FILED
SEP 30 1996
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 6-443 / 95-0945

STATE OF IOWA,

Plaintiff-Appellee,

vs.

CHARLES E. JONES,

Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, James E. Kelley (motion to suppress) and James R. Havercamp (trial), Judges.

Defendant appeals from judgment and sentence, following jury trial, entered upon his conviction of possession of a counterfeit controlled substance with intent to deliver in violation of Iowa Code section 124.401(1)(c) (1993). **AFFIRMED.**

Lauren M. Phelps, Davenport, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, William E. Davis, County Attorney, and Hugh J. Pries, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Huitink and Streit, JJ.

STREIT, J.

Defendant appeals his conviction for possession of a counterfeit controlled substance with intent to deliver. He claims evidence obtained from a warrantless and illegal search should have been suppressed, ineffective assistance of counsel, and insufficient evidence to support the conviction.

Charles Jones was arrested early one morning in 1993 at a friend's house in Davenport. The house had been under surveillance since around 4:30 a.m. by Officer Moore of the Davenport Police Department who watched several cars drive up to the house, stop in the street, speak for a few minutes to a black male from the house, and then drive away. He suspected criminal activity and stopped a van that was leaving the house. The driver of the van told Officer Moore he had been asked at the house if he wanted a "rock," but he declined. Officer Moore called for backup and approached the house with another officer.

As the officers were making their way to the house, a car drove up with its headlights on, illuminating the police officers, and Jones stepped out of the house. The police identified themselves and Jones turned around and ran back into the house. Officer Moore pursued Jones inside as Jones entered the bathroom and shut the door. As Officer Moore approached the door, he heard a "chintzy aluminum sound like a screen window being raised and shut real quick." He reached for the bathroom doorknob just as Jones exited. The other officer came into the house and took Jones.

Officer Moore went into the bathroom and found a window screen partially open. Outside on the sill of the window lay a cellophane cigarette wrapper with ten to twelve whitish pieces of a hard substance, presumed to be crack cocaine. Field tests indicated the substance was not cocaine. The pieces were chopped buckeye nut meats.

Jones began voluntarily disrobing in the house, protesting, "You got nothing on me," and police let him proceed. Inside one of Jones' socks were four twenty dollar bills. Jones was arrested and the money was taken by the police as evidence.

Jones was charged and convicted of possession with intent to deliver a simulated controlled substance. He now appeals based on: (1) the district court erred in denying his motion to suppress evidence obtained from an allegedly illegal, warrantless search based in part upon statements from an informant of untested credibility; (2) trial counsel was ineffective in failing to object to the introduction of cash unrelated to drug sales; and (3) insufficient evidence supports the conviction.

I. Motion to Suppress. Constitutional challenges are reviewed de novo. *State v. Finnel*, 515 N.W.2d 41, 43 (1994). Fact-findings underlying the district court's ruling on the motion to suppress are binding on us if supported by substantial evidence. *State v. Cadotte*, 542 N.W.2d 834, 836 (Iowa 1996).

Jones contends there was not probable cause for his arrest and the evidence obtained by the police without a warrant should have been suppressed. First, we must

decide whether defendant has standing to raise the issue of the legitimacy of the search. *See State v. Baker*, 441 N.W.2d 388, 390 (Iowa App. 1989).

In order to challenge the constitutionality of the search, defendant must allege and prove both injury in fact and that the intrusion violated his own legitimate expectation of privacy as opposed to the rights of a third party. *Id.; see Rakas v. Illinois*, 439 U.S. 128, 139, 99 S. Ct. 421, 427, 58 L. Ed. 2d 387, 398 (1978); *State v. Graham*, 291 N.W.2d 345, 348 (Iowa 1980). The mere fact that seized evidence is being used against defendant does not provide standing. *Id.; State v. Dixon*, 241 N.W.2d 21, 23 (Iowa 1976).

The district court found Jones did not have standing to raise the issue of entry under his status as a guest. We disagree. Jones stayed overnight at his friend's house playing cards and watching television.[1] He was legitimately on the premises. This conduct is sufficient to constitute an overnight guest under the standard set by the Supreme Court. *See Minnesota v. Olson*, 495 U.S. 91, 98-100, 110 S. Ct. 1684, 1689-90, 109 L. Ed. 2d 85, 94 (1990); *Rakus*, 439 U.S. at 144, n. 12, 99 S. Ct. at 431, n. 12, 58 L. Ed. 2d at 398 (1978). Since, we find Jones had an expectation of privacy, we now analyze the legitimacy of the search.

