IN THE COURT OF APPEALS OF IOWA

No. 2-623 / 11-0692
Filed August 22, 2012

THOMAS E. KNOP,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Karen A. Romano, Judge.

An applicant for postconviction relief appeals the district court decision denying his request for relief from his conviction for possession of a controlled substance, third offense. **AFFIRMED.**

Christine E. Branstad of Branstad Law, P.L.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant Attorney General, John Sarcone, County Attorney, and Nathaniel Tagtow, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., Potterfield, J., and Miller, S.J.*

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

MILLER, S.J.

I. Background Facts & Proceedings

On July 29, 2008, Des Moines Police Officer Andrew Wierck stopped a vehicle that had no license plates and a paper tag that was hard to read. After the vehicle was stopped he observed that the paper tag had expired more than a year previously. The driver of the vehicle was Thomas Knop. In addition to not having current registration on the vehicle, Knop did not have proof of insurance. In speaking to Knop, Officer Wierck noticed he had been drinking. Knop had an open Gatorade bottle that was partially filled with beer. Officer Wierck believed Knop was impaired because his speech was slurred, his face was red, and his eyes were watery and bloodshot.

Officer Wierck testified he intended to arrest Knop for traffic violations and then do field sobriety tests. He asked Knop to exit his vehicle. He conducted a search of Knop's person, felt a baggie in Knop's right front pocket, and removed it.[1] The item was later determined to be a baggie of methamphetamine. Knop was placed in handcuffs and put in the officer's vehicle. Through a computer search officer Wierck learned Knop had an outstanding warrant for possession of a controlled substance in Dallas County.

Knop was taken to the Polk County Jail. Officer Wierck's report stated Knop had been arrested for possession of methamphetamine and the Dallas County warrant. The officer testified the traffic citations would have been

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[1] Officer Wierck asked Knop to consent to a search. Knop refused, and the officer conducted the search anyway.

attached to the report when he turned it in.[2] The officer stated that due to the charge of possession of methamphetamine and the outstanding Dallas County warrant, he decided not to further pursue a charge of operating while intoxicated. Knop was charged by trial information with possession of a controlled substance (methamphetamine), third offense, in violation of Iowa Code section 124.401(5) (2007).

Knop filed a motion to suppress, claiming the officer lacked specific and articulable facts in order to conduct a *Terry* pat-down search.[3] He also claimed the officer improperly exceeded the scope of a *Terry* pat-down search. At the suppression hearing, held on November 25, 2008, Officer Wierck testified as outlined above. The district court concluded the officer was not conducting a *Terry* pat-down search, but was conducting a search incident to arrest. The court found, "At the time Officer Wierck removed defendant from his automobile, he had already decided to arrest Knop for the various traffic offenses which were evident." The court also found, "There can be no question that Officer Wierck had probable cause to arrest defendant." The court denied the motion to suppress.[4]

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[2] There was evidence that Knop was issued citations for, among other things, lack of vehicle registration, lack of insurance, open container, and failure to transfer title.

[3] Referring to *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (holding an officer may conduct a pat-down search when the officer has specific, articulable facts which lead him reasonably to conclude that criminal activity may be afoot and the person may be armed and dangerous).

[4] Knop filed a second motion to suppress, claiming that a statement he made after he was placed in handcuffs should be suppressed under the Fifth Amendment. He does not make any claims in his current postconviction action based on this second motion to suppress.

Knop waived his right to a jury trial. The case was submitted to the court on the minutes of evidence and certain exhibits. The court found Knop guilty of possession of a controlled substance (methamphetamine), third offense. Knop was sentenced to a term of imprisonment of not to exceed five years.

Knop appealed his conviction. The appeal was dismissed by the Iowa Supreme Court as frivolous, pursuant to Iowa Rule of Appellate Procedure 6.1005.

Knop filed an application for postconviction relief. He claimed Officer Wierck gave conflicting testimony, in that he had actually been arrested for possession of a controlled substance and the Dallas County warrant, and the officer had not intended to arrest him for the traffic violations. He additionally claimed that the court erroneously ruled that the search was valid as a search incident to arrest, that the court failed to announce the verdict in open court, and that he received ineffective assistance from his trial and appellate counsels.

