**IN THE COURT OF APPEALS OF IOWA**

No. 3-211 / 12-0686
Filed April 24, 2013

**STATE OF IOWA,**
Plaintiff-Appellee,

**vs.**

**DAMIEN NEWSOME,**
Defendant-Appellant.

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Appeal from the Iowa District Court for Polk County, Robert B. Hanson (motion to suppress) and Robert A. Hutchison (trial and sentencing), Judges.

A defendant appeals his conviction for possession with intent to deliver a controlled substance. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Tyler J. Buller, Assistant Attorney General, John Sarcone, County Attorney, and Mark Taylor, Assistant County Attorney, for appellee.

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

**VOGEL, P.J.**

Damien Newsome appeals his conviction of possession with intent to deliver a controlled substance, to-wit crack cocaine, in violation of Iowa Code section 124.401(1)(c) (2011). He claims the district court erred in overruling his motion to suppress because the stop of the vehicle he was a passenger in was without articulable, reasonable suspicion. He also claims there was insufficient evidence to overcome a motion for judgment of acquittal as to whether he constructively possessed the drugs. Finally, he claims his constitutional right of confrontation was violated. In the alternative to his specific arguments, he makes an umbrella claim of ineffective assistance of counsel should we find any argument unpreserved. We affirm.

## I. Background Facts and Proceedings

In April 2011, after drugs—crack cocaine and heroin—were found in Darien Lucas's apartment when Newsome was present, Newsome agreed to cooperate with the Polk County Attorney's Office, by providing information about drug dealing. Even before entering into the proffer agreement, Newsome outlined to law enforcement the process of how he and others were bringing drugs from Chicago to Des Moines on the bus routes. In July, law enforcement learned that Newsome was still involved in the transportation of drugs, through the information obtained from two confidential informants, Lucas and an "unwitting source." Newsome was arrested and convicted of possession of a controlled substance with intent to deliver cocaine based crack, in violation of Iowa Code section 124.401(1)(c)(3), a class "C" felony, after a stipulated trial on the minutes of evidence. In a previously filed motion to suppress evidence he

asserted the evidence was obtained as a result of an illegal search and seizure. In denying the motion to suppress, the district court made the following findings of fact:

> On July 29, 2011, Officer Chad Nicolino of the Des Moines Police Department received a tip from a confidential informant that defendant, Damien Newsome, would be arriving on either the Greyhound bus or Megabus from Chicago at around 11:00 p.m., carrying an unknown quantity of crack cocaine. Officer Nicolino was familiar with both defendant and the confidential informant, Darien Lucas, from an earlier narcotics investigation. In the course of this earlier investigation, defendant was found to be in possession of crack cocaine and heroin and agreed to proffer with law enforcement. Defendant told law enforcement he was involved in the transportation of crack cocaine and heroin from Chicago to Des Moines, using either the Greyhound bus or the Megabus, and that Darien Lucas was also involved.
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> Lucas was later arrested, and also agreed to proffer with law enforcement, which led to the aforementioned tip about defendant's activities on the night of July 29, 2011. Prior to July 29, Lucas had supplied information to law enforcement in one other case that had led to a search warrant and arrest. He had also given information regarding two other cases that were active at the time, but had not yet led to any arrests. The information Lucas passed on to Officer Nicolino on July 29 was based on information Lucas was receiving that night from an unwitting source—someone who thought they were assisting Lucas in coordinating a drug deal and did not know he was cooperating with law enforcement. As of July 29, the Des Moines Police Department had not opened any cases, executed any search warrants, or made any arrests based on information from this particular unwitting source.
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> After receiving the tip from Lucas, Officer Nicolino contacted Officer Brady Carney, also of the Des Moines Police Department, who was on patrol at that time. At the direction of Officer Nicolino, Officer Carney and his partner Officer Trimble traveled to the area of Fourth and Walnut Street in downtown Des Moines, near the stops for the Greyhound bus and the Megabus and waited for further information. As the officers monitored the bus stops, Lucas remained in contact with Officer Nicolino regarding when defendant would arrive and how the officers could identify him. At one point, Lucas told Officer Nicolino that defendant would be picked up by a red or maroon minivan with a white female driver and a black male passenger. He also clarified that defendant would arrive on the Megabus, not the Greyhound bus, and told Officer Nicolino that the

