

IN THE COURT OF APPEALS OF IOWA

No. 8-761 / 07-1740
Filed December 17, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KRISTOPHER MARTIN HANSEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Mark J. Smith
(motion to suppress), Mary E. Howes (trial), Judges.

Defendant appeals his conviction for 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, Cristen Douglass, Assistant Attorney
General, William E. Davis, County Attorney, and Meredith Friedman, Legal
Intern, for appellee.

Considered by Vogel, P.J., and Eisenhauer, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

ROBINSON, S.J.**I. Background Facts & Proceedings**

On May 21, 2007, at about 5:30 p.m., Davenport Police Officers Scott Fuller and Robert Bytnar were driving in a marked police van on Locust Street, a heavily traveled street in Davenport, Iowa. They noticed cars were slowing down or stopping in front of them, and then saw Kristopher Hansen standing in the middle of the four-lane road. Hansen was talking to a man on the sidewalk, and did not appear to be paying attention to the traffic problems he was creating. One of the officers told Hansen to remove himself from the flow of traffic. Hansen replied, "I'm getting the f*** out of the street, okay." The man Hansen had been talking to ran away.

The officers believed Hansen had committed disorderly conduct, in violation of Iowa Code section 723.4(7) (2007), which prohibits the obstruction of "any street, sidewalk, highway, or other public way, with the intent to prevent or hinder its lawful use by others." The officers stopped Hansen, who by then had reached the sidewalk, and arrested him. The officers performed a search incident to arrest and found 79.2 grams of marijuana in Hansen's pants pocket. There was no drug tax stamp on the marijuana.

Hansen was charged with possession of a controlled substance with intent to deliver, failure to affix a drug tax stamp, and disorderly conduct. He filed a motion to suppress, claiming he had not committed a public offense and officers did not have justification to perform a warrantless search. The district court denied the motion to suppress. The court found "the officers did have probable

cause to believe that the Defendant was committing the offense of Disorderly Conduct for impeding or stopping traffic in violation of Iowa Code section 723.4(7).” The court concluded the officers properly conducted a search incident to arrest.

Hansen waived his right to a jury trial, and the case proceeded to a trial to the court based on the minutes of testimony. The State then agreed to dismiss the charges of possession of a controlled substance with intent to deliver and disorderly conduct. The court found Hansen guilty of failure to affix a drug tax stamp, in violation of section 453B.12. Hansen was sentenced to a period of imprisonment not to exceed five years. He appeals his conviction.

II. Motion to Suppress

Hansen contends the district court erred by denying his motion to suppress. He asserts that he was not engaged in criminal activity at the time of the stop. Hansen claims he was properly crossing the street when he was accosted by the police officers. He asserts that under *Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883, 20 L. Ed. 2d 889, 907 (1968), the officers had no reasonable cause to conduct a pat down search. Hansen posits he was stopped solely because he used foul language to the officers.

The Fourth Amendment guarantees citizens the right to be free from unreasonable searches and seizures. *State v. McGrane*, 733 N.W.2d 671, 676 (Iowa 2007). Because this case raises a constitutional issue, our review is de novo. *State v. Freeman*, 705 N.W.2d 293, 297 (Iowa 2005). We independently

evaluate the defendant's claims under the totality of the circumstances. *McGrane*, 733 N.W.2d at 675.

Police officers may engage in the warrantless search of a person if the search is made incident to arrest. *State v. Griffin*, 691 N.W.2d 734, 736 (Iowa 2005). Under section 804.7(1), a police officer may arrest a person without a warrant "for a public offense committed or attempted in the peace officer's presence." See *Rife v. D.T. Corner, Inc.*, 641 N.W.2d 761, 770 (Iowa 2002). An offense "which is prohibited by statute and is punishable by fine or imprisonment" is a public offense.¹ Iowa Code § 701.2.

On our de novo review of the record, we conclude the evidence shows the police officers could properly arrest Hansen for disorderly conduct based on his actions in their presence. The officers stated traffic was slowing down or coming to a stop because Hansen was standing in the middle of a heavily-traveled road in Davenport during rush hour. Officer Fuller stated, "The traffic was honking and stopping due to the suspect in the middle of the road." Officer Bytnar stated Hansen was impeding the flow of traffic and he considered it to be a dangerous situation.

We conclude there was probable cause to arrest Hansen for violating section 723.4(7). "If there is probable cause to arrest a person, then a search of the person arrested and the area within the person's immediate control is lawful." *Freeman*, 705 N.W.2d at 298. We conclude the officers properly conducted a

¹ A violation of section 723.4(7) is a simple misdemeanor. A simple misdemeanor is punishable by "imprisonment not to exceed thirty days" and/or a fine of between \$65 to \$625. Iowa Code § 903.1(a).

search incident to arrest, and the district court did not err in denying Hansen's motion to suppress.

III. Ineffective Assistance of Counsel

Hansen claims he received ineffective assistance because defense counsel did not challenge the charge of disorderly conduct under section 723.4(7) on the ground the statute is unconstitutionally overbroad and vague. He claims the statute is unconstitutional as applied to him. We review claims of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999).

In every case in which the constitutionality of a statute is attacked, we should consider whether the party has standing to raise the issue. *See State v. Price*, 237 N.W.2d 813, 816 (Iowa 1976). “[A] person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground it may conceivably be applied unconstitutionally to others, in other situations not before the Court.” *See Broadrick v. Oklahoma*, 413 U.S. 601, 610-11, 93 S. Ct. 2908, 2915, 37 L. Ed. 2d 830, 839 (1973) (citations omitted). Hansen has not raised any possible exceptions to this standing requirement. *See Price*, 237 N.W.2d at 816 (discussing possible exceptions to the standing requirement).

A party that has not been convicted under a statute does not have standing to assert the statute is unconstitutionally vague or overbroad. *See State v. Henderson*, 269 N.W.2d 404, 405 (Iowa 1978) (noting defendant had not been charged and convicted under statutory alternative she claimed was vague).

Hansen was not convicted of disorderly conduct; that charge was dismissed by the State. We conclude he does not have standing to challenge the constitutionality of section 723.4(7) on vagueness or overbreadth grounds.² Because Hansen does not have standing to raise these constitutional claims, he cannot show defense counsel breached an essential duty by failing to raise them. We conclude Hansen has not shown he received ineffective assistance of counsel.

We affirm defendant's conviction.

AFFIRMED.

² We recognize Hansen was arrested for disorderly conduct, and the search was incident to his arrest for disorderly conduct. A search incident to arrest is valid if there is probable cause for the arrest. See *Griffin*, 691 N.W.2d at 737. Even if it is later determined a defendant is innocent of the offense for which he was arrested, this does not make the search incident to arrest illegal if there was probable cause when the arrest was made. See *Freeman*, 705 N.W.2d at 299 (citation omitted). Thus, even if defense counsel challenged the charge of disorderly conduct on constitutional grounds, this would not undermine the search incident to arrest because we have already found probable cause for the arrest.