JUN 27 1995

IN THE COURT OF APPEALS OF IOWA

No. 5-263 / 94-562

STATE OF IOWA,

Appellee,

vs.

TOMMY MCCELLAN-BEY,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jon C. Fister, Judge.

McCellan-Bey appeals the judgment and sentence entered upon his convictions, following a jury trial, of possession with intent to deliver and failure to affix a tax stamp. **AFFIRMED.**

Barbara H. Liesveld, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kim Griffith, Assistant County Attorney, for appellee.

Heard by Donielson, C.J., and Hayden and Huitink, JJ.

HAYDEN, J.

At 12:30 a.m. on November 23, 1993, Waterloo Police Officer Lori Cook heard brakes squeal and a collision occur between two cars. The two cars were traveling westbound on Franklin Street in Waterloo. The two cars, a red-over-white Cadillac and a red Suzuki Sidekick, appeared to be in a chase and were traveling less than a car-length apart. A short time later, Cook saw the cars going in the opposite direction at what appeared to be in excess of the speed limit. Cook followed the cars in her squad car. During her pursuit of the cars, Cook radioed for assistance.

Two other units responded to Cook's request for assistance. Cook was able to stop the Suzuki. However, the driver of the Cadillac (defendant), would not fully stop his car. Despite requests from Officer Cook to stop his vehicle, defendant tried to leave the scene. Officer Jimmy Schmidt stopped defendant's car by putting the car in park and turning off the ignition. Officer Schmidt removed defendant from the vehicle and attempted to pat him down for weapons. Defendant kept pulling his right hand down. After three unsuccessful attempts to pat down defendant, Officer Schmidt arrested defendant for interference with official acts and searched defendant incident to the arrest. In the search, Officer Schmidt found $756, mostly in $20 denominations, and three rocks of crack cocaine. Defendant was placed in one of the patrol cars and his car was searched. No controlled substances were found in the car.

Officers transported defendant to the police station where they conducted a strip-search on him. When defendant removed his right shoe, a plastic bag containing twenty rocks of crack cocaine fell out. Officers also found an address book in defendant's coat pocket. In light of the address book, the cocaine, and the large amount of cash, the officers sought and obtained a search warrant for defendant's residence.

Officers searched the upstairs and basement areas of the house at 229 Ricker. Officers found a black gym bag which contained razor blades and sandwich bags that had the corners cut off. Officers found no instruments to smoke crack cocaine at defendant's residence, nor on his person.

Defendant was charged with possession with intent to deliver a controlled substance and failure to affix a drug tax stamp. He filed a motion to suppress any and all statements and evidence obtained as a result of the stop and search.

At the suppression hearing the court asked defense counsel if he was prepared to stipulate the court only needed to hear evidence about the stop of defendant. Defense counsel said this was correct. The court denied the motion.

After a jury trial defendant was found guilty as charged. Defendant pled guilty to being a second offender, and the court sentenced him to a term of thirty years for the offense of possession with intent to deliver and five years for the offense of failure to affix a drug tax stamp, to be served concurrently.

Defendant appeals. He raises two issues: (1) the trial court erred in denying his motion to suppress, and (2) his trial counsel was ineffective in several particulars.

I. Scope of Review.

Where constitutional rights are implicated, such as here, our review is de novo. *State v. Dickerson*, 313 N.W.2d 526, 530 (Iowa 1981); *State v. Knutson*, 234 N.W.2d 105, 106 (Iowa 1975) (citation omitted).

II. Motion to Suppress.

Defendant asserts evidence seized from his person and from the car should have been suppressed as the fruit of an unlawful search. U.S. Const. amend IV. We hold error, if any, has not been preserved.

At the motion to suppress hearing, the trial court questioned defendant's counsel on the issue presented in the motion to suppress. The trial court inquired:

> Q. I reviewed the motion to suppress and I found it a little bit ambiguous, but the defense attorney has explained to me that the issue here is the stop of the motor vehicle not the arrest [for] interference that resulted out of the pat down or frisk and the search that would have been incident to that arrest, if that arrest had not been the result of the stop. And so I believe counsel are prepared to stipulate that the only thing we need to hear evidence on is the basis for the stop . . . .
>
> A. That is, Your Honor.

From this exchange, as well as defendant's motion to suppress, it is clear defendant challenged only the validity of the stop. Defendant concedes this point in his brief when he acknowledges "the hearing on the motion to suppress addressed the stop only." On appeal, however, defendant states he "do[es] not challenge the trial court's

decision on the legality of the stop pursuant to the investigation [but does] challenge the lawfulness of the resulting pat down search for the alleged reason of checking for weapons."

Our supreme court has repeatedly held that issues, including constitutional issues, which are not raised in the trial court cannot be raised on appeal. *See, e.g., Davis v. State*, 443 N.W.2d 707, 710 (Iowa 1989) (citations omitted); *State v. Hansen*, 286 N.W.2d 163, 165-66 (Iowa 1979) (citation omitted). The orderly, fair, and efficient administration of the adversary system requires litigants not be permitted to present one case at trial and a different one on appeal. *State v. Tobin*, 333 N.W.2d 842, 844 (Iowa 1983). Because defendant failed to raise the issue below, it is waived.

III. Ineffective Assistance of Counsel.

Defendant next asserts the trial counsel was ineffective for: (1) failing to challenge the pat-down search at the suppression hearing; (2) failing to require the court to rule on his motion for preliminary determination of admissibility of evidence and failing to object to the testimony of his federal probation officer regarding her supervision of him; (3) failing to adequately investigate his prior and current drug use, his employment and salary, the date of his payday, and to use expert testimony to show what quantities of cocaine are consumed by heavy crack cocaine users; and (4) failing to communicate to the court after trial commenced that he accepted a plea bargain

wherein he would plead guilty to the charges in return for the State dismissing the charge of being a second offender.

Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. *State v. Koenighain*, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly-ineffective attorney the opportunity to explain his or her conduct. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). We conclude there is an inadequate record for us to adjudicate defendant's claim without counsel's explanation for his/her conduct. We therefore preserve defendant's ineffective assistance of counsel claim for a later proceeding.

AFFIRMED.