IN THE COURT OF APPEALS OF IOWA

No. 8-060 / 06-2051
Filed March 14, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID LEE GREEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, James C. Bausch, Judge.

David Green appeals his convictions, following jury trial, for possession of crack cocaine with intent to deliver and failure to affix a drug tax stamp. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brad Walz, Assistant County Attorney, for appellee.

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

MILLER, J.

David Green appeals his convictions, following jury trial, for possession of crack cocaine with intent to deliver and failure to affix a drug tax stamp. He claims the district court erred in partially denying his motion to suppress evidence and his attorney rendered ineffective assistance of counsel. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS.

The following facts could reasonably be found from the record. In early June 2006 Waterloo Police Officer Matt McGeough spoke with property owner Maxine Scott concerning neighborhood complaints, including drug dealing, dog fighting, and disorderly conduct, at her property located at 1527 East Fourth Street in Waterloo. Scott was "very cooperative" with the officers and agreed to sign a no trespass order for that property and provided police with a copy of the rental agreement. However, she did not actually sign the trespass enforcement form until June 20, 2006.

On the afternoon of June 16 Officer McGeough drove by the house at 1527 East Fourth Street several times and observed "constant activity" outside. Around 7:30 p.m. he drove by that address again and observed five or six persons in the yard and sidewalk outside the home. He and Officer Steven Newell decided to stop and talk to those persons about the no trespass agreement. Known tenant Charles Gilley was not one of the people outside the house. Officer McGeough recognized a couple of the people and knew they did not live at that house. Two others who were present admitted to the officers they did not live there either. When asked by officers, the defendant David Green

stated that he did live there and he had moved there two months earlier from Mississippi to live with his brother Charles Gilley.

Officer McGeough asked Green for some identification. Green became "fidgety" and said he did not have any. McGeough then asked Green how old he was and Green said he was sixteen and then changed his answer and said, "No, seventeen." The actual birthdate he finally gave indicated he was almost eighteen. Green then again changed his story and said he was not living there, continued to be fidgety, and started looking from side to side. During this time Green also began breathing more rapidly and started to take slow steps backward, while continually reaching toward the back right pocket of his jeans. Green's actions prompted McGeough to repeatedly tell Green that for safety reasons he was to stop reaching into his pockets, to tell him to stand still, and to eventually put his hand on Green's right shoulder to stop him from backing up further. When McGeough touched Green's shoulder, Green quickly turned away from him and again started reaching back toward the same back pocket.

At that point McGeough knocked Green's hand away from his pocket and told him he was going to pat him down for weapons for safety purposes. As McGeough patted Green down he felt a bulge in the back pocket of his jeans, lifted up Green's shirt to see what it was, and saw a plastic baggie sticking out of Green's right rear jeans pocket. Based on Green's conduct and his own training and experience, Officer McGeough suspected the baggie held narcotics. McGeough pulled the baggie out of Green's pocket and observed what he believed to be crack cocaine in the baggie. Green was then arrested and placed

in handcuffs. McGeough found $145 in Green's left back pocket. Officer McGeough then read Green his *Miranda* rights and placed him in the squad car.

On the drive to the police station the officers observed Green digging with his hands down the back of his pants and told him to stop and lean to the side so they could see what he was doing. Upon arrival at the station Green started walking stiffly and taking small steps, further raising the officers' suspicion that he had something hidden in his pants. Green was a minor at the time of this arrest and told the officers his parents were in Mississippi but could not provide a telephone number for them. Officers eventually were able to get a number but were unable to contact anyone for Green.

McGeough gave Green his *Miranda* rights a total of three times. Green eventually indicated he understood them, and began to answer the officers' questions. At some point during the questioning Green admitted he had additional crack cocaine on his person and produced another baggie from down the back of his pants. The baggie appeared to also contain crack cocaine. Later laboratory tests confirmed the substances in both the baggie found in Green's rear pocket and the one from inside his pants were crack cocaine, in the amounts of .81 grams and 6.15 grams respectively. Green had no drug paraphernalia on his person, and had no drug tax stamps.

The State charged Green, by trial information, with possession of crack cocaine with the intent to deliver, in violation of Iowa Code section 124.401(1)(c) (2005), and possession of crack cocaine without affixing a drug tax stamp, in violation of section 453B.12. Green filed a motion to suppress evidence, based

on his alleged "illegal detention, arrest, search, and questioning. . . ." A hearing was held on the motion to suppress. The matter proceeded to jury trial and the jury found Green guilty as charged.

