**IN THE COURT OF APPEALS OF IOWA**

No. 3-220 / 12-1177
Filed June 26, 2013

**CONRAD CALDWELL,**
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**
Respondent-Appellee.

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Appeal from the Iowa District Court for Linn County, Stephen B. Jackson Jr., Judge.

Conrad Caldwell appeals from the district court ruling denying his application for postconviction relief. **AFFIRMED.**

Wallace L. Taylor, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, Jerry Vander Sanden, County Attorney, and Robert Hruska, Assistant County Attorney, for appellee.

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

**BOWER, J.**

Conrad Caldwell appeals from the district court ruling denying his application for postconviction relief. Caldwell argues the district court erred in finding his counsel was not ineffective for failing to file a motion to suppress evidence. Because we find Caldwell's claim of ineffective assistance of counsel did not survive his guilty plea, we affirm.

## I. Background Facts and Proceedings

Conrad Caldwell was charged with and pleaded guilty to carrying weapons, in violation of Iowa Code section 724.4 (2009); possession of marijuana, in violation of section 124.401(5); and interference with official acts, in violation of section 719.1. Caldwell filed a pro se application for postconviction relief and counsel was appointed.[1] In his application, Caldwell argues his trial counsel was ineffective by failing to file a motion to suppress evidence.

The incident which led to Caldwell's arrest and eventual conviction occurred on March 2, 2010. On that date Caldwell took his car to Walmart for an oil change.[2] While performing the oil change, a Walmart employee observed a firearm in Caldwell's vehicle and called the police. Almost an hour after work began on Caldwell's vehicle, the police arrived. After a discussion with Caldwell, the police obtained permission to search under the front driver's seat of Caldwell's car. No firearm was located.

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[1] Counsel filed a recast application on his behalf.

[2] Caldwell was accompanied by his girlfriend, Molly Feldman. Feldman traveled in her own vehicle.

Subsequent to this search, as Caldwell began to remove his car from the oil change bay, his path was blocked by the arrival of an additional police officer. Caldwell was approached and informed that the police would like to search the rest of the vehicle. After a brief discussion Caldwell again consented to a search, this time to the area under the passenger seat. The officer began the search in the front seat but soon proceeded to an area behind the passenger seat. Objecting to the extension of the search beyond the front passenger seat, Caldwell entered the back seat of the car to stop the search. Caldwell was forcibly removed from the vehicle and placed under arrest.[3] Officers continued their search and located a firearm. Caldwell's car was subsequently impounded.

Philip Fontana was appointed to represent Caldwell, although they did not meet until Caldwell's pretrial conference. Caldwell testified at the postconviction relief trial that he did not understand at the time what a motion to suppress was and did not discuss the filing of such a motion with Fontana. Immediately prior to the pretrial conference, Fontana presented Caldwell with a plea offer that reduced his sentence to fifteen days on each count to run concurrently, plus a fine. Caldwell signed a written plea and waiver of rights.

## II. Standard of Review

We review postconviction relief applications which raise constitutional questions de novo. *Harrington v. State*, 659 N.W.2d 509, 519 (Iowa 2003).

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[3] Feldman was also arrested.

## III. Discussion

Caldwell's postconviction relief application raises a single issue: whether counsel was ineffective by failing to file a motion to suppress evidence. Before we can address the ineffective-assistance-of-counsel argument, we must determine whether Caldwell's arguments survive his guilty plea.

### A. Claim Survival After Plea

Caldwell's application for postconviction relief is complicated by the fact he entered a guilty plea. He argues, however, his counsel was ineffective before the plea was entered. In such instances we examine the facts and circumstances of the case to determine whether counsel breached a duty prior to the plea, and whether the breach rendered the plea unintelligent or involuntary. *See State v. Carroll*, 767 N.W.2d 638, 644 (Iowa 2009). The analysis is substantially similar to other ineffective-assistance-of-counsel cases; Caldwell must prove his counsel breached an essential duty and, but for the breach, he would have proceeded to trial. *Id.*

Our supreme court provided the analytical framework to be used in *State v. Utter*, 803 N.W.2d 647, 652–55 (Iowa 2011). First, Caldwell must show his counsel's errors were so substantial that he was effectively without the assistance of counsel. *Utter*, 830 N.W.2d at 652. Because counsel had no duty to pursue a meritless issue, we first examine whether a motion to suppress would have been successful. *Id*.

