IN THE COURT OF APPEALS OF IOWA

No. 2-708 / 11-1621
Filed October 3, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

EDWARD MARTIN III,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer, Judge.

Edward Martin III appeals from the judgments and sentences entered following his guilty pleas to possession of methamphetamine third offense and credit card fraud. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant Appellate Defender, for appellant.

Edward Martin III, Waterloo, appellant pro se.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brad P. Walz, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J, and Doyle and Tabor, JJ.

DOYLE, J.

Defendant Edward Martin III appeals from the judgments and sentences entered following his guilty pleas to possession of methamphetamine third offense and credit card fraud. He asserts there was no factual basis to support his guilty plea to the possession third charge, and he contends his trial counsel was ineffective for failing to file a motion to suppress evidence obtained from the search of his person. Additionally, he asserts numerous claims pro se. Upon our review, we affirm Martin's judgments and sentences entered following his guilty pleas and preserve one of Martin's pro se claims for further postconviction relief proceedings.

***I. Background Facts and Proceedings*.**

In late 2010, Edward Martin was charged with credit card fraud in violation of Iowa Code section 715A.6 (2009). While this charge was pending, Martin was charged by trial information with possession of cocaine base third[1] offense in violation of Iowa Code section 124.401(5) (2011), following a separate April 2011 incident. After a laboratory report determined the substance was actually methamphetamine, the State filed a motion to amend the trial information for the

[1] The trial information listed two of Martin's past drug convictions to arrive at the third offense charge: a 1991 conviction for delivery of cocaine base and a 2003 conviction for possession of cocaine base. As our supreme court noted in its opinion affirming another one of Martin's 2003 possession of cocaine convictions: "The summer of 2003 was apparently a sticky one for Martin." *State v. Martin*, 704 N.W.2d 665, 668 n. 1 (Iowa 2005). The court explained it was ruling that day on two of Martin's unrelated 2003 convictions for cocaine possession in separate opinions. *Id.*; *see also State v.* Martin, 704 N.W.2d 674 (Iowa 2005). Additionally, the court observed that this court had affirmed Martin's third 2003 conviction for possession of cocaine, and Martin had not sought further review of that affirmance. *See Martin*, 704 N.W.2d at 668 n. 1; *see also State v. Martin*, No. 03-2092, 2005 WL 425488 (Iowa Ct. App. February 24, 2005). It is the third 2003 affirmed conviction that the State references in the trial information.

possession third charge to change the substance it alleged Martin possessed to methamphetamine.

Trial commenced on the possession third charge in July 2011. Prior to jury selection, the State informed the court and Martin that it planned to seek a habitual offender sentencing enhancement pursuant to Iowa Code section 902.8, citing two of Martin's past felony convictions. The State informed Martin that if he were found guilty of the possession third charge as a habitual offender, he would not be eligible for parole until he had served the minimum sentence of confinement of three years. *See* Iowa Code § 902.8. However, the State indicated it would not file the habitual offender enhancement if Martin pled guilty to the possession third charge. The State's plea offer was explained to Martin, and Martin rejected the offer. Thereafter, a jury was selected, and the presentation of evidence began.

On the morning of the second day of trial, the trial court, counsel, and Martin again discussed the State's plea offer. Martin was informed that because he had been convicted of a forcible felony within the last five years, he would actually face a mandatory-minimum period of confinement if he were found guilty on the possession third charge pursuant to Iowa Code section 902.11.[2] *See also State v*. *Ross*, 729 N.W.2d 806, 810 (Iowa 2007) ("Section 902.11 provides that forcible felons who have a prior forcible felony conviction must serve at least one-half of their term of imprisonment before being eligible for parole."). The State

[2] The forcible-felony conviction was a November 2007 conviction for domestic abuse assault third offense, for which Martin received a five-year prison sentence

advised Martin its original plea offer still stood, and an *Alford* plea[3] was suggested by Martin's counsel. Martin was initially reluctant, but after discussing the offer with his attorney, he agreed to enter an *Alford* plea to the possession third charge and to his unrelated pending charge of credit card fraud. The parties agreed the court could rely upon the evidence already presented in the possession third trial, as well as the minutes of testimony in both cases in determining whether a factual basis existed for the pleas. In a colloquy with the court, Martin stated he was pleading guilty because he was satisfied it was in his best interests. Martin agreed that there was a strong possibility that, unless he took advantage of the plea offer, he would be convicted of the charges against him. The court then found factual bases existed to support Martin's *Alford* pleas in both cases, and it accepted Martin's pleas.

