IN THE COURT OF APPEALS OF IOWA

No. 6-514 / 95-1278

STATE OF IOWA,

Appellee,

vs.

JERRY ANGELLE,

Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Woodbury County, Philip S. Dandos and Gary E. Wenell, Judges.

Defendant appeals from judgment and sentences, following jury trial, entered upon his convictions of possession with intent to deliver a controlled substance, failure to affix drug tax stamps, and maintaining a vehicle where drugs are stored. **AFFIRMED.**

Frank E. Robak, Sr., of Robak & Springer, Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, Susan M. Crawford, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Mark A. Campbell, Assistant County Attorney, for appellee.

Considered by Habhab, P.J., Cady, and Vogel, JJ.

CADY, J.

Jerry Angelle appeals from judgment and sentences following a jury trial for possession with intent to deliver a controlled substance, failure to affix drug tax stamps, and maintaining a vehicle where drugs are stored, in violation of Iowa Code sections 124.401(1)(b)(3), 453B.12, and 124.402(1)(e) (1995). We affirm the convictions on our review.

On June 7, 1994, Sioux City police officers executed a search warrant for the residence of Jerry Angelle. The warrant had been issued May 29, 1994. The warrant was supported by information from two confidential informants that Angelle was selling crack from his residence. Police surveillance confirmed numerous cars would arrive at the residence and stay a short period of time. The search resulted in the seizure of drugs and drug paraphernalia.

A police officer also stopped Jerry Angelle's vehicle on June 7 based on the officer's knowledge Angelle's driver's license had been suspended. When the officer asked Angelle to produce his license, Angelle responded he did not have it, but he had "taken care of the suspension." The officer contacted the department of transportation and confirmed Angelle's license was under suspension. The officer placed Angelle under arrest, and searched the passenger compartment of the vehicle. The officer found eighty-three rocks of crack cocaine near and directly below a hole in the floorboard of the vehicle.

Angelle was charged with possession with intent to deliver, failure to affix drug tax stamps, and illegally maintaining a vehicle where drugs are stored. He was arraigned on June 15, 1994. More than sixty days later, on August 18, 1994, Angelle filed a motion to suppress the evidence seized during the warrantless search of his car. He claimed the vehicle stop was a pretext to search for drugs.

At the hearing on the suppression motion, the police officer testified he hoped to find drugs when he stopped Angelle. The trial court overruled the motion. It concluded the traffic stop was valid, as was the subsequent search incident to arrest. The court found it was immaterial the officer had a secondary reason for stopping Angelle's vehicle.

On December 23, 1994, 191 days after arraignment, Angelle moved to suppress the items seized during the search of his residence. He argued the warrant was obtained using false and misleading information about one of the confidential informants. The informant denied he had seen Angelle selling drugs from his residence. This statement contradicted the testimony of the police officers and the information included in the warrant application. The court specifically found the informant's testimony at the hearing was not credible and overruled the motion.

At trial, the State introduced into evidence a police scanner seized during the search of Angelle's residence. Angelle established the scanner was not operational at the time it was seized and police officers altered it prior to trial by programming

it and inserting batteries. Angelle moved for a new trial based on a claim the prosecution tampered with evidence. The trial court overruled the motion.

Angelle was convicted as charged. At the sentencing hearing, the prosecutor stated if Angelle "was sentenced to 25 years in prison with a minimum one-third, [he] would serve 50 months, which is slightly more than 4 years." Angelle was sentenced to terms not to exceed twenty five years, five years, and two years with the sentences running concurrently. The court exercised its discretion not to impose the mandatory minimum sentence under Iowa Code section 124.413 (1995).

Angelle appeals. He contends: (1) the district court improperly denied his motion to suppress items seized during the pretextual warrantless search of his vehicle; (2) the district court improperly denied his motion to suppress items seized pursuant to a warrant because it was not immediately executed and was allegedly obtained with false or misleading information; and (3) the prosecutor engaged in misconduct by tampering with evidence and by speculating about how parole would reduce a sentence of incarceration.

The State contends Angelle's claims were not properly preserved for appellate review. It argues the motions to suppress were untimely and Angelle failed to move for a mistrial based on a claim of prosecutorial conduct.

I. WARRANTLESS SEARCH

Our rules of criminal procedure require objections to evidence based on the ground it was illegally obtained to be raised by a motion to suppress prior to trial.

