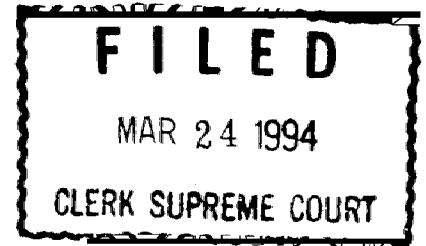


IN THE COURT OF APPEALS OF IOWA

No. 4-005 / 92-1898



HAROLD TRAYWICK,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Scott County,
James E. Kelley, Judge.

Traywick appeals the denial of his application for
postconviction relief based on ineffective assistance of
counsel. **AFFIRMED.**

Kent A. Simmons, Davenport, for appellant.

Bonnie J. Campbell, Attorney General, Mary Tabor,
Assistant Attorney General, William E. Davis, County
Attorney, and James Hoffman, Assistant County Attorney, for
appellee.

Considered by Hayden, P.J., Sackett, J., and Schlegel,
S.J.*

*Senior judge from the Iowa Court of Appeals serving by
order of the Iowa Supreme Court.

HAYDEN, P.J.

At about 2 p.m. Richard Cavanaugh saw a strange car near the rural residence of Arthur Schaeffer, his brother-in-law and neighbor. The car drove by Cavanaugh's residence, turned around and drove by again, stopped near the Schaeffer residence, and then backed up to Cavanaugh's property. The sole occupant of the car, an African-American male, told Cavanaugh his car was overheating and he was lost. After receiving directions to the interstate, the driver left but did not head for the interstate as he had indicated. Instead, he returned to the Schaeffer residence and pulled into the driveway.

Schaeffer returned to his home at about 3:40 p.m. to discover it had been burglarized. Schaeffer reported the incident to the police at 3:47 p.m. He also called Cavanaugh and stated his house had been burglarized. Cavanaugh told Schaeffer about the stranger in the car and said he had written down the car's license plate number.

Deputy Sheriff Paul Wolfe investigated the Schaeffer burglary. While en route to Schaeffer's residence Wolfe learned the car seen by Cavanaugh was registered to a woman named Luella Traywick. Wolfe also learned she was married to Harold Traywick, a person Wolfe knew had been a suspect in a prior burglary. The front door of the Schaeffer residence had been kicked in, and Wolfe noted a distinct shoe print on the door. Schaeffers reported cash and perhaps jewelry were missing from the residence.

At about 5:49 p.m. Wolfe and two other officers intercepted the Traywick car. Wolfe recognized Harold Traywick as the driver of the car, but he did not know the passenger. Wolfe testified he pulled up next to the Traywick car and saw the passenger doing something with his hands, either trying to hide something or pulling back the slide on an automatic pistol. Wolfe drew his service revolver, identified himself, and ordered the two men to place their hands on the dash. Traywick was removed from the car and placed in handcuffs. After Traywick was placed in the squad car, the passenger was handcuffed and moved to the back of the car. Wolfe observed the tread of Traywick's shoes were similar to the print left on the Schaeffer's door. Jewelry was found under the seat on the passenger side of the vehicle. The jewelry, however, did not come from the Schaeffer residence but from another house burglarized the same day.

Traywick was charged and convicted of two counts of second-degree burglary. See State v. Traywick, 468 N.W.2d 452 (Iowa 1991). The supreme court preserved defendant's ineffectiveness claim against his trial counsel. See id. at 454.

Traywick filed an application for postconviction relief, raising his ineffectiveness claim. The district court denied the application, concluding Wolfe had reasonable grounds to stop the Traywick car and probable cause to arrest Traywick.

Traywick appeals. He contends the mere fact his wife's car was seen in the vicinity of the Schaeffer residence less than two hours before a burglary was discovered did not provide reasonable grounds to stop that car four hours after the discovery and several miles from the scene. He also contends the officers did not have probable cause to arrest him. He argues trial counsel was ineffective in failing to raise or adequately argue these contentions.

Ordinarily, our review of postconviction relief proceedings is for errors of law. Van Hoff v. State, 447 N.W.2d 665, 668 (Iowa App. 1989) (citation omitted). However, when a postconviction petitioner asserts a violation of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances. Id. Our review is de novo. Id. (citation omitted). In order to prevail on an ineffectiveness claim, defendant must show by a preponderance of the evidence (1) counsel's performance was deficient and (2) counsel's deficient performance prejudiced the defense so as to deprive defendant of a fair trial. Whitsel v. State, 439 N.W.2d 871, 872 (Iowa App. 1989) (citations omitted). The petitioner must overcome a strong presumption of counsel's competency. Id. (citing Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 693-94 (1984) (citation omitted)). Defendant is not entitled to perfect representation, only that which is in the normal range of competency. Id. (citation omitted).

I. Legality of Vehicle Stop. Traywick contends his trial counsel rendered ineffective assistance by failing to challenge the legality of the investigatory stop in a suppression motion. At the postconviction proceeding defendant's trial counsel testified he did not challenge the officers' initial stop of the vehicle because he thought the description of the vehicle and license plate number were sufficient to justify an officer stopping the vehicle. Our supreme court has held a strategic decision not to file a suppression motion is not necessarily an indication of ineffective assistance of counsel. Kellogg v. State, 288 N.W.2d 561, 565 (Iowa 1980) (citation omitted); see Kyle v. State, 364 N.W.2d 558, 563 (Iowa 1985) ("decision not to seek a suppression hearing clearly seems to be a judgment call made by a competent attorney, especially since there is no reason to believe that a motion to suppress would have been successful").

