IN THE COURT OF APPEALS OF IOWA

No. 1-390 / 10-1191
Filed July 27, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID ALAN HUSSMAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, William A. Price, District Associate Judge.

A defendant appeals following his guilty plea to operating while intoxicated, second offense, and driving while license revoked. **AFFIRMED.**

Benjamin D. Bergmann of Parrish, Kruidenier, Dunn, Boles, Gribble, Parrish, Gentry & Fisher, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, John P. Sarcone, County Attorney, and David Porter and Thomas DeSio, Assistant County Attorneys, for appellee.

Considered by Vogel, P.J., Vaitheswaran, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

VOGEL, P.J.

On May 18, 2010, David Hussman pleaded guilty to: (Count I) operating while intoxicated, second offense, in violation of Iowa Code section 321J.2 (2009); and (Count II) driving while license revoked in violation of Iowa Code section 321J.21. On July 2, 2010, Hussman filed a motion in arrest of judgment asserting (1) he "did not full[y] understand his constitutional rights"; and (2) he "did not fully understand and appreciate the legal consequences of his guilty plea." A hearing was held and Hussman testified that he now believed there was not probable cause to stop his vehicle and consequently sought to withdraw his guilty plea. The district court found the officer stopped the vehicle due to the registered owner having a revoked license and there would have been no merit to a motion to suppress. The district court denied Hussman's motion in arrest of judgment. Hussman then stated that he had no objection to proceeding with sentencing and the district court imposed sentence. Hussman appeals and argues his trial counsel was ineffective.

We review Hussman's ineffective-assistance-of-counsel claims de novo. *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 postconviction-relief proceedings, regardless of our view of the potential viability of the claim. *Id.* We find the record is adequate to reach Hussman's claims.

To prevail on an ineffective-assistance-of-counsel claim, a defendant must show by a preponderance of the evidence that (1) his trial counsel failed to perform an essential duty, and (2) prejudice resulted from this failure. *Straw*, 709 N.W.2d at 133. A defendant's inability to prove either element is fatal and therefore, we may resolve a claim on either prong. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003).

Hussman first argues his trial counsel was ineffective for failing to investigate and "raise a suppression issue," which caused Hussman's plea to be involuntary and not intelligently made. The "suppression issue" is whether the officer had reasonable suspicion to stop Hussman's vehicle. Our supreme court previously held:

> [A]n officer has reasonable suspicion to initiate an investigatory stop of a vehicle to investigate whether the driver has a valid driver's license when the officer knows the registered owner of the vehicle has a suspended license, and the officer is unaware of any evidence or circumstances indicating the registered owner is not the driver of the vehicle.

State v. Vance, 790 N.W.2d 775, 781 (Iowa 2010). The record demonstrates that an officer stopped the vehicle because it was registered to Hussman, who had a revoked license. Upon inquiry, the officer confirmed Hussman was in fact the driver.

In determining whether there was reasonable suspicion to stop the vehicle, the relevant facts are (1) whether the vehicle was registered to a person that had a revoked driver's license and (2) whether the officer was aware of circumstances indicating the registered owner was not the driver. *See id.* In the present case, the vehicle was registered to Hussman, whose driver's license was

revoked. Clearly because Hussman was both the registered owner and driver, the second point is not applicable. Further, Hussman does not in any way dispute the facts.

Hussman's appellate counsel states, the defendant "believe[d] there was no constitutional basis for the stop." Yet appellate counsel gives no actual legal argument as to why the investigatory stop was not reasonable or why *Vance* is not controlling. We find that a motion to suppress would have been without merit and therefore, trial counsel did not breach a duty by not filing one. *See State v. Rice*, 543 N.W.2d 884, 888 (Iowa 1996) (explaining that defense counsel has no duty to make a meritless motion).

Hussman next argues that because he was challenging his trial counsel's failure to file a motion to suppress, his trial counsel was ineffective for not withdrawing from the case for the motion-in-arrest-of-judgment hearing.[1] In order to establish prejudice, Hussman must show that had new counsel been appointed, that counsel would have prevailed in arguing a motion to suppress should it have been filed, resulting in Hussman's motion in arrest of judgment being granted. *State v. Maxwell*, 743 N.W.2d 185, 196 (Iowa 2008) (explaining that prejudice exists where the claimant proves by a reasonable probability that the result of the proceedings would have been different). As we found above, because there is no factual basis to support a motion to suppress and such a

[1] Hussman did not request new counsel. Additionally, it appears that Hussman asked trial counsel to file a motion in arrest of judgment because "he was not going in the in-jail treatment program" and it was not until the hearing that counsel discovered his issue with the motion to suppress.

Trial counsel did opine that the motion was frivolous, which as the State acknowledges, she "arguably should have kept silent about her opinion on the merits of the motion."

motion is without merit, new counsel would not have prevailed in arguing a motion to suppress should it have been filed. Consequently, a change in attorney would not have resulted in his motion in arrest of judgment being granted. Hussman cannot establish prejudice and this claim must fail. Therefore, we affirm.

AFFIRMED.