

IN THE COURT OF APPEALS OF IOWA

No. 1-294 / 10-0711
Filed May 25, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DENNIS WILLIAM BUSH,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jon Fister (motion to suppress) and Todd A. Geer (trial), Judges.

Defendant appeals his conviction for possession of marijuana, third offense. **AFFIRMED.**

Mark A. Newman, Forest City, for appellant.

Thomas J. Miller, Attorney General, Bridget Chambers, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brad Walz and Joel Dalrymple, Assistant County Attorneys, for appellee.

Considered by Vogel, P.J., Vaitheswaran, J., and Mahan, S.J.* Tabor, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MAHAN, S.J.**I. Background Facts & Proceedings.**

On July 7, 2009, at about 1:00 a.m., Deputy David Hinz of the Black Hawk County Sheriff's Department noticed a pickup truck that had a license plate cover that partially obscured the rear license plate. This is a violation of Iowa law.¹ Deputy Hinz saw the pickup drive up to a twenty-four hour ATM at a credit union. The pickup then parked in front of the lobby of the credit union, which was not open, near another vehicle. Deputy Hinz approached the vehicles, and at 1:04 a.m. he called in the license plate numbers. The pickup was registered to Dennis Bush. The other vehicle had been driven by Corderro Daniels. Deputy Hinz was aware Bush had a history of drug-related convictions, and he was suspicious a drug transaction was in progress.

Bush and Daniels stated they agreed to meet in the parking lot so Bush could loan Daniels some money for gasoline and cigarettes. Deputy Hinz ascertained that Daniels did not have a valid driver's license, and he was eventually given a citation for driving without a license. Deputy Hinz called for backup, and Deputy Tony Meyer came to the scene at about 1:16 a.m. Daniels agreed to a search of his vehicle, but nothing of interest was found.

Deputy Hinz requested that Bush consent to a search of his vehicle, and Bush refused. He noticed Bush appeared to be "slightly nervous" and "perspiring

¹ Iowa Code section 321.37(3) (2009) provides, "It is unlawful for the owner of a vehicle to place any frame around or over the registration plate which does not permit full view of all numerals and letters printed on the registration plate." Section 321.38 also provides license plates must be "in a place and position to be clearly visible and shall be maintained free from foreign materials and in a condition to be clearly legible." A traffic violation, even if minor, gives an officer probable cause to stop a motorist. *State v. Aderholdt*, 545 N.W.2d 559, 563 (Iowa 1996).

a little bit.” Deputy Meyer saw “Bush was looking at us and he was fidgeting and he was reaching for something in front of him near the console.” Deputy Meyer also saw Bush was “really sweaty, which was unusual for that evening ‘cause it was quite cool out.”

Deputy Hinz explained to Bush that he had an equipment violation. Deputy Meyer called for Officer Greg Fangman of the Waterloo Police Department, and Max, a drug-sniffing dog, to come to the scene. Officer Fangman was dispatched at 1:27 a.m. and arrived at the scene at 1:32 a.m. Deputy Hinz was writing out the equipment violation warning for the defendant when Officer Fangman arrived. Max sniffed around Bush’s pickup and indicated the driver’s side door.² Officers then located marijuana in the vehicle. Bush was charged with possession of marijuana, third offense, in violation of Iowa Code section 124.401(5) (2009), and with being a habitual offender under sections 902.8 and 902.9.

Bush filed a motion to suppress, claiming his pickup was searched without probable cause. The district court found there was probable cause for the search of Bush’s vehicle because there had been an alert by a drug dog. The court also found, “the delay occasioned by waiting for the drug dog was not unreasonable.” Furthermore, the court concluded the officers had reasonable suspicion to expand the scope of the stop and call for the drug dog. The court denied the motion to suppress.

² Max also sniffed around Daniel’s car and indicated the smell of narcotics. No illegal substances were found in Daniel’s car, but Daniels admitted there had recently been narcotics in his car.

The case proceeded to a trial to the bench based on the minutes of testimony. The district court found Bush guilty of possession of marijuana, third offense, and being a habitual offender. Bush was sentenced to a term of imprisonment not to exceed fifteen years. He appeals his conviction, claiming he received ineffective assistance of defense counsel.

II. Standard of Review.

Claims of ineffective assistance of counsel are reviewed de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied defendant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). We presume that representation by counsel is competent, and a defendant has the burden to prove by a preponderance of the evidence that counsel was ineffective. *Jasper v. State*, 477 N.W.2d 852, 855 (Iowa 1991).