Iowa R. Crim. P. 10(2)(c). The motion must be filed no later than forty days after arraignment. Iowa R. Crim. P. 10(4). The failure to file a timely motion, without good cause, constitutes a waiver of the objection. Iowa R. Crim. P. 10(3); *State v. See*, 532 N.W.2d 166, 168 (Iowa App. 1995). This requirement has been strictly followed. *See*, 532 N.W.2d at 168; *State v. Froning*, 328 N.W.2d 333, 335 (Iowa 1982). Further, a belated filing of a motion to suppress can provide sufficient grounds on appeal to uphold a trial court's ruling admitting the evidence, even though the State did not argue waiver and the trial court did not base its ruling on the late filing of the motion. *See State v. Rhiner,* 352 N.W.2d 258, 261 (Iowa 1984).

Angelle filed his motion to suppress the items seized in the warrantless search of his vehicle more than 60 days after arraignment. The record reveals no reason for its late filing. Thus, we find the objection waived. Angelle failed to preserve error on this issue.

Even if Angelle had filed a timely motion to suppress, we would affirm the trial court's ruling on the merits. The officer had reasonable cause to make an investigatory stop of Angelle's vehicle. *See State v. Mitchell,* 498 N.W.2d 691, 693 (Iowa 1993). The officer's determination, made seven days prior to the stop of Angelle's vehicle, that Angelle's license was suspended represented an articulable reason which was more than an inchoate or unparticularized suspicion or hunch. *See State v. Haivland,* 532 N.W.2d 767, 768 (Iowa 1995). Additionally, an investigatory stop is valid as long as the officer has a proper ground for the stop though other

reasons may exist. *State v. Garcia*, 461 N.W.2d 460, 463 (Iowa 1990). Once Angelle was placed under arrest, the officer was permitted to search the passenger compartment of the vehicle. *State v. Edgington*, 487 N.W.2d 675, 677 (Iowa 1992).

II. SEARCH WARRANT

Similarly, Angelle untimely filed his motion to suppress the evidence seized during the execution of a search warrant. The late filing was unexcused and the underlying objection was waived. Angelle failed to preserve error on this issue.

Again, even if Angelle had filed a timely motion to suppress, we would affirm the trial court's ruling on the merits. A search warrant is valid if executed within ten days of the date of issue. Iowa Code § 808.8 (1995). Additionally, Angelle failed to show the search warrant was based on false and misleading information. *State v. Green*, 540 N.W.2d 649, 656 (Iowa 1995). Although one informant's testimony at the suppression hearing contradicted the statements attributed to him in the warrant application, the trial court determined the informants contradictory testimony at the hearing was not credible, based in a large part on the informant's apparent motive to protect his reputation since his identity was no longer confidential. We give considerable deference to the trial court's findings on the credibility of witnesses. *State v. Simpson*, 528 N.W.2d 627, 634 (Iowa 1995). Moreover, the remedy for false or misleading information is to excise it from the application. *State v. Green*, 540 N.W.2d at 656. Even without the challenged information, the statements from the

other informant and the surveillance information were sufficient to support probable cause for the issuance of the warrant.

III. PROSECUTORIAL MISCONDUCT

Angelle claims the prosecutor engaged in misconduct during the trial and at the sentencing hearing. Angelle asserts his allegation of misconduct during the trial for the first time on appeal. To preserve error on claim of prosecutorial misconduct at trial, the defendant must move for a mistrial. *State v. Dahlstrom*, 224 N.W.2d 443, 449 (Iowa 1974). By permitting the case to be submitted to the jury without asserting the denial of a fair trial by reason of the alleged misconduct of the prosecuting attorney, a defendant indicates a willingness to take his or her chance on a favorable verdict. *Id.* This constitutes a waiver of the alleged misconduct. *Id.* Angelle did not move for a new trial based on the alleged prosecutorial misconduct and therefore failed to preserve error.

Likewise, Angelle raises the issue of prosecutorial misconduct during sentencing for the first time on appeal. No objection appears in the record during sentencing or through post trial motion. This claim of error is also waived. *See State v. Morehouse*, 316 N.W.2d 884, 886 (Iowa 1982). Further, Angelle makes no showing the prosecutor's statement at sentencing concerning the mandatory term of incarceration constituted misconduct, nor does he show the statement prejudiced him.

See State v. Anderson, 448 N.W.2d 32, 33 (Iowa 1989). There is no indication the sentencing court based the sentence on any improper factors.

AFFIRMED.