**IN THE COURT OF APPEALS OF IOWA**

No. 0-351 / 09-1241
Filed June 30, 2010

**STATE OF IOWA,**
Plaintiff-Appellee,

**vs.**

**CONNIE JO GATES,**
Defendant-Appellant.

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Appeal from the Iowa District Court for Linn County, Robert E. Sosalla (suppression) and David M. Remley (trial and sentencing), Judges.

Connie Jo Gates appeals from her convictions for homicide by vehicle while a controlled substance was present, homicide by vehicle while attempting to elude, operating a motor vehicle without the owner's consent, and possession of a controlled substance. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney General, Harold Denton, County Attorney, and Jerry Vander Sanden, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Mansfield, JJ. Tabor, J., takes no part.

**MANSFIELD, J.**

Connie Jo Gates appeals the judgment and sentence entered upon jury verdicts finding her guilty of: (1) homicide by vehicle while any amount of a controlled substance was present in violation of Iowa Code section 707.6A(1) (2009); (2) homicide by vehicle while attempting to elude in violation of section 707.6A(2)(b); (3) operating a motor vehicle without the owner's consent in violation of section 714.7; and (4) possession of a controlled substance in violation of section 124.401(5) (2009). On appeal, Gates argues: (1) the district court erred in denying her motion to suppress the evidence obtained by officers during a warrantless search of her purse and clothing; (2) the district court erred in denying her motion to suppress statements made to a paramedic as privileged under Iowa Code section 622.10; (3) her defense counsel rendered ineffective assistance by failing to move to suppress the results of the urine test taken pursuant to section 321J.6; and (4) the district court erred in holding section 321J.2(1)(c) was not unconstitutional as a violation of the defendant's rights to due process of law under the U.S. Constitution. Upon our review, we affirm.

## I. Background Facts and Proceedings

The trial and the suppression hearing revealed the following facts: At approximately 12:30 a.m. on March 25, 2009, while on patrol, Officer Tran of the Cedar Rapids Police Department spotted a black Dodge Neon matching the description of a vehicle reported stolen. Officer Tran called for backup prior to attempting to stop the vehicle. After Officers Chiafos and Hansen arrived, Officer Tran activated his emergency lights. The driver of the Neon, later identified as

Gates, slowed at first, as if getting ready to pull over, but then quickly accelerated. A high speed chase ensued.

The chase proceeded through the downtown area. Gates exceeded the posted speed limit and ran red lights. The Neon then entered the on-ramp for Interstate 380 South at 8th Street. While driving on the interstate, Gates reached speeds of approximately 100 miles per hour. An officer attempted to stop the car using stop sticks, but Gates successfully maneuvered around them. The Neon exited the interstate at the Wilson Avenue exit still going approximately sixty-five to seventy miles per hour. When the Neon reached the top of the off-ramp, it collided with a taxi cab being driven on Wilson Avenue by Richard Dankert. Dankert was later pronounced dead on arrival at the hospital. When Gates entered the Wilson Avenue intersection, her traffic light was red, and the taxi cab's traffic light was green.

The officers pursuing the Neon arrived at the scene soon after the collision. Officer Chiafos approached the driver's side of the Neon. The driver's door was open, and Gates was lying on the ground next to the vehicle. Gates complained of pain in her leg. Officer Chiafos asked Gates if she was the driver of the vehicle, and she stated she was. Officer Chiafos asked Gates to identify herself and she did. Officer Chiafos remained with Gates until and after the emergency responders arrived at the scene.

The precise order of events after this point is not clearly established in the record, but we accept the district court's findings. According to the district court, Officers Chiafos and McKinstry searched Gates's clothing prior to the paramedics arriving, while the defendant remained on the ground next to the

vehicle.[1] During this search, Officer McKinstry found a small amount of marijuana in Gates's coat pocket. After the paramedics arrived, Officer Chiafos remained near Gates. Officer Chiafos overheard a paramedic ask Gates whether she had consumed any alcohol or drugs, to which Gates responded that she had used marijuana and crack cocaine. Before Gates was put into the ambulance by the paramedics, she requested her purse that was lying nearby. Officer Chiafos searched the purse for weapons prior to handing it to Gates and found a glass crack pipe and Brillo pads, both of which were confiscated as evidence.

