IN THE COURT OF APPEALS OF IOWA

No. 7-369 / 96-1425

000391

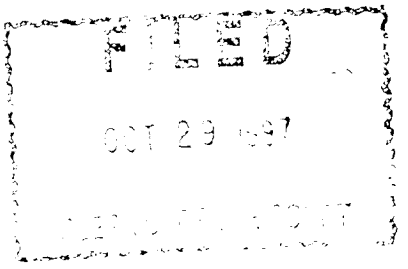
STATE OF IOWA,

Plaintiff-Appellee,

vs.

GLEN ALLEN EMARY,

Defendant-Appellant.



Appeal from the Iowa District Court for Polk County, George Bergeson, Judge.

Defendant appeals from his conviction for first-degree theft in violation of Iowa Code sections 714.1(4) and 714.2(1) (1995). **AFFIRMED.**

Susan R. Stockdale of Roehrick, Hulting, Blumberg, Kirlin & Krull, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, John P. Sarcone, County Attorney, and Odell McGhee, Assistant County Attorney, for appellee.

Heard by Sackett, Streit, and Habhab*, JJ.

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

HABHAB, S.J.

The defendant appeals from his conviction for first-degree theft in violation of Iowa Code sections 714.1(4) and 714.2(1) (1995). He argues: 1) his trial counsel was ineffective in failing to file a motion to suppress; 2) the district court erred in denying his motion for a change of venue; 3) there was insufficient evidence to prove he knew the property was stolen; and 4) the district court applied an incorrect standard when it determined the State had proven the value of the stolen property exceeded $10,000.

Factual Background

At approximately 9:45 a.m. on May 19, 1995, conservation officer Steven Schutte received a call from a state park officer about the presence of a suspicious vehicle with no license plates in the state park in Clear Lake, Cerro Gordo County, Iowa. Schutte observed two men working in and around the vehicle, and stopped them as they were leaving the park. The vehicle did not have license plates. Later, it was determined the vehicle had a paper temporary registration in the back window.

Defendant Glen Emary was the driver of the vehicle. Schutte asked the defendant and his passenger, D. J. Bulman, what they had been doing in the park. They advised that they had been installing stereo speakers in the car. The officer asked them for identification and paperwork to show ownership of the vehicle. The defendant could not produce a driver's license and he gave the officer a false name and birth date. The defendant did not have any proof of ownership of the vehicle and

told the officer several different stories about whose it was and how it had come into his possession.

The officer checked the vehicle identification number and learned the car had been stolen in West Des Moines in January 1995. The defendant was arrested. He told a state trooper he had obtained the vehicle in Polk County. In a search of the car, officers found several vehicle title certificates hidden in a canister. When asked about them, the defendant indicated he was in the process of dealing on some cars. The defendant was charged with first-degree theft in Polk County and his motion for a change of venue was denied. The case was tried to the court, and the defendant was found guilty as charged. Because this was his third felony conviction, the court found the defendant to be an habitual offender and sentenced him to a fifteen-year indeterminate term of incarceration.

On appeal, the defendant argues his trial counsel was ineffective in failing to file a motion to suppress to challenge the constitutionality of the stop. He contends the conservation officer did not have reasonable cause to make an investigatory stop of the vehicle. The defendant also argues the district court erred in denying his motion for change of venue. Finally, the defendant challenges the sufficiency of the evidence to show the value of the car and that he knew the car was stolen. We address the issues in turn.

Discussion

I. Ineffective Assistance of Counsel. Our review of an allegation of ineffective assistance of counsel is de novo. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa App. 1994). Ineffective assistance claims are generally reserved for postconviction proceedings but can be resolved on direct appeal when, as here, the record adequately presents them. *State v. Ueding*, 400 N.W.2d 550, 553 (Iowa 1987); *State v. Ogilvie*, 310 N.W.2d 192, 197 (Iowa 1981). Our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged." *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). Ineffective assistance is measured by whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93; *see Schertz v. State*, 380 N.W.2d 404, 408 (Iowa 1985). In examining counsel's conduct, we review de novo the totality of relevant circumstances, *State v. Yaw*, 398 N.W.2d 803, 805 (Iowa 1987), mindful of the strong presumption that counsel performed competently. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). Defendant bears the burden of proving by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1987).

Iowa law permits the stopping of a vehicle when there are reasonable grounds to believe it is not properly registered. *Delaware v. Prouse*, 440 U.S. 648, 661, 99 S. Ct. 1391, 1400, 59 L. Ed. 2d 660, 672 (1979); *State v. Jackson*, 315 N.W.2d 766, 767 (Iowa 1982). In *Jackson*, as here, the vehicle stopped did not have license plates. Upon further investigation, it was determined that it did have a properly displayed Department of Transportation temporary registration. The officer here had received a call about the car, informing him it did not have license plates. The calling officer had not arrived by the time the car left the park and Officer Schutte stopped the car. Even though after stopping the car the officer determined the proper DOT paperwork was displayed, that does not make the stop improper. When he properly asked the defendant for a driver's license and paperwork showing ownership of the car, the defendant could not produce either. A subsequent records check revealed the vehicle was stolen. From our review of the totality of the circumstances, we find the stop permissible under the circumstances. As our supreme court in *Jackson* stated:

> The parameters of constitutional stops of motor vehicles to check for vehicle registration and driver's licenses were explained in *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). All that *Prouse* requires is an articulable and reasonable suspicion that the motorist is unlicensed or that the vehicle being stopped is unregistered [or that the vehicle or the occupant is otherwise subject to seizure for a law violation]. 440 U.S. at 661, 99 S.Ct. at 1400, 59 L.Ed.2d at 672. Nothing in *Prouse*, or in our holding in *State v. Hilleshiem*, 291 N.W.2d 314, 317-18 (Iowa 1980), prohibits a stop when there are reasonable grounds to believe a vehicle is not properly registered.

