. The employee stated Rutter paid cash and checked into room 217 with an unidentified woman. Soon, Rutter began receiving a number of short phone calls and, at some point, another man came to the room.

Officers McNamee and Schmidt set up surveillance of the room. Officers Payne and Krough also were in the area. McNamee was familiar with Rutter from a prior drug trafficking investigation. About one month earlier, Rutter had been arrested and charged with possession of methamphetamine with intent to deliver.

After some time, Rutter left the motel and walked to a motorcycle parked outside. Payne and Krough stopped him a short distance away and arrested him

for driving with a suspended license. Following the arrest, Payne found the key to room 217 hidden in the back of his police car.

Payne and Krough, together with McNamee and Schmidt, returned to the motel and continued to conduct surveillance of room 217. Parked near the room was a white pickup truck that had not previously been there. McNamee saw a man looking out of a window in the room. He characterized the man's behavior as "suspicious and consistent with somebody who is either dealing or buying from the hotel there." This man left the motel with another man, got into the truck, and drove away.

McNamee and Schmidt radioed Payne to stop the truck. McNamee also advised Payne that the truck appeared to be missing the front license plate. Payne stopped the truck. He identified the driver as Dennis Dieken, then asked Adams to identify himself. Adams handed Payne his non-driver identification card. Payne testified he associated Adams's name with past narcotic activity. He radioed the identification to McNamee, who confirmed Adams was a name he recognized as connected with another drug investigation.

In the meantime, McNamee and Schmidt arrived at the scene. McNamee recognized Dieken as the man he had seen in the window of room 217. He and Payne took Dieken to the back of the truck to question him. Dieken appeared nervous and repeatedly looked over at Adams. He consented to a search of the truck and his person. Payne found a cigarette package in the truck which contained what appeared to be methamphetamine.

While Dieken was being questioned by the other officers, Schmidt approached the passenger side of the truck and asked Adams to get out, which

he did. Schmidt then obtained Adams's consent to search his person. He found a bag containing methamphetamine in his right pocket and small zip-lock bag in Adams's left front pants pocket, which, he testified, was the type of container used to carry methamphetamine. Schmidt handcuffed Adams and asked him if he had any other methamphetamine. Adams told Schmidt that he had more in a cigarette package in the front of his pants. Schmidt conducted a further search which revealed the package and a large amount of money.

On October 30, 1998, the State charged Adams with one count of possession of "more than five grams of a mixture or substance containing methamphetamine, with intent to deliver," and one count of failure to affix a drug tax stamp, in violation of Iowa Code sections 124.401(1)(b) and 453B.12. The district court denied Adams's motion to suppress and the case proceeded to trial. The jury returned guilty verdicts on both counts. The court adjudged Adams guilty and sentenced him to an indeterminate term not to exceed twenty-five years on the possession count and five years on the tax stamp count, to be served concurrently. This appeal followed.

II. Motion to Suppress

Adams contends the stop violated his constitutional rights under the Fourth Amendment to the United States Constitution. We review constitutional issues de novo in light of the totality of the circumstances. *State v. Canas*, 597 N.W.2d 488, 492 (Iowa 1999). We consider the evidence presented during the suppression hearing and at trial. *State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998).

The Fourth Amendment affords people a right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The amendment protects against "unreasonable government intrusion upon a person's legitimate expectation of privacy." *Breuer*, 577 N.W.2d at 45. Subject to certain exceptions such as consent, the government must obtain a warrant prior to unreasonably searching an area in which a person has a legitimate expectation of privacy. *Id.*

A Fourth Amendment seizure takes place when a police officer stops a vehicle and detains its occupants. *Delaware v. Prouse,* 440 U.S. 648, 653, 99 S. Ct. 1391, 1396, 59 L. Ed. 2d 660, 667 (1979). Such a seizure is unreasonable except where officers have "articulable and reasonable suspicion" that either the vehicle or occupant is subject to seizure for violation of law. *Id.* at 663, 99 S. Ct. at 1461, 59 L. Ed. 2d. at 673. To determine whether reasonable suspicion exists, we ask "whether the facts available to the officer at the time of the stop would lead a reasonable person to believe that the action taken by the officer was appropriate." *State v. Jones*, 586 N.W.2d 379, 382 (Iowa 1998) (quoting *State v. Kinkhead*, 570 N.W.2d 97, 100 (Iowa 1997)). Although an officer cannot rely on "unparticularized suspicion," the officer needs "considerably less than proof of wrongdoing by a preponderance of the evidence." *State v. Richardson*, 501 N.W.2d 495, 496-97 (Iowa 1993) (quoting *United States v. Sokolow*, 490 U.S. 1, 8, 109 S. Ct. 1581, 1585, 104 L. Ed. 2d 1, 10 (1989)). If this objective standard is not satisfied, any evidence obtained through the unjustified investigatory stop must be suppressed. *Jones*, 586 N.W.2d at 382.

