IN THE COURT OF APPEALS OF IOWA

No. 0-933 / 09-1648
Filed February 9, 2011

DAVID ELLIS HASKINS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge.

Applicant appeals from the district court's dismissal of his application for postconviction relief. **AFFIRMED.**

Michael J. Piper of Dickey & Campbell Law Firm, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, John P. Sarcone, County Attorney, and Michael Hunter, Assistant County Attorney, for appellee State.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ. Tabor, J., takes no part.

VOGEL, J.

David Haskins appeals from the district court's dismissal of his application for postconviction relief. He asserts that his trial counsel was ineffective for failing to file a timely motion to suppress and that his postconviction counsel was ineffective for failing to prove that Haskins would have prevailed on that motion to suppress. Because we find that Haskins would not have prevailed on a motion to suppress and therefore cannot prevail on the prejudice prong, we affirm.

I. Background Facts and Proceedings.

In September 2006, Haskins was stopped for speeding, and subsequently, officers discovered four bags (totaling ninety-nine grams) of marijuana in an open paper sack in his vehicle, and two bags (totaling two grams) of marijuana and a finger scale in his pants pocket. Haskins was charged with possession of a controlled substance with intent to deliver in violation of Iowa Code section 124.401(1)(d) (2005) and failure to possess a tax stamp in violation of Iowa Code sections 453B.3 and 453B.12. Although Haskins's trial attorney filed a motion to suppress, it was untimely and denied as such.

In February 2007, Haskins pled guilty to possession of marijuana with intent to deliver as part of a plea bargain, and a five-year sentence was imposed to run concurrent with a second-degree robbery sentence in a separate case. The failure to affix a drug tax stamp charge and a misdemeanor citation were dismissed. The supreme court dismissed Haskins's subsequent appeal as frivolous.

In August 2008, Haskins filed an application for postconviction relief asserting that his trial counsel was ineffective for failing to file a timely motion to

suppress. A hearing was held in June 2009, after which the district court, finding Haskins had suffered no prejudice by the misstep of his trial counsel, dismissed his application. Haskins appeals and raises ineffective-assistance-of-counsel claims.

II. Ineffective Assistance of Counsel.

We review ineffective-assistance-of-counsel claims de novo. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008). In order to prevail on an ineffective-assistance-of-counsel claim, an applicant must show (1) his trial counsel failed to perform an essential duty and (2) prejudice resulted. *Kirchner v. State*, 756 N.W.2d 202, 204 (Iowa 2008). We may resolve a claim on either prong. *Id.*

A. Trial Counsel.

Haskins first asserts his trial counsel was ineffective for failing to file a timely motion to suppress and had trial counsel done so, the motion would have been successful such that he would not have pled guilty.[1] We acknowledge the motion to suppress was untimely filed, but agree with the district court that Haskins cannot prevail on the prejudice prong. According to the trial information, Haskins was stopped for speeding. While the officer was talking to Haskins, the officer noticed the strong smell of marijuana emanating from his person and observed a green film and bumps on Haskins's tongue, which from his experience, he believed indicated marijuana use. The officer asked Haskins if he had been smoking marijuana, to which Haskins replied that he was returning

[1] In his brief, Haskins also states that his trial attorney was ineffective for a "failure to investigate," but then argues this was because he did not file a timely motion to suppress. Any claim based upon a failure to investigate was not presented to the district court and therefore, is not preserved for appeal. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

from a party where marijuana had been smoked. The officer asked Haskins to get out of the car, and when Haskins did the officer saw a paper sack from Arby's that was open at the top and appeared to contain marijuana. It was later determined to contain four separate bags of marijuana weighing a total of ninety-nine grams. The officer placed Haskins in handcuffs, searched Haskins's person and found two baggies of marijuana and a finger scale in one of his pockets. *See State v. Moriarty*, 566 N.W.2d 866, 869 (Iowa 1997) (explaining a circumstance where the smell of marijuana gives rise to probable cause to search a defendant's person); *State v. Merrill*, 538 N.W.2d 300, 301–02 (Iowa 1995) (same). Another officer arriving on the scene retrieved the marijuana in the open Arby's sack and searched Haskins's vehicle. *See Arizona v. Gant*, ___ U.S. ___, ___, 129 S. Ct. 1710, 1719, 173 L. Ed. 2d 485 (2009) ("[C]ircumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'"); *State v. McGrane*, 733 N.W.2d 671, 680 (Iowa 2007) ("For the plain view exception to apply, police must be rightfully in the place that allows them to make the observation. In addition, the State has the burden of proving (1) the item seized was in plain view and (2) its incriminating character was immediately apparent."); *Merrill*, 538 N.W.2d at 301 ("[W]e have previously held that the smell of burning marijuana from a car may give a police officer probable cause to search a vehicle."). Contrary to the officers' statements, Haskins claims the marijuana was "[i]n a closed Arby's sack." With the district court's apparent rejection of Haskins's version of the facts, we agree that a timely motion to suppress would not have been successful.

B. Postconviction Counsel.

Haskins also asserts his postconviction counsel was ineffective for failing to confer meaningfully with Haskins and for failing to investigate his case. *See Connor v. State*, 630 N.W.2d 846, 848 (Iowa Ct. App. 2001) ("[O]nce counsel is appointed in a postconviction proceeding the petitioner has a right to the effective assistance of this counsel."). Essentially, he argues that had his postconviction counsel presented additional evidence, he would have established that the marijuana found in his car was not in plain view and consequently, his motion to suppress would have been granted. Haskins cannot prevail on this argument because even assuming that marijuana in the sack was not in plain view, the motion to suppress would not have been granted. After Haskins was legitimately stopped for speeding, the officer noticed the strong smell of marijuana emanating from his person, noticed physical symptoms indicating marijuana use, and Haskins admitted to being at a place where marijuana was smoked. The officer had probable cause to search Haskins's person. *See Moriarty*, 566 N.W.2d at 869 (holding that the "plain smell of burnt marijuana" and "an unused alligator clip hanging from the defendant's rearview mirror" provided the officer with probable cause to search defendant's person); *Merrill*, 538 N.W.2d at 301–02 (holding that the smell of burnt marijuana and furtive movements provided the officer with probable cause to search defendant's person). That search resulted in the discovery of a scale and two baggies of marijuana in his pocket. Haskins was arrested for possession of marijuana, and officers could search Haskins's vehicle for evidence of that crime. *Gant*, ___ U.S. at ___, 129 S. Ct. at 1719, 173 L. Ed. 2d at 485 (explaining that where a defendant is arrested for drug charges, police

could expect to find evidence of that offense in the passenger compartment of a vehicle). Therefore, even assuming that the marijuana was not in plain view, there is no reasonable probability that he could prevail. *See State v. Straw*, 709 N.W.2d 128, 137 (Iowa 2006) ("[T]he defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pleaded guilty and would have insisted on going to trial."). We affirm the district court's dismissal of Haskins's postconviction relief application.

AFFIRMED.