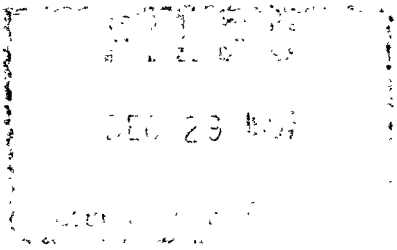
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IN THE COURT OF APPEALS OF IOWA

No. 7-565 / 96-1624
Filed December 29, 1997



GORDON FORMARO, JR.,
Appellant,

vs.

STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Appanoose County, Richard J. Vogel, Judge.

Gordon Formaro, Jr. appeals the district court's denial of his application for postconviction relief. **AFFIRMED.**

John R. Silko, Bloomfield, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Robert Bozwell, County Attorney, and Mark E. Kruse, Assistant County Attorney, for appellee.

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

STREIT, P.J.

Defendant Formaro appeals from denial of his application for post-conviction relief. Formaro's application alleged ineffective assistance of counsel for not attempting to suppress statements Formaro made at the scene or guns found in a search of the vehicle he was driving. Because Formaro did not establish his counsel incompetent or that prejudice resulted from his counsel's actions, we affirm.

I. Background & Facts.

On December 17, 1992, a citizen told Appanoose County Deputy Sheriff Duley that a man, later identified as the defendant Gordon Formaro, Jr., was driving a vehicle without a license and with no license plates. The citizen informed Duley the vehicle was headed toward the town of Moravia.

Duley drove to a convenience store in Moravia and spotted an automobile fitting this description. Duley saw Formaro and a woman companion leave the store, get into the car, and drive away. Duley trailed Formaro west on Highway 142. Formaro was weaving back and forth in his lane. Duley called for back up and then stopped the vehicle.

When he approached the car, Duley saw a gun case on the rear floorboard. Duley asked Formaro if the case had a loaded gun in it and Formaro said it was not loaded. Duley did a pat down on Formaro. A knife was found. Both men went back to the patrol car and Duley ran a driver's license check. Formaro's license was suspended for being an habitual offender.

In the patrol car, Duley asked Formaro whether he had a license for the gun, if he had ever been convicted of a felony, and if he owned the car. Formaro told Duley he owned the gun and he was going to get a hunting license. Formaro admitted he had been convicted of a felony but said the governor pardoned him. He said he was the owner of the car. Formaro said the documentation of the pardon and proof of ownership of the vehicle had been stolen. Duley arrested Formaro for driving while his license was suspended. Deputy Regenwether arrived at the scene as back up, took possession of the gun, and conducted an inventory search of the vehicle. More guns were found in the trunk of the vehicle.

Following trial, Formaro was found guilty of being a felon in possession of a firearm in violation of Iowa Code section 724.26 (1993) and a habitual offender in violation of section 902.8. The district court sentenced him to serve a term of imprisonment not to exceed fifteen years. His conviction and sentence were affirmed on appeal and his claim of ineffective assistance of counsel was preserved for postconviction relief.

Formaro's application for postconviction relief claimed his trial counsel was ineffective for not objecting to the introduction of statements Formaro made in Duley's police car before he was arrested. He also alleged ineffective assistance because counsel did not seek to have the guns found on the floorboard and in the trunk suppressed. The district court denied the application Formaro appeals.

II. Standard of Review.

When a defendant asserts a constitutional violation, such as ineffective assistance of counsel, we resolve the issue by making an independent evaluation of the totality of the circumstances. *Nims v. State*, 401 N.W.2d 231, 233 (Iowa App. 1986). This is equivalent to a de novo review. *Id.* The burden of proving ineffective assistance of counsel by a preponderance of the evidence is on Formaro. *State v. Wissing*, 528 N.W.2d 561, 563 (Iowa 1995).

To establish his claim of ineffective assistance of counsel, Formaro must establish: (1) his counsel's performance did not fall within the range of normal competency; and (2) the deficient performance so prejudiced him as to deprive Formaro of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984). We keep in mind the admonition of the Supreme Court in *Strickland* that "the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.*

With these principles in mind, we evaluate whether Formaro can establish his ineffective assistance of counsel claims.

III. Statements Made in Duley's Vehicle Before Arrest.

Formaro argues his counsel was ineffective for not attempting to suppress the statements he made to Duley while sitting in Duley's patrol car. Formaro contends the statements were inadmissable because he was not given *Miranda* warnings prior

to questioning. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706 (1966).