> bus was running late and would arrive around 11:45 p.m., rather than at 11:00 p.m. as he had previously reported.
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> Officer Nicolino passed all of this information on to Officer Carney as he received it from Lucas. While patrolling near the bus stop, Officer Carney observed a red van with a white female driver and a black male passenger parked directly across the street from the bus stop. This van left the area briefly at around 11:10 p.m., and Lucas reported this to Officer Nicolino. At approximately 11:45 p.m., Lucas told Officer Nicolino the Megabus had arrived and defendant was in the red van, leaving the area of Fourth and Walnut. Officer Carney and Officer Trimble observed the red van heading east on Walnut Street, away from the bus stop, and initiated a traffic stop just across the Walnut Street bridge at East First and Walnut.
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> As Officer Carney approached the van, he observed that the passenger in the backseat later identified as defendant, appeared to be moving around. Officer Carney ordered defendant to put his hands up, and had to repeat this command several times before defendant complied. Defendant was ordered out of the van and identified as Damien Newsome. Officer Carney ordered the two front-seat passengers out of the van as well, entered the van, and observed a bag of what appeared to be crack cocaine on the floor directly below where defendant had been sitting.
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> After receiving *Miranda* warning, defendant stated someone had thrown the drugs at him from the front seat and they were not his. Defendant was then handcuffed and placed in the patrol car. The officers retrieved the plastic bag from the back seat of the van for field testing, and the contents later tested positive as crack cocaine. Defendant was charged with Possession of a Controlled Substance with Intent to Deliver and Failure to Possess a Tax Stamp.

Newsome appeals.

## II. Ineffective Assistance of Counsel

Newsome argues to the extent any of his claims are waived or not preserved, his trial counsel was ineffective for allowing him to waive the issue or failing to preserve the issue. A claim of ineffective assistance of counsel is reviewed de novo. *State v*. *Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011). "To establish an ineffective-assistance-of-counsel claim, a defendant must prove by a preponderance of the evidence: (1) trial counsel failed to perform an essential

duty, and (2) prejudice resulted." *Id*. "Ordinarily, ineffective assistance of counsel claims are best resolved by postconviction proceedings to enable a complete record to be developed and afford trial counsel an opportunity to respond to the claim." *State v*. *Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004). However, if the record on direct appeal is sufficient we can consider the claims. *State v*. *Tate*, 710 N.W.2d 237, 240 (Iowa 2006). We will address Newsome's ineffective-assistance-of-counsel claims under this framework as they arise after each specific claim.

**III. Motion to Suppress**

Newsome argues the district court erred in denying his motion to suppress because the stop of the vehicle violated his Iowa and United States constitutional right to be free from unreasonable searches and seizures. *See* U.S. Const. amend. IV, XIV; Iowa Const. art. I, § 8. We have noted the search and seizure provisions of the United States and Iowa Constitutions contain identical language. Therefore, when as here, a defendant raises both federal and state constitutional claims, we have discretion to consider the claims simultaneously. *State v*. *Pals*, 805 N.W.2d 767, 771-72 (Iowa 2011).

We review constitutional issues de novo. *State v*. *Vance*, 790 N.W.2d 775, 780 (Iowa 2010). On a suppression ruling we independently evaluate the totality of the circumstances found in the record, including the 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 district court's findings of fact due to its ability to assess the credibility of the witnesses. *State v*.

*Carter*, 696 N.W.2d 31, 36 (Iowa 2005). We are not, however, bound by those findings. *Id.*

Newsome's argument has two subparts: first the argument against the validity of the stop, and second, whether the information relied upon by the police should have been considered in determining whether the stop was proper. Because the received information was part of the basis for the validity of the stop, we will address that argument first.

**A. Information Relied upon by Police to Justify the Stop**

Newsome makes three main claims regarding the information relied upon by the police: (1) the information obtained from him in April was too remote in time to support a finding of reasonable suspicion as to the stop in July, (2) Lucas and the "unwitting source" were not sufficiently trustworthy to justify reliance upon to obtain information, and (3) Officer Carney's observations did not corroborate the information from those informants.