The ambulance transported Gates to Mercy Hospital in Cedar Rapids for treatment. After hospital personnel removed Gates's clothing during treatment, Officer Chiafos re-searched Gates's coat and pants, which had been placed on a chair in the emergency room. Officer Chiafos found some additional loose marijuana in the same pocket in which marijuana had been found during the initial search at the scene of the accident.

At approximately 1:00 a.m. Officer Tracy Schmidt went to Mercy Hospital to obtain a urine sample from Gates to test for alcohol and controlled substances. He spoke with the attending physician and confirmed Gates had not been given any drugs and was lucid enough to make legal decisions. Officer Schmidt identified himself to Gates and informed her that he was invoking Iowa's informed consent law. He read the informed consent advisory information to Gates.

[1] Officer Chiafos testified at trial that he and Officer McKinstry performed the search of Gates's clothing after she was strapped to the back board by the paramedics. However, Gates testified the search occurred first and we will defer to the finding of the district court that it did.

Gates stated she understood and consented to a urine sample at approximately 1:20 a.m. An emergency room nurse took the sample via catheter and gave it to Officer Schmidt who took it to St. Luke's Hospital for testing. The test results revealed Gates had concentrations of marijuana and cocaine in her urine that exceeded the maximum amounts measurable by the lab's testing equipment. The concentration of marijuana in Gates's system exceeded 135 nanograms per milliliter, and the concentration of cocaine in Gates's system exceeded 3000 nanograms per milliliter.

The State charged Gates by trial information on April 1, 2009, with one count each of homicide by vehicle while any amount of a controlled substance was present, homicide by vehicle while attempting to elude, theft in the second degree, and possession of a controlled substance.[2]

Gates filed her first motion to suppress on May 15, 2009, asserting her statements to the paramedic were privileged under Iowa Code chapter 622.10. She also challenged the admissibility of the results of the urine test. Gates filed her second motion to suppress on May 19, 2009, challenging the warrantless searches of her clothing and purse. Both motions were overruled and the case proceeded to trial on June 22, 2009.

The jury returned guilty verdicts on both homicide by vehicle counts as well as the possession of a controlled substance count. On the theft charge, the jury returned a verdict of guilty to a lesser-included offense, operating without the owner's consent. Following entry of the verdicts, Gates admitted to previous

[2] Gates pled guilty to two additional counts, possession of drug paraphernalia and driving while under suspension, and was sentenced thereon to time served.

convictions for other drug-related offenses. Gates appeared for sentencing on August 13, 2009. The district court merged the homicide by vehicle counts into a single conviction. The district court then sentenced Gates to twenty-five years imprisonment for the homicide by vehicle conviction, two years for operating without the owner's consent, and five years on the enhanced drug possession charge. The district court ordered the operating charge to run concurrently with the homicide by vehicle charge, and the drug possession charge to run consecutively, for a total sentence of thirty years. Gates appeals.

## II. Motion to Suppress Evidence Obtained in the Search of Gates's Clothing and Purse

Gates argues the district court erred in denying her motion to suppress the evidence obtained during the search of her clothing and purse because these were unreasonable searches and seizures under the Fourth Amendment of the United States Constitution and article I, section 8 of the Iowa Constitution.

When we review the denial of a motion to suppress based on a claimed violation of the defendant's constitutional rights, we do so de novo according to our "'independent evaluation of the totality of the circumstances as shown by the entire record.'" *State v. Cowles*, 757 N.W.2d 614, 616 (Iowa 2008) (quoting *State v. Kinkead*, 570 N.W.2d 97, 99 (Iowa 1997)). "We give deference to the district court's fact findings due to its opportunity to assess the credibility of witnesses, but we are not bound by those findings." *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001). "In our review of the district court's ruling on defendant's motion to suppress, we consider both the evidence presented during the

suppression hearing and that introduced at trial." *State v. Jackson*, 542 N.W.2d 842, 844 (Iowa 1996).