Ineffective assistance of counsel claims can be established by counsel's failure to investigate a motion to suppress statements made by the defendant. *See i.e. Rinehart v. Brewer*, 561 F.2d 126, 132 (8th Cir. 1977). However, when counsel investigates the possibility of a motion to suppress but decides against it, rarely will we find counsel's decision amounts to ineffective assistance of trial. *See Kyle v. State*, 364 N.W.2d 558, 563 (Iowa 1985). For the claim to be successful, prejudice must be shown to have resulted from the counsel's decision not to seek to suppress the statements. *Id.*

Formaro's counsel considered filing a motion to suppress but did not because he did not think it would be successful. We agree. There must be an interrogation and custody to invoke *Miranda*. *Miranda*, 384 U.S. at 444-45, 86 S. Ct. at 1612, 16 L. Ed. 2d at 706-07; *see State v. Brown*, 341 N.W.2d 10, 16 (Iowa 1983); *State v. Cook*, 330 N.W.2d 306, 312 (Iowa 1983); *State v. Kyseth*, 240 N.W.2d 671, 673 (Iowa 1976). Custodial interrogation is the "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in any way." *State v. Davis*, 446 N.W.2d 785, 788 (Iowa 1989). A defendant is not entitled to *Miranda* rights merely because questioning takes place at the police station. *See California v. Beheler*, 463 U.S. 1121,1125 (1983); *Jenner v. Smith*, 982 F.2d 329, 334-35 (8th Cir.), *cert. denied*, 510 U.S. 822 (1993) (defendant

not in custody when he voluntarily went to police headquarters and was free to leave). The focus of an investigation on a defendant without anything more does not require the safeguards of *Miranda*. *Beckwith v. United States*, 425 U.S. 341, 345-47 (1976).

Formaro was not in custody when he was questioned by Duley. Deputy Duley was standing by Formaro's car when the discussion about the gun in the backseat took place. After that, Formaro was taken back to Duley's patrol car, and it was there the two discussed Formaro's being a habitual offender, Formaro's purpose for having the gun, Formaro's being a convicted felon, and ownership of the car Formaro was driving. Just because the officer's investigatory questions were asked while Formaro was sitting in the patrol car does not mean Formaro was in custody. *See Beheler*, 463 U.S. at 1125. He had not been arrested or handcuffed. His freedom had not been restricted in any way. Formaro was not entitled to *Miranda* warnings before the discussion between he and Duley took place. The statements were admissable.

Because we find the statements admissable, Formaro cannot establish his counsel's performance was incompetent by not seeking a motion to suppress the statements made in the patrol car. Even if the statements were inadmissable, Formaro's claim would fail because he can not establish prejudice. The gun in Formaro's car was in plain view of officer Duley. Formaro had previously been convicted on a weapons charge. This evidence, without Formaro's statements, would have been enough to uphold the conviction of being a felon in possession of a firearm.

IV. Guns Found in Passanger Compartment and Trunk of Vehicle.

Formaro claims his counsel was ineffective for not filing a motion to suppress the gun seized from the passanger compartment of his car and the guns seized from the trunk of his car. We review the record de novo to determine if trial counsel's decision not to attempt suppression of the guns rises to the level of ineffective assistance of counsel.

A traffic violation, however minor, gives an officer probable cause to stop a motorist. *United States v. Cummins*, 920 F.2d 498, 500 (8th Cir.1990), *cert. denied*, 502 U.S. 962 (1993). Here, Formaro was stopped for operating a motor vehicle without license plates affixed. The stop was legal and reasonable.

Once a lawful stop is made, an officer may conduct an investigation "reasonably related in scope to the circumstances which justified the interference in the first place." *Cummins*, 920 F.2d at 502. If the party acts or responds in a manner that raises suspicions unrelated to the traffic offense, the officer can broaden his search to satisfy those suspicions. *U.S. v. Barahona,* 990 F.2d 412, 416 (8th Cir. 1993). Officers can conduct a search under exigent circumstances such as when there is a legitimate for there safety. *United States v. Vance*, 53 F.3d 220, 222 (8th Cir.1995).

The gun on the rear floorboard was in the officer's plain view. When Duley asked him about it, Formaro's response raised suspicion in Duley's mind. Duley was also suspicious of Formaro's conflicting answers. He was entitled to satisfy those

suspicions. He was also entitled to make the scene safe. Seizure of the gun in the passenger compartment was appropriate under these circumstances.

The search of the trunk was valid on independent grounds. There was no one to drive the vehicle from the scene. It is the policy of the Appanoose County Sheriff's Office to impound vehicles when there is no one to drive it from the scene. The search in which the guns were discovered in the trunk was a routine inventory search. Further, police may search the trunk of a car if probable cause and exigent circumstances exist at the time the automobile is stopped by police. *See, i.e., State v. Edgington,* 487 N.W.2d 675, 678-79 (Iowa 1992). Probable cause may evolve from a proper investigatory stop of a vehicle. *Id.* Probable cause for a vehicle search exists when circumstances would lead a reasonably prudent person to believe the vehicle contains contraband. *Id.* Probable cause for the search can be established by the officers' discovery of an illegal weapon or other contraband. *Id.* (citations ommitted).

After de novo review we find probable cause existed to search the trunk of the vehicle Formaro was driving. Formaro's confused answers to questions about ownership of the gun and the presence of the gun in the passenger compartment gave the officers probable cause there may be more guns in the trunk.

Because we agree with trial counsel that evidence of the guns would not have been suppressed, Formaro can not prove his counsel acted incompetently by not seeking to suppress the guns. One weapon had been found in the passanger compartment of the vehicle. Even if the guns should have been suppressed, Formaro

cannot establish prejudice resulted from the guns in the trunk being admitted. As the postconviction court noted, the possession of one weapon was sufficient to support the charge.

AFFIRMED.