First, Newsome claims any information given from him to law enforcement was too stale at the time it was relied on by law enforcement. Newsome never makes a specific statement of exactly what information he gave to law enforcement, but rather makes the general statement he "agreed to cooperate with law enforcement in April of 2011. The warrantless search in question occurred on July 29, 2011." First, it is important to note Newsome is attempting to challenge the "execution of a warrantless search" of the vehicle in which he was a passenger by arguing the information he previously had provided was stale. As discussed below, Newsome cannot challenge the search of the vehicle, just the stop. Even if we assume Newsome is arguing the stop/seizure was

illegal because it was based on stale information, neither issue was ever brought before the district court and is therefore not preserved for our review. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

However, Newsome makes the general argument anything not preserved should be analyzed as an ineffective assistance of counsel claim. We must therefore decide whether our record is sufficient to decide if failing to object on staleness grounds was a breach of an essential duty of trial counsel causing Newsome prejudice. Our supreme court has held that while the timeliness of information is important in a probable cause determination "time is not alone determinative[,] it is one of several factors to be considered in ascertaining the existence or nonexistence of probable cause for issuance of a search warrant." *State v. Rockhold*, 243 N.W.2d 846, 850 (Iowa 1976). A staleness issue is resolved by consideration of all factors present in a particular situation. *State v. Paterno*, 309 N.W.2d 420, 423 (Iowa 1981).

According to the district court's order, Newsome "[t]old law enforcement he was involved in the transportation of crack cocaine and heroin from Chicago to Des Moines, using either the Greyhound bus or the Megabus, and that Darien Lucas was also involved." Any information given from Newsome to police would have been known by them already, particularly in light of the fact Newsome had previously been arrested for selling crack cocaine and heroin. He admitted to police during its investigation before the proffer agreement, the drugs were being transported in from Chicago on the Greyhound or Megabus. Moreover,

Newsome was working with Lucas, who later relayed the same information regarding the bus transportation to the police. We find by looking at all of the factors surrounding the challenged information, even though approximately three months had passed between Newsome's detailing the drug transport and the use of the information, it was not so stale as to not be relied upon. The arguably stale information from April was both redundant and only a small portion of the total information relied upon when officers stopped the van in July. Therefore, because counsel has no duty to raise a meritless claim, Newsome's counsel was not ineffective for failing to assert staleness as a defense in the motion to suppress. *See State v*. *Dudley*, 766 N.W.2d 606, 620 (Iowa 2009).

The next issue regarding information provided to police is whether Lucas and the "unwitting source" were sufficiently reliable to provide a basis for the stop of the vehicle. Newsome and the State disagree on the test used to determine the reliability of sources. The probable cause needed for a warrantless search of a vehicle must be based on facts that would justify a magistrate to issue a warrant. *State v*. *Hoskins*, 711 N.W.2d 720, 729 (Iowa 2006). Contrary to Newsome's assertion on appeal, we look to the totality of the circumstances available to police when determining if probable cause based on a confidential informant exists. *Id.* at 726. When evaluating the reliability of the informant, the court looks to the informant's past performance and any discrepancies and consistencies between the information provided by the informant and the events that transpired. In this case, the informant's information that Newsome had crack cocaine in his possession after riding to Des Moines on the Megabus was consistent with the information Newsome had previously provided, along with the

visual corroboration of the officers of the details of the events. *See id.* at 729. The claim is meritless so counsel was not ineffective.

The third claim Newsome makes regarding the reliability of information is that Officer Carney's observations did not corroborate facts germane to effectuating a warrantless search. Again, Newsome cannot challenge the search of the vehicle. However, even if we assume Newsome is arguing the stop/seizure was illegal because of a lack of reliable information, his argument fails. We find Newsome's reliance on *State v*. *Walshire*, misplaced. 634 N.W.2d 625, 626 (Iowa 2001). The court in *Walshire* found, "The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." *Id.* at 627 (*citing Florida v*. *J.L*., 529 U.S. 266, 272 (2000)).

