

IN THE COURT OF APPEALS OF IOWA

No. 0-055 / 09-0141
Filed May 12, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

WILLIAM ARTHUR DEWITT,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Mark D. Cleve,
Judge.

Defendant appeals his convictions for possession of marijuana with intent
to deliver, a tax stamp violation, and interference with official acts. **AFFIRMED.**

Kent A. Simmons, Davenport, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney
General, Michael J. Walton, County Attorney, and Kelly Cunningham, Assistant
County Attorney, for appellee.

Heard by Vogel, P.J., Doyle, J., and Miller, S.J.*

Considered by Vogel, P.J., Doyle and Eisenhauer, JJ., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

EISENHAUER, J.

William DeWitt appeals, arguing: (1) there is insufficient evidence to support his convictions; (2) his arrest violated his constitutional protections against unreasonable searches and seizures; and (3) he received ineffective assistance of counsel. We affirm the convictions and preserve his ineffective assistance claims.

I. Background Facts and Proceedings.

A confidential informant (CI) gave Davenport police officers the following information: DeWitt, a tall, thin white male in his twenties, would be selling marijuana at the Davenport Wal-Mart store shortly before he went to work on the evening of June 5, 2008. DeWitt would be driving a gray 1994 Lincoln town car registered to his father, with Illinois plate A244897.

The officers determined DeWitt lived with his father, Gerald DeWitt, in Illinois and confirmed the gray Lincoln was registered to DeWitt's father.

Based on this information, the Davenport officers set up surveillance of the Wal-Mart store around 8:30 p.m. About a half-hour later, a white male matching the description given by the CI drove the A244897-licensed Lincoln into the Wal-Mart parking lot, parked, and entered the store. The undercover officers had planned to have officers in a marked squad car approach the driver before he entered the store. Because the squad car did not arrive in time, the plan was changed and undercover officers Westbay and Morel followed the Lincoln's driver, later identified as DeWitt, into the store.

The officers observed DeWitt walking back and forth in the main aisle of the store without looking at merchandise, without entering any of the smaller aisles, and without appearing to be shopping. Rather, “he just appeared to be looking around as if he was attempting to meet somebody.” After walking around for several minutes, DeWitt used his cell phone. Officer Morel believed the observed behavior was consistent with DeWitt looking for his intended marijuana purchaser.

Morel and Westbay were informed the patrol squad had arrived and they were instructed to make contact with DeWitt and attempt to get him to come back to the Lincoln. Because they were not in uniform, the officers exposed the badges worn on chains around their necks. One side is photo identification and one side is a detective badge. Officer Morel described the encounter with DeWitt:

My initial approach was identifying myself as a police officer and that I needed to speak with him. And Mr. DeWitt acted surprised, which would be normal. And then he asked about what. And at that point I said, “We need to go outside to your vehicle about a drug investigation.”

. . . .

At the time I initially approached and had said that we wanted to speak to him outside, we took a hold of his—actually Corporal Westbay positioned himself on the other side of Mr. DeWitt and basically kind of took hold of his elbow because I didn’t want him to flee after I said this was a drug investigation. That’s unfortunately what he tried to do, which was break free from me and attempt to basically run past Corporal Westbay at that point. We simply took hold of him, and at the time my intent on this is to actually try to persuade him to do this in a calm nature because what we really want him to do is try to get him to what we call flip, which would be to provide information on maybe who his supplier is so we can further an investigation on somebody who’s actually a bigger dealer than he would be. . . .

So even though he initially tried to leave, we are still trying to basically talk to him or calm him down by saying just relax, this doesn't have to be a big deal, let's go out to the car and don't fight with us. And unfortunately, it didn't turn out to where he was going to listen to our instructions or take our advice and he was actively trying to get away from us.

Because the investigation involved drugs, the officers were concerned DeWitt might be armed. When he tried to break free and run they took him to the floor to control him. During this struggle DeWitt received a cut on his forehead resulting in EMT treatment at the scene and additional treatment at the local hospital.

Because it was clear DeWitt was not going to cooperate and "flip" his supplier, a K9 dog was ordered to the scene to do a "free air sniff." The K9 dog reacted to DeWitt's vehicle causing the officers to obtain a search warrant for the Lincoln. During the search, the officers discovered 449 grams of marijuana in the trunk, an amount consistent with intent to deliver. No fingerprints were found on the drugs.

DeWitt was charged with possession with intent to deliver, violation of the drug tax stamp act, and interference with official acts. DeWitt filed a motion to quash arrest and suppress evidence and an application to compel disclosure of the CI's identity. At the motion hearing DeWitt testified he had driven from Illinois to meet a friend to help this friend buy fishing equipment for a fishing trip they would take together after DeWitt got off work the next morning. DeWitt explained he was approached by two individuals who asked to speak with him and when he turned away they grabbed his arm. When he pulled his arm away they took him

to the floor. DeWitt stated he never saw a police badge and was never shown a badge before he was taken down.

