IN THE COURT OF APPEALS OF IOWA

No. 3-054 / 12-0420
Filed February 27, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

STUART BENNETT ROTH,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, Jeffrey L. Poulson (motion to suppress), and Steven J. Andreasen (trial), Judges.

Stuart Bennett Roth appeals from his judgment, conviction, and sentence for possession of a controlled substance. **AFFIRMED.**

Tod J. Deck of Deck Law L.L.P., Sioux City, for appellant.

Thomas J. Miller, Attorney General, Thomas Tauber, Assistant Attorney General, Patrick Jennings, County Attorney, and Mark Campbell, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

Stuart Bennett Roth appeals from his judgment, conviction, and sentence for possession of a controlled substance, contending the court should have granted his motion to suppress physical evidence. He also argues his counsel was ineffective in arguing the motion to suppress. We affirm, finding probable cause existed for the search of Roth's vehicle and that Roth's counsel was not ineffective.

I. Facts and Proceedings

On July 6, 2011, officers surveilling a residence suspected of housing illegal drug activity[1] saw Stuart Roth drive up to the house, park behind the residence, and leave shortly thereafter. Upon driving away, he was observed by police officers to be speeding over fifty miles an hour in a thirty to thirty-five mile an hour speed zone. Roth was pulled over, ordered out of the car,[2] and a uniformed officer conducted a pat-down for weapons. Another officer in plain clothes who had been observing the suspected house identified himself and proceeded to question Roth regarding the presence of marijuana in his vehicle.[3] The officer stated, "I know where you just came from and it's not a question of whether or not you have any weed . . . . It's a question of how much do you have and where you put it." After being asked again, Roth responded that the drugs

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[1] Five days before Roth's arrest, police arrested another person leaving the house with a controlled substance. They also had received multiple calls regarding drug activity at the house, and over a period of days witnessed patterns of activity indicative of illegal drug operations. A search warrant for the premises was not obtained until after Roth's arrest. The application was based on information obtained June 23rd and July 1st, as well as on Roth's July 6th arrest.

[2] Roth does not dispute reasonable suspicion for the stop.

[3] Roth was not read his Miranda rights before the questioning began. *See Miranda v. Arizona*, 384 U.S. 436, 478–79 (1990).

were under the center console. The officer then placed Roth in handcuffs and searched the car, confirming the presence of marijuana. Roth did not consent to the search of his vehicle.

Roth was charged by trial information with driving while license revoked and possession of a controlled substance—third violation. Roth filed a written arraignment, pleading not guilty; he also waived his right to a trial by jury. He then filed a motion to suppress his statements made during the traffic stop and the physical evidence of marijuana found during the search of his car. In his motion, Roth argued the questioning by the plain-clothes officer constituted a custodial interrogation, and that the officers did not have probable cause to search his car absent his incriminating statements. The State responded that Roth was not in custody and that probable cause to search Roth's vehicle existed independently of his inculpatory statements. The district court found the questioning was a custodial interrogation and concluded Roth's statements should be suppressed at trial.

Regarding the marijuana seized, however, the court concluded that officers had probable cause for the search of Roth's vehicle pursuant to the vehicle exception to the warrant requirement, without the incriminating statements. At the hearing on the motion to suppress evidence, the court heard the testimony of three officers and admitted into evidence the officers' written application for a search warrant for the suspected drug residence. The officers testified that "stop and go" visits to a location is an indication of drug activity, that they had information from the Tri-State Task Force suggesting the residence was inhabited by a "pound supplier of marijuana," that a confidential informant from a

different case knew about the drug supplier, that eventually three different informants said drugs were being sold from the house, and that one of the informants detailed that buyers would pull into the alley next to the residence—the same location where Roth parked during his brief visit to the house. The officers testified about a particular "stop and go" visit at the house which resulted in a marijuana charge five days before Roth's arrest. The search warrant application included that information, but also included Roth's arrest and was not submitted to a court until after Roth was stopped and charged. The written search warrant application included the dates of June 23, July 1, and July 6, when Roth was stopped and searched. The court denied the motion to suppress the marijuana and Roth's motion to reconsider, ruling that the officers had probable cause to search Roth's car, independent of Roth's statements.