First, unlike *Walshire*, the information did not come from an anonymous tip; it came from an informant known to have information regarding crack/cocaine trafficking. Second, the information provided to law enforcement goes beyond mere description of an event as it was occurring and offered additional veracity because of its predictive qualities. The distinction that this was a "concealed crime" rather than one observable by the public is irrelevant as here, unlike the anonymous public informant in *Walshire*, the informant was in an "intimate or confidential relationship" to support the accuracy of the observation. *Walshire*, 634 N.W.2d at 628. This argument must also fail and all of the information gathered by law enforcement was sufficiently reliable.

**B. Stop of the Vehicle**

Newsome disagrees with the State and the district court on the applicable standard and level of suspicion necessary for this traffic stop. A passenger in a motor vehicle may challenge the validity of a stop of the vehicle but not the search of the vehicle because he has no possessory interest in it. *State v. Nucaro*, 614 N.W.2d 856, 859 (Iowa Ct. App. 2000) ("Having already denied ownership of the car and the items in it, Nucaro cannot claim a legitimate expectation of privacy in the invaded place. *See Rakas v. Illinois*, 439 U.S. 128 (1978).").[1]

Generally, unless an exception applies a seizure must be conducted pursuant to a warrant to be reasonable. *State v. Kreps*, 650 N.W.2d 636, 641 (Iowa 2002). One such exception allows an officer to briefly stop a vehicle for investigatory purposes when "the officer has a reasonable, articulable suspicion that a criminal act has occurred, is occurring, or is about to occur." *Vance*, 790 N.W.2d at 780. This means for an investigatory stop to comply with the protections of the Fourth Amendment, 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 to reasonably believe criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *Vance*, 790 N.W.2d at 781.

Here, the parties seem to blur the distinctions between reasonable suspicion and probable cause. However, the distinction here is unnecessary

[1] The State spends significant time in its brief discussing the automobile exception to the Fourth Amendment's warrant requirement for searches of vehicles. However, we will only address the issue raised before us, the propriety of the stop.

because the stop of the vehicle was clearly made with reasonable suspicion because the higher burden of probable cause was also met. As probable cause is a higher standard than reasonable suspicion, our determination that the stop was justified by probable cause subsumes a determination of reasonable suspicion. *See Kreps*, 650 N.W.2d at 642 (noting reasonable suspicion requires considerably less proof of than probable cause).

There was sufficient probable cause to stop the van in which Newsome was a passenger based on Officer Carney's observation, the information from Lucas, and Newsome's known—and previously admitted—status as a drug trafficker. *See State v*. *Pals*, 805 N.W.2d 767, 775 (Iowa 2010) ("Probable cause exists where the facts and circumstances within the officer's knowledge and of which he had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." (citations omitted)). The motion to suppress was properly denied.

**IV. Sufficiency of the Evidence**

Newsome next argues the district court erred in failing to enter a judgment of acquittal because there was not sufficient evidence Newsome constructively possessed the drugs. He frames this argument as a general "constructive possession" argument, but also that the district court denied him his Sixth Amendment right to confront his accusers and erred by wrongly considering certain prior bad act and hearsay evidence. All three of Newsome's arguments are either unpreserved or without merit.

### A. Constructive Possession

We review challenges to the sufficiency of evidence for correction of errors of law. *State v*. *Yeo*, 659 N.W.2d 544, 547 (Iowa 2003). We will uphold the verdict if there is substantial evidence to support it. *Id.* Evidence is substantial if it would convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. *Id.* We review the record in the "light most favorable to the State, including legitimate inferences and presumptions that may fairly and reasonably be deduced from the evidence in the record." *State v*. *Webb*, 648 N.W.2d 72, 76 (Iowa 2002).

Our supreme court has defined constructive possess as follows:

> [C]onstructive possession is "knowledge of the presence of the controlled substances on the premises and the ability to maintain control over them." In determining whether a defendant had constructive possession, we consider a number of factors. They include: incriminating statements made by the defendant, incriminating actions of the defendant upon the police's discovery of drugs among or near the defendant's personal belongings, the defendant's fingerprints on the packages containing drugs, and any other circumstances linking the defendant to the drugs.

*State v*. *Cashen*, 666 N.W.2d 566, 571 (Iowa 2003) (internal citations omitted).

