IN THE COURT OF APPEALS OF IOWA

No. 3-173 / 12-0139
Filed May 15, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CRAIG E. HARRISON,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Marlita A. Greve, Judge.

Appeal from the convictions and sentences for possession of a controlled substance with intent to deliver, drug tax stamp violation, and driving while suspended. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Theresa Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Michael J. Walton, County Attorney, and Kelly Cunningham, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

EISENHAUER, C.J.

Craig Harrison appeals from the convictions and sentences for possession of a controlled substance with intent to deliver, drug tax stamp violation, and driving while suspended. He contends the court erred in denying his motion to suppress and in allowing the State to withdraw the plea agreement. We affirm.

I. Background Facts and Proceedings

The evening of July 7, 2009, Officer Burkle received a call from a confidential informant, reporting a black male in a red Jeep Cherokee with license number 994RDB was "slinging dope" behind the house at 1633 Ripley Street in Davenport. Burkle and his partner, Officer Ellerbach, responded in their unmarked car. Spotting the Jeep in the alley behind 1633 Ripley, they drove down the alley past the Jeep, which had no one inside, took note of the license plate, then set up surveillance at a nearby convenience store. A few minutes later, the officers saw a black male get into the Jeep and drive away. They followed, but stayed back a block or two to avoid being seen. The Jeep stopped at the side of the street in the 1200 block of Ripley. The officers drove past, then circled back once they were out of sight. The Jeep was gone. The officers thought the driver was trying to avoid them.

After searching the area for a few minutes, the officers saw the Jeep driving north in the alley leading to 1633 Ripley. They set up surveillance again at the convenience store. Less than ten minutes later, the Jeep was seen headed east on Locust. Based on their observations and the information from the confidential informant, the officers thought the driver was leaving to make a drug delivery. As the officers tried to follow, they were impeded by traffic and

eventually had to use their emergency lights to get through intersections. They caught the Jeep around the 3000 block of Locust. As they came closer, they noticed the license plate frame covered the name of the county. They pulled the Jeep over in the 3400 block of Locust.

As Harrison got out of the Jeep, he had one hand behind his back. When Officer Burkle patted him down, he felt a golf ball sized lump "between his buttocks region." They handcuffed Harrison and put him in the backseat of the squad car. After other officers arrived, Harrison was moving around in the backseat. Officer Shorten opened the door to make sure Harrison's handcuffs were not too tight and saw a small plastic bag in Harrison's hand. Shorten tried to grab the bag, but Harrison tossed it on the floorboard of the car. Four individually-wrapped rocks of what later tested as crack cocaine fell out onto the street. The bag contained fourteen more rocks of crack cocaine.

Harrison was charged by trial information with possession with intent to deliver a schedule II controlled substance, a drug tax stamp violation, and driving while suspended. Police also issued a traffic citation for "fail[ure] to maintain registration plate" in violation of Iowa Code section 321.38 (2009).

In January 2010, pursuant to a plea agreement, Harrison pleaded guilty to the possession-with-intent-to-deliver charge. The State agreed to dismiss the other charges and the traffic citation and to recommend against incarceration. The plea agreement also provided the State could withdraw any recommendations "[s]hould the Defendant have a criminal history more extensive than that revealed in the pleadings." After the court accepted Harrison's plea, it discussed the next steps: preparation of a presentence investigation, Harrison

meeting with a probation officer, and the sentencing hearing. Harrison asked to withdraw his plea, stating, "I wouldn't have took this plea if I would have knew that, sir." The court allowed the withdrawal and set trial for the following Monday. About ten minutes after the hearing ended and Harrison had met with his attorney, he returned to the courtroom and asked to have his guilty plea reinstated. The court again accepted Harrison's guilty plea and deferred accepting or rejecting the plea agreement.

