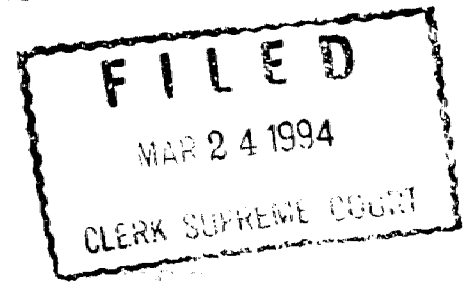


IN THE COURT OF APPEALS OF IOWA

No. 4-078 / 93-941



STATE OF IOWA,

Appellee,

vs.

GORDON FORMARO, JR.,

Appellant.

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

Defendant appeals from judgment and sentence, following jury trial, entered upon his convictions of receipt, transportation and dominion and control of firearms or offensive weapons by a felon, in violation of Iowa Code section 724.26 (1993), and of being an habitual offender, in violation of section 902.8. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and B. John Burns, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Thomas G. Fisher, Jr., Assistant Attorney General, and Mark E. Kruse, County Attorney, for appellee.

Considered by Donielson, C.J., and Habhab and Cady, JJ.

CADY, J.

Gordon Formaro's vehicle was stopped by law enforcement officers after they received information it was being driven without license plates and the driver had no operator's license. One of the officers, deputy David Duley, noticed a gun case behind the front seat of Formaro's vehicle after he approached the vehicle. The case appeared to contain a gun. Formaro was asked to step out of the vehicle. He was searched. A knife with a four-inch blade was found and removed from Formaro's person. Formaro was told to sit in Duley's patrol car while Duley ran a driver's license check. Duley was informed that Formaro had a suspended license.

While in the patrol car and in response to a series of questions by Duley, Formaro stated the gun case held a shotgun. He admitted ownership of the gun. He also stated in response to questioning that he had previously been convicted of a felony but received a pardon. He could not produce the title and registration for the car or papers verifying his claim of pardon. Formaro was arrested for driving while his license was under suspension. Three more guns were found in the trunk of his vehicle during an inventory search.

Formaro was charged with receipt, transportation and dominion and control of firearms or offensive weapons by a felon and with being an habitual offender. At trial, Duley testified to the facts surrounding the stop and the

statements made by Formaro. Another officer testified, without objection, he had been advised at the scene that Formaro was a convicted felon and was armed with a knife. A third officer at the scene also testified without objection. He recalled details reported to him by Duley and the statements made by Formaro in the patrol car. Formaro was convicted as charged and sentenced to a term of imprisonment not to exceed fifteen years.

Formaro appeals. He claims trial counsel was ineffective in failing to lodge hearsay objections to the testimony of the two deputy sheriffs. He also claims his counsel was ineffective for failing to move to suppress statements he made to the deputy sheriffs while at the scene of the stop and after he had been placed in the law enforcement vehicle.

The State asserts the testimony of the two deputy sheriffs was properly admitted to fully explain the investigation and to place the incident in the proper context. They also argue Miranda warnings were not required since Formaro was not in custody at the time the questioning took place.

Our standard of review is de novo. Polly v. State, 355 N.W.2d 849, 854 (Iowa 1984). To establish the claim for ineffective assistance of counsel, defendant must prove two elements. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1987). The first is that counsel failed to perform an essential duty. Id. The second is that prejudice resulted from the failure. Id.

I. HEARSAY

The record fails to demonstrate ineffective counsel for failing to object to trial testimony. The line between admissible background information and inadmissible hearsay statements can be fine. See State v. Mount, 422 N.W.2d 497, 507 (Iowa 1988). In this case, the testimony claimed by Formaro to be inadmissible was preceded by comprehensive nonhearsay testimony of another deputy about the same information. Under the circumstances, we cannot conclude that counsel's failure to object to the testimony of the two deputies fell below the normal range of competency. Moreover, since the testimony was duplicative of earlier testimony, no prejudice has been shown. See State v. Hollins, 397 N.W.2d 701, 705 (Iowa 1986).

II. MOTION TO SUPPRESS

The final question is whether counsel was ineffective for failing to file a motion to suppress the inculpatory statements made by Formaro in the officer's vehicle. Formaro claims the statements were in response to interrogation in a custodial setting.