In a written ruling the district court denied in part and sustained in part Green's motion to suppress. The court found the officers were appropriately at the address in question and that Officer McGeough had a reasonable basis for conducting a *Terry* safety pat-down of Green based on his observations, Green's furtive movements, and the surrounding circumstances. The court further found that the drugs found on Green at the police station were the result of a valid search incident to arrest. Accordingly, the court denied the motion with regard to the evidence seized from Green's person and the statements he made to the police during the initial stop. However, the court concluded the officers did not strictly comply with Iowa Code section 232.11(2), dealing with a juvenile defendant's rights once in custody, and thus sustained Green's motion with respect to the statements he made at the police station during his interview. Green reasserted these challenges in a combined motion for new trial and motion in arrest of judgement. The court denied Green's post-trial motions prior to sentencing.

On appeal Green claims the district court erred in partially denying his motion to suppress. He also claims his trial counsel was ineffective in failing to request the reporting of *voir dire* and closing arguments, and in not objecting during the State's closing arguments.

II. MERITS.

A. Motion to Suppress.

The State urges that Green failed to preserve error on some of the issues he now raises on appeal, because he did not raise them in the district court. We agree there is some question as to whether Green sufficiently raised all of the issues he presents on appeal. However, because we find no merit in any of his claims we need not rely on error preservation to dispose of the issues he raises and thus will address them on their merits.

Green's challenge is based on his constitutional right to be free from unreasonable search and seizure, as guaranteed by the Fourth Amendment to the United States Constitution.[1] We review this alleged constitutional violation de novo in light of the totality of the circumstances as shown by the entire record. *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001). "We give deference to the district court's fact findings due to its opportunity to assess the credibility of witnesses, but we are not bound by those findings." *Id*.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Evidence obtained in violation of this provision is inadmissible in a prosecution, no matter how relevant or probative the evidence

[1] The rights guaranteed in the Fourth Amendment apply to the states through the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655-81 S. Ct. 1684, 1694, 6 L. Ed. 2d 1081, 1090 (1961).

may be. *State v. Manna*, 534 N.W.2d 642, 643-44 (Iowa 1995). Warrantless searches and seizures are per se unreasonable unless they fall within one of the carefully drawn exceptions to the warrant requirement. *State v. Simmons*, 714 N.W.2d 264, 271 (Iowa 2006). The State has the burden of proving by a preponderance of the evidence that a warrantless search falls within one of the exceptions to the warrant requirement. *State v. Naujoks*, 637 N.W.2d 101, 107-08 (Iowa 2001)

> One of the well-established exceptions to the warrant requirement is that formulated in *Terry v. Ohio*, which allows an officer to stop an individual or vehicle for investigatory purposes based on a reasonable suspicion, supported by specific and articulable facts, that a criminal act has occurred or is occurring.

State v. Kinkead, 570 N.W .2d 97, 100 (Iowa 1997) (citing *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968)).

Initially, we agree with the district court that the officers were appropriately at the address in question due to the numerous complaints they had received regarding possible illegal activity at the address, and because the landlord had been contacted and informally agreed with the police in regard to maintaining order on the property. Once appropriately on the property, the officers had the authority to approach persons in front of the house, which included Green, to make basic identification inquiries of those individuals from the common sidewalks. "[R]easonable cause may exist to investigate conduct which is subject to a legitimate explanation and turns out to be wholly lawful." *State v. Richardson*, 501 N.W.2d 495, 497 (Iowa 1993). "The principal function of an

investigatory stop is to resolve the ambiguity as to whether criminal activity is afoot." *Id.*

> Clearly, the officers were not required to rule out all possibility of innocent behavior before initiating a brief stop and request for identification. The test is founded suspicion . . . . Even if it was equally probable that the [person was] innocent of any wrongdoing, police officers must be permitted to act before their reasonable belief is verified by escape or fruition of the harm it was their duty to prevent.

United States v. Holland, 510 F.2d 453, 455 (9th Cir.1975) (footnote omitted).

As set forth above, Officer McGeough approached Green and asked if he lived at the residence and for identification. Green initially stated he did live at the residence with his brother but subsequently changed his answer and said he did not live there. When asked how old he was Green stated he was sixteen, but then changed his answer and said he was seventeen. The birthdate he finally gave the officers indicated he was almost eighteen. Green did not have any identification. Furthermore, during this time Green began to breathe more rapidly, continually looked from side to side, kept stepping slowly away from Officer McGeough, and reached toward his back pocket several times despite the officer repeatedly telling him to stop reaching because of safety concerns. When Green continued to ignore the officer's requests McGeough put his hand on Green's shoulder to keep him from continuing to back up. Green then turned quickly away from the officer and again started to reach for his back pocket. It was at this point that Officer McGeough patted Green down for safety purposes.