At the February 2010 sentencing hearing after receipt of the presentence investigation, the State "move[d] to withdraw the plea agreement," noting the criminal history attached to the trial information did not show any previous offenses, but the presentence investigation revealed Harrison had been to prison on three prior occasions. Harrison's attorney pointed the court to the April 2009 bond review hearing, where a copy of Harrison's criminal record was presented and "[p]resumably a copy of that was provided to the State at that time." The attorney asked the court to allow Harrison to withdraw his guilty plea if the court allowed the State to withdraw the plea agreement. The court confirmed with Harrison his wish to withdraw his guilty plea. The court "allow[ed] the Defendant to withdraw his plea of guilty based upon the State's review of the record and change in recommendation."

In June 2010 Harrison filed a motion to suppress, claiming the vehicle stop and the subsequent seizure and search of his person "was illegal, without a warrant, probable cause, exigent circumstances or voluntary consent." He argued there was no probable cause or reasonable suspicion to justify the pat-down search. The court denied the motion, finding "the tip from the informant,

fully corroborated by the officers' observation of the person, place and vehicle, the driver's activity, and the driver's attempt to evade being followed, are sufficient objective facts to support an investigatory stop of the vehicle and driver for suspicion of possessing and selling illegal controlled substances." The court also considered the license plate violation as a basis for the stop and ruled the vehicle stop on that ground was pretextual.

Harrison failed to appear for the trial scheduled in July. He was arrested a year later in July 2011. Trial began in September 2011, and Harrison chose to remain in jail rather than attend the first day of the trial. He attended the remainder of the trial and was convicted on all counts. He filed pro se post-trial motions for judgment of acquittal, for a new trial, in arrest of judgment, and to disqualify the trial judge.

At the sentencing hearing in January 2012, the court denied all the post-trial motions. It sentenced Harrison to concurrent sentences of up to ten years on the possession with intent to deliver charge, up to five years on the drug tax stamp violation, and thirty days in jail on the driving while suspended charge. The court dismissed the traffic citation.

II. Scope and Standards of Review

We review claims the trial court failed to suppress evidence obtained in violation of the constitution de novo. *State v. Lowe*, 812 N.W.2d 554, 566 (Iowa 2012); *see also State v. Palmer*, 791 N.W.2d 840, 844 (Iowa 2010) (holding we review de novo a district court's decision to admit statements allegedly obtained in violation of the accused's constitutional rights). This requires us to make an independent evaluation of the totality of the circumstances as shown by the

entire record, including the evidence presented at the suppression hearings. *State v. Lane*, 726 N.W.2d 371, 377 (Iowa 2007). Because the district court has the opportunity to evaluate the credibility of witnesses, we give deference to the factual findings of the district court, but we are not bound by them. *Id.*

We review ineffective assistance of counsel claims de novo. *State v. Rodriguez*, 804 N.W.2d 844, 848 (Iowa 2011). To succeed on a claim, a defendant must show by a preponderance of the evidence that the attorney failed to perform an essential duty, and prejudice resulted. *State v. Bryant*, 819 N.W.2d 564, 569 (Iowa Ct. App. 2012). We may affirm if either element is absent. *Id.*

III. Merits

A. Motion to Suppress. Harrison contends the court erred in denying his motion to suppress. In ruling on the motion, the court found the license plate issue was a pretextual basis for the stop, but found sufficient objective facts to support an investigatory stop related to drug dealing.

To conduct an investigatory stop an officer must have a reasonable, articulable suspicion criminal activity has occurred, is occurring, or is about to occur. *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000); *see State v. Kinkead*, 570 N.W.2d 97, 100 (Iowa 1997). The State must prove by a preponderance of the evidence the officer had specific and articulable facts that, taken together with rational inferences from those facts, would lead the officer reasonably to believe criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

> Whether reasonable suspicion exists for an investigatory stop must be determined in light of the totality of the circumstances confronting a police officer, including all information available to the officer at the time the decision to stop is made. The circumstances under which the officer acted must be viewed through the eyes of a

> reasonable and cautious police officer on the scene, guided by his experience and training.

State v. Vance, 790 N.W.2d 775, 781 (Iowa 2010) (citations and internal quotation marks omitted).

