

IN THE COURT OF APPEALS OF IOWA

No. 6-225 / 05-0556
Filed May 24, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JEREMIAH PAUL DUKE,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom,
Judge.

The defendant appeals from the denial of his motion to suppress and
convictions by the district court. **AFFIRMED.**

Timothy McCarthy, II, of McCarthy & Hamrock, P.C., West Des Moines,
for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney
General, John P. Sarcone, County Attorney, and Daniel C. Voogt, Assistant
County Attorney, for appellee.

Heard by Vogel, P.J., and Zimmer and Vaitheswaran, JJ.

VOGEL, P.J.

Jeremiah Duke appeals from the denial of his motion to suppress evidence and his subsequent convictions by the district court for possession of methamphetamine with intent to deliver, failure to affix a drug tax stamp, possession of marijuana, and carrying weapons. We affirm his convictions and the denial of the motion to suppress, but preserve his ineffective assistance of counsel claim.

I. Background Facts and Proceedings.

Duke was driving a van with no license plates in Des Moines on March 9, 2004, when he was pulled over by the police. Nick Cipale was a passenger in the van Duke was driving. As Officers Anderson and Bagby activated their flashing lights to initiate the stop, they noticed Cipale lean toward the center of the van and reach between the two front seats with his left hand. The officers noted the movement to each other before approaching the van, concerned that Cipale may have been hiding a weapon. Officer Anderson approached the driver's side of the van while Officer Bagby went to the passenger side. Duke cooperated with the officers and provided a valid dealer's license plate, proof of ownership, and proof of insurance. From the passenger side, Officer Bagby noticed a police scanner lying on top of a sweatshirt and duffle bag between the two front seats. He also recognized the passenger as Cipale because he had previously arrested him for possession of drugs and knew Cipale had at least one prior felony conviction for possession of drugs with the intent to deliver.

The officers separately asked Duke and Cipale to exit the van, and both were patted down for weapons. Officer Anderson found a spring-loaded knife in

Duke's pocket, but Cipale had no weapons on his person. The officers then placed both men at the rear of the van so that Officer Bagby could conduct a search between the front seats where Cipale had been observed reaching into just prior to the stop. When Officer Bagby saw an open duffle bag with a visible bundle of money, he stopped the search and was about to request a K-9 officer come to the scene. Having heard of the stop from his own radio, Officer Miller with the K-9 unit was already en route and within five minutes was on the scene. An exterior search of the van was conducted. When the dog alerted to the driver's side, the K-9 officer placed the dog inside the van, where the dog alerted on an object between the two front seats. Officer Bagby then looked into the duffle bag located in that area and found a nylon case with marijuana and drug paraphernalia, methamphetamine, a knife, electronic equipment, and cash. The duffle bag contained several items with Duke's name on them.

As a result of this search, Duke was charged on April 7, 2004, with possession of methamphetamine with intent to deliver, conspiracy to deliver methamphetamine, failure to affix a drug tax stamp, possession of marijuana, and carrying weapons. On October 28, 2004, just days prior to the November 1 trial date, Duke's trial counsel filed a motion to suppress the evidence found as a result of the traffic stop. Facing a possible dismissal of the untimely motion, Duke agreed to waive his right to a jury trial and allow the district court to hear the motion to suppress simultaneously with the bench trial. His written waiver was dated October 29, 2004, the same day the district court issued a ruling memorializing the parties' agreement on the simultaneous motion to suppress and bench trial. After a two-day trial, the district court denied Duke's motion to

suppress in finding the search of the van was reasonable in light of the officers' concerns for their safety. Duke was convicted of possession of methamphetamine with the intent to deliver, failure to possess a drug tax stamp, possession of marijuana, and carrying weapons. Duke appeals the denial of his motion to suppress on grounds that it was an unlawful search. He also appeals his convictions, claiming ineffective assistance of his trial counsel.

II. Scope of Review.

As Duke's appeal of the denial of his motion to suppress rests on constitutional grounds, our review of is de novo. *State v. Freeman*, 705 N.W.2d 293, 297 (Iowa 2005). We are required to review the record and independently evaluate the totality of the circumstances. *State v. Hoskins*, ___ N.W.2d ___, ___ (Iowa 2006). We are not bound by the fact findings of the district court, but we do give deference to those findings because the district court had the opportunity to evaluate the credibility of the witnesses. *Id.* Likewise, Duke's ineffective assistance of counsel claim is based in the Sixth Amendment to the United States Constitution and is reviewed de novo. *State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005).

