

IN THE COURT OF APPEALS OF IOWA

No. 9-317 / 98-503

Filed July 23, 1999

STATE OF IOWA,

Appellee,

vs.

ARTHUR GRIFFIN ETHRIDGE,

Appellant.

FILED
JUL 23 1999

Appeal from the Iowa District Court for Jasper County, Richard D. Morr,
Judge.

Arthur Ethridge appeals from his conviction for possession of
methamphetamine with the intent to deliver. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney
General, Steve Johnson, County Attorney, and Michael K. Jacobsen, Assistant
County Attorney, for appellee.

Considered by Sackett, C.J., and Mahan, and Zimmer, JJ. Streit, J., takes no
part.

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ZIMMER, J.

Defendant Arthur Ethridge appeals from a judgment and sentence entered following his conviction of possession of a schedule II controlled substance, methamphetamine, with intent to deliver. *See* Iowa Code § 124.401(1)(c)(6) (1997). He claims his trial counsel was ineffective for failing to file a motion to suppress evidence.

I. Background Facts and Proceedings. On November 4, 1997, Jasper County Deputy Sheriff Fred Oster stopped a vehicle being driven by Ethridge after observing the vehicle had faulty brake light equipment, and faulty turn signal equipment. While in the process of stopping defendant's vehicle, Deputy Oster observed Ethridge and his passenger moving around, bending over, and leaning towards each other inside the vehicle.

After stopping the vehicle, Deputy Oster identified Ethridge as the vehicle's driver. He then walked to the passenger side of the vehicle and identified Ethridge's passenger as Christine Shipley. From outside the vehicle, Deputy Oster observed a medical syringe lying on the passenger-side rear floorboard. Deputy Oster knew from his training and experience that syringes are commonly used to inject controlled substances into the body.

Deputy Oster told Shipley to step out of the vehicle. While he was searching her, he saw Ethridge reaching in and out of his pockets. He also observed Ethridge move his left hand down the side of the driver's seat. Deputy Oster discontinued his search of Shipley after observing Ethridge's movements and told him to move his

hand away from the side of the seat. He then asked him to step out of the vehicle. Deputy Oster found a small amount of a powder substance, later identified as methamphetamine, next to the side of the driver's seat where Ethridge had placed his hand. Oster searched Ethridge but found nothing on his person. A search of Ethridge's vehicle yielded drug paraphernalia and a bag containing marijuana residue. Deputy Oster then arrested both Shipley and Ethridge.

After Ethridge and Shipley were taken to the sheriff's department, a baggie containing methamphetamine was recovered from one of Shipley's socks. After questioning Shipley, Sheriff's personnel returned to the scene of the stop. They recovered two baggies of methamphetamine which Shipley told them she had discarded on the side of the road.

The State charged Ethridge with possession of methamphetamine with intent to deliver in violation of Iowa Code section 124.401(1)(b)(7) (1997), failure to affix a drug tax stamp in violation of Iowa Code sections 453B.3 and 453B.12 (1997), and prohibited acts in violation of Iowa Code section 124.401(1)(e) (1997). The State also alleged Ethridge was an habitual offender. *See* Iowa Code § 902.8 (1997). The State later dismissed the drug tax stamp offense and the prohibited acts offense.

Ethridge's trial counsel did not challenge the search of Ethridge's vehicle. The case proceeded to jury trial. The jury found Ethridge guilty of the lesser offense of possession of a controlled substance (less than five grams of methamphetamine) with intent to deliver in violation of Iowa Code section 124.401(1)(c)(6), a class C felony. The district court sentenced Ethridge to an indeterminate term of

incarceration not to exceed ten years and a \$1000 fine. Ethridge filed a timely notice of appeal.

II. Scope of Review and Preservation of Error. The scope of review for Ethridge's ineffective assistance of counsel claim is de novo. *See State v. Cook*, 565 N.W.2d 611, 613 (Iowa 1997). His claim was preserved by filing a notice of appeal.

