IN THE COURT OF APPEALS OF IOWA

No. 9-092 / 98-333

STATE OF IOWA,

Appellee,

vs.

PATRICK DAVID McDOLE,

Appellant.

FILED
APR 30 1999

Appeal from the Iowa District Court for Washington County, Lucy J. Gamon, Judge.

Defendant appeals from judgment and sentence entered for second-offense operating while intoxicated. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Barbara A. Edmondson, County Attorney, and Eric R. Goers, Assistant County Attorney, for appellee.

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

ZIMMER, J.

Patrick David McDole appeals from judgment and sentence entered for second offense operating while intoxicated in violation of Iowa Code section 321J.2 (1997). He claims the trial court erred in overruling on the merits his motion to suppress evidence obtained as a result of an investigatory stop of his vehicle. We affirm.

On June 7, 1997, Washington Police Officer Jerry Dunbar received a medical call that someone had passed out near a local tavern. Dunbar responded to the call, which was received at approximate 12:45 p.m. Upon arriving in the parking lot of the tavern, Dunbar noticed defendant walking approximately half-way between the parking lot and an entrance to the tavern. Dunbar parked his patrol car, exited the vehicle and from a distance of approximately twenty feet asked defendant if he was the subject of the medical call. McDole responded "I think the guy you're talking about is over there," and pointed in the direction of one corner of the tavern building. During deposition, Dunbar testified McDole was, in his opinion, intoxicated:

> Oh, when he walked out, he was not walking a — I would say normal walk, more like someone that was intoxicated. And when he spoke to me, there was a cut off like telephone post that was, I believe, used for like parking, they could only pull up so far and he put his one arm against it and — I don't remember which arm. I believe it was his left one, but I couldn't say for certain. Leaned up against it and told me the guy was across the other side of the building or pointed in that direction.

Dunbar located the person who had passed out near an entrance to the tavern, found him unresponsive but breathing, and awaited arrival of an ambulance which had been dispatched to the scene. While waiting, Officer Dunbar heard a vehicle

engine starting, and looked into the parking lot to identify the source. He saw a car backing up with McDole driving it. Dunbar noticed McDole was having difficulty backing up the car and pulling out of the parking lot. He testified the car was "jerky backing up" and may have stalled once when McDole tried to move the vehicle forward. Dunbar stated the vehicle was moving very slow, as if the driver was slipping the clutch.

At this point the ambulance was within sight, and Dunbar stated he decided to stop defendant's vehicle for safety reasons before it drove out of the tavern parking lot. Dunbar ran to the vehicle and knocked on the driver's window. McDole responded slowly, but eventually rolled down his window. Dunbar asked McDole to stop driving because he needed to speak with him. McDole indicated compliance, but instead of staying in place, he pulled on to the road in front of the tavern. McDole's vehicle stalled on the road and traffic was forced to slow down because it was apparently unclear as to what was happening with defendant's car. McDole started his car again, and then pulled the vehicle off the road.

Officer Dunbar approached the vehicle and asked McDole to step out of the car. Dunbar asked McDole his name, and at this point smelled alcohol on him. McDole then failed a series of field sobriety tests and tested positive on a preliminary blood test. Officer Dunbar arrested McDole for driving while intoxicated. At the police station, a second intoxilyzer test was administered, indicating defendant's blood alcohol content to be .229.

Before trial, but forty-two days after written arraignment had been filed, McDole filed a motion to suppress challenging the officer's "stop" and investigation. Following hearing during which the parties agreed Officer Dunbar's deposition would be the sole evidence considered in the matter, the court denied the motion. It concluded Dunbar acted reasonably in performing an investigatory check of the car before allowing McDole to proceed. The court found Dunbar had reasonable cause to believe McDole was operating a motor vehicle while intoxicated at the time he stopped defendant's vehicle. McDole subsequently waived his right to a jury. Following a trial to the court, he was found guilty of OWI, second offense and sentenced to fourteen days in jail.

McDole now appeals, challenging the court's ruling denying his motion to suppress. He argues Officer Dunbar had insufficient grounds to stop him, and consequently his constitutional rights to be free from unreasonable search and seizure were violated. The State contends on appeal that the suppression motion was untimely, and that Officer Dunbar had sufficient reason to stop McDole. Defendant argues if his motion is denied on grounds it was untimely, his trial counsel was ineffective for filing a meritorious motion late.

I. Timeliness of Motion. The State initially contends defendant's motion to suppress was not timely filed under Iowa Rules of Criminal Procedure 10(2)(c) and 10(4), and therefore should be denied.[1] McDole argues his motion was timely

[1] Rule 10(4) requires motions to suppress be filed no later than forty days after arraignment.

because he filed his motion on the fortieth day after the arraignment order was signed by the district court. The State did not raise its argument to the district court and the district court did not address this matter, instead ruling on the merits.