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[1] The State, citing *Minnesota v. Olson*, 495 U.S. 91, 98-100, 110 S. Ct. 1684, 1689, 109 L. Ed. 2d 85, 94 (1990), argued since Jones did not go to sleep at his girlfriend's house, he was not an "overnight guest." *Olson* does not hold that an overnight guest can never have a legitimate expectation of privacy unless he actually sleeps at the other private place he sought out in place of his own home, whether it be a hotel room, or a home of a friend. *Id.*

It is a well-recognized principle that once a police officer has the requisite reasonable suspicion to make a "Terry stop," *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), and the subject of that suspicion takes flight when approached by the officer, the circumstances may justify the officer in making an arrest. *State v. Bumpus*, 459 N.W.2d 619, 624 (Iowa 1990) (citations omitted). While flight alone does not give rise to probable cause, it may, when coupled with a preexisting reasonable suspicion, "elevate the preexisting suspicion up to the requisite Fourth Amendment level of probable cause." *Id.* (citing *United States v. McFadden*, 722 F. Supp. 807, 809-10 (D.C. 1989)).

Hot pursuit and exigent circumstance are sufficient to justify a warrantless entry into a house. *See United States v. Santana*, 427 U.S. 38, 42-43, 96 S. Ct. 2406, 2409, 49 L. Ed. 2d 300, 304-06 (1976). The police had a preexisting reasonable suspicion to question Jones,[2] given the time of day and the information obtained from the driver of the van,[3] which corroborated with the activity police had observed all morning. When

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[2] Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause. *Adams v. Williams* [407 U.S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972)] demonstrates as much.

State v. Ohlsen, 537 N.W.2d 794, 796-97 (Iowa App. 1995) (citing *Alabama v. White*, 496 U.S. 325, 330, 110 S. Ct. 2412, 2416, 110 L. Ed. 2d 301, 309 (1990)).

[3] Defendant claims the driver of the van was an informant of untested credibility and the evidence obtained during the warrantless search which was based in part by the

Jones ran back into the house after police had identified themselves, not only did Jones flee from officers who had a reasonable articulable suspicion he was involved in selling drugs, he attempted to conceal the "drugs" by placing them outside on the sill of a bathroom window.

Once Jones saw the police, there was likewise a realistic expectation that any delay would result in the destruction of evidence. *Id.* Officer Moore followed Jones into the house and heard the sound of a window screen open and shut as he approached the bathroom where Jones had fled. After Jones was seized and in the hands of the other officer, Officer Moore looked outside the bathroom window to see ten to twelve whitish pieces of a hard substance and retrieved it as evidence.

We find the police had probable cause to believe that contraband was in the bathroom. The information received from a person's senses is a sufficient basis for probable cause. *See State v. Merrell*, 538 N.W.2d 300, 301 (Iowa 1995). Although hearing the sound of the window open and shut alone is not probative of the existence of drugs in Jones' possession, such action, coupled with the surrounding circumstances, afforded Officer Moore sufficient probable cause to go into the bathroom and look out the window. We have previously recognized that furtive movements coupled with

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statements of the driver should be suppressed. While we assume that the unverified statement from the driver might not have been reliable enough to establish probable cause, we nevertheless find it sufficiently reliable to justify a Terry stop given the driver's statements corroborated what the police had observed all morning. *See Ohlsen*, 537 N.W.2d at 797 (Iowa App. 1995).

additional suspicious circumstances can provide sufficient ground for a warrantless search. *State v. Riley*, 501 N.W.2d 487, 490 (Iowa 1993). We affirm the trial court's denial of defendant's motion to suppress.

II. Ineffective Assistance of Counsel. Jones contends trial counsel failed to object to admission into evidence the four twenty dollar bills seized from him at the time he was arrested and expert testimony that crack cocaine is most commonly sold for $20 a rock. Defendant has the burden of proving by a preponderance of the evidence his attorney did not perform an essential duty and, as a result, he was prejudiced. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa App. 1994). To demonstrate prejudice, Jones must prove there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Failure to object in this case is not sufficient grounds for granting relief. Defendant has not proved trial counsel failed to perform an essential duty or as a result he was prejudiced. Therefore, we conclude there was not ineffective assistance of counsel.

III. Sufficiency of the Evidence. Defendant's last contention is there was not substantial evidence he possessed a simulated controlled substance with intent to deliver. When reviewing criminal convictions for sufficiency of the evidence, we review the evidence in a light most favorable to the State. *State v. McGrew*, 515 N.W.2d 36, 37 (Iowa 1994). A conviction is reversed only if there is no substantial

evidence in the record supporting the verdict or the verdict is clearly against the weight of the evidence. *Id.* at 37-38. Substantial evidence is evidence which could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.* at 38. We find there was substantial evidence to support defendant's conviction based on the evidence and testimony given at trial.

AFFIRMED.