Prior to sentencing, Martin filed a pro se motion in arrest of judgment in each case, arguing, among other things that his pleas were involuntary and "contrary to the sufficiency of the evidence." The district court overruled Martin's motions and sentenced Martin to five years on the drug possession conviction and two years on the credit card fraud conviction, to be served consecutively.

Martin now appeals his convictions and sentences for possession of methamphetamine third offence and credit card fraud.[4] He asserts there was no

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[3] An *Alford* plea is a variation of a guilty plea where the defendant does not admit participation in the acts constituting the crime but consents to the imposition of a sentence. *See North Carolina v. Alford*, 400 U.S. 25, 37 (1970); *State v. Burgess*, 639 N.W.2d 564, 567 n. 1 (Iowa 2001).

[4] Martin filed two pro se supplemental briefs. The first brief (with the credit card fraud case docket number on the cover) states he "appeals from his convictions for possession of methamphetamine, third-offense, and credit card fraud." Martin's second pro se supplemental brief (with the drug possession case docket number on the cover) states he "is only challenging his conviction and sentence for possession of

factual basis to support his guilty plea to the possession third charge, and he contends his trial counsel was ineffective for failing to file a motion to suppress evidence obtained from the search of his person. Additionally, he asserts numerous claims pro se.

II. Scope and Standards of Review.

We review a claim of error in a guilty plea proceeding for the correction of error at law. *State v*. *Meron*, 675 N.W.2d 537, 540 (Iowa 2004). "We review claims of ineffective assistance of counsel de novo." *State v*. *Rodriguez*, 804 N.W.2d 844, 848 (Iowa 2011).

III. Discussion.

A. Factual Basis for Guilty Plea to Possession Third Charge.

A conviction on a plea of guilty, including an *Alford* plea, cannot stand if a factual basis for the charge does not exist. *State v*. *Rodriguez*, 804 N.W.2d 844, 849 (Iowa 2011); *State v*. *Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999); *see also* Iowa R. Crim. P. 2.8(2)(b). There must be a showing that the facts support the crime, but not necessarily a showing that the defendant is guilty. *State v*. *Keene*, 630 N.W.2d 579, 581 (Iowa 2001). The "record, as a whole, must disclose facts to satisfy the elements of the crime." *Id.*

To support a conviction for possession of a controlled substance, the State must establish the defendant knew the contraband was present, knew its illegal nature, and exercised dominion and control [i.e., possession] over it. *State*

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methamphetamine third offense, in this appeal." Our rules of appellate procedure permit a criminal defendant only one pro se supplemental brief (*see* Iowa R. App. P. 6.901(2)(a)), but since the drug possession and credit card fraud cases were not consolidated, we will consider both of Martin's pro se supplemental briefs.

v. *Maxwell*, 743 N.W.2d 185, 193 (Iowa 2008). Unlawful possession can be either actual or constructive. *State v*. *Vance*, 790 N.W.2d 775, 784 (Iowa 2010). Actual possession may be shown by direct evidence, such as when the precursor product is found on the person. *Id.* Additionally, it can be shown by circumstantial evidence showing that a person at one time had actual possession of the contraband. *Id.* "[T]he record does not need to show the totality of evidence necessary to support a guilty conviction, but it need only demonstrate facts that support the offense." *State v*. *Ortiz*, 789 N.W.2d 761, 768 (Iowa 2010). Accordingly, "we need only 'be satisfied that the facts support the crime.'" *Id.* (quoting *Keene*, 630 N.W.2d at 581).

Here, the district court articulated that it relied on the evidence already presented at trial, as well as the minutes of testimony, in determining a factual basis existed to support Martin's *Alford* plea to the possession third charge. At trial, Officer Prichard testified that he observed a small red container fall from Martin's pocket when Martin was patted down by another officer. The minutes of testimony attached to the trial information include Officer Pritchard's September 2010 police report setting forth the same facts. These facts clearly support the possession charge. Although another police report attached to the minutes vaguely states Martin was seen tossing a small baggy of narcotics onto the ground, reviewing the record as a whole, we agree with the district court that a factual basis existed to support Martin's *Alford* plea to the possession third charge. We therefore affirm on this issue.