Roth proceeded to a bench trial, renewing his motion to suppress, objecting to the admission of the physical evidence at trial, and filing a motion for judgment of acquittal. The trial court thoroughly reconsidered its earlier rulings on the motion to suppress and came to the same conclusions. The court admitted the marijuana into evidence and ultimately found Roth guilty of both counts. Roth filed a motion in arrest of judgment, arguing the search exceeded the scope of his traffic stop, citing *State v. Pals*, 805 N.W.2d 767 (Iowa 2011). The State resisted the motion, arguing that, even if the stop was pretextual, probable cause to search trumps an expansion of the scope of the stop. The court denied the motion, noting "[t]he court does not believe the *Pals* opinion changes the court's conclusions that were previously reached." Roth appeals his conviction and sentence for possession of a controlled substance.

II. Analysis

We review appeals from a district court's denial of a motion to suppress evidence based on constitutional grounds de novo. *Pals*, 805 N.W.2d at 771. "This review requires an independent evaluation of the totality of the circumstances as shown by the entire record. This court gives deference to the factual findings of the district court due to its opportunity to evaluate the credibility of the witnesses, but is not bound by such findings." *Id.* (internal citations and quotations omitted). We review claims of ineffective assistance of counsel de novo. *State v*. *Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011).

A. Probable Cause

Roth first argues his motion to suppress physical evidence should have been granted as the search was based on his suppressed statements which the district court found were obtained in violation of *Miranda*.[4] 384 U.S. at 479. He argues no independent grounds existed for the warrantless search of his vehicle that produced the physical evidence and therefore the evidence should be excluded as fruit of the illegal questioning.[5] The state argues facts known to the officers at the time of the vehicle search constituted probable cause, even without the incriminating statements.

Our supreme court considered the probable cause exception to the warrant requirement for searches of vehicles in *State v*. *Hoskins,* 711 N.W.2d 720 (Iowa 2006).

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[4] The State does not appeal the ruling suppressing the statements.

[5] Roth and the State agree the facts do not present a search incident to arrest exception to the warrant requirement.

> Probable cause exists to search a vehicle "when the facts and circumstances would lead a reasonably prudent person to believe that the vehicle contains contraband. The facts and circumstances upon which a finding of probable cause is based include 'the sum total . . . and the synthesis of what the police [officer has] heard, what [the officer] knows, and what [the officer] observe[s] as [a] trained officer[ ].'"

Hoskins, 711 N.W.2d at 726 (quoting *State v*. *Gillespie*, 619 N.W.2d 345, 351 (Iowa 2000)). Probable cause "need not rise to certainty beyond a reasonable doubt." *State v*. *Carter*, 696 N.W.2d 31, 37 (Iowa 2005) (finding probable cause to search a vehicle where defendant was driving in area known for many vehicle narcotics arrests, was digging in dash when signaled to pull over and veered through three lanes of traffic, exhibited highly nervous behavior, and part of plastic baggie was sticking out of the dash after defendant was pulled over).

The vehicle search in *Hoskins* involved a confidential informant who told the police that Hoskins was in possession of drugs at a bar. *Hoskins,* 711 N.W.2d at 723–24. When police found Hoskins, he was driving away from the bar. *Id.* at 724. Ultimately, Hoskins proceeded through a red light without stopping and police officers pulled him over. *Id.* The officers searched Hoskins' car, finding drugs in the vehicle. *Id.* Our supreme court affirmed the district court finding there was probable cause to justify the search of the vehicle, stating:

> If a magistrate was presented with an affidavit in support of an application for a search warrant containing all the information [the police officer] had available to him when he authorized the search of Hoskins' vehicle, the magistrate should have found there was probable cause to issue a warrant to search Hoskins' vehicle.

Id.

Here, the district court found probable cause in the totality of the information available to officers at the time the search of Roth's vehicle was initiated. The court outlined this information as follows:

> Defendant and his vehicle had not been seen by the officers during their surveillance of the house since July 1, 2011; they had no connection to the house or the neighborhood and, thus, no apparent reason to be at the house. Defendant stopped very briefly at the house and went to an area where he likely had contact with . . . the occupant, consistent with the stop and go traffic routinely observed at drug houses. The house was a suspected drug house, and the officers had stopped a person who had just received marijuana at the house under similar circumstances just a few days before July 6. Defendant then drove away from the house rapidly. Based upon the facts and circumstances in this case, the court finds and concludes that the State has met its burden of establishing probable cause for the search of [Roth's] vehicle.