A postconviction hearing was held on March 14, 2011. Officer Wierck testified similarly to his testimony at the suppression hearing. He stated the fact Knop's vehicle had not been registered for more than a year "was a serious offense in my book," and he intended to arrest him for the traffic violations. He also testified, "I felt the traffic violations were flagrant enough that he should be arrested."

The district court denied Knop's request for postconviction relief. The court determined Officer Wierck did not give false testimony at the suppression hearing. The court found there was sufficient evidence to show Officer Wierck

intended to arrest Knop for traffic violations prior to searching him. The court determined there was no error in the suppression ruling that the search was incident to arrest. The court also determined Knop had not shown he received ineffective assistance of trial counsel or appellate counsel. Knop now appeals the district court's ruling on his application for postconviction relief.

II. Standard of Review

Generally, we review an appeal from a denial of postconviction relief for the correction of errors at law. *Lado v. State*, 804 N.W.2d 248, 250 (Iowa 2011). "Thus, we will affirm if the trial court's findings of fact are supported by substantial evidence and the law was correctly applied." *Harrington v. State*, 659 N.W.2d 509, 520 (Iowa 2003). We have noted that the postconviction court is in a superior position to judge the credibility of witnesses. *Carroll v. State*, 466 N.W.2d 269, 273 (Iowa Ct. App. 1990).

On the other hand, when an applicant raises a constitutional claim as a basis for postconviction relief, we review the claim de novo. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012). Our review is de novo in light of the totality of the circumstances and the record upon which the postconviction court made its rulings. *Goosman v. State*, 764 N.W.2d 539, 541 (Iowa 2009). In de novo review, we also give weight to the credibility findings made by the postconviction court. *Cox v. State*, 554 N.W.2d 712, 714 (Iowa Ct. App. 1996).

Knop's brief contains a heading titled "STATEMENT OF THE ISSUE PRESENTED FOR REVIEW." Although the brief thus identifies only one "issue," the contents of the brief appear to present two issues, (1) a claim that the search

of Knop's person was an illegal warrantless search and the suppression court's finding that the search was incident to arrest is not supported by substantial evidence, and (2) a claim that trial and appellate counsel rendered ineffective assistance by not urging that Officer Wierck presented conflicting, and thus false, testimony. Our review of the first claim is for correction of error. *Lado*, 804 N.W.2d at 250; *Harrington*, 659 N.W.2d at 520. Our review of the second is de novo. *See State v. Jorgensen*, 785 N.W.2d 708, 712 (Iowa Ct. App. 2009) (holding our review of ineffective-assistance-of-counsel claims is de novo). We discuss the two issues in reverse order, however.

III. Merits

A. Knop contends Officer Wierck gave conflicting testimony between what he testified to at the suppression hearing, and what he testified to at the postconviction hearing. He also claims this testimony conflicts with what was written down in the police report. In essence, Knop claims the officer lied in his statement that he intended to arrest Knop for traffic offenses at the time he conducted the search. Knop claims he was actually arrested for possession of methamphetamine and the Dallas County warrant, both of which were discovered only after the search had been conducted. He claims, therefore, it was not a valid search incident to arrest, and his motion to suppress should have been granted. He argues he received ineffective assistance from defense counsel and appellate counsel because the issue of the conflicts in the officer's testimony was not explored sufficiently.

To establish a claim of ineffective assistance of counsel, an applicant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied applicant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). Absent evidence to the contrary, we assume that the attorney's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

In his police report, Officer Wierck discusses that Knop did not have any license plates, that the paper tags were expired, that Knop admitted he did not have insurance, and that he had an open bottle of alcohol in the vehicle. The reports concludes, "Veh. stopped for no plates and exp. tag. Driver, Thomas Knop, arrested for poss. meth. and Dallas Co. warrant."

At the suppression hearing, the officer testified that when he asked Knop to step out of his vehicle, "I was going to place him under arrest for traffic violations." He also testified that Knop was given traffic citations. The district court in its suppression ruling must have found officer Wierck credible, finding, "At the time Officer Wierck removed defendant from his automobile, he had already decided to arrest Knop for the various traffic offenses which were evident." The court concluded the officer had properly conducted a search incident to arrest.

At the postconviction hearing, which was held about two and one-half years after the suppression hearing, Officer Wierck again testified, "I intended to arrest him for the traffic violations." He also testified, "I felt the traffic violations were flagrant enough that he should be arrested." He testified he believed Knop

was served with the traffic citations once they arrived at the jail. The postconviction court specifically found, "Knop's argument that Office Wierck testified falsely is without merit." The court concluded Knop had failed to show he received ineffective assistance due to counsels' failure to explore the alleged inconsistencies in the officer's testimony.

