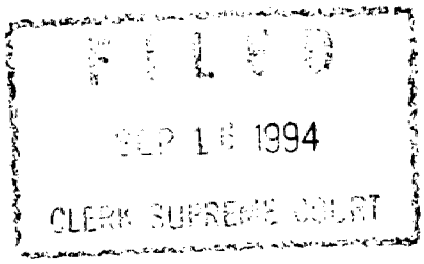
IN THE COURT OF APPEALS OF IOWA

No. 4-331 / 93-35



STATE OF IOWA,

Appellee,

vs.

DOUGLAS ROBERT THORNTON,

Appellant.

Appeal from the Iowa District Court for Polk County, Richard A. Strickler, Judge.

Defendant appeals judgment and sentences entered upon his convictions of carrying weapons and possession of a controlled substance with intent to deliver in violation of Iowa Code sections 724.4, 204.401(1)(c) and 204.401(1)(e) (sentencing enhancement) (1989) (chapter 204 now codified at chapter 124 (1993)). **AFFIRMED.**

Frank Burnette of Davison & Burnette, Des Moines, for appellant.

Bonnie J. Campbell, Attorney General; Robert P. Ewald, Assistant Attorney General; John P. Sarcone, County Attorney; and James P. Ward, Assistant County Attorney, for appellee.

Considered by Donielson, C.J., and Hayden and Huitink, JJ.

DONIELSON, C.J.

The defendant, Douglas Thornton, appeals from his convictions for possession of a controlled substance with intent to deliver[1] and carrying weapons in violation of Iowa Code section 724.4. Our review with respect to the alleged deprivation of constitutional rights is de novo, otherwise it is for the correction of errors of law.

The defendant was a passenger in a pickup in which drugs and firearms were found following a search by deputies. The two passengers and driver of the truck were arrested. All three filed motions to suppress evidence obtained from the officers' search. The trial court granted the motion with respect to evidence found in connection with the search of the pickup.

The State sought discretionary review of the ruling and the Iowa Supreme Court granted it and transferred the matter to the Iowa Court of Appeals. During the pendency of the appeal the State offered plea bargains to the three defendants which would give them deferred judgments in exchange for pleas of guilty. Two of the defendants accepted the plea arrangements but, upon the advice of counsel, defendant Thornton did not.

On February 25, 1992, the Iowa Court of Appeals filed an opinion reversing the trial court's suppression order. State v. Thornton, No. 1-493/90-1828 (Iowa App. February

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1. Iowa Code § 204.401 (now § 124.401).

25, 1992). The defendant did not apply for further review, and procedendo issued. Following a jury trial the defendant was found guilty of possession of a controlled substance with intent to deliver and carrying weapons. The defendant now appeals. Additional facts relevant to the appeal are set forth and considered in the following legal arguments raised by the defendant.

I. **Suppression Order.**

The defendant contends the court of appeals erred in reversing the trial court's suppression order. The State asserts this court's prior ruling became the law of the case and is not subject to further review on appeal. We agree with the State and conclude the defendant is bound by this court's previous ruling on the suppression issue.

Pursuant to Iowa Code section 814.5(2)(b) and Iowa Rule of Appellate Procedure 201 the State sought discretionary review of the trial court's suppression order. When an application for discretionary review is granted "further proceedings shall be had pursuant to the rules of appellate procedure." Iowa R. App. P. 203. The Iowa Supreme Court has held an appeal on discretionary review will be handled like any other appeal and other appellate procedures and rules are equally applicable. See Severson v. Peterson, 364 N.W.2d 212, 214 (Iowa 1985).

If the defendant was dissatisfied with this court's reversal of the trial court's suppression order, he could, as a matter of right, have applied for further review from

the Iowa Supreme Court. Iowa Code § 602.4102(4); Iowa R. App. P. 402; see also State v. Riley, 501 N.W.2d 487, 488 (Iowa 1993); State v. Rosenstiel, 473 N.W.2d 59, 60 (Iowa 1991). The defendant did not do so and this court's reversal of the suppression order became the law of the case. See State v. Di Paglia, 248 Iowa 97, 78 N.W.2d 472 (1956), cert. denied, 352 U.S. 1017 (1957). The doctrine of the law of the case represents the practice of courts to refuse to reconsider what has once been decided. State v. Grosvenor, 402 N.W.2d 402, 405 (Iowa 1987). "It is a rule which provides that the legal principles announced and the view expressed by a reviewing court in an opinion, right or wrong, are binding throughout further progress of the case upon the litigants the trial court and this court in later appeals." Id. We have considered the authorities and arguments in the defendant's reply brief and find no basis for excepting this case from application of the law of the case doctrine.

Decisions of this court are final and are not reviewable except upon a grant of further review by the supreme court. Iowa Code § 602.5106(2). The defendant does not get two bites at the apple. The suppression issue was previously appealed and conclusively ruled upon by this court. That decision became the law of the case and we cannot address it in this appeal.

II. **Identity of the Defendant.**

The defendant argues no evidence was introduced at trial to prove he was guilty of possession of a controlled substance with the intent to distribute. He contends the State's entire case on the issue of identity consisted of nothing more than his occupancy as a passenger in a truck which was found to contain controlled substances. "In determining whether the evidence is sufficient to support a conviction, the relevant inquiry is 'whether, after viewing the evidence in the light light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" State v. Casady, 491 N.W.2d 782, 787 (Iowa 1992) (quoting Jackson v. Virginia, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560, 573 (1979).

The pickup in which the defendant was riding was stopped at approximately three o'clock in the morning. It came to the attention of a deputy who noticed, among other things, that the vehicle had stopped in the middle of the road and its passengers had disembarked and were heading toward a house. When deputies searched the defendant they found on him a small pipe with what appeared to be marijuana residue in its bowl. The defendant was also in possession of $380 in cash.

