IN THE COURT OF APPEALS OF IOWA

No. 0-405 / 99-1286
Filed August 16, 2000

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STATE OF IOWA,
Plaintiff-Appellee,

vs.

NANETTE HORTON,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, James D. Coil, District Associate Judge.

Defendant appeals from the judgment and sentence entered following her conviction of possession of a controlled substance (marijuana). *See* Iowa Code § 124.401(5) (1999). She contends her trial counsel was ineffective by failing to file a motion to suppress evidence. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Stephan J. Japuntich, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Denise A. Timmins, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Danielle Davis, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Miller and Hecht, JJ.

MILLER, J.

Nanette Horton appeals her conviction of Possession of Marijuana, following jury trial, contending defense counsel was ineffective for failing to file a timely motion to suppress. Finding counsel not ineffective because a motion to suppress would have been meritless, we affirm.

From the evidence presented at trial, a reasonable jury could have found the following facts. In June 1998, Horton was a passenger in a vehicle pulled over for failure to display a working license plate light after the officer observed the vehicle leave an area known for its high level of drug activity. As the driver was removing the plates from his vehicle for failure to provide the officer with proof of insurance, an officer asked the driver whether he had anything illegal in his truck. The driver informed the officer there were a couple "roaches[1]" in the ashtray. An officer observed the roaches, walked around the vehicle and asked Horton to step out, and then asked her to empty her pockets. Among the items Horton produced was a small bag with some marijuana in it. Horton was subsequently charged with possession of marijuana.

Jury trial ensued. After the State rested, defense counsel moved to suppress the inculpatory evidence gathered during the search due to a lack of probable cause to suspect Horton was involved in any criminal activity. The trial court overruled the motion because the motion was untimely[2] and the search

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[1] The arresting officer testified a roach is a marijuana cigarette. The officer further testified there was not enough marijuana left in these roaches to smoke without tearing them apart and putting the remaining marijuana in another roach.

[2] Motions to suppress must be filed within forty days of arraignment. See Iowa Rules of Criminal Procedure 10(4) and 11(1)(e).

was incident to a lawful arrest. Horton appeals, contending counsel was ineffective.

To establish an ineffective assistance of counsel claim, the defendant must show that "(1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom." *State v. Miles*, 344 N.W.2d 231, 233-34 (Iowa 1984). The test of ineffective assistance of counsel focuses on whether the performance by counsel was reasonably effective. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1994). The defendant must show that performance fell below an objective standard of reasonableness so that counsel failed to fulfill the role in the adversary process the Sixth Amendment envisions. *Id.*

A presumption exists counsel is competent and counsel's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995) (citing *Strickland*, 466 U.S. at 689-90, 104 S. Ct. at 2065-66, 80 L. Ed. 2d at 693-94). The defendant must overcome this presumption and has the burden of proving by a preponderance of the evidence both elements of such a claim. *Id.*; *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989). Improvident trial strategy, miscalculated tactics, mistake, carelessness or inexperience does not necessarily amount to ineffective counsel. *State v. Aldape*, 307 N.W.2d 32, 42 (Iowa 1981). To warrant a finding of ineffective assistance of counsel, the circumstances must include an affirmative factual basis demonstrating counsel's inadequacy of representation. *Id.*

While we often preserve ineffective assistance of counsel claims for postconviction proceedings, we consider such claims on direct appeal if the

record is sufficient. *State v. Casady*, 597 N.W.2d 801, 807 (Iowa 1999). The record is sufficient in this case. Our review is de novo. *Id.*

> The Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution protect individuals against unreasonable searches and seizures. Searches and seizures conducted without prior approval by a judge or magistrate are per se unreasonable unless they fall within one of the exceptions to the warrant requirement. The State has the burden to prove by a preponderance of the evidence that a warrantless search falls within one of the exceptions.

State v. Canas, 597 N.W.2d 488, 492 (Iowa 1999). The State urges, and the district court found, this was a lawful search incident to arrest.

A lawful arrest is necessary in order for there to be a lawful search incident to the arrest. *State v. Ceron*, 573 N.W.2d 587, 589 (Iowa 1997). Horton contends the officer had no probable cause to arrest her for possession of the marijuana found in the truck. The vehicle Horton was in was a small pickup truck, with only a front seat. While the driver did indicate to the officer the roaches were in the ashtray, the driver did not claim ownership. Based on the proximity of the drugs to Horton, the officer had probable cause to believe Horton was in actual or constructive possession of marijuana and thus had probable cause to arrest her for possession of marijuana before the search took place. *See, e.g., State v. Padavich*, 536 N.W.2d 743, 751 (Iowa 1995) ("possession" includes actual as well as constructive possession, and sole as well as joint possession, and holding constructive possession may be inferred when an item is found in a place which is subject to the defendant's sole or joint dominion and control). The arrest was therefore lawful, and we move to the question of whether this search was a valid search incident to an arrest.

The purpose of a search incident to arrest is to prevent the arrestee from destroying evidence or gaining possession of a weapon which could be used to resist arrest or effect an escape. *Chimel v. California*, 395 U.S. 752, 763, 89 S. Ct. 2034, 2040, 23 L. Ed. 2d 685, 694 (1969); *Canas*, 597 N.W.2d at 492. However, in *United States v. Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973), the Court stated a straightforward rule, easily applied, and predictably enforced: "[I]n the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *Id.* at 235, 94 S. Ct. at 477, 38 L. Ed. 2d at 441. In so holding, the Court rejected the suggestion that "there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest." *Id.* Therefore, whether the officer who arrested Horton had reason to believe a search of her person would reveal evidence of crime or weapons is not of significance if the search was otherwise valid.

A search incident to an arrest must be substantially contemporaneous with the arrest, and must be confined to the immediate vicinity of the arrest. *Vale v. Louisiana*, 399 U.S. 30, 33, 90 S. Ct. 1969, 1971, 26 L. Ed. 2d 409, 413 (1970); *Canas*, 597 N.W.2d at 492. However, a search incident to an arrest may be made before as well as after a formal arrest if the search is substantially contemporaneous with the arrest and probable cause to arrest existed at the time of the search. *State v. Peterson*, 515 N.W.2d 23, 25 (Iowa 1994) (citing *Rawlings v.* Kentucky, 448 U.S. 98, 111, 100 S. Ct. 2556, 2564, 65 L. Ed. 2d

633, 645-46 (1980)). Here probable cause to arrest existed at the time of the search and the search was substantially contemporaneous with the arrest as it immediately preceded the arrest.

Counsel is not ineffective when the issue counsel did not raise has no merit. *State v. Westeen*, 591 N.W.2d 203, 207 (Iowa 1999). A motion to suppress the marijuana seized from Horton's person would have had no merit because the search of her person was a valid search incident to a lawful arrest. Counsel was not ineffective for not filing and pursuing a motion to suppress.

AFFIRMED.