We agree with the district court's conclusion that Knop has not shown officer Wierck testified falsely. The officer's testimony between the suppression hearing and the postconviction hearing is remarkably consistent, especially when considering that two and one-half years had passed between the times the officer testified. Although the police report states that Knop was arrested for possession of methamphetamine and the Dallas County warrant, and does not state he was arrested for the traffic offenses, as the district court points out, this does not mean Knop was not arrested for traffic offenses. The police report contains information about the traffic offenses. Also, Officer Wierck testified the traffic citations would have been attached to the report when he handed it in.

Additionally, Officer Wierck testified the traffic citations were served on Knop once they got to the jail, as these were computer generated. As the postconviction court also noted, an officer may arrest a person for traffic offenses, and then later issue the traffic citations to the person. *See* Iowa Code § 805.1(1) (giving officers discretion to issue a citation in lieu of continued custody); *State v. Ceron*, 573 N.W.2d 587, 591 (Iowa 1997) (noting chapter 805 applied to traffic violations).

We conclude Knop has not shown he received ineffective assistance due to counsels' failure to argue that Officer Wierck's testimony was false. The court that heard his testimony at the suppression hearing and the court that heard his testimony at the postconviction hearing both determined the officer's testimony was credible. We give weight to the credibility findings made by the court. *Cox*, 554 N.W.2d at 714. We do not find counsel ineffective for failing to pursue a meritless issue. *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011).

B. Knop contends the postconviction court's finding that the search was incident to arrest was not supported by substantial evidence. In general, searches conducted without a warrant are per se unreasonable. *State v. Watts*, 801 N.W.2d 845, 850 (Iowa 2011). There are some exceptions to this warrant requirement, however, including: (1) consent search, (2) search based on probable cause and exigent circumstances, (2) search of items in plain view, and (4) search incident to arrest. *State v. Naujoks*, 637 N.W.2d 101, 107 (Iowa 2001). "The State has the burden to prove by a preponderance of the evidence that the search falls within an exception." *State v. Fleming*, 790 N.W.2d 560, 568 (Iowa 2010).

Here, the State asserted there was a valid search incident to arrest. "This exception allows a police officer 'to search a lawfully arrested individual's person and the immediately surrounding area without a warrant.'" *State v. Christopher*, 757 N.W.2d 247, 249 (Iowa 2008) (citation omitted). Further, an arrest is valid if it is supported by probable cause. *Id.* at 250 (noting probable cause exists if the totality of circumstances, as viewed by a reasonable and prudent person, would

lead a person to believe a crime has been committed). In considering an arrest that led to a search incident to arrest, "whether a Fourth Amendment violation has occurred does not turn on the officer's actual state of mind or subjective motives." *Id.* at 251.

In this case, it is clear the officer had probable cause to arrest Knop for the traffic offenses. There was probable cause to believe Knop committed traffic offenses, including open container, in violation of section 321.284, and failure to have valid registration for the vehicle, in violation of section 321.17. These are serious misdemeanors. *See* Iowa Code § 321.17, .284. When an officer has reasonable cause to believe a person has violated any provision of chapter 321 punishable as a simple, serious, or aggravated misdemeanor, the officer may immediately arrest the person. Iowa Code § 321.485(1)(a); *State v. Snider*, 522 N.W.2d 815, 817 (Iowa 1994).

Furthermore, "a search incident to arrest need not be made *after* a formal arrest if it is substantially contemporaneous with it, provided probable cause for the arrest existed at the time of the search." *State v. Peterson*, 515 N.W.2d 23, 25 (Iowa 1994) (emphasis in original). Here, there was probable cause to arrest Knop for the traffic violations, and the fact he was searched prior to formal arrest does not invalidate the search. *See State v. Horton*, 625 N.W.2d 362, 364 (Iowa 2001) (noting search may precede arrest).

We conclude the postconviction court correctly determined the suppression court's conclusion that Knop was searched incident to arrest for the traffic offenses is supported by substantial evidence. We find no error in the

postconviction court's finding that Knop was not entitled to postconviction relief on this ground.

We affirm the decision of the district court denying Knop's application for postconviction relief.

AFFIRMED.