Our criminal procedure rules are clear: defendant has forty days after arraignment to file a motion to suppress. If he files outside this window, the court may reject his motion as untimely. Where a written arraignment is used, the date of the arraignment is the date the written arraignment is filed, not — as McDole contends — the date the order of arraignment is signed. *See* Iowa R. Crim. P. 10(4). We will uphold the ruling of the trial court on the admissibility of evidence on any ground appearing in the record, whether urged below or not. *See State v. Terry*, 569 N.W.2d 364, 368 (Iowa 1997).

We determine McDole's motion to suppress was untimely. Though the court ruled on the merits rather than on timeliness, we determine the trial court properly denied defendant's motion to suppress. *See State v. McCowen*, 297 N.W.2d 226, 227 ((Iowa 1980) (upholding trial court's denial of suppression motion because the motion was untimely, even though the trial court ruled on the merits and the State did not resist the motion as untimely).

II. Ineffective Assistance of Counsel. As we have determined the motion to suppress was not timely filed, McDole argues his trial counsel was ineffective for failing to file it in a timely manner.

Generally, claims of ineffective assistance of counsel are preserved for postconviction proceedings. *See State v. Martin*, 587 N.W.2d 606, 609 (Iowa App.

1998). However, they may be resolved on direct appeal when the record adequately addresses the issues. *Id.* We find the record is adequate to address McDole's ineffective-assistance-of-counsel claim.

Defendant bears the burden of demonstrating ineffective assistance of counsel. *See State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997). "A defendant receives ineffective assistance of counsel when: (1) the defense attorney fails in an essential duty; and (2) prejudice results." *State v. Bugley*, 562 N.W.2d 173, 178 (Iowa 1997) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984)). To prove counsel failed in an essential duty, defendant must prove the attorney's performance was outside the range of normal competency. *See State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996). Prejudice is determined by ascertaining whether counsel's failure worked to defendant's actual and substantial disadvantage so that a reasonable probability exists that but for the trial attorney's unprofessional errors, the resulting conviction would have been different. *See State v. Martin*, 587 N.W.2d at 609. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

We first note that even though the motion was untimely, the trial court nevertheless reached the merits of the motion. Because counsel secured a ruling on the merits, he breached no professional duty to McDole. *See State v. McCurry*, 544 N.W.2d 444, 448 (Iowa 1996).

The record also shows that McDole's counsel renewed at trial the objections raised in the suppression motion. These objections were enough to cure any claimed

breach of duty in failing to file a timely motion to suppress. ***See State v. McCurry,*** **544 N.W.2d at 448.**

Finally, not only did counsel secure a ruling on the merits of the motion, but we determine the trial court properly denied that motion. "The police may stop and briefly detain a person for investigative purposes if the officer has '*reasonable cause* to believe a crime may have occurred.'" *See State v. Rosenstiel*, 473 N.W.2d 59, 61 (Iowa 1991) (emphasis in original) (quoting *State v. Scott*, 409 N.W.2d 465, 468 (Iowa 1987)). "To meet the reasonable cause standard a police officer must be able to articulate something more than an inchoate and unparticularized suspicion or hunch." *See State v. Haviland*, 532 N.W.2d 767, 768 (Iowa 1995) (citing *Alabama v. White*, 496 U.S. 325, 329, 110 S.Ct. 2412, 2416, 110 L.Ed.2d 301, 308 (1990)). Reasonableness of a stop is measured by whether the facts available to the officer at the moment of the stop would warrant a person of reasonable caution to believe the action taken was appropriate. *See State v. Wiese*, 525 N.W.2d 412, 414 (Iowa 1994). The State must show the officer had "specific and articualable cause to support a reasonable belief that criminal activity may have occurred." *State v. Weiss*, 525 N.W.2d at 414 (quoting *State v. Aschenbrenner*, 289 N.W.2d 618, 619 (Iowa 1980)). **The officer is bound by the true reasons for the stop.** ***See State v. Rosenstiel,*** **473 N.W.2d at 61. Ultimately, "the relevant inquiry is whether the totality of the circumstances demonstrates reasonable suspicion."** ***State v. Ohlsen,*** **537 N.W.2d 794, 796 (Iowa App. 1995) (citing *Alabama v. White*, 496 U.S. at 330, 110 S.Ct. at 2416, 110 L.Ed.2d at 309).**

We determine Officer Dunbar had reasonable cause to justify stopping the defendant. Dunbar first encountered defendant walking out of a tavern. He observed defendant was not walking normally. McDole leaned against a pole to balance himself while Dunbar questioned him about his knowledge of an individual who had fallen down or passed out. Based on his observations, Dunbar concluded McDole was intoxicated. We note Officer Dunbar has had five years experience with the City of Washington Police Department and was trained at the Iowa Law Enforcement Academy with regard to OWI stops and arrests.