B. Ineffective Assistance of Counsel—Motion to Suppress.

Martin asserts the methamphetamine he possessed was discovered pursuant to an unlawful search under the United States Constitution and the Iowa Constitution. Because his trial counsel did not file a motion to suppress the evidence seized, he argues his trial counsel breached an essential duty by failing to challenge the search, which was prejudicial to him. He asserts he would not have pled guilty if his counsel had not been ineffective. Although we often preserve ineffective assistance claims for postconviction relief, we find the record here is sufficient to address this claim on direct appeal. *See State v. Braggs*, 784 N.W.2d 31, 34 (Iowa 2010).

Ineffective assistance of counsel requires a defendant to prove (1) trial counsel failed to perform an essential duty and (2) such failure resulted in prejudice. *Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010). Failure to prove either element by a preponderance of the evidence is fatal to the claim. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003). We presume counsel is competent, and miscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance. *Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008). Trial counsel has no duty to raise an issue that has no merit. *See State v. Dudley*, 766 N.W.2d 606, 620 (Iowa 2009). To prove prejudice resulted, a defendant must show there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001).

Because counsel has no duty to raise a meritless issue, the validity of Martin's constitutional claim must be determined. *See Dudley*, 766 N.W.2d at

620. "If his constitutional challenges are meritorious, we will then consider whether reasonably competent counsel would have raised these issues and, if so, whether [the defendant] was prejudiced by his counsel's failure to do so." *See id.*

In determining whether police conduct violates the Fourth Amendment, Iowa courts have a two-step approach. *State v*. *Fleming*, 790 N.W.2d 560, 564 (Iowa 2010). We first consider whether the person raising the challenge has shown a legitimate expectation of privacy in the area that was searched. *Id.* If there is a legitimate expectation of privacy, then we consider whether the State unreasonably invaded that interest. *Id.*

A search and/or seizure that is conducted without a warrant is considered to be per se unreasonable unless it comes within certain specifically established exceptions. *State v*. *Watts*, 801 N.W.2d 845, 850 (Iowa 2011). These exceptions include: (1) exigent circumstances; (2) consent; (3) search incident to arrest; and (4) plain view. *Id.* The State has the burden to show by a preponderance of the evidence that a warrantless search falls within one of these recognized exceptions. *Id.* Martin asserts that he had a legitimate expectation of privacy concerning the container that fell from his pocket, which is contrary to his initial position at trial where he denied the container and drugs were his. He also asserts none of the exceptions apply here.

Here, assuming without deciding that Martin had a legitimate expectation of privacy, we agree with the State that 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). 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 officers had probable cause to arrest Martin for public intoxication in violation of Iowa Code section 123.46(2) ("A person shall not be intoxicated in a public place. A person violating this subsection is guilty of a simple misdemeanor."). The officers on the scene reported and testified Martin appeared intoxicated when they arrived, and Martin admitted he was intoxicated. Thus, there was probable cause to believe Martin was intoxicated in a public place. If an officer has reasonable grounds to believe that an indictable public offense has been committed and the person committed it, the officer is authorized to make an arrest without a warrant. *Id.* § 804.7(3).

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 Martin for public intoxication, and he was arrested soon after the methamphetamine was found and charged with public intoxication, disorderly conduct, and possession of cocaine. The fact Martin 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). Consequently, we find the search of Martin's person was reasonable.

For these reasons, we find that a motion to suppress the drug evidence seized following the search incident to arrest would have been meritless. Martin's trial counsel had no duty to file a meritless motion. *See Dudley*, 766 N.W.2d at 620. Because Martin has failed to show counsel failed to perform an essential duty, we find his claim for ineffective assistance of counsel as it relates to the search of his person must fail.

