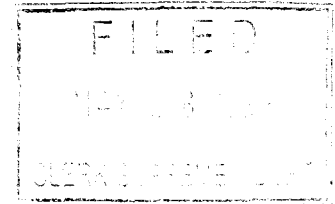


IN THE COURT OF APPEALS OF IOWA

No. 9-250 / 98-0646

Filed May 26, 1999



STATE OF IOWA,
Appellee,

vs.

BRADLEY LEE WINTERS,
Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, John Stuart
Scoles (motion to suppress) and Bryan H. McKinley, Judges.

On appeal from his conviction for possession of methamphetamine with intent
to deliver, Bradley Winters contends his trial counsel was ineffective for failing to
preserve error on a challenge to the legality of the search conducted pursuant to the
issuance of a citation. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney
General, Paul L. Martin, County Attorney, and William J. Hoekstra, Assistant County
Attorney, for appellee.

Considered by Huitink, P.J., and Streit and Mahan, JJ.

STREIT, J.

Bradley Winters was charged and convicted of possession of methamphetamine with the intent to deliver and sentenced to an indeterminate ten-year prison term. Winters contends his trial counsel was ineffective for failing to challenge the search incident to the issuance of a citation citing *Knowles v. Iowa*, __ U.S. __, __ S. Ct. __, 140 L. Ed. 2d 465 (1998). Because we find trial counsel can not be found ineffective for failing to predict the United States Supreme Court will grant certiorari and hold an Iowa statute unconstitutional, we affirm.

In November 1997, a police officer stopped Daniel Moore's vehicle for a traffic violation and learned Moore's license was under suspension. He issued Moore a citation and conducted a search of the vehicle pursuant to Iowa Code section 805.1(4) (1997)(officer's issuance of citation in lieu of arrest or continued custody does not affect officer's authority to conduct otherwise lawful search).

During the search, the officer found a fanny pack which belonged to Winters, a passenger in Moore's car. Inside the pack was a scale, spoon, scissors, a mirror case, and a Tupperware container. The officer searched Winters and found methamphetamine and Zigzag papers. Winters was searched again at the jail and officers discovered an address book, \$1440, paper folds, and a chunk of methamphetamine.

Because an ineffective assistance of counsel claim asserts a constitutional violation, we make an evaluation based on the totality of the circumstances. This is equivalent to a de novo review. *Cuevas v. State*, 415 N.W.2d 630, 632 (Iowa 1987). A convicted person seeking relief on a claim of ineffective assistance of counsel must prove two elements: (1) breach of an essential duty; and (2) prejudice. *State v. Broughton*, 450 N.W.2d 874, 876 (Iowa 1990). The test for the first element is whether the lawyer's performance was outside the range of normal competency. *Pettes v. State*, 418 N.W.2d 53, 56 (1988). The test for the second element is whether counsel's error affected the outcome of the case. *State v. Bumpus*, 459 N.W.2d 619, 627 (Iowa 1990).

Winters contends trial counsel was ineffective for failing to object when the State offered evidence seized by police during the search incident to the traffic citation pursuant to Iowa Code section 805.1(4). Our supreme court upheld the constitutionality of section 805.1(4) on three separate occasions. See *State v. Doran*, 563 N.W.2d 620 (Iowa 1997); *State v. Knowles*, 569 N.W.2d 601 (Iowa 1997); *State v. Orozco*, 573 N.W.2d 22 (Iowa 1997).

Winters' trial was in February of 1998. The United States Supreme Court granted certiorari of *State v. Knowles* in March of 1998. Trial counsel had no way of knowing certiorari would be granted in that case. See *Knowles v. Iowa*, ___ U.S. ___, ___ S. Ct. ___, 140 L. Ed. 2d 465 (1998)(reversing the Iowa Supreme Court in *State v. Knowles* and declaring section 805.1(4) unconstitutional). Although the question is

not whether certiorari will be granted, but whether the challenge was worth raising, *see State v. Schoelerman*, 315 N.W.2d 67, 72 (Iowa 1982), we find counsel's decision in this case, not to challenge section 805.1(4), competent in light of the fact our supreme court upheld the constitutionality of the statute three times in 1997.

Winters argues trial counsel should have known the Supreme Court would have granted certiorari in *State v. Knowles* and he should have predicted the outcome of the case. Our supreme court has made clear such a high duty is not required of a competent attorney. "We have never held counsel to a duty of clairvoyance." *Morgan v. State*, 469 N.W.2d 419, 427 (Iowa 1991)(citing *Cuevas v. State*, 415 N.W.2d 630, 633 (Iowa 1987))(counsel not required to predict change in law); *Snethen v. State*, 308 N.W.2d 11, 16 (Iowa 1981)("Counsel need not be a crystal gazer; it is not necessary to know what the laws will become in the future to provide effective assistance of counsel"); *Hinkle v. State*, 290 N.W.2d 28, 34 (Iowa 1980) (ineffective assistance claim rejected even though counsel failed to object to instruction we rejected in later cases). To do so would be to hold the attorney to a higher duty than is required of the supreme court of this state.

Because we find Winters' attorney did not breach an essential duty in not preserving a challenge to the constitutionality incident to a citation, we affirm.

AFFIRMED.

No. 98-0646. [9-250] STATE v. WINTERS

Appeal from the Iowa District Court for Cerro Gordo County, John Stuart Scoles and Bryan H. McKinley, Judges. **AFFIRMED.** Considered by Huitink, P.J., and Streit and Mahan, JJ. Opinion by Streit, J. (4 pages \$1.60)

Bradley Winters was charged and convicted of possession of methamphetamine with the intent to deliver and sentenced to an indeterminate ten-year prison term. Winters contends his trial counsel was ineffective for failing to challenge the search incident to the issuance of a citation under Iowa code section 805.1(4), citing *Knowles v. Iowa*, __ U.S. __, __ S. Ct. __, 140 L. Ed. 2d 465 (1998). Our supreme court upheld the constitutionality of section 805.1(4) on three separate occasions. The United States Supreme Court granted certiorari of *State v. Knowles* in March of 1998. Trial counsel had no way of knowing certiorari would be granted in that case or that the case would be reversed. We have never held counsel to a duty of clairvoyance. To do so would be to hold the attorney to a higher duty than is required of the supreme court of this state.