A black shaving kit bag found on the seat of the pickup contained three loaded .22 caliber clips; a 9 millimeter clip; eighteen rounds of .22 ammunition; a roach clip and

pot pipe; methamphetamine; and marijuana. A further search of the vehicle and surrounding area revealed methamphetamine in the engine compartment between the fender and hood and methamphetamine and marijuana underneath the vehicle.

Underneath the seat of the truck deputies found a loaded 9 millimeter Browning semi-automatic pistol; a Ruger .22 caliber semi-automatic pistol; and a mirror with methamphetamine powder residue on it. It was undisputed the 9 millimeter Browning had belonged to the defendant in 1988 when he applied for a weapons permit from the Polk County Sheriff's Department.

Much of the incriminating evidence was found in the shaving kit. A deputy testified as to how the pot pipe found on Thornton matched and could be used in conjunction with the pipe found in the shaving kit. The cash found on the defendant was mostly twenty-dollar bills and consistent with the proceeds of drug sales. We find the record contains substantial evidence from which a jury could find the defendant guilty of possession with intent to distribute or the aiding and abetting thereof.

III. Jury Instruction--Dominion and Control.

The defendant had requested the jury be instructed he must have exercised dominion and control over the weapons in order to be guilty of violating Iowa Code section

724.4(1)[2] and to enhance his sentence for possession as provided in section 204.401(1)(e).[3] An exercise of dominion and control is an element of the offense prohibiting the possession of firearms and offensive weapons by convicted felons. Iowa Code § 724.26. The defendant reasoned the dominion and control requirement presents a greater burden for the State to prove and the legislature would not have wanted a less stringent standard to have applied to the offenses for which he was charged since conviction thereon would mandate longer sentences than those imposed for a violation of section 724.26.

The trial court denied the defendant's request. It instructed the jury regarding the meaning of the terms "possession" and "knowledge." "Jury instructions are designed to explain the **applicable law** to the jurors so the law may be applied to facts proven at trial." State v. Bennett, 503 N.W.2d 42, 45 (Iowa App. 1993) (emphasis added). A review of the statutes at issue reveals the defendant's exercise of "dominion and control" was not an element specific to the offenses charged and the trial

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2. **Carrying weapons.**
....[A] person ... who **knowingly** carries or transports in a vehicle a pistol or revolver, commits an aggravated misdemeanor. Iowa Code 724.4(1) (emphasis added).

3. "A person in the **immediate possession or control** of a firearm while participating in a violation of [section 204.401] shall be sentenced to two times the term otherwise imposed by law, and no such judgment, sentence, or part thereof shall be deferred or suspended." (Emphasis added.)

court did not err in denying his request. To the extent the defendant questions the fairness of his sentence as compared to that for a convicted felon sentenced for the possession of a firearm, we remind him states have wide latitude in fixing the punishments for crimes, and any sentencing disparity among the various offenses involving the possession of firearms is a legislative, not judicial, concern. See 21 Am. Jur. 2d Criminal Law §§ 589, 595 (1981).

IV. Motion for Mistrial--Prosecutorial Misconduct.

After the closing arguments had been completed and the jury had begun its deliberations, the defendant's counsel moved for a mistrial based on the prosecutor's allegedly inappropriate references during his rebuttal argument regarding the defendant's ability to subpoena witnesses. The defendant contends the comments violated his Fifth-Amendment right to remain silent. The State asserts the defendant has waived error on this issue by not making a timely objection before the trial court.

Error must be preserved as to final arguments before appellate review may be had. State v. Johnson, 272 N.W.2d 480, 484 (Iowa 1978). Defense counsel did not object to the prosecution's allegedly improper statements at the time they were made or at the close of the State's rebuttal argument. Instead, defense counsel waited until after the jury had commenced deliberating before raising concerns about the prosecution's closing arguments. This delay

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precluded the trial court from offering the jury a cautionary instruction or admonishment at the time the allegedly improper statements were made. See, e.g., State v. Phillips, 226 N.W.2d 16, 18 (Iowa 1975).

A party's conduct in permitting a case to be submitted to the jury without asserting the denial of a fair trial by reason of the alleged misconduct of the prosecuting attorney indicates a willingness of counsel to take his chances on a favorable verdict and constitutes a waiver of the alleged misconduct. See e.g., State v. Dahlstrom, 224 N.W.2d 443, 449 (Iowa 1974). The defendant had a duty to object at the time of argument to offensive or improper remarks by the prosecution, and the failure to do so constitutes waiver of the error. See State v. Whitfield, 212 N.W.2d 402, 406 (Iowa 1973); State v. Love, 302 N.W.2d 115, 121 (Iowa 1981).

V. Ineffective Assistance of Counsel.

The defendant contends he received ineffective assistance of counsel with regard to the advice he reject the State's plea bargain. Generally, ineffective assistance of counsel claims are preserved for postconviction proceedings to allow trial counsel an opportunity to defend the charge. State v. Mulder, 313 N.W.2d 885, 890 (Iowa 1981), cert. denied, 459 U.S. 841 (1982); State v. Nebinger, 412 N.W.2d 180, 191-92 (Iowa App. 1987). Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the

defendant's claim for postconviction proceedings so the facts may be so developed. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly ineffective attorney the opportunity to explain his or her conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978).

We conclude there is an inadequate record for us to adjudicate the defendant's claim without counsel's explanation for the advice. We therefore reserve defendant's ineffective assistance of counsel claim for a later proceeding.

AFFIRMED.