III. Ineffective Assistance of Counsel. To support his claim of ineffective assistance of counsel, Ethridge must prove (1) his counsel failed in an essential duty, and (2) prejudice resulted from counsel's error. *See State v. McPhillips*, 580 N.W.2d 748, 754 (Iowa 1998). We may affirm on appeal if either element is absent. *Id.* To prove the first prong, Ethridge must prove his attorney's performance was not within the normal range of competence. *See id.* In this regard, there is a presumption that counsel is competent. *See State v. Arne*, 579 N.W.2d 326, 330 (Iowa 1998). A claim of ineffective assistance of counsel cannot be predicated upon counsel's failure to assert a meritless claim. *See State v. Rice*, 543 N.W.2d 884, 888 (Iowa 1996).

Generally, we do not review claims of ineffective assistance of counsel on direct appeal. *See State v. Kinkead*, 570 N.W.2d 97, 103 (Iowa 1997). Such claims are generally preserved for postconviction relief proceedings where an evidentiary record may be developed and a hearing held on counsel's alleged errors. *See State v. McKettrick*, 480 N.W.2d 52, 56 (Iowa 1992). However, ineffective assistance claims may be resolved on direct appeal when the record adequately addresses the issues. *See State v. McPhillips*, 580 N.W.2d at 754. We find the record is sufficient

to determine Ethridge's counsel was not ineffective for failing to file a motion to suppress.

The Fourth Amendment protects citizens from unreasonable and warrantless searches and seizures. U.S. Const. amend. IV. Warrantless searches and seizures are per se unreasonable unless they fall within one of the recognized exceptions to the warrant requirement. *See Mincey v. Arizona*, 437 U.S. 385, 390; 98 S. Ct. 2408, 2412, 57 L. Ed. 2d 290, 298–99 (1978); *State v. Carlson*, 548 N.W.2d 138, 140 (Iowa 1996). The plain view doctrine is one of the exceptions. *See Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2023, 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 initial intrusion of the police was lawful; and (2) the incriminating nature of the evidence is immediately apparent. *See Horton v. California*, 496 U.S. 128, 136, 110 S. Ct. 2301, 2308, 110 L. Ed. 2d 112, 123 (1990); *State v. Chrisman*, 514 N.W.2d at 60. The incriminating nature of an item is immediately apparent when there is probable cause to associate the property with criminal activity. *See State v. Oliver*, 341 N.W.2d 744, 746 (Iowa 1983). “A ‘practical, nontechnical’ probability that incriminating evidence is involved is all that is required.” *Texas v. Brown*, 460 U.S. 730, 742, 103 S. Ct. 1535, 1543, 75 L. Ed. 2d 502, 514 (1983) (citations omitted). A showing such a belief is correct or more likely true than false is not required. *Id.*

Ethridge does not dispute the initial traffic stop of his vehicle was lawful. Rather, he argues the incriminating nature of the syringe was not immediately

apparent and therefore evidence seized from the search of the vehicle should be suppressed.

In this case, Deputy Oster observed Ethridge and his passenger moving about the interior of the vehicle, bending over, and leaning towards each other as he made the traffic stop. At the time he observed the syringe lying on the rear passenger-side floorboard, he knew from training and experience that syringes are commonly used to inject controlled substances. Because of these background facts, there was probable cause to associate the syringe with illegal drug activity. We conclude the deputy's seizure of the syringe satisfies the requirements of the plain view exception.

In addition, we conclude the existence of probable cause, coupled with exigent circumstances, supports the subsequent search that yielded methamphetamine and drug paraphernalia. The deputy's observation of the syringe, coupled with the furtive movements of Ethridge and his passenger inside the vehicle, provided the deputy with probable cause for the search. The exigency requirement is satisfied by the vehicle's inherent mobility. *See State v. Cain*, 400 N.W.2d 582, 583 (Iowa 1987).

We conclude the seizure of the syringe was justified by the plain view exception to the warrant requirement, and the subsequent search was supported by probable cause coupled with exigent circumstances. We conclude the evidence Ethridge claims his trial attorney should have sought to suppress was admissible. An attorney is not ineffective for failing to seek the suppression of admissible evidence. *See Kellogg v. State*, 288 N.W.2d 561, 565 (Iowa 1980). Ethridge was not prejudiced

by his attorney's failure to file a suppression motion. Ethridge is not entitled to relief based on his claim of ineffective assistance of counsel.

AFFIRMED.