Although Roth now argues the record does not clearly describe how much of the information was known to the officers at the time of the search of Roth's vehicle, we, like the district court, are limited to the record made, not the record which might have been made.

Probable cause to search Roth's car does not rely only on information about the residence he briefly visited. Our supreme court has established factors to limit the use of "all persons present" warrants for those physically on the premises of, or driving away from, a suspected drug house. *State v*. *Prior*, 617 N.W.2d 260, 263–64 (Iowa 2000); *State v*. *Jamison*, 482 N.W.2d 409 (1992) *overruled on other grounds by State v*. *Heminover*, 619 N.W.2d 353 (Iowa 2000) (finding search warrant did not cover search of a car belonging to a person who stopped at drug house briefly and drove away where there were no facts "that would show that at the time the warrant issued there was some nexus between the defendant or his vehicle and the criminal activity being carried on" at the

suspected drug house). The search of Roth's car, however, occurred on the basis of his activity at the house, in real time.

The probable cause sustaining the search includes the information that his visit conformed to the pattern associated with drug purchases: a brief visit after parking in a rear alley, he had not previously been in the neighborhood for any legitimate reason, and he left the residence speeding. Such behavior was testified to by Officer Clausen—the arresting officer who was a member of the Sioux City street level drug unit. He testified to his years of experience and ongoing training to identify drug related activity. He testified to prior arrests made during his career following stop and go traffic at suspected drug houses in Sioux City. An expert witness may testify to the customs and practices of those who use or deal in narcotics. *State v*. *Shumpert*, 554 N.W.2d 250, 254 (Iowa 1996) (finding admission of testimony regarding packaging of drugs by police corporal proper). The court properly relied on this testimony in finding probable cause existed for the search of Roth's vehicle. *State v*. *Watts*, 801 N.W.2d 845, 855–56 (Iowa 2011) (finding officer's seven years of experience sufficient to support assertion in search warrant regarding the smell of marijuana). Further, the probable cause requirement includes the use of "reasonable, common sense inferences" and "must be seen and weighed . . . as understood by those versed in the field of law enforcement." *State v*. *Green*, 540 N.W.2d 649, 655 (Iowa 1995).

Roth now argues the search exceeded the scope of the traffic stop, relying on *State v*. *Pals*, where our supreme court found probable cause for a traffic stop, followed by a search based on consent which was found to be involuntary.

805 N.W.2d at 782. Roth, however, is in a different situation. While Roth's vehicle was stopped because of traffic violations, the search of his vehicle was based on independent grounds which the district court determined to be sufficient to satisfy the requirement of probable case. Though the district court determined Roth's initial statements were improperly obtained, "[e]vidence obtained illegally does *not*, however, become sacred and inaccessible." *State v. Seager*, 571 N.W.2d 204, 210 (internal quotations omitted). Instead, if "the police have obtained or would have obtained evidence through a source unrelated to the illegality, the challenged evidence is admissible." *Id.* at 211. Here, that source was probable cause to search coupled with the mobile nature of the vehicle. *See State v. Allensworth*, 748 N.W.2d 789, 792 (Iowa 2008). The district court properly denied Roth's motion to suppress the physical evidence.

B. Ineffective Assistance

Roth next argues that his counsel was ineffective in arguing his motion to suppress. In order to establish a claim of ineffective assistance of counsel, Roth must show both that his counsel failed to perform an essential duty and that he was prejudiced by this failure. *See Brubaker*, 805 N.W.2d at 171. Here, we find Roth has failed to establish he was prejudiced by counsel's arguments during the motion to suppress. Upon our full review of the record, we found no Fourth Amendment violation during the search of his vehicle. Counsel preserved error on the Fourth Amendment claim and we determined the claim was not meritorious. Roth's claim his counsel provided ineffective assistance fails. *See id.*

AFFIRMED.