III. Merits.

A. Bush claims he received ineffective assistance because defense counsel failed to challenge the constitutionality of the length of the seizure. He points out that there may be a constitutional violation if a traffic stop is unreasonably prolonged by a call for a drug-sniffing dog. See *Illinois v. Caballes*, 543 U.S. 405, 407-08, 125 S. Ct. 834, 837, 160 L. Ed. 2d 842, 846 (2005) (noting a “seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission” in order to conduct a dog sniff). Bush states that he

was required to remain at the scene for twenty-three minutes before the drug dog was even requested, and that this was too long.

While this issue was not raised in Bush's motion to suppress, it was clearly raised in his "Brief Supporting Defendant's Motion to Suppress." After discussion between the court and the parties, it was decided the issue would be addressed during the suppression hearing. Furthermore, the court clearly ruled on the issue in its order denying the motion to suppress:

Secondly, the delay occasioned by waiting for the drug dog was not unreasonable. The entire traffic stop took approximately 30 minutes. The investigating officers interviewed two separate individuals, searched the person of the defendant by consent, searched the other party's vehicle by consent, and issued two citations. The citations had not been completed by the time the drug dog arrived.

Bush cannot show he was prejudiced by counsel's failure to raise the issue in the motion to suppress because the court addressed the issue anyway. Bush has not shown he received ineffective assistance of counsel on this ground.

B. Bush also claims he received ineffective assistance because defense counsel did not request that a DVD of the video and audio recording from deputy Hinz's patrol car be admitted for more than a limited purpose. He asserts defense counsel offered the DVD for only a limited purpose—to show the video did not catch the dog indicating on the car—and the court admitted it only for that purpose. Bush contends if the full DVD is considered it would show there was an unreasonable length of time before the drug dog was called to the scene.

"[A]ll that we have required in Iowa is that the dog sniff be conducted within a reasonable amount of time from the initial, lawful stop and that the stop is not unduly prolonged without a sufficient basis." *State v. Bergmann*, 633

N.W.2d 328, 335 (Iowa 2001). “[P]olice cannot unduly prolong their detention of an individual to secure a drug dog or for any other reason without additional suspicion of wrongdoing that warrants expansion of the stop.” *Id.* There is no specific time limit for traffic stops, and whether the duration of a stop is reasonable depends upon the facts of the case. *United States v. Peralez*, 526 F.3d 1115, 1119 (8th Cir. 2008).

Although the DVD has a counter that would allow a determination of when specific events took place, the testimony at the suppression hearing provided evidence of what occurred during the stop, and several specific times were provided. Deputy Hinz testified he made the initial call for the stop at 1:04 a.m. Deputy Meyer was dispatched to the scene at 1:11 a.m., and he arrived at 1:16 a.m. Officer Fangman was dispatched at 1:27, and he arrived with Max at 1:32 a.m. Thus, approximately twenty-eight minutes elapsed from the time of the initial stop to when the drug dog arrived.

When an officer has a valid suspicion of wrongdoing, he may broaden the scope and length of a detention. *Bergmann*, 633 N.W.2d at 335. In this case, the officer was aware Bush had a history of drug offenses. Bush and Daniels were parked in a parking lot at about 1:00 a.m. Because Bush had just been at an ATM, there was a suspicion he was engaged in a cash transaction. Officer Hinz testified illegal drugs are often purchased with cash. Bush and Daniels admitted they had agreed to meet there. There was evidence Bush appeared to be “slightly nervous,” “perspiring a little bit,” “fidgeting,” and “really sweaty, which was unusual for that evening ‘cause it was quite cool out.” Based on these factors, the officers had a reasonable suspicion to expand the scope of the stop

to call for the drug dog. Additionally, Bush has not shown there was any undue delay in waiting for the drug dog because the evidence shows deputy Hinz was still in the process of making out the written warning for the equipment violation and a citation to Daniels when officer Fangman and Max arrived.

We determine that even if defense counsel had offered the DVD for more than a limited purpose, Bush has not shown there is a reasonable probability the result of the motion hearing would have been different. See *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984) (“The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”). We conclude Bush has failed to show he received ineffective assistance of counsel.

We affirm Bush’s conviction.

AFFIRMED.