A few minutes after he located and gave attention to an unconscious person near the tavern, Dunbar heard a car start and observed McDole having difficulty driving his car in the tavern parking lot. At this point, Officer Dunbar clearly had reasonable cause to believe defendant's worrisome actions were alcohol induced and posed a risk to public safety. With an ambulance approaching the area, it was reasonable as well as prudent for Dunbar to leave the unconscious individual in order to stop McDole from driving away from the parking lot. After being told to stop, McDole drew further attention to himself by pulling into the road in front of the tavern and stalling his vehicle.

Given all these circumstances, we determine it was reasonable for Officer Dunbar to stop defendant's vehicle. McDole's motion to suppress was properly denied on the merits. Therefore, even if counsel had filed the motion on time, the district court would have nevertheless correctly overruled it. McDole has not been prejudiced by trial consel's failure to timely file the suppression motion. Nor can we

say McDole's trial counsel was ineffective for failing to timely file a meritless motion. *Cf. State v. Hoskins*, 586 N.W.2d 707, 709 (1998) (trial counsel is not incompetent for failing to pursue a meritless issue). We conclude McDole has failed to establish his ineffective assistance of counsel claim.

AFFIRMED.

No. 98-333. [9-092] STATE v. McDOLE

Appeal from the Iowa District Court for Washington County, Lucy J. Gamon, Judge. **AFFIRMED.** Considered by Streit, P.J., and Vogel, and Zimmer, JJ. Opinion by Zimmer, J. (9 pages $3.60)

Patrick David McDole appeals from judgment and sentence entered for second offense operating while intoxicated in violation of Iowa Code section 321J.2 (1997). He claims the trial court erred in overruling on the merits his motion to suppress evidence obtained as a result of an investigatory stop of his vehicle. **OPINION HOLDS:** ***I. Timeliness of Motion.*** The State initially contends defendant's motion to suppress was not timely filed under Iowa Rules of Criminal Procedure 10(2)(c) and 10(4), and therefore should be denied. McDole argues his motion was timely because he filed his motion on the fortieth day after the arraignment order was signed by the district court. The State did not raise its argument to the district court and the district court did not address this matter, instead ruling on the merits. Our criminal procedure rules are clear: defendant has forty days after arraignment to file a motion to suppress. If he files outside this window, the court may reject his motion as untimely. Where a written arraignment is used, the date of the arraignment is the date the written arraignment is filed, not — as McDole contends — the date the order of arraignment is signed. *See* Iowa R. Crim. P. 10(4). We will uphold the ruling of the trial court on the admissibility of evidence on any ground appearing in the record, whether urged below or not. *See State v. Terry*, 569 N.W.2d 364, 368 (Iowa 1997). We determine McDole's motion to suppress was untimely. Though the court ruled on the merits rather than on timeliness, we determine the trial court properly denied defendant's motion to suppress. *See State v. McCowen*, 297 N.W.2d 226, 227 ((Iowa 1980) (upholding trial court's denial of suppression motion because the motion was untimely, even though the trial court ruled on the merits and the State did not resist the motion as untimely). ***II. Ineffective Assistance of Counsel.*** As we have determined the motion to suppress was not timely filed, McDole argues his trial counsel was ineffective for failing to file it in a timely manner. He contends the investigating officer had insufficient grounds to stop him, and consequently his constitutional rights to be free from unreasonable search and seizure were violated. He claims counsel's failure in this matter denied him a fair trial. We determine that because counsel secured a ruling on the merits, he breached no professional duty to McDole. The record also shows that McDole's counsel renewed at trial the objections raised in the suppression motion. These objections were enough to cure any claimed breach of duty in failing to file a timely motion to suppress. Finally, not only did counsel secure a ruling on the merits of the motion, but we determine the trial court properly denied that motion because the investigating officer had reasonable cause to justify stopping the defendant. Therefore, even if counsel had filed the motion on time, the district court would have nevertheless correctly overruled it. McDole has not been prejudiced by trial counsel's failure to timely file the suppression motion. Nor can we say McDole's trial counsel was ineffective for failing to timely file a meritless motion. McDole has failed to establish his ineffective assistance of counsel claim