We independently evaluate the totality of the circumstances found in the record, including evidence introduced at both the suppression hearing and at trial. *State v. Bogan*, 774 N.W.2d 676, 679-80 (Iowa 2009). We give deference to the trial court's findings because of its ability to assess the credibility of the witnesses. *State v. Carter*, 696 N.W.2d 31, 36 (Iowa 2005). However, we are not bound by those findings. *Id.*

The officers received a very specific call from a confidential informant, including a description of the vehicle, its location, its driver, its license plate, and the driver's illegal activity. The officers involved were specially trained in drug enforcement. Their observations of the vehicle and driver corroborated the informant's information. Harrison's action in pulling over, stopping, yet not getting out of the car support a reasonable inference he was seeking to avoid being followed, especially since he soon returned to the previous place where he reportedly was dealing drugs. Given the officers' experience and training, the information from the confidential informant, and their observations of Harrison's behavior, when the officers saw Harrison drive away again a few minutes after his return to the alley behind 1633 Ripley, it was reasonable for them to infer he was leaving to deliver drugs. From our independent evaluation of the totality of the circumstances, we agree with the trial court's determination the officers had a reasonable suspicion of criminal activity sufficient to justify an investigatory stop

of Harrison's vehicle. Consequently, we conclude the court did not err in denying his motion to suppress. This claim fails.

B. Plea Agreement. Harrison contends the court erred in allowing the State to withdraw from the plea agreement and his attorney was ineffective in failing to object to the court's action. In relevant part, the memorandum of plea agreement provided the State "will recommend against incarceration," but "may withdraw any recommendation previously made" upon certain conditions, including Harrison "hav[ing] a criminal history more extensive than that revealed in the pleadings."

At sentencing, the State moved to withdraw its recommendation against incarceration, noting the presentence investigation revealed Harrison had "been to prison on three prior occasions," while "the criminal history attached to the trial information" did not show any prior offenses and "it looked like his record was completely clean." Harrison's attorney responded by noting Harrison's criminal record, including the prior offenses and incarcerations, was discussed at a bond review hearing and "[p]resumably a copy of that was provided to the State at that time." The attorney then asked the court to allow Harrison to withdraw his guilty plea if it allowed the State to withdraw the plea agreement. The court allowed Harrison "to withdraw his plea of guilty based upon the State's review of the record and change in recommendation in this matter."

Harrison asks for reversal of his convictions, sentences, and judgment, and for remand for specific performance of the plea agreement. *See State v. King*, 576 N.W.2d 369, 371 (Iowa 1998) ("If a prosecutor breaches the plea agreement, the remedy is either specific performance or withdrawal of the guilty

plea."). Alternatively, he contends his attorney was ineffective if we determine the attorney did not properly object to the State's breach or did not adequately request specific performance.

Arguably, the State did not breach the plea agreement because Harrison's criminal record was more extensive "than that revealed in the pleadings," so the State had the option to withdraw the recommendation against incarceration. However, if we assume for the sake of our analysis the State breached the agreement, we must consider the appropriate remedy. "Generally, a breached plea agreement may be remedied by allowing the defendant to withdraw the guilty plea or by remanding for resentencing before a new judge." *State v. Fannon*, 799 N.W.2d 515, 524 (Iowa 2011) (citing *King*, 576 N.W.2d at 371; George L. Blum, *Choice of Remedies Where State Prosecutor Has Breached Plea Bargain*, 9 A.L.R.6th 541 (2005)). The trial court granted Harrison's request to withdraw his guilty plea, which was an appropriate remedy. Accordingly, the trial court did not err. This claim fails.

Having found no error, we affirm.

AFFIRMED.

Bower, J., concurs; Danilson, J., concurs specially.

DANILSON, J. (concurring specially)

I concur with the majority but note that this is not the first appeal involving a plea agreement conditioned upon what the State perceives to be the defendant's past criminal history and later the State cries foul because the PSI reports a more extensive criminal history. We are mindful of a prosecutor's discretion in proposing or accepting plea offers. However, rather than consuming limited judicial resources, I would suggest the better practice would be to order a pre-plea PSI report, which would avoid the necessity of a plea proceeding, a proceeding to vacate the plea and, as here, the subsequent appeal.