**B. Merit of Motion to Suppress**

Caldwell argues the search of his vehicle was beyond the scope of consent, was not a valid search incident to arrest, and was not a valid inventory search. He also argues probable cause to search was limited to the area under the driver's seat.

Our supreme court, noting the Fourth Amendment does not require a warrant in all cases, has long recognized automobiles are to be treated differently for purposes of the warrant requirement. *See State v. Olsen*, 293 N.W.2d 216, 218 (Iowa 1980). A search warrant is not required when probable cause exists as a car may be moved and evidence lost. *Id.* The inherent mobility of the vehicle creates an exigency which permits a warrantless search when probable cause exists. *See State v. Vance*, 790 N.W.2d 775, 791 (Iowa 2010). The issue before us is whether probable cause existed to search Caldwell's vehicle, and if so, to what extent.

Probable cause to search an automobile exists "when the facts and circumstances would lead a reasonably prudent person to believe the automobile contains contraband." *State v. Dawdy*, 533 N.W.2d 551, 556 (Iowa 1995). We employ the same stringent standard when reviewing a warrantless search as we would when reviewing the issuance of a search warrant. *State v. Shea*, 218 N.W.2d 610, 614 (Iowa 1974). The search is good or bad based upon the state of affairs at the time the search began; success or failure does not impact the probable cause question. *State v. Swartz*, 244 N.W.2d 553, 555 (Iowa 1976).

We are to independently evaluate the totality of the circumstances as reflected by the entire record. *State v. Maddox*, 670 N.W.2d 168, 171 (Iowa 2003).

Probable cause may be found upon an informant's tip, provided the tip is sufficiently reliable. *See United States v. Caswell*, 436 F.3d 894, 898 (8th Cir. 2006). A totality-of-the-circumstances examination is required to determine whether the tip is reliable enough to support probable cause. *United States v. Koons*, 300 F.3d 985, 990 (8th Cir. 2002). Unproven informants are presumed to be less reliable than informants with track records of success. *See United States v. Nolen*, 536 F.3d 834, 840 (8th Cir. 2008). The Supreme Court has also recognized that known informants are presumed to be more reliable because they can be directly assessed by law enforcement and held to account for inaccuracies or falsehoods. *Id.* at 839–40. "It is well-settled that the personal and recent knowledge of named eyewitnesses is sufficient to establish probable cause." *United States v. Dukes*, 432 F.3d 910, 913 (8th Cir. 2006).

In the present case, a Walmart employee observed a firearm in Caldwell's vehicle, which was reported to police. The initial responding officer, Brandon Boesenberg, was given incomplete or inaccurate information from someone other than the employee who personally observed a firearm. Officer Boesenberg then conducted a consensual search of the driver's side seat area. Following the consensual search, Officer Kenneth Washburn, then a Lieutenant with the police department, arrived and spoke directly with the employee who observed the gun. Officer Washburn learned the gun had been seen in the pocket behind the passenger's seat. This is the area he searched, and the area Caldwell attempted

to prevent Officer Washburn from searching. The informant was personally available to Officer Washburn, and the informant's information was based upon personal observation. Officer Washburn was able to assess the informant's credibility and could have held the informant accountable for any false or misleading information. Based upon these factors, we find Officer Washburn had probable cause to search the pocket behind the passenger's seat and the automobile exigency excused the warrant requirement.

The motion to suppress would have been meritless, and Caldwell's counsel was under no duty to pursue it. Caldwell is unable to establish his counsel acted in a way that denied him effective assistance of counsel and his claims do not survive his plea.[4]

**AFFIRMED.**

[4] The district court found that Caldwell's claims survived his plea. Though we disagree, the result is identical. The search was supported by probable cause, and the warrant requirement was excused by the automobile exigency exception. Caldwell's counsel was not ineffective for failing to file the motion, and Caldwell would be unable to establish prejudice because the motion would have been denied.