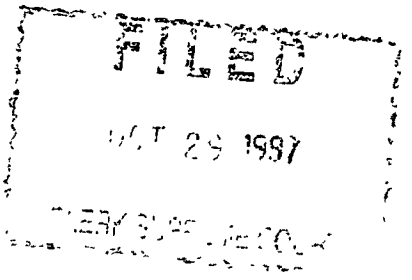
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IN THE COURT OF APPEALS OF IOWA



No. 7-362 / 96-1281
Filed 10/29/97

STATE OF IOWA,
Appellee,

vs.

GARY DEAN CORT,
Appellant.

Appeal from the Iowa District Court for Polk County, George Bergeson (motion to suppress) and Ray A. Fenton (trial), Judges.

Gary Cort appeals from his conviction, following a bench trial, for possession of a controlled substance with intent to deliver. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and John P. Messina, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, John P. Sarcone, County Attorney, and Elizabeth Quinlan, Assistant County Attorney, for appellee.

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

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HUITINK, J.

Gary Dean Cort appeals his conviction for possession of a controlled substance with intent to deliver in violation of Iowa Code section 124.401(1)(c).

I. Background Facts and Proceedings.

Cort was banned from Prairie Meadows Casino by its management on October 4, 1995, after an altercation with another customer. Later that month, Cort received an invitation to celebrate his November birthday at Prairie Meadows. A casino employee recognized Cort from the October incident and notified security. After Cort's identity was confirmed, he was arrested by Altoona police officers for criminal trespass. A search of Cort's person following his arrest produced methamphetamine and four hundred dollars in cash.

Cort was charged with criminal trespass and possession with intent to deliver methamphetamine, a schedule II controlled substance. He pled guilty to misdemeanor trespassing and not guilty to the drug charges.

Cort moved to suppress the money and drugs seized during his arrest. He claimed he was arrested illegally citing the invitation to celebrate his birthday at Prairie Meadows and the resulting legality of his presence there. The district court denied Cort's motion to suppress after a hearing on its merits.

Recognizing the resulting inevitability of conviction, Cort agreed to a trial on stipulated evidence. The district court, after an abbreviated proceeding during which Cort stipulated to the minutes of testimony and allegations made in the trial

information, found Cort guilty of possession of methamphetamine with intent to deliver. Cort was sentenced to an indeterminate ten-year term of confinement that was suspended and was placed on probation.

On appeal Cort renews his claim that he was illegally arrested and any evidence seized should have been suppressed. He also claims just cause for the untimely filing of his motion to suppress in district court. In the event this court finds otherwise, Cort argues he was denied effective assistance of counsel based on his lawyer's failure to timely file the motion to suppress.

II. Timeliness of Cort's Motion.

Cort was arraigned on December 29, 1995. His motion to suppress was filed sixty-seven days later. Iowa Rule of Criminal Procedure 10(4) requires the filing of a motion to suppress no later than forty days after arraignment unless the delay is for good cause. *State v. See*, 532 N.W.2d 166, 168 (Iowa App. 1995) (citations omitted). Failure to timely file a motion to suppress amounts to a waiver of defendant's Fourth Amendment objection to the admission of seized evidence. *Id.*

Cort cites his inability to consult with his attorney and counsel's preoccupation with other matters as good cause for the delayed filing of his motion to suppress. Cort bears the burden of establishing good cause. *Id.* The determination of good cause for late filing of a pretrial motion requires the court to weigh the defendant's interest in obtaining a full and fair trial against the rules' purpose of avoiding unnecessary surprise and delay. *Id.*

Cort has not met his burden on this issue. Counsel's preoccupation with other matters and limited availability are not adequate justifications for violating the rule. We hold Cort waived any Fourth Amendment objection to admission of the seized evidence because of his failure to timely file his motion to suppress.[1]

III. Ineffective Assistance of Counsel.

Ordinarily claims of ineffective assistance of counsel are preserved for postconviction proceedings unless the record is sufficient to make the required findings. *State v. Boyles*, 551 N.W.2d 600, 610 (Iowa 1996). We find the record in this case is sufficient for this purpose and proceed to the merits of Cort's ineffective assistance of counsel claim.

Our ultimate concern in claims of ineffective assistance of counsel is with the "fundamental fairness of the proceedings whose result is being challenged." *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987)(quoting *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L.Ed. 674, 699 (1984)). To prevail on a claim of ineffective assistance of counsel, one must show: (1) his attorney failed to perform an essential duty; and (2) the failure prejudiced him. *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989). The burden of proof is on the applicant to overcome the presumption counsel acted within the normal range of competency. *Bettis v. State,* 547 N.W.2d 635, 637 (Iowa App. 1996). We need not determine whether counsel

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[1] Even though the State did not resist Cort's motion on this ground, we may affirm on any ground appearing in the record. *State v. McCowen*, 297 N.W.2d 226, 227 (Iowa 1980).

breached an essential duty before considering whether the defendant is able to establish the required prejudice. *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992). To prove prejudice, the applicant must show he suffered a substantial and actual disadvantage, and there is a reasonable probability the outcome of the proceeding would have been different without counsel's errors. *Id.*

Cort's argument, essentially, is he was not trespassing on November 8, 1995. He denies receipt of notice that the October 4, 1995 ban was effective on subsequent dates, and, alternatively, that the promotional birthday invitation lifted any ban Prairie Meadows had previously imposed. Cort accordingly contends his arrest and the search incident to it were unlawful, and the seized evidence should have been suppressed.[2]

An arrest is the taking of a person into custody when and in the manner authorized by law. Iowa Code § 804.5. A peace officer may make a warrantless arrest where a public offense has been committed and the peace officer has reasonable cause to believe the person arrested committed it. Iowa Code § 804.7(3). A search incident to lawful arrest is automatically permissible. *Chimel v. California*, 395 U.S. 752, 762-63, 89 S.Ct. 2034, 2040, 23 L.Ed.2d 685, 694 (1969); *United States v. Robinson*, 414 U.S. 218, 235, 94 S.Ct. 467, 477, 38 L.Ed.2d 427, 440-41 (1973). Moreover, "[a] search incident to lawful arrest is legal even if the arresting officer .

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[2] Cort does not challenge the reasonableness of the search incident to his arrest. Accordingly, we need not address this issue.

had no independent probable cause to conduct the search." *Meyer*, 543 N.W.2d at 879 (citing *State v. Garcia*, 461 N.W.2d 460, 463 (Iowa 1990)). "'So long as the officer is legally permitted and objectively authorized to do so, an arrest is constitutional.'" *Id.*

The record indicates the arresting officers verified Prairie Meadows' records and confirmed Cort had been banned from the premises. The arresting officers were therefore objectively authorized and legally permitted to arrest Cort for trespass. *See* Iowa Code § 716.7(2)(b)(1995)(stating trespass is the knowing disregard of a request or notice to leave or refrain from entering the premises). The arrest and search incident to arrest were accordingly valid. The court correctly denied Cort's motion to suppress the drugs and money seized during his arrest. Cort was not prejudiced by his counsel's failure to file a motion to suppress in a timely manner.

Because Cort's November 8, 1995, arrest was valid, the evidence was properly admitted, and Cort has failed to establish ineffective assistance of counsel, we affirm his conviction.

AFFIRMED.