**IN THE COURT OF APPEALS OF IOWA**

No. 6-229 / 05-0597
Filed May 24, 2006

**STATE OF IOWA,**
Plaintiff-Appellee,

**vs.**

**RAMAREZ MAURICE GARY,**
Defendant-Appellant.

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Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer and James C. Bauch, Judges.

Ramarez Gary appeals from his conviction and sentencing for possession of a controlled substance with intent to deliver. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, Mark Tremmel, County Attorney, and Brad Walz, Assistant County Attorney, for appellee.

Considered by Zimmer, P.J., and Miller and Hecht, JJ.

**HECHT, J.**

Ramarez Gary appeals from his conviction and sentence for possession of a controlled substance with intent to deliver in violation of Iowa Code section 124.401(1)(5) (2003). We affirm.

**I. Background Facts and Proceedings.**

On August 10, 2004, William Herkelman of the Black Hawk County Sheriff's Department received a tip from a confidential informant that Ramarez Gary was traveling in a vehicle while in possession of crack cocaine. Around 6:00 p.m. on that evening, Herkelman informed Waterloo Police Officer Steven Newell that Gary was traveling in his own vehicle in a particular area of Waterloo. Newell proceeded to that area and observed Gary's vehicle traveling on East 4th Street. Newell then learned that Gary's license was suspended and initiated a traffic stop after concluding the driver of the car matched Gary's description.

When Newell approached the vehicle he immediately smelled marijuana and learned that Gary was a passenger, not the driver, of the vehicle. As Gary exited his vehicle, Newell smelled marijuana emanating from his person. A police dog was then called to the scene and "hit" on the front passenger seat where Gary had been sitting. A subsequent search of the vehicle produced no drugs, however. Believing that Gary had hidden drugs in his underwear or socks, officers then decided to conduct a more thorough search of Gary's person and transported him to the station. At the station, officers discovered 4.22 grams of cocaine base in Gary's socks.

Based on this discovery, the State charged Gary with possession of cocaine with intent to deliver. Gary later waived his right to a jury trial and

requested a bench trial on the stipulated record. The court found him guilty and sentenced him to an indeterminate prison term of ten years. Gary appeals, claiming the court erred in overruling his motion to suppress. He also asserts trial counsel provided ineffective assistance in failing to move to dismiss based on the violation of his speedy trial rights.

**II. Motion to Suppress.**

Gary moved to suppress all evidence obtained following the stop of his vehicle. The district court rejected claims that the stop of Gary's vehicle was constitutionally infirm and that the subsequent search, during which cocaine base was discovered, violated Gary's constitutional rights. Gary appeals from this ruling. We review alleged constitutional violations under a de novo standard of review and make an independent evaluation of the totality of the circumstances as shown by the entire record. *State v. Breuer,* 577 N.W.2d 41, 44 (Iowa 1998).

**A. Reasonableness of the Vehicle Stop.**

Gary first maintains Officer Newell was not justified in undertaking the stop because Gary was not driving the vehicle. The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures by government officials.[1] *State v. Kinkead,* 570 N.W.2d 97, 100 (Iowa 1997). The Fourth Amendment requires that an officer have reasonable cause or suspicion to stop a vehicle for investigatory purposes. *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S. Ct. 1391, 1401, 59 L. Ed. 2d 660, 673 (1979). "In order to establish reasonable cause, the State carries the burden to show that the officer had

[1] Because Gary's suppression motion relied only on Federal constitutional grounds, we need not address any State constitutional claims.

'specific and articulable cause to support a reasonable belief that criminal activity may have occurred.'" *State v. Wiese,* 525 N.W.2d 412, 414 (Iowa 1994) (quoting *State v. Aschenbrenner,* 289 N.W.2d 618, 619 (Iowa 1980)).

As noted, Officer Newell only stopped Gary's vehicle after he learned that Gary's license had been suspended and that an individual matching Gary's description was driving his vehicle. Because Newell reasonably believed an unlicensed driver was in control of the vehicle, we conclude the stop was reasonable. *See State v. Jones,* 586 N.W.2d 379, 382 (Iowa 1998), *overruled on other grounds by State v. Heminover*, 619 N.W.2d 353 (Iowa 2000), finding a stop proper when an officer stopped a vehicle based on a reasonable, albeit inaccurate assumption as to who was driving.

**B. Reasonableness of the Vehicle Search.**

Gary further maintains the court erred in concluding the search of his vehicle was reasonable. Upon our de novo review, we concur with the district court's decision on this issue. As Officer Newell approached the vehicle, he noticed an odor of marijuana emanating from it. After asking Gary to exit the vehicle, the officer also smelled marijuana emanating directly from Gary's person. These observations ripened Newell's reasonable suspicion into probable cause. That probable cause, coupled with the exigency due to the vehicle's mobility, fully justifies the search of the vehicle. *See State v. Hoskins*, __ N.W.2d __, __ (Iowa 2006); *State v. Eubanks*, 355 N.W.2d 57, 59 (Iowa 1984).