Adams's first contention is that there was no traffic violation to justify the vehicle stop. The district court agreed with Adams that the evidence was conflicting on whether the vehicle was stopped for a license plate violation. The court ultimately found, "the pickup truck was stopped solely because of the suspicion of drug possession and/or sales." On our de novo review of the record, we agree with this finding.

The specific question we must answer is whether the officers had an "articulable and reasonable suspicion" that Adams violated laws prohibiting the possession or sale of illegal drugs. We answer yes to this question. Payne testified he was conducting surveillance of the motel when he saw a white truck leave with two occupants. He stated he stopped the car about a mile or two from the motel because he knew there had been a day long investigation of drug activity in room 217 of the motel. Payne was the person who arrested Rutter earlier that day and also was the person who found the key to room 217 that Rutter had apparently hidden in his squad car. Payne additionally saw the truck at the motel, parked close to room 217.

The record does not reveal that Payne or any other officer investigating the motel saw Adams in room 217 or entering or leaving room 217. However, we believe the previously described circumstances were sufficient to alert these experienced officers to "criminal activity." *See Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884-85, 20 L. Ed. 2d 889, 911 (1968). Accordingly, we conclude the stop did not violate the Fourth Amendment.

Adams does not expressly challenge the officers' conduct in approaching him and asking for his name. Therefore we need not consider the issue.[1] For the same reason, we also need not decide whether Schmidt acted constitutionally in ordering Adams out of the vehicle.[2] Finally, we note that Adams consented to the remaining searches of his pockets, obviating any Fourth Amendment concerns. *See State v. Manna*, 534 N.W.2d 642, 646 (Iowa 1995).

III. Ineffective Assistance of Counsel Claim

Adams next contends his trial attorney was ineffective in (1) failing to preserve error on the motion to suppress, assuming we find he did not, and (2) failing to obtain a photograph of the front of the truck, to determine whether there was grounds to stop the vehicle for a traffic violation. We review an ineffective assistance of counsel claim de novo. *State v. Rubino*, 602 N.W.2d 558, 563 (Iowa 1999). While we normally preserve such claims for postconviction relief proceedings, we may address them on direct appeal when the record is adequate to decide the issue. *State v. Johnson*, 604 N.W.2d 669, 673 (Iowa App. 1999). To prevail, Adams must prove by a preponderance of the evidence (1) his trial counsel breached an essential duty, and (2) prejudice resulted. *State v. Astello*, 602 N.W.2d 190, 198 (Iowa App. 1999). The first element requires an applicant to overcome a strong presumption of counsel's competence and establish the conduct was outside the normal range of competency. *Irving v.*

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[1] We note that our appellate courts have upheld brief detentions for identification purposes. *See State v. Riley*, 501 N.W.2d 487, 489 (Iowa 1993) (noting merely talking to passenger or asking for identification not unconstitutional).

[2] *Cf. State v. Scott*, 518 N.W.2d 347, 349 (Iowa 1994) (reasonable cause to believe crime had occurred justified brief detention to conduct warrantless weapons search). By the time Schmidt ordered Adams out of the car, he knew Adams was the subject of another methamphetamine trafficking investigation.

State, 533 N.W.2d 538, 540 (Iowa 1995). The second element requires an applicant to show there is a reasonable probability that, but for counsel's errors, the trial outcome would have been different. *Wemark v. State*, 602 N.W.2d 810, 817 (Iowa 1999). We may dispose of Adams's claim if he fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

The State did not argue that Adams failed to preserve error in any respect. Therefore, we need not address Adam's first ineffective assistance of counsel claim. With respect to the second claim, trial counsel in fact raised the issue of the asserted license plate violation. However, Payne testified he did not stop the truck due to a missing front license plate but because of the day long narcotics investigation. In light of this testimony, defense counsel acted well within the range of competency in declining to introduce a photograph of the truck's front. We conclude he did not breach an essential duty and we accordingly reject Adams's second ineffective assistance of counsel claim.

We affirm the district court's ruling on Adams's motion to suppress as well as his conviction and sentence.

AFFIRMED.

Huitink, J., concurs; Sackett, C.J. specially concurs.

SACKETT, C.J. (concurring specially)

I concur with the result of the majority opinion. Conduct such as paying cash for a hotel room, requesting to have immediate access to your room, looking out your hotel window and placing or receiving telephone calls from your hotel room does not in every circumstance provide a "reasonable and articulable suspicion that criminal activity may be afoot." *See Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). These activities, taken alone on their face, are undertaken every day by a substantial number of people who are not in the business of drug trafficking. Identifying and investigating every person who engages in this type of hotel activity as possible drug traffickers is far too overreaching. Basing an investigation or *Terry* stop on these "hotel activities" alone is unreasonable without evidence of drug activity.