Jackson, 315 N.W.2d at 767.

Having determined the stop was not in violation of the defendant's constitutional rights, the evidence obtained from the stop was admissible at trial. Since the evidence was properly obtained and was admissible, defense counsel's "failure" to file a motion to suppress could not have prejudiced the defendant. Without a showing of prejudice, the defendant's claim of ineffective assistance of counsel fails.

II. Motion for Change of Venue. Because in this case the question of venue concerns legal consequences flowing from undisputed facts, the issue is one of law, not of fact. *Jamieson v. Harrison*, 532 N.W.2d 779, 781 (Iowa 1995). We review for corrections of errors at law. Iowa R. App. P. 4. Iowa Code section 803.2(1) controls venue in criminal cases. Venue is proper in any county where the crime is committed. "If conduct or results which constitute elements of an offense occur in two or more counties, prosecution of the offense may be had in any of such counties." Iowa Code § 803.3(1). The State has the burden to prove venue is proper by a preponderance of the evidence. *State v. Allen*, 293 N.W.2d 16, 18 (Iowa 1980). The State need only prove one element of the crime occurred in the county to establish proper venue. The elements of possession and control of stolen property are: 1) the property was stolen; 2) the defendant exercised control over the property; 3) the defendant knew the property was stolen; and 4) the defendant did not intend to return the property to its owner promptly or turn it over to an appropriate public official.

Iowa Criminal Jury Instructions 1400.13. We will affirm the district court's decision if supported by substantial evidence.

The defendant's argument focuses on whether or not the State proved the defendant exercised control over the vehicle in Polk County. He argues the court only had an uncorroborated statement of the defendant, which would be insufficient to determine venue. We disagree. There is evidence in the record that the vehicle was stolen in Polk County. The defendant, through his attorney, admitted he took possession of the vehicle in Polk County and that he drove the car from Polk County to Cerro Gordo County. (*See* pages 41 and 43 of the appendix where defense counsel stated on the record that he was satisfied "with our statements.") This is sufficient to support venue in Polk County. The district court did not err in denying the defendant's motion for change of venue.

III. Sufficiency of the Evidence. The standard of review is for errors at law. *State v. Phams*, 342 N.W.2d 792, 795 (Iowa 1983). We uphold a conviction if there is substantial evidence in the record to support it. *State v. Frake*, 450 N.W.2d 817, 819 (Iowa 1990). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Taft*, 506 N.W.2d 757, 762 (Iowa 1993). Substantial evidence does not, however, denote some elevated quantity of proof. *State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994). Rather, the relevant question in our review of the case "is whether, after viewing all the evidence in the light most favorable to the

prosecution, any rational trier of facts could have found the essential elements of the crime beyond a reasonable doubt." *Id.*

The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984). Circumstantial evidence is just as probative as direct evidence. *State v. Parrish*, 502 N.W.2d 1, 3 (Iowa 1993); *State v. Garr*, 461 N.W.2d 171, 173 (Iowa 1990). We consider all the evidence at trial, not just the evidence that supports the verdict. *State v. Liggins*, 524 N.W.2d 181, 186 (Iowa 1994). A conviction is binding unless the finding is clearly against the weight of the evidence. *State v. Schrier*, 300 N.W.2d 305, 306 (Iowa 1981).

The defendant first challenges the sufficiency of the evidence that he knew the vehicle was stolen. Iowa Code section 714.1(4) requires proof that a defendant actually believed the property was stolen. *See State v. McVey*, 376 N.W.2d 585, 586 (Iowa 1985); *State v. Hutt*, 330 N.W.2d 788, 790 (Iowa 1983). The nature of the articles and the circumstances of the case are pertinent elements. *State v. Jones*, 289 N.W.2d 597, 600 (Iowa 1980); *State v. Brightman*, 252 Iowa 1278, 1282-83, 110 N.W.2d 315, 317 (1961). The fact finder may also consider the defendant's statements and actions at the time the stolen property is discovered. *Brightman*, 252 Iowa at 1284, 110 N.W.2d at 318. Although defendant attempted to explain his possession of the stolen vehicle in a variety of ways, his explanations presented a

credibility question peculiarly within the province of the trier of fact. The court was not required to accept defendant's version of the facts. *State v. Trammell*, 458 N.W.2d 862, 863 (Iowa App.1990). The reasonable inferences from the evidence in the record is such that the trier of fact could find the defendant knew the vehicle was stolen.

Second, the defendant challenges the court's finding concerning the value of the vehicle. The testimony introduced at trial provided the court with a description of the stolen vehicle, including its condition and that it was "loaded," a description of and the cost of a newer replacement vehicle, and the "common-day knowledge" of what a one-year-old car is worth compared with its new purchase price.

With regard to the value of stolen property, Iowa Code section 714.3 (1995) in part provided that "[t]he value of property is its highest value by any reasonable standard at the time that it is stolen." The supreme court has observed that testimony as to value is liberally received with its weight to be determined by a [trier of fact], and that rules as to competency of witnesses on questions of value are also liberally construed. *State v. Savage*, 288 N.W.2d 502, 504 (Iowa 1980); *see* Iowa R. Evid. 701. We conclude the evidence introduced at trial was sufficient for the court to find the value of the stolen car exceeded $10,000.

For the reasons stated above, we affirm the defendant's conviction.

AFFIRMED.