On October 7, 2008, the court specifically found the officers credible and DeWitt's version of the events not credible and denied DeWitt's motions. At the bench trial in November 2008, DeWitt testified he drove the vehicle to and from his work shift six days a week from February 2008, when his car broke down, to June 5, 2008. However, DeWitt stated if he wanted to go out socially he would either ride his bike or walk instead of using the vehicle. DeWitt and his father both testified there were other sets of keys to the vehicle in addition to a key behind the license plate. DeWitt was found guilty on all counts and this appeal followed.

II. Substantial Evidence.

DeWitt argues the State's evidence was insufficient to establish: (1) he knew the marijuana was in the trunk; or (2) the undercover officers were acting within their authority in grabbing him and taking him to the floor. We review his claim for errors at law. *State v. Rohm*, 609 N.W.2d 504, 509 (Iowa 2000). We will uphold a finding of guilt if substantial evidence supports the verdict. *Id.* "Substantial evidence is evidence upon which a rational finder of fact could find a defendant guilty beyond a reasonable doubt." *Id.* "We review the facts in the light most favorable to the State." *Id.*

When the State charges a defendant with possession, the State must prove the defendant "exercised dominion and control over the contraband, had knowledge of the contraband's presence, and had knowledge the material was a

narcotic.” *State v. Maxwell*, 743 N.W.2d 185, 193 (Iowa 2008). Actual possession is not required; constructive possession is sufficient. *Id.* A defendant has constructive possession of contraband when the defendant “has knowledge of the presence of the controlled substance and has the authority or right to maintain control of it.” *Id.* Generally, “constructive possession is recognized by inferences.” *Id.*

We consider several factors in determining whether DeWitt had constructive possession of the marijuana:

(1) incriminating statements made by the accused, (2) incriminating actions of the accused upon the police’s discovery of a controlled substance among or near the accused’s personal belongings, (3) the accused’s fingerprints on the packages containing the controlled substance, and (4) any other circumstances linking the accused to the controlled substance.

State v. Carter, 696 N.W.2d 31, 39 (Iowa 2005). Additional factors may be considered when the “premises” involve a motor vehicle:

(1) was the contraband in plain view, (2) was it with the accused’s personal effects, (3) was it found on the same side of the car seat as the accused or immediately next to him, (4) was the accused the owner of the vehicle, and (5) was there suspicious activity by the accused.

Id. The above factors “merely act as a guide” and even if some factors are present our courts are still “required to determine whether all of the facts and circumstances create a reasonable inference” DeWitt knew of the drug’s presence and had control and dominion over the drugs. See *Maxwell*, 743 N.W.2d at 194.

DeWitt points out the controlled substance was not in plain view, but was in the trunk. Although DeWitt was driving the car that evening, DeWitt’s father,

not DeWitt, was the car's owner and other people were allowed to drive the car. DeWitt denied knowledge of the controlled substance and his fingerprints were not found on the package. DeWitt's claims his wandering Wal-Mart's main aisle and cell phone usage is consistent with meeting a friend to help him purchase fishing equipment.

On the other hand, the evidence supporting the court's conclusion DeWitt had constructive possession of the marijuana includes DeWitt's concession that most of the other people identified as potential drivers of the car had their own drivable vehicles. In contrast, DeWitt's own vehicle had been inoperable since February 2008. DeWitt's claim he never drove the car socially is contradicted by his own testimony he planned to take the car on a fishing trip immediately after finishing work. DeWitt drove this car as many as six days a week to and from work; therefore, he had routine use of the vehicle containing marijuana. DeWitt was the most recent driver of the car and was the only person in it at the time he drove into the Iowa Wal-Mart parking lot. *See id.* Accordingly, DeWitt had an immediate right to control the drugs and exclusive possession of the car just prior to the marijuana discovery.

Further, DeWitt drove to an Iowa Wal-Mart even though he lived near a Wal-Mart in Illinois and even though he needed to immediately return to Illinois to start his evening work shift. Although DeWitt claimed he was meeting a new friend to shop for fishing equipment, when he entered the store he never approached the fishing area. DeWitt could not remember the friend's last name.

Additionally, when Morel and Westbay identified themselves as police officers and asked DeWitt to accompany them out of the store to discuss a drug investigation, DeWitt did not cooperate and calmly accompany the police outside to answer questions. Rather, DeWitt tried to break free and flee, forcing the police to subdue him due to their concerns about him carrying a weapon.

The credibility of witnesses is for the factfinder to decide except for those rare circumstances where the testimony is absurd, impossible, or self-contradictory. *State v. Kostman*, 585 N.W.2d 209, 211 (Iowa 1998). The trial court stated:

[I]n assessing the credibility of the witnesses at trial, the Court finds that the detectives and other officers who testified were generally credible, and that [DeWitt] was not. In assessing [DeWitt's] credibility, the Court has considered both his demeanor while testifying, and the substance of his testimony. As to the latter, the Court specifically rejects [DeWitt's] claim that he was accosted and man-handled by persons who did not identify themselves as law enforcement officers. The Court also finds not credible [DeWitt's] assertion that he traveled from his home in Milan, [Illinois] to the Davenport Wal-Mart to meet a friend whose last name he did not know for the purpose of buying fishing equipment.

