IN THE COURT OF APPEALS OF IOWA

No. 2-707 / 11-1615
Filed October 3, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

FREDERICK DOUGLAS ARMSTRONG,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Stephen B. Jackson, Judge.

A defendant appeals from his conviction of possession of cocaine as an habitual offender. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Benjamin Parrott, Assistant Attorney General, Janet M. Lyness, County Attorney, and Meredith Rich-Chappell, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Danilson and Mullins, JJ.

VOGEL, P.J.

Defendant Frederick Armstrong appeals his conviction, sentence, and judgment for possession of a controlled substance (cocaine), third offense, a class D felony enhanced as an habitual offender in violation of Iowa Code sections 124.401(5), 124.206(2)(d), and 902.8 (2009). He argues his trial counsel was ineffective for failing to file a motion to suppress. We affirm.

I. Background facts and proceedings

On March 15, 2010, North Liberty police officer Mitch Seymour stopped a van driven by Mary Sheehy for failing to yield the right of way. The front seat passenger of the van was Armstrong, and in the middle bench seat was Patricia York. While Officer Seymour was sitting in his vehicle, writing Sheehy a traffic citation for failing to yield upon a left turn, Officer Landsgard and Officer Santiago arrived on the scene, followed by Officers Chandler and Bender. Officer Santiago was a high-risk probation officer; Armstrong was on high-risk probation. Officer Seymour returned to Sheehy's van, handed her a citation and requested to search the van. Sheehy consented. Officer Seymour thought that Officer Santiago was still talking to Armstrong at this time.

Upon receiving consent to search the van, all of the occupants were asked to exit the van, and each complied. In the map compartment of the passenger-side door—adjacent to the passenger seat where Armstrong had been seated—Officer Seymour discovered a burnt piece of aluminum foil containing what appeared to him to be cocaine. After that discovery, Officer Chandler asked to look in Armstrong's mouth, which he briefly did. After the second request for Armstrong to open his mouth, Officer Chandler observed a piece of foil in

Armstrong's mouth. A scuffle ensued, and Officer Santiago observed a piece of aluminum foil come out of Armstrong's mouth, hit the ground, and be pushed under a patrol car by Armstrong. Once Armstrong was placed in handcuffs and seated in the back of a patrol car, officers seized the foil from under the patrol car as well as a baggie from where Armstrong had been lying during the scuffle. They both contained cocaine.

On March 29, 2010, the State filed a trial information charging Armstrong with possession of a controlled substance (cocaine base), third offense. The information was later amended on May 12, 2011, to allege Armstrong was an habitual offender as well as to amend the charge from a cocaine based substance to cocaine. A jury trial commenced on August 10, 2011, and the jury found Armstrong guilty as charged. Armstrong waived his right to a jury trial regarding his prior offenses and stipulated to having two prior felony drug convictions. Armstrong was sentenced on September 30, 2011, to fifteen year imprisonments with a mandatory three-year minimum, but suspended the sentences and placed Armstrong on probation for five years. The court ordered Armstrong to reside at Hope House as a condition of probation, which was to run consecutive to an eighteen-month term of imprisonment not the subject of this appeal. Armstrong appeals.

II. Ineffective assistance

Armstrong claims trial counsel was ineffective in failing "to challenge the extended seizure of Armstrong." We review Armstrong's ineffective-assistance-of-counsel claims de novo. *See State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). Although ineffective-assistance-of-counsel claims do not need to be

raised on direct appeal, a defendant may do so if he has reasonable grounds to believe the record is adequate to address his claim. *State v*. *Johnson*, 784 N.W.2d 192, 198 (Iowa 2010). If we determine the record is adequate, we resolve the claim. *Id.* If we determine the record is inadequate, we must preserve the claim for post-conviction proceedings, regardless of our view of the potential viability of the claim. *Id.* It is the defendant's burden to establish "an adequate record to allow the appellate court to address the issue." *State v*. *Fannnon*, 799 N.W.2d 515, 520 (Iowa 2011) (citation omitted).

Armstrong claims his trial counsel breached an essential duty and prejudiced his case when she failed to challenge the extended seizure of his person as unconstitutional under both the federal and state constitutions. The Fourth Amendment of the United States Constitution and article I, section 8 of the Iowa constitution provide protection to individuals against unreasonable searches and seizures. *State v*. *Kinkead*, 570 N.W.2d 97, 100 (Iowa 1997). A traffic stop is more analogous to an investigative detention than a custodial arrest, and the United States Supreme Court and our supreme court treat a traffic stop based on probable cause or reasonable suspicion under the standard set forth in *Terry v*. *Ohio*, 392 U.S. 1, 19 (1968). *Terry* emphasized that "[t]he scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible." *Id.* (internal quotations omitted).

As a result, under traditional application of the exclusionary rule, "evidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation." *State v*. *Pals*, 805 N.W.2d 767, 775-76 (Iowa 2011) (quoting *Terry*, 392 U.S. at

29). A valid traffic stop may become "unlawful if it is prolonged beyond the time reasonable required to complete [its] mission." *Florida v*. *Royer*, 460 U.S. 491, 500 (1983). This means the seizure must be limited both in scope and duration. *Id.* So long as inquiries unrelated to the traffic stop "do not measurably extend the duration of the stop" they do not run afoul with the constitution. *Arizona v*. *Johnson*, 555 U.S. 323, 333 (2009).

In this case, because trial counsel did not move to suppress the evidence, Armstrong did not argue that the State lacked reasonable suspicion that evidence of a crime would be found in the van. The duration of the traffic stop was also not at issue before the district court. Absent an objection, the State had no reason to develop a record on these two issues during trial. Consequently, the factual record in this direct appeal is not sufficient to evaluate the extent to which the request for consent to search extended the duration of the traffic stop, and Armstrong's claim is more appropriate for post-conviction proceedings. With an undeveloped record on the very issue raised, we cannot determine whether trial counsel was ineffective for failing to file a motion to suppress, especially without giving trial counsel an opportunity to explain the reasons for her actions. *See State v*. *Lane*, 743 N.W.2d 178, 183 (Iowa 2007).

III. Conclusion

Because the record is not sufficient for us to determine whether Armstrong's trial counsel was effective, Armstrong's ineffective assistance of counsel claims are preserved for possible postconviction proceedings and his conviction affirmed.

AFFIRMED.