The general rule is an investigatory stop of a motor vehicle is constitutionally permissible only if the stopping officer has specific and articulable cause to reasonably believe criminal activity is afoot. Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968); State v. Aschenbrenner, 289 N.W.2d 618, 619 (Iowa 1980) (citations omitted); State v. Dixon, 241 N.W.2d 21, 23 (1976); see State v. Lamp, 322 N.W.2d 48, 51 (Iowa 1982) (citation omitted). This burden of proof falls upon the State when an investigatory stop is challenged.

In re S.A.W., 499 N.W.2d 739, 741 (Iowa App. 1993) (citing State v. Lamp, 322 N.W.2d 48, 51 (Iowa 1982)). Reasonable cause is established by showing the officer has specific and articulable cause to support a reasonable belief criminal activity may have occurred. State v. Henderson, 313 N.W.2d 564, 565 (Iowa 1981) (citation omitted); Terry v. Ohio, 392 U.S. at 21-22, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906. Mere suspicion is not enough. State v. Scott, 409 N.W.2d 465, 468 (Iowa 1987) (citation omitted). Evidence justifying the stop, however, need not rise to a level of probable cause. Id. (citations omitted).

In this case the officer had been given a description of the vehicle. The officer testified he observed a car matching the license plate number and the general description of the vehicle given by Cavanaugh. The officer was investigating a specific crime. See Lamp, 322 N.W.2d at 51. In addition, the officer recognized the defendant as someone who had been a suspect in a prior burglary. See State v. Curry, 436 N.W.2d 371, 372 (Iowa App. 1988).

The information relied upon by officers when they made the stop was reasonably deduced and sufficient to give them reasonable cause. The investigatory stop was reasonable under the circumstances of this case.

Traywick's counsel's performance was not so deficient as to deny him representation guaranteed by the Sixth Amendment. There was no showing of prejudice. We affirm the trial court's denial of postconviction relief on this issue.

II. Legality of Arrest. In this appeal of a postconviction proceeding Traywick contends his trial counsel rendered ineffective assistance in failing to adequately present the challenge of the legality of his arrest. Traywick contends his trial counsel failed to take sufficient steps to ensure the trial judge received the amended motion to suppress, failed to subpoena Deputy Blaesi and Cavanaugh, and failed to point out the significance of a similar tread design on defendant's shoes and the prints found at the Schaeffer's residence.

In this case Deputy Sheriff Wolfe had been given a description of the vehicle. The officer testified he observed a car matching the license plate number and the general description of the vehicle given by Cavanaugh. The officer was investigating a specific crime. See Lamp, 322 N.W.2d at 51. In addition, the officer recognized the defendant as someone who had been a suspect in a prior burglary. See Curry, 436 N.W.2d at 372. Upon approaching defendant's vehicle the officer observed the passenger moving his hands, either trying to hide something or pulling back the slide on an automatic pistol.

A police officer may make a warrantless arrest if he has probable cause to believe a crime has been committed and the person he is arresting committed it. Children v. Burton, 331 N.W.2d 673, 679 (Iowa 1983) (citation omitted). Probable cause to arrest exists where the facts and circumstances within arresting officer's knowledge

would lead a reasonable and prudent person to believe a crime has been committed and the arrestee has committed it. State v. Strong, 493 N.W.2d 834, 836 (Iowa 1992) (citations omitted); State v. Harris, 490 N.W.2d 561, 563 (Iowa 1992) (citations omitted). Probable cause must be determined on the particular facts in each case. Children, 331 N.W.2d at 680 (citations omitted).

Traywick contends his trial counsel rendered ineffective assistance in failing to ensure the trial judge received the amended motion to suppress. The trial court record shows defendant's initial motion to suppress did not challenge the legality of the arrest. In an amended motion to suppress, however, this challenge was raised. Defendant's trial counsel filed the amended motion and brought a copy to the judge's chambers on July 28, 1989, the same day the trial court filed its denial of the motion. In its order the trial court acknowledged the challenge to the legality of the arrest but determined reasonable grounds existed to arrest Traywick. The postconviction court also determined there was probable cause to arrest Traywick. A defendant is not entitled to perfect representation, but only to that which is within the range of normal competency. Cuevas v. State, 415 N.W.2d 630, 632 (Iowa 1987) (citation omitted). There is a strong presumption counsel's actions were reasonable under the circumstances. State v. Hildebrant, 405 N.W.2d 839, 841 (Iowa 1987). We determine trial counsel's representation was within the normal range of competency.

Traywick also contends his trial counsel rendered ineffective assistance in failing to subpoena Deputy Sheriff Blaesi and Cavanaugh to testify to the "equivocal nature of the presence of the car near the scene." In this case a burglary had been committed. Deputy Wolfe had a description of the vehicle seen "at the scene of the burglary, including the vehicle's license plate number. Defendant has failed to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984). Cavanaugh identified the license plate number of the vehicle he observed at the scene of the burglary. Deputy Sheriff Blaesi investigated the burglary scene. Defendant has failed to show how their testimony would have assisted him or caused a different outcome.

Finally Traywick argues his counsel's failure to argue the tread similarity could not be a basis for probable cause to arrest. Similarly, we find defendant has failed to show a reasonable probability such an argument would have caused a different result in his trial.

We conclude Traywick's trial counsel exercised his duty to adequately and properly prepare defendant's case. Counsel's representation was within the normal range of competency and reasonable under the circumstances of this

case. We affirm the trial court's denial of postconviction relief.

Costs of this appeal are assessed to Traywick.

AFFIRMED.