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. *Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883, 20 L. Ed. 2d 889, 909 (1968); *see also Michigan v. Long*, 463 U.S. 1032, 1047-50, 103 S. Ct. 3469, 3480-81, 77 L. Ed. 2d 1201, 1218-19 (1983).

> The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

Terry, 392 U.S. at 27, 88 S. Ct. at 1883, 20 L. Ed. 2d at 909 (citations omitted).

Further, the officers here were aware this was a high-crime area because they had received many complaints from the neighbors regarding drug dealing activity, dog fighting, drinking, and general disorderly conduct. In addition to these general complaints, there had been approximately three calls where police actually had to go to the address in question on formal complaints. Although an "individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime", "the fact that the stop occurred in a 'high crime area' [is] among the relevant contextual considerations in a *Terry* analysis." *Illinois v. Wardlow,* 528 U.S. 119, 124, 120 S. Ct. 673, 676, 145 L. Ed. 2d 570, 576 (2000) (citation omitted).

Accordingly, we conclude that based on Green's furtive movements, the officer's experience and knowledge that the area in question was a high-crime area, and all other surrounding circumstances, Officer McGeough had a

reasonable, articulable suspicion that his safety or that of others was in danger. He thus was warranted in proceeding with a *Terry* protective weapons pat-down of Green at that point in time.

During the pat-down, Officer McGeough felt a bulge in the back pocket Green had been reaching toward repeatedly. Upon lifting the tail of Green's shirt to look at the bulge McGeough saw a plastic baggie sticking out of Green's pocket. Based on his training and experience, as well as all of the other surrounding circumstances, McGeough believed that type of baggie likely contained narcotics. Accordingly, McGeough had probable cause to remove the baggie from Green's pocket because he believed it to contain contraband. *See Minnesota v. Dickerson*, 508 U.S. 366, 375-76, 113 S. Ct. 2130, 2137, 124 L. Ed. 2d 334, 340 (1993) (holding an officer may conduct a protective weapons search or pat-down of a suspect's outer clothing and may seize an object if its incriminating nature is immediately apparent through size or shape); *State v. Harriman*, 737 N.W.2d 318, 320-21 (Iowa Ct. App. 2007) (finding that because officer was immediately certain item was contraband without manipulating it the item was properly discovered under "plain-feel" exception to warrant requirement). Upon confirming the contents of the baggie McGeough had probable cause to arrest Green on suspicion of drug possession. McGeough then arrested Green, placed him in handcuffs, read him his *Miranda* rights, and put in him in the squad car. For purposes of this appeal we conclude Green was in custody from the point when he was arrested and handcuffed by Officer McGeough.

Green also contends the State did not make a "good faith" effort to notify his parents, guardian, or custodian that he had been taken into custody as required under section 232.11(2); his *Miranda* waiver was therefore not valid; and thus his statements during his interview at the police station were not voluntary. However, because the district court in fact found the police did not comply with section 232.11 and sustained Green's motion to suppress as to the statements he made at the police station we need not address this contention in this appeal.

In ruling on the motion to suppress the district court declined to suppress the baggie of crack cocaine found on Green at the police station, concluding it was found as the result of a valid search incident to arrest.[2] The State argues that the court's ruling as to this second baggie of crack cocaine was not erroneous because it would have been found during the booking process at the jail and is thus subject to the "inevitable discovery" doctrine.

The inevitable discovery doctrine is based on "the premise that relevant, probative evidence gathered despite Fourth Amendment violations is not constitutionally excluded when the police would have inevitably discovered the same evidence acting properly." *State v. Christianson*, 627 N.W.2d 910, 912 (Iowa 2001). If the police would ultimately discover the evidence by lawful means, using the Fourth Amendment to exclude the evidence serves no legitimate purpose. *State v. Seager*, 571 N.W.2d 204, 211 (Iowa 1997).

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[2] The purpose of a search incident to arrest is to prevent the arrested person from destroying evidence or gaining possession of a weapon that could be used to resist arrest or effect an escape, and such a search must be substantially contemporaneous with the arrest and confined to the immediate vicinity of the arrest. *State v. McGrane*, 733 N.W.2d 671, 676 (Iowa 2007).