Viewing all of the evidence in the light most favorable to the State and adopting the district court's credibility determinations, the above-detailed facts and circumstances create a reasonable inference DeWitt had constructive possession of the marijuana. Additionally, substantial evidence supports the conclusion the officers were acting within their authority during the encounter as

they took actions to protect the public and themselves from a potentially-armed drug dealer. Accordingly, substantial evidence supports DeWitt's convictions.¹

III. Unconstitutional Search and Seizure.

DeWitt argues the officers forcefully arrested him *before* attempting any type of consensual encounter or investigative stop in violation of his state and federal constitutional rights against unreasonable search and seizure. Specifically, DeWitt claims Officer Morel grabbed him and took him into physical custody *before* identifying himself and also contends the court's finding the officers had cause to believe DeWitt "posed a risk of flight and harm to other customers while he remained in the store" is unsupported by the record.

Where the State is alleged to have violated DeWitt's constitutional rights against unreasonable searches and seizures, our review of the district court's ruling is *de novo*. *Carter*, 696 N.W.2d at 36. We independently evaluate the totality of the circumstances as shown by the record. *State v. Reinders*, 690 N.W.2d 78, 82 (Iowa 2004). We give deference to the district court's fact findings because of its ability to assess the credibility of the witnesses, but we are not bound by those findings. *State v. Crawford*, 659 N.W.2d 537, 541 (Iowa 2003).

Additionally, we recognize the police draw upon their experience and specialized training to make inferences from the cumulative information available to them. *State v. Maddox*, 670 N.W.2d 168, 171-72 (Iowa 2003). "Seemingly

¹ As part of his substantial evidence argument, DeWitt suggests it was improper for the trial court to allow hearsay evidence of what the CI told the officers. Because substantial evidence supports DeWitt's convictions when the CI's statements are used only for foundation and without using them for substantive value and because DeWitt admits there is no doubt the "officers had reasonable cause to initiate an investigative stop," we need not address DeWitt's hearsay argument.

innocent activities may combine with other factors to give an experienced police officer reasonable grounds to suspect wrongdoing.” *Id.* at 173-74.

In addition to the trial court’s credibility findings detailed above, the suppression court specifically found: “The Court does not find credible [DeWitt’s] claim that he never saw a police badge and was never shown a badge before he was taken down.” The suppression court concluded:

Based on an objective review of the evidence presented at the hearing, the Court determines that Detectives Morel and Westbay had reasonable and articulable suspicion that [DeWitt] was involved in the delivery of illegal drugs at the time they attempted to detain him and escort him out of the store for the purpose of further interrogation and discussion. All of the pertinent information provided by the confidential informant had been corroborated by the time [DeWitt] arrived at the Wal-Mart, and his behavior in the store gave the officers greater cause to believe that [DeWitt] was involved in a drug transaction and that he posed a risk of flight and of harm to other customers while he remained in the store. [DeWitt’s] physical resistance to the officer’s attempt to briefly detain and question him further gave rise to a legitimate need to control him and provided grounds for a valid arrest of [DeWitt], initially for the offense of interference with official acts . . . and subsequently for the drug offenses

After our *de novo* review, we conclude the officers took reasonable precautionary actions for their own protection as well as for the protection of the public. See *United States v. Carter*, 360 F.3d 1235, 1240 (10th Cir. 2004) (holding officers engaged in an investigatory stop have a right to take reasonable steps to protect themselves and ensure the safety of innocent bystanders). Accordingly, we find no constitutional violation.

IV. Ineffective Assistance of Counsel.

DeWitt's final argument is he received ineffective assistance of counsel by: (1) counsel's failure to renew an application to compel disclosure of the identity of the CI, and (2) counsel's failure to discover facts surrounding Wal-Mart's store surveillance video.

In order to prevail on his claims of ineffective assistance of counsel, DeWitt must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted. See *State v. Lane*, 726 N.W.2d 371, 393 (Iowa 2007). We evaluate the totality of the relevant circumstances in a de novo review. *Id.* at 392. Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). We prefer to leave ineffective-assistance-of-counsel claims for postconviction relief proceedings. *State v. Lopez*, 633 N.W.2d 774, 784 (Iowa 2001). Those proceedings allow an adequate record of the claim to be developed "and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant's claims." *Biddle*, 652 N.W.2d at 203.

This is not the "rare case" that allows us to decide DeWitt's ineffective assistance claims on direct appeal without an evidentiary hearing. See *State v. Straw*, 709 N.W.2d 128, 138 (Iowa 2006). We preserve his claims for possible postconviction relief proceedings.

AFFIRMED.