Once the van was stopped, Newsome was observed making "furtive movements" and failed to comply with officer's repeated commands to raise his hands. The drugs were found on the floor of the van directly behind the front passenger seat—where Newsome was sitting and where his feet would have been. When confronted with the drugs, Newsome immediately and repeatedly

denied ownership of the drugs. There was sufficient evidence of the constructive possession factors to find Newsome possessed the drugs.[2]

**B. Confrontation Clause**

Next, Newsome argues the district court considered improper evidence by considering the statements of Lucas and the "unwitting source" because they were in violation of the Confrontation Clause and Iowa's rules of evidence. This argument was not made to the district court and is therefore not preserved for our review. *See Meier*, 641 N.W.2d at 537. Moreover, by agreeing to a stipulated trial on the minutes of evidence, including the testimony of Lucas, Newsome waived any objection to the testimony that would be offered. *See State v*. *Brown*, 656 N.W.2d 355, 360 (Iowa 2003) ("Generally, a stipulation to the admission of testimony at trial constitutes a waiver of any objection to the testimony raised prior to trial.").

However, Newsome argues in the alternative to issue preservation and waiver his trial counsel was ineffective for failing to preserve the issue and/or in waiving it. The record is not sufficient on direct appeal to address this issue because if Newsome had not stipulated to the use of Lucas's testimony and proceeded to trial, there is nothing in the record to show if Lucas could have been located and subpoenaed such that Newsome would have had the opportunity to confront him. This issue is preserved for any possible postconviction proceeding.

[2] Newsome only contest the elements of the offense that he possessed crack cocaine. Any arguments regarding the other elements of the offense are waived.

### C. Hearsay and Prior Bad Acts

Lastly, Newsome argues the district court erred in considering improper prior bad acts and hearsay evidence. These issues were also not decided by the district court and were waived by agreeing to the stipulated trial. However, we must address Newsome's alternative argument of ineffective assistance.

The hearsay claim against the out-of-court statements of Lucas and the "unwitting source" are easily disposed of. First of all, Newsome fails to identify which statements he claims are hearsay. Furthermore, none of the statements we can identify were used for the truth of the matter asserted; they were used to show why the officers conducted the stop of the vehicle. The statements are therefore not hearsay. *See State v*. *Baker*, 293 N.W.2d 568, 574-75 (Iowa 1980) (holding out-of-court statements offered for any relevant purpose, other than to prove the truth of the matter asserted, are not hearsay). Therefore, trial counsel was not ineffective for allowing Newsome to stipulate to the use of this evidence. Because counsel has no duty to raise a meritless claim, Newsome's counsel was not ineffective for failing to raise the argument. *See Dudley*, 766 N.W.2d at 620 (finding counsel has no duty to raise a meritless claim).

The final argument Newsome makes is whether trial counsel was ineffective for allowing the use of prior bad act evidence. Newsome did resist the State's motion to use some evidence under Iowa Rules of Evidence 5.404(b). However, this motion was never ruled on. Iowa Rule of Evidence 5.404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other

> purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The record before us shows the State's intention of using Newsome's prior drug involvement was not to prove propensity to commit the current crime, but to prove Newsome had knowledge the substance seized was crack cocaine and he knew the crack cocaine was in the van. *See State v*. *Henderson*, 696 N.W.2d 5, 11 (Iowa 2005) (holding evidence of a prior conviction of possession of marijuana was relevant in subsequent prosecution for same offense, for valid, non-character-related purpose of demonstrating defendant's knowledge that substance found in was marijuana). The prior admission by Newsome that he was involved in drug dealing shows the July incident, being found with the drugs by his feet, was not a mistake or accident. An objection against the use of this evidence would be meritless as it would be offered for a non-character reason. Therefore counsel is not ineffective for not objecting to the inclusion of the evidence.

## V. Conclusion

The motion to suppress was properly denied as there was both reasonable suspicion and probable cause to stop the vehicle based on the observations of the officers and the reliable information provided to them. There was sufficient evidence to show the drugs found where Newsome's feet were in the van supporting a finding of constructive possession by Newsome. The record before us is not sufficient to determine if counsel was ineffective in failing

to preserve and waiving a confrontation clause issue. We therefore preserve that issue alone. All other ineffective assistance claims are without merit.

**AFFIRMED.**