III. Motion to Suppress.

On appeal, Duke again argues that the pat-down search and subsequent search of the van were unreasonable under the Fourth Amendment of the Federal Constitution. Duke concedes that the officers had probable cause to initiate the traffic stop because he did not have license plates displayed on the van. When police officers harbor concerns for their safety during an investigatory stop, the law has long recognized an exception to a warrantless search. See

Terry v. Ohio, 392 U.S. 1, 24, 88 S. Ct. 1881, 1880, 20 L. Ed. 2d 889, 907-08 (1968). Under *Terry*, an officer has authority to conduct a reasonable search for weapons for the officer's own protection, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual. *Id.* at 27, 88 S. Ct. at 1883, 20 L. Ed. 2d at 909. Even when under *Terry* there is reasonable suspicion to stop an individual, the reasonableness requirement of the Fourth Amendment dictates that "[t]he scope of the detention must be carefully tailored to its underlying justification." *State v. McCoy*, 692 N.W.2d 6, 18 (Iowa 2005) (quoting *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 1325, 75 L. Ed. 2d 229, 238 (1983)). Moreover, an "investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop," and "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Royer*, 460 U.S. at 500, 103 S. Ct. at 1325-26, 75 L. Ed. 2d at 238. Furtive movements made by a passenger, coupled with other suspicious circumstances can be sufficient to establish probable cause. *State v. Merrill*, 538 N.W.2d 300, 301 (Iowa 1995) (citing *State v. Riley*, 501 N.W.2d 487, 488-90 (Iowa 1993)).

After signaling for the van to stop, the officers noticed the passenger started "diving" between the two front seats with his left hand. The officers cautiously approached the van. From the passenger's side, Officer Bagby could see a police scanner in plain view and recognized Cipale as a felon with previous drug convictions. Out of concern for their safety, the officers conducted a brief pat-down search of both Duke and Cipale, revealing a spring-loaded knife in

Duke's possession. Officer Bagby then looked between the seats for possible weapons that Cipale could have attempted to hide when the stop was initiated.¹ He saw a scanner and a sweatshirt positioned on top of an open duffle bag. A large bundle of cash was visible inside the bag. This all occurred within the first few minutes of the traffic stop, as the K-9 handler, Officer Miller, arrived shortly after alerted by radio to the initial stop. Officer Miller walked the drug dog around the van twice, and the dog alerted on the front driver's side door both times. The dog also alerted on the duffle bag between the front seats when it was let into the van, which resulted in a search and discovery of the incriminating contents of the duffle bag.

We conclude the pat-down search was reasonable considering what the officers observed and knew: Cipale's furtive movements within the van, Cipale's known criminal drug record, and the plain-view presence of the police scanner.² Officer Bagby testified that in his training and experience, police scanners are used by those distributing narcotics to monitor the whereabouts of law enforcement. The officers logically and reasonably extended that search to the area between the two front seats to determine whether Cipale was attempting to hide a weapon with his furtive movement. *State v. Richardson*, 501 N.W.2d 495, 497 (Iowa 1993). At that time, Officer Bagby gained additional facts with the large bundle of cash visible in the partially-opened duffle bag.

¹ Officer Bagby admitted at trial that, although he knew of Cipale's drug history, he had not known Cipale to be violent or to carry a weapon.

² When asked if the scanner was plugged into the cigarette lighter, Officer Bagby testified that he did not recall.

In addition, Officer Miller, with the trained drug dog, was on the scene shortly after the stop. Iowa has adopted the long-standing viewpoint that, “Having the trained dog sniff the perimeter of [defendant’s] vehicle, which had been lawfully stopped in a public place, [does] not of itself constitute a search.” *State v. Bergmann*, 633 N.W.2d 328, 335 (Iowa 2001) (quoting *United States v. Jeffus*, 22 F.3d 554, 557 (4th Cir. 1994)). All that is required under Iowa law 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. *Id.* The walk around the van with the K-9 unit occurred within five minutes of the initial stop, and Officers Anderson and Bagby were not yet finished checking the validity of Duke’s driver’s license and vehicle registration. We conclude the pat-down search and the search of the van were reasonable under our constitutional requirements and affirm the district court’s denial of Duke’s motion to suppress.

IV. Ineffective Assistance of Trial Counsel.

Duke has also raised an ineffective assistance claim against his trial counsel for the failure to file a timely motion to suppress, thereby affecting Duke’s ability to proceed with a jury trial or risk waiving the motion to suppress. Ineffective assistance of counsel claims are generally preserved for postconviction relief actions. *State v. Fox*, 491 N.W.2d 527, 535 (Iowa 1992); *State v. Stewart*, 691 N.W.2d 747, 750 (Iowa Ct. App. 2004). While Duke maintains that his jury-trial waiver resulted from pressure or other persuasion by his trial counsel’s belief that the motion to suppress was meritorious, there is little evidence on the record regarding this claim from Duke’s trial counsel. Therefore,

we find that the record is not adequate to decide the claim of ineffective assistance of counsel on direct appeal and preserve it for possible postconviction proceedings. See *State v. Tejada*, 677 N.W.2d 744, 752 (Iowa 2004) (stating when the record is inadequate to decide an issue on direct appeal and trial counsel has not had opportunity to explain his actions, an ineffective assistance claim will be preserved for postconviction proceedings).

AFFIRMED.