The Fourth Amendment of the United States Constitution and article I, section 8 of the Iowa Constitution guarantee persons the right to be free from "unreasonable searches and seizures." *State v. Carlson*, 548 N.W.2d 138, 140 (Iowa 1996). Evidence collected in violation of this right "is inadmissible, no matter how relevant or probative the evidence may be." *State v. Predka*, 555 N.W.2d 202, 205 (Iowa 1996). Warrantless searches are per se unconstitutional, unless covered under an established exception. *State v. Christopher*, 757 N.W.2d 247, 249 (Iowa 2008). The State has the burden of proving the applicability of an exception by a preponderance of the evidence. *Id.*

The district court found, and the State argues, the seizure of the marijuana from Gates's coat and the crack pipe and Brillo pads from Gates's purse fell within the following exceptions: (1) search for weapons during a close range investigation, *see Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883, 20 L. Ed. 2d 889, 909 (1968) (recognizing this exception), and (2) probable cause plus exigent circumstances, particularly the potential for destruction, concealment or loss of the evidence, *see State v. Nitcher,* 720 N.W.2d 547, 554-55 (Iowa 2006) (recognizing this exception). We find both searches to be proper under the *Terry* exception, and thus do not address the potential applicability of the exception based upon probable cause plus exigent circumstances.

In *Terry*, the Supreme Court held an officer may briefly stop and search an individual for weapons when the officer "is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and

presently dangerous to the officer or to others . . . ." 392 U.S. at 24, 88 S. Ct. at 1881, 20 L. Ed. 2d at 908. "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence . . . ." *Adams v. Williams*, 407 U.S. 143, 146, 92 S. Ct. 1921, 1923, 32 L. Ed. 2d 612, 617 (1972). When an officer is engaged in a protective *Terry* search, it may extend to other objects and spaces in order to secure the officer's safety and the safety of others in the vicinity when it is possible the individual may gain access to those objects or areas. *Michigan v. Long*, 463 U.S. 1032, 1048, 103 S. Ct. 3469, 3480, 77 L. Ed. 2d 1201, 1219 (1983). Whether the officer is justified in performing the search in order to secure the safety of the officer and others is measured according to an objective reasonable standard. *Terry*, 392 U.S. at 27, 88 S. Ct. at 1883, 20 L. Ed. 2d at 909. Additionally,

> when the officer remains particularly vulnerable in part *because* a full custodial arrest has not been effected, and the officer must make a quick decision as to how to protect himself and others from possible danger . . . we have not required that officers adopt alternate means to ensure their safety in order to avoid the intrusion involved in a *Terry* encounter.

*Long*, 463 U.S. at 1052, 103 S. Ct. at 3482, 77 L. Ed. 2d at 1221-22. (internal citations and quotation marks omitted; emphasis in the original). If, during a search for weapons, an officer discovers contraband, the officer is not "required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances." *Id*., 463 U.S. at 1050, 103 S. Ct. at 3481, 77 L. Ed. 2d at 1220.

On our review, we conclude the officers had a reasonable basis to conduct protective searches of Gates's clothing and purse. Gates had been

involved in a reckless, high-speed attempt to elude the officers prior to the accident. Accordingly, the officers could have reasonably expected Gates might continue her attempt to escape the authorities by using weapons on her person or in her purse. Additionally, we reject the contention that Gates was immobilized and thus did not pose a threat to the officers at the time of the search. During the initial search of her clothing, the district court found she was not yet on the backboard. Even if she had been, a weapon in her clothing still could have posed a potential threat. Additionally, the search of the purse was justified because Gates could have used any weapon therein against the unarmed paramedics after being put into the ambulance. Accordingly, we affirm the decision of the district court denying the motion to suppress the evidence seized incident to the search of Gates's clothing and purse.[3]

### III. Motion to Suppress Gates's Statements to the Paramedic

Gates next argues the district court erred in denying her motion to suppress the statements she made to the paramedics because they were privileged under Iowa Code section 622.10 and thus inadmissible. Gates further maintains the privilege was not waived by Officer Chiafos's presence when the statements were made.

Because the physician-patient privilege exists by statute, we review the district court's interpretation for errors of law. *State v. Deases*, 518 N.W.2d 784,

[3] Gates does not argue that either the initial search of her outer clothing or the search of her purse exceeded the proper scope of a protective *Terry* search, assuming that adequate grounds for such a search existed. *See Minnesota v. Dickerson*, 508 U.S. 366, 374-77, 113 S. Ct. 2130, 2136-38, 124 L. Ed. 2d 334, 343-47 (1993) (discussing the proper scope of such a search). Gates also does not separately challenge the second search of her outer clothing that occurred at the hospital, presumably because the admission of any additional fruits from that search would likely be considered harmless error, even if there was error.