**C. Search of Gary at Police Station.**

Gary further maintains that because officers had already searched his vehicle and his person, and located nothing, the officers "had no reasonable

ground for believing that a public offense had been committed, nor did law enforcement have any reason to believe that Mr. Gary had committed any such offense." As such, he asserts his "arrest" was illegal and that the drugs seized should have been suppressed. *See State v. Thornton*, 300 N.W.2d 94, 95 (Iowa 1981) (noting rule that an illegal arrest will generally require suppression of any evidence seized pursuant to the arrest).

Iowa Code section 804.7(3) allows a peace officer to make an arrest without a warrant "[w]here the peace officer has reasonable ground for believing that an indictable public offense has been committed and has reasonable ground for believing that the person to be arrested has committed it." The "reasonable ground for belief" standard within section 804.7(3) is tantamount to probable cause. *State v. Harris,* 490 N.W.2d 561, 563 (Iowa 1992). Probable cause is present "if the totality of the circumstances as viewed by a reasonable and prudent person would lead that person to believe that a crime has been or is being committed and that the arrestee committed or is committing it." *State v. Bumpus,* 459 N.W.2d 619, 624 (Iowa 1990). If there is probable cause to arrest a person, then a search of the person is lawful. *See State v. Canas,* 597 N.W.2d 488, 492 (Iowa 1999), *abrogated on other grounds by State v.Turner*, 630 N.W.2d 601, 606 n. 2 (Iowa 2001).

Here, on appeal Gary appears to concede he was under arrest when searched at the police station. He asserts there "can be no doubt that Mr. Gary was in custody at the time of his detention." He further cites the definition of "arrest" as the "taking of [a] person into custody . . . including restraint of the person . . . ." Iowa Code § 804.5. Accordingly, because Gary was under arrest,

officers lawfully searched his person incident to the arrest. *See Canas*, 597 N.W.2d at 492. The district therefore correctly refused to suppress the evidence of the cocaine base which was discovered during that search.

**III. Speedy Trial.**

Gary contends trial counsel provided ineffective assistance in failing to move to dismiss the charge based on the violation of his speedy trial rights. We generally reserve ineffective assistance of counsel claims for postconviction proceedings. *State v. Ueding,* 400 N.W.2d 550, 553 (Iowa 1987). We will resolve the claim on direct appeal, however, when the record adequately presents the issues. *Id.* We believe this is such a case. To establish a claim of ineffective assistance of counsel, the defendant must prove by a preponderance of the evidence (1) that counsel failed to perform an essential duty and (2) that prejudice thereby resulted. *State v. Constable,* 505 N.W.2d 473, 479 (Iowa 1993).

When a defendant has not waived his right to a speedy trial, and has not been brought to trial within ninety days after filing of the charging instrument, the court must order the charges dismissed "unless good cause to the contrary be found." Iowa R. Crim. P. 2.33(2)(*b*). Good cause "focuses on only one factor: the reason for the delay." *State v. Nelson,* 600 N.W.2d at 598, 601 (Iowa 1999). "[A] comparatively weak reason for the delay may become sufficient to avoid dismissal if the delay is relatively short and does not prejudice the accused." *State v. Keys,* 535 N.W.2d 783, 786 (Iowa Ct. App. 1995). The State bears the burden of proving good cause for the delay. *Nelson,* 600 N.W.2d at 600. This can include proof the delay is attributable to the defendant. *Id.*

At the hearing on Gary's motion to suppress, the court inquired of the parties whether there were any "speedy trial problems in this case?" The prosecutor responded that although the initial trial date was scheduled for February 8, a date within the speedy trial timeframe, Gary had requested four weeks of continuance, and that the consequent delay should be attributable to Gary. When asked to respond, Gary's counsel did not dispute the prosecutor's representation that a continuance of four weeks should be attributed to the defendant. Although Gary's appellate brief does not acknowledge that colloquy, we believe our conclusion that Gary did request and receive a four-week continuance of the trial is buttressed by a "Final Pretrial Conference Order" which notes the one-month continuance, and states the "delay caused by this continuance shall be charged to the defendant for purposes of speedy trial rights."

The delay occasioned by Gary's request for a continuance placed this case beyond the speedy trial timeframe. A defendant may not participate in events which delay his trial, and then later take advantage of the delay to terminate the prosecution. *State v. Finn,* 469 N.W.2d 692, 694 (Iowa 1991). We conclude the State has established good cause for the delay in bringing Gary to trial. As no speedy trial violation could be established on this record, counsel did not provide ineffective assistance in failing to move to dismiss the charge on speedy trial grounds.

**AFFIRMED.**