***C. Pro Se Claims*.**

In his pro se supplemental briefs, Martin sets forth various statements and assertions. We review his arguments with the following in mind: "When a party, in an appellate brief, fails to state, argue, or cite to authority in support of an issue, the issue may be deemed waived." *State v. Adney*, 639 N.W.2d 246, 250 (Iowa Ct. App. 2001). A party's failure in a brief to cite authority in support of an issue may be deemed waiver of that issue. Iowa R. App. P. 6.903(2)(g)(3) (stating the argument section shall include "[a]n argument containing the appellant's contentions and the reasons for them with citations to the authorities relied on and references to the pertinent parts of the record . . . [and f]ailure to cite authority in support of an issue may be deemed waiver of that issue"); *see also State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997); *Metro. Jacobson Dev. Venture v. Bd. of Review*, 476 N.W.2d 726, 729 (Iowa Ct. App. 1991). A random mention of an issue, without elaboration or supportive authority, is not sufficient to raise an issue for review. *EnviroGas, L.P. v. Cedar Rapids/Linn Cnty. Solid Waste Agency*, 641 N.W.2d 776, 785 (Iowa 2002) (citing *Soo Line R.R. v. Iowa*

Dep't of Transp., 521 N.W.2d 685, 689 (Iowa 1994)). We do not consider conclusory statements not supported by legal argument. *See*, *e.g*., *Baker v*. *City of Iowa City*, 750 N.W.2d 93, 103 (Iowa 2008) (holding that a party's "conclusory contention" was waived where the party failed to support it with an argument and legal authorities); *State v*. *Piper*, 663 N.W.2d 894, 913-14 (Iowa 2003), *overruled on other grounds by State v*. *Hanes*, 790 N.W.2d 545, 551 (Iowa 2010), (concluding the defendant waived consideration of the merits of his claims on appeal which were presented as one-sentence conclusions without analysis); *McCleeary v*. *Wirtz*, 222 N.W.2d 409, 417 (Iowa 1974) (holding that a "subject will not be considered" where a "random discussion" is not supported by a legal argument and citation to authority); *see also United States v*. *Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("[a] skeletal 'argument', really nothing more than an assertion, does not preserve a claim. . . . Judges are not like pigs, hunting for truffles buried in briefs.").

Pro se or not, parties to an appeal are expected to follow applicable rules. It has long been the rule that procedural rules apply equally to parties who are represented by counsel and to those who are not. Pro se parties receive no preferential treatment. *See Hays v*. *Hays*, 612 N.W.2d 817, 819 (Iowa Ct. App. 2000). "The law does not judge by two standards, one for lawyers and the other for lay persons. Rather, all are expected to act with equal competence. If lay persons choose to proceed pro se, they do so at their own risk." *Metro*. *Jacobson Dev*. *Venture*, 476 N.W.2d at 729. Although this may seem harsh to a pro se litigant, it is justified by the notion that appellate judges must not be cast in

the role of advocates for a party who fails to comply with court rules and inadequately presents an appeal. *See Piper*, 663 N.W.2d at 913-14.

Applying the above, we do not consider Martin's pro se arguments that we find to be conclusory, lacking citation to legal authority, or lacking reference to pertinent parts of the record, and to set forth those arguments here would serve no useful purpose. That having been said, we do address Martin's claim that his *Alford* plea to the credit card fraud charge lacked a factual basis because we find the record here is sufficient to address this claim on direct appeal. *See Braggs*, 784 N.W.2d at 34.

The district court relied upon the minutes of testimony attached to the trial information in the credit card fraud case in finding a factual basis existed to accept his *Alford* plea to the charge. The minutes of testimony detail that the bank's witnesses would testify that five false deposits were made into Martin's bank account via an ATM in August 2010. Specifically, Martin, using his VISA/debit card, electronically reported to the ATM that he had deposited five hundred dollars, five separate times, when all he actually deposited were empty envelopes. The claimed deposits allowed Martin to withdraw four hundred dollars from the ATM that he did not have in his account. The minutes also detail that an officer would testify substantially in accordance with his report, attached to the minutes. The report states Martin initially reported to the bank that his debit card had been stolen and another person had made the false deposits and withdrawals, but ultimately he confessed he made the false deposits in order to get money, a scam he learned while he was in jail. These facts clearly support the credit card fraud charge. Reviewing the record as a whole, we agree with the

district court that a factual basis existed to support Martin's *Alford* plea to the credit card fraud charge. We therefore affirm on this issue.

Additionally, we find Martin sufficiently preserved his claim that his trial counsel was ineffective for failing to resist the State's motion to amend the trial information. However, because we find the record here is insufficient to address this claim on direct appeal, we preserve it for further postconviction relief proceedings.

IV. Conclusion.

For the reasons stated above, we affirm Martin's judgments and sentences entered following his guilty pleas and preserve one of Martin's pro se claims for further postconviction relief proceedings.

AFFIRMED.