787 (Iowa 1994). The physician-patient privilege is set out in Iowa Code section 622.10(1), which provides:

> A practicing attorney, counselor, physician, surgeon, physician assistant, advanced registered nurse practitioner, mental health professional, or the stenographer or confidential clerk of any such person, who obtains information by reason of the person's employment, or a member of the clergy shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the person in the person's professional capacity, and necessary and proper to enable the person to discharge the functions of the person's office according to the usual course of practice or discipline.

Although section 622.10(1) is an evidentiary rule and not a substantive right, *Roosevelt Hotel Ltd. P'ship v. Sweeney*, 394 N.W.2d 353, 355 (Iowa 1986), its purpose is not the elucidation of truth, which is the typical purpose of evidentiary rules, but rather, "to promote uninhibited and full communication between a patient and his doctor so the doctor will obtain the information necessary to competently diagnose and treat the patient." *Chung v. Legacy Corp.*, 548 N.W.2d 147, 149 (Iowa 1996). In order to establish the existence of this privilege, the person asserting the existence of the privilege has the burden to show "(1) the relationship of doctor-patient; (2) the acquisition of the information or knowledge during this relationship; and (3) the necessity of the information to enable the physician to treat the patient skillfully." *State v. Henneberry*, 558 N.W.2d 708, 709 (Iowa 1997).

In our review, we find the district court's ruling on the motion to suppress to be appropriate because Gates's statements to the paramedic were not privileged under section 622.10(1). The statute does not include paramedics and thus Gates cannot meet the first element of the privilege. By its terms, section

622.10(1) covers physicians, surgeons, physician assistants, advanced registered nurse practitioners, and mental health professionals. The use of this list suggests the statute is applicable only to those professions expressly identified because the list is repeated consistently throughout the statute, *see, e.g.*, Iowa Code § 622.10(2)–(4), and the professions listed in the statute are very specific in some instances (e.g. "advanced registered nurse practitioner"). *See Kucera v. Baldazo*, 745 N.W.2d 481, 487 (Iowa 2008) (recognizing and applying the rule of "expressio unius est exclusio alterius" to legislative enactments). Additionally, other jurisdictions have similarly rejected the inclusion of paramedics under their statutes defining the physician-patient privilege. *See Med-Express, Inc. v. Tarpley*, 629 So.2d 331, 332 (La. 1993); *State v. LaRoche*, 442 A.2d 602, 603 (N.H. 1982); *State v. Ross*, 947 P.2d 1290, 1292-93 (Wash. Ct. App. 1997); *but see People v. Wilber*, 664 N.E.2d 711, 715 (Ill. App. Ct. 1996). Accordingly, because Gates's statements were not privileged under section 622.10, we do not need to decide whether any privilege was waived as a result of Officer Chiafos's presence.

**IV. Ineffective Assistance of Counsel**

Gates also claims his trial counsel was ineffective because he failed to move to suppress the results of the urine test taken pursuant Iowa Code section 321J.6 as fruit of the poisonous tree. Gates's argument rests on an assumption that the evidence found during the search of her clothing and purse as well as the statements made to the paramedics should have been suppressed.

Ineffective assistance of counsel claims arise under the Sixth Amendment of the United States Constitution and thus we review them de novo. *State v.*

*Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). Generally, claims of ineffective assistance of counsel are reviewed during a postconviction proceeding; however, when the record is adequate, review of the issue is appropriate on direct appeal. *Id*. In this case we will review Gates's claim of ineffective assistance of counsel on direct appeal because the record is adequate.

We have already found the physical evidence and the statements to the paramedics should not have been suppressed. Accordingly, there is no "fruit of the poisonous tree," and trial counsel was not ineffective for failing to object to the admission of the results of the urine test. *See State v. Westeen*, 591 N.W.2d 203, 207 (Iowa 1999) (defense counsel is not ineffective for failing to raise an issue that has no merit).

Officer Schmidt took Gates's urine sample pursuant to Iowa Code section 321J.6. Under this section, implied consent to a test of Gates's urine would be appropriate if the police officer had "reasonable grounds to believe that the person was operating a motor vehicle in violation of section 321J.2 or 321J.2A, and if . . . [t]he person has been involved in a motor vehicle accident or collision resulting in personal injury or death." Iowa Code § 321J.6(1)(b). Officer Schmidt properly invoked implied consent under this section because he had "reasonable grounds to believe that a person was operating a motor vehicle in violation of section 321J.2" (i.e., while having a controlled substance within her person) based on Gates's own statements and the discoveries in her coat and purse.

