IN THE COURT OF APPEALS OF IOWA

No. 1-364 / 10-1840
Filed June 29, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT BENWARD BURT, IV,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Bradley J. Harris (guilty plea) and Richard D. Stochl (sentencing), Judges.

A defendant contends that plea counsel was ineffective in failing to file a motion to suppress evidence obtained after a consent search of the defendant's vehicle. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Martha E. Trout and Jean C. Pettinger, Assistant Attorneys General, Thomas J. Ferguson, County Attorney, and James Katcher and Brad P. Walz, Assistant County Attorneys, for appellee.

Heard by Vogel, P.J., Vaitheswaran, J., and Miller, S.J.* Tabor, J., takes no part.

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

VAITHESWARAN, J.

A Waterloo police officer stopped a vehicle and arrested Robert Burt for driving with a suspended license. The officer asked Burt if he could search the vehicle. Burt consented to the search, which uncovered six baggies of marijuana.

The State charged Burt with possession of marijuana with intent to deliver, as a second and habitual offender. Burt entered an *Alford*[1] plea to possession of marijuana, third offense. The district court accepted the plea and later imposed sentence.

On appeal, Burt contends his plea attorney was ineffective in failing to file a motion to suppress the marijuana evidence. "Ordinarily, ineffective assistance of counsel claims are best resolved by postconviction proceedings to enable a complete record to be developed and afford trial counsel an opportunity to respond to the claim." *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004). But, at oral arguments, Burt and the State agreed the record was adequate to address the issue on direct appeal. They also essentially agreed that Burt's plea did not result in a waiver of this ineffective-assistance-of-counsel claim. *See State v. Carroll*, 767 N.W.2d 638, 644 (Iowa 2009) (stating ineffective-assistance-of-counsel claims asserting failure to file a motion to suppress may survive a guilty plea). Accordingly, we proceed to the merits, reviewing the record de

[1] When a person enters an *Alford* plea, he or she voluntarily consents to the imposition of sentence notwithstanding the fact that the person is unwilling or unable to admit to commission of the crime. *See North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 167, 27 L. Ed. 2d 162, 171 (1970).

novo. *State v. Lyman*, 776 N.W.2d 865, 877 (Iowa 2010) (setting forth standard of review).

Burt premises his ineffective-assistance-of-counsel claim on a narrow point of law. He does not assert "that seizure of his vehicle was without reasonable grounds or that his consent was involuntary." Instead, he contends, the officer unconstitutionally "subjected [him] to an expanded investigation" without "independent grounds for the expansion." Burt concedes "this Court has not, as yet, recognized such a right to be free from an unfounded expansion of the officer's investigation under either the federal or state constitution." He maintains, however, that "[a] normally competent attorney, being aware of these developments, would have concluded the question as to the validity of [his] consent to search his vehicle was worth raising."

The problem Burt faces is that, in Iowa, a voluntary consensual search is a well-recognized exception to the rule against warrantless searches. *See State v. Naujoks*, 637 N.W.2d 101, 107 (Iowa 2001). As Burt does not contend his consent was involuntarily obtained, his attorney reasonably could have relied on this exception to conclude it was not worth raising a challenge to the vehicle search.

We recognize that other jurisdictions have adopted the principle of law Burt espouses. *See State v. Smith*, 184 P.3d 890, 902 (Kan. 2008) ("[W]e continue to adhere to our longstanding rule that consensual searches during the period of a detention for a traffic stop are invalid under the Fourth Amendment to the United States Constitution and § 15 of the Kansas Constitution Bill of

Rights.")[2]; *State v. Fort*, 660 N.W.2d 415, 419 (Minn. 2003) ("We therefore conclude that the investigative questioning, consent inquiry, and subsequent search went beyond the scope of the traffic stop and was unsupported by any reasonable articulable suspicion."); *State v. Carty*, 790 A.2d 903, 912 (N.J. 2002) ("We agree with the Appellate Division that consent searches following a lawful stop of a motor vehicle should not be deemed valid under *Johnson* unless there is reasonable and articulable suspicion to believe that an errant motorist or passenger has engaged in, or is about to engage in, criminal activity."). But this authority is far from the majority rule. *See State v. Jenkins*, 3 A.3d 806, 843–50 (Conn. 2010) (canvassing state law on the issue). Moreover, *Smith*, *Fort*, and *Carty* all involved the seizure of evidence from passengers following violations of traffic rules by the drivers, unequivocally rendering the requests for consent suspicionless seizures as to the passengers. *Smith*, 184 P.3d at 893; *Fort*, 660 N.W.2d at 416; *Carty*, 790 A.2d at 905. Here, in contrast, the State makes a cogent argument that the officer's request of the driver for consent to search the vehicle was based on an ongoing concern as to whether Burt owned the vehicle and a suspicion that Burt may have recently emptied one of his pockets. We need not decide whether the State's argument would carry the day. We simply note it as further grounds for concluding that a reasonable attorney would not have found it worth citing these out-of-state opinions. *State v. Schoelerman*, 315 N.W.2d 67, 72 (Iowa 1982) (noting effective assistance does not require an attorney to be a "crystal gazer" who predicts future changes in established legal

[2] The Connecticut Supreme Court pointed out that *Smith* did not rely on its state constitution in deciding the issue. *See State v. Jenkins*, 3 A.3d 806, 849 (Conn. 2010).

principles); *accord. State v. Westeen*, 591 N.W.2d 203, 210 (Iowa 1999). We conclude trial counsel did not breach an essential duty in failing to raise the issue.

We affirm Burt's judgment and sentence.

AFFIRMED.