Miranda warnings are required to be given by law enforcement officers prior to questioning whenever an individual is in custody. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 10 L. Ed. 2d 694 (1966); State v. Evans, 495 N.W.2d 760, 762 (Iowa 1993). Custody occurs once freedom of movement has been restrained in any significant way. Van Hoff v. State, 447 N.W.2d 665, 672

(Iowa App. 1989). The important inquiry is "how a [person] in the suspect's position would have understood [the] situation." Berkemer v. McCarty, 468 U.S. 420, 442, 104 S. Ct. 3138, 3151, 82 L. Ed. 2d 317, 336 (1984).

An ordinary traffic stop and questioning does not constitute a custodial interrogation, triggering Miranda warnings. Pennsylvania v. Bruder, 488 U.S. 9, 10-11, 109 S. Ct. 205, 206, 102 L. Ed. 2d 172, 176 (1988); State v. Cook, 330 N.W.2d 306 (Iowa 1983) (general on-the-scene questioning does not involve custody for purpose of Miranda). Traffic stops typically involve brief encounters and occur in public view. Bruder, 488 U.S. at 10-11, 109 S. Ct. at 206, 102 L. Ed. 2d at 176. The officer making the stop is permitted to ask the detainee a moderate number of questions to determine identity and obtain information to confirm or dispel the suspicions which justified the stop. Berkemer, 468 U.S. at 439-40, 104 S. Ct. at 3150, 82 L. Ed.2d at 334. The rule, however, is not absolute. The point at which a traffic stop may transform into a custodial interrogation must be determined by considering the totality of the circumstances. See generally J.R. Ghent, Annotation, What Constitutes "Custodial Interrogation" Within Rule of of Miranda v. Arizona, 31 A.L.R.3d 565, § 14 (1970). Many factors have been identified to assist in this determination, including the accused's freedom to leave, and the purpose, form and length of the interrogation. United States v. Griffin, 922

F.2d 1343, 1348 (8th Cir. 1990). See United States v. Sharpe, 470 U.S., 675, 686, 105 S. Ct. 1568, 1575, 84 L. Ed. 2d 605, 615 (1970) (In determining whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly . . ."); 1 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 6.6 at 108-09 (Supp. 1991) (application of custody standards to investigatory stops). Even the words spoken by the officer to the defendant, together with the officer's tone of voice and general demeanor, can be important considerations. See People v. Haurey, 859 P.2d 889, 893 (Colo. 1993). The purpose of the questioning may also be critical. A public safety exception, for instance, exists which permits questioning by law enforcement officials concerning the location of guns prior to Miranda warnings. See New York v. Quarles, 467 U.S. 649, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984); United States v. Boucher, 909 F.2d 1170, 1174 (8th Cir. 1990). Moreover, the observation of weapons in a vehicle during a routine traffic stop could transform the encounter into a Terry stop, permitting questioning without Miranda warnings to confirm or dispel any reasonable suspicions that a crime has been committed. See Berkemer, 468 U.S. at 439, 104 S. Ct. at 3150, 82 L. Ed. 2d at 334.

We believe the record in this case is insufficient, under the totality of circumstances standard of review, to properly determine whether counsel was ineffective for failing to challenge the questioning under Miranda. The encounter was not a routine traffic stop. A back-up vehicle was called in prior to making the stop, and a third deputy arrived at the scene after the stop was made. Formaro was frisked and placed in one of the law enforcement vehicles. The questioning extended beyond the public safety exception. The gun observed by the deputy sheriff was in a case, and the record was silent concerning any suspicion by the deputy that Formaro had committed a crime by possssessing the gun. Although these factors are not conclusive on the issue, a potential Miranda claim was presented. The brief trial record, however, does not reveal the length of the questioning, the precise sequence of the events, and other important factors. We recognize ample independent evidence exists to show Formaro was a prior convicted felon and the shotgun was in plain view. Yet, assuming some of Formaro's statements should have been suppressed, we cannot conclude prejudice would not arise since some statements establish the elements of the crime.

We preserve Formaro's Miranda claim of ineffective assistance of counsel for postconviction review. This will allow for a full development of the record and a fair and complete disposition of the issue. We affirm Formaro's conviction on appeal.

AFFIRMED.