**V. Constitutionality of Iowa Code Section 321J.2(1)(c)**

Lastly, Gates argues the district court erred in denying her motion for directed verdict of acquittal on the first homicide by vehicle count because Iowa Code subsection 321J.2(1)(c) violates her substantive due process rights under the United States Constitution. Gates argues the statute is unconstitutional because it is not rationally related to the legitimate state goal of protecting citizens from the potential harm that results from the actions of persons driving while impaired.[4]

We review de novo whether a statute violates a defendant's constitutional rights. *State v. Bower*, 725 N.W.2d 435, 440 (Iowa 2006). In doing so, we presume a statute is constitutional unless the defendant can prove the statute is unconstitutional beyond a reasonable doubt. *Id*. at 441. If the application of the statute to the defendant is constitutional, then the defendant does not have standing to bring a facial challenge against the statute. *Id.* at 443.

Iowa Code subsection 321J.2(1)(c) provides: "A person commits the offense of operating while intoxicated if the person operates a motor vehicle in this state . . . [w]hile any amount of a controlled substance is present in the

[4] We note that Gates's present argument appears to be arguably somewhat different from the one she asserted below. Section 707.6A(1), the basis for the first homicide by vehicle count, makes it a class B felony to unintentionally cause the death of another by operating a motor vehicle while intoxicated as prohibited by section 321J.2. In the trial court, Gates argued section 707.6A(1) unconstitutionally allows a person to be convicted of homicide by vehicle even though the person had only a trace amount of drugs in her body that could not have caused *the accident*. On appeal, Gates makes a somewhat broader argument that section 321J.2(1)(c) unconstitutionally allows a person to be convicted of operating while intoxicated even though the person had only a trace amount of drugs in her body that could not have impaired her ability to drive (regardless of whether an accident occurred). However, since the State concedes in its brief that error was preserved, we shall reach the merits of Gates's argument.

person, as measured in the person's blood or urine."[5] In arguing that subsection 321J.2(1)(c) is unconstitutional, Gates focuses on the hypothetical situation where a defendant has not used any controlled substances for an extended period of time and yet tests positive for the substance even though she has only a trace amount in her urine. However, in this case, Gates admitted she used two controlled substances, marijuana and cocaine, merely hours before the accident. Additionally, the subsequent testing of her urine revealed she had substantially more than a trace amount of two controlled substances, marijuana and cocaine, in her body, considering that both levels exceeded the maximum amounts measurable by the laboratory's equipment. According to the testimony of the lab technician, the concentration of marijuana in Gates's system exceeded 135 nanograms per milliliter and the concentration of cocaine in Gates's system exceeded 3000 nanograms per milliliter. Gates does not allege the statute is unconstitutional as applied to her, i.e., where the defendant used a controlled substance recently and the resulting concentrations were high. Thus, we need not consider her postulated hypothetical.

Furthermore, in *State v. Comried*, our supreme court concluded that Iowa Code subsection 321J.2(1)(c) is "clear and unambiguous and that 'any amount' means any amount greater than zero." 693 N.W.2d 773, 778 (Iowa 2005) (citing cases with similar holdings). Further, the court concluded that the legislature "could reasonably have imposed such a ban" because the effects of drugs are unpredictable, there is no reliable indicator of impairment, and there is no

[5] Gates does not challenge the constitutionality of Iowa Code subsections 321J.2(1)(a) or (b).

accepted agreement as to the quantity of a controlled substance necessary to cause impairment. *Id*. at 776.

**VI. Conclusion**

In summary, we find the district court did not err in denying Gates's motion to suppress the evidence obtained incident to the search of her clothing and purse. We further find the statements made to the paramedics were not covered by Iowa Code section 622.10(1), and thus were admissible. We also find trial counsel was not ineffective for failing to challenge the admission of the results of the urine test as fruits of the poisonous tree. Finally, we also find the district court correctly denied Gates's motion for directed verdict of acquittal on the first homicide by vehicle count. Thus, we affirm.

**AFFIRMED.**