Green had been arrested and taken to the jail for booking. As testified to by Officer McGeough at trial, at the point where Green produced the second baggie of crack cocaine the officers planned to "uncuff him and try to determine – first off we tried to determine parental information, and then, you know, if he had any further evidence on him." The additional drugs hidden in Green's pants would thus inevitably have been discovered during a search incident to the normal booking process at the jail. Accordingly, the district court did not err in denying Green's motion to suppress the crack cocaine found on his person at the station.[3]

B. Ineffective Assistance of Counsel.

Green next claims his trial counsel rendered ineffective assistance by not requesting that *voir dire* and closing arguments be reported, thereby not properly preserving the record for appellate purposes, and in not objecting to the State's use of Green's inconsistent statements during its closing arguments.

When there is an alleged denial of constitutional rights, such as ineffective assistance of counsel, we evaluate the totality of the circumstances in a de novo review. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998). In order to succeed on a claim of ineffective assistance of counsel, a defendant must prove (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000). An ineffective assistance claim may be disposed of if the defendant fails to prove either of the two prongs of such a claim. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). In order to prove

[3] We need not and do not determine whether the district court correctly concluded the second baggie was found as the result of a valid search incident to arrest.

prejudice, Green must show there is a reasonable probability that but for his counsel's unprofessional errors the result of the proceeding would have been different. *Ledezma v. State*, 626 N.W.2d 134, 143-44 (Iowa 2001).

Following jury selection, Green's counsel challenged the State's peremptory strike of an African-American potential juror, Mr. Adams, and unsuccessfully moved for mistrial. Defense counsel challenged the reason given by the State for its peremptory strike of Mr. Adams and a hearing was held outside the presence of the jury on his challenge. *See Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719, 90 L. Ed. 2d 69, 83 (1986) (holding that a potential juror may not be struck "solely on account of their race"). Green's attorney argued that although the county attorney had stated at a conference at the bench that he had struck Adams because Adams had said he "had friends that had been in prison for drugs" he, Green's attorney, had not "hear[d] him say drugs," but only that he had friends in prison, and noted there were white jurors who also knew persons in prison but had not been struck by the State.

The county attorney gave two reasons to support the challenged strike, first, that Adams had given a "furtive answer to knowing or having close acquaintances or friends that were in prison or on probation" and a belief that Adams had "specifically stat[ed] drugs as being the reason," and second, that Adams had been convicted for driving while his license was suspended, indicating he had probably been arrested before. The prosecutor also noted that five other potential jurors had been struck for similar reasons, noted that Adams was the seventh juror struck, and stated that "the fact that Mr. Adams was struck

has nothing to do with his race." In ruling on Green's *Batson* challenge the district court found Adams had indicated that "he had three acquaintances who were convicted of drug-related offenses." The court concluded the prosecutor's stated reasons were valid, race neutral, and not pretextual.

On appeal Green appears to contend, although it is not entirely clear, that his trial counsel was ineffective for failing to request this *voir dire* be reported and by not doing so counsel failed to properly preserve this issue for appellate review. More specifically, he contends that because the *voir dire* was not reported we cannot tell if Adams specifically stated he had friends in prison *for drugs* or just that he had friends in prison. However, the district court resolved this issue on the record in its ruling on Green's *Batson* challenge by finding that Adams had in fact stated he had "three acquaintances who were convicted of drug-related offenses." Under these circumstances we conclude Green is unable to show how he was prejudiced by the absence of a record of the *voir dire.*

Finally, Green claims his counsel rendered ineffective assistance by not objecting to the State's reference during closing arguments to his inconsistent statements to law enforcement officers, and by not requesting that closing arguments be reported. Assuming the State did refer to those inconsistent statements, as discussed above the statements were made prior to Green being placed in custody and the district court did not err by not suppressing them. Counsel thus had no duty to assert this meritless objection and breached no duty by not doing so. *See State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999).

Furthermore, under these circumstances Green cannot have been prejudiced by the absence of a record of the closing arguments.

III. CONCLUSION.

We conclude Officer McGeough lawfully approached Green to make a basic identification inquiry. Then, based on Green's furtive movements and all the specific surrounding circumstances he had reasonable suspicion to conduct a *Terry* protective weapons pat-down of Green's person, and Green was not taken into custody until Green had made the challenged inconsistent statements and the officer had discovered the first baggie of crack cocaine. Accordingly, any evidence seized from Green's person and statements he made to the police during this initial stop were admissible. The district court did not err in denying a portion of Green's motion to suppress evidence.

We further conclude Green's attorney did not render ineffective assistance by not requesting *voir dire* and closing arguments be reported and not objecting during the State's closing argument.

AFFIRMED.