

IN THE COURT OF APPEALS OF IOWA

No. 3-264 / 12-1427
Filed April 10, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

VILAYCHITH FILA KHOUANMANY,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert,
Judge.

A defendant appeals her conviction claiming counsel was ineffective in
failing to file a motion to suppress. **AFFIRMED.**

Erin M. Carr of Carr & Wright, P.L.C., Des Moines, for appellant.

Vilaychith Khouanmany, Mitchellville, appellant pro se.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney
General, John Sarcone, County Attorney, and Andrea Petrovich, Assistant
County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

MULLINS, J.

Vilaychith Khouanmany appeals following her guilty plea to possession of a controlled substance with intent to deliver as a second or subsequent offender, in violation of Iowa Code section 124.401(1)(d) (2011). On appeal she claims her attorney rendered ineffective assistance by failing to file a motion to suppress the evidence obtained following a stop of her vehicle.

Police received a tip of a strong smell of marijuana emanating from a room at a local hotel. Police responded to the hotel room and smelled fresh marijuana from outside the door and from the two rooms on either side. When the police knocked on the door, they received no response. The officers kept the room under surveillance, and less than five minutes after knocking on the door, officers saw two women running from the room. Khouanmany, one of those women, proceeded to a vehicle with a suitcase and attempted to drive away. However, police intervened and prevented her from leaving the parking lot. They removed her from the car and again smelled fresh marijuana. When they searched the vehicle, they found a large quantity of marijuana in the suitcase, and after obtaining a search warrant and searching the hotel room, they also found marijuana in the toilet.

Khouanmany was charged with, among other things, possession of a controlled substance with the intent to deliver as a second or subsequent offender. At the plea hearing defense counsel stated to the court:

One other just housekeeping matter for the record, Judge, before we go forward. Today is the date set for the 40th day to file motions in this particular matter, and I did want to just make record that we had—I had talked with my client about filing a motion to

suppress in this case. We had discussed that. It's my understanding my client also understands that we are not going to file that. I do have it prepared today, but we are not going to file that as we are entering the plea on, well, today.

Later during the plea colloquy with Khouanmany, the court asked:

Ms. Khouanmany, are you fully satisfied with the advice and services you have received from your attorney?

The Defendant: Yes.

The Court: Is there anything you have asked of [defense counsel] or others in his office to do for you that they have not done to your satisfaction?

The Defendant: Oh, he's done everything for me.

The Court: Now, he has mentioned that today is the day—deadline for him to file a motion to suppress, which would seek the exclusion of some part or all of the evidence that the State has against you. Do you understand that?

The Defendant: Yes.

The Court: And do you understand that if I accept your plea of guilty today, you would be waiving or giving up your right to challenge the State's evidence through that motion to suppress?

The Defendant: Yes.

The Court: And is [defense counsel] correct that you have made the decision that he not file that motion and that you accept the State's plea offer in this case?

The Defendant: Yes.

The Court: You understand you have the right to take this case through to trial and have the Court determine whatever the issues might be in that motion to suppress?

We'll try it again. You understand you have the right to proceed to trial, and in the meantime, have the Court determine whatever the issues might be in that motion to suppress. Do you understand that?

The Defendant: Yes.

The Court: You have decided to have your attorney not file that motion and proceed on the guilty plea that we've been talking about this afternoon. Is that right?

The Defendant: The one that's being dismissed?

The Court: No. You've decided to not file the motion to suppress, not go to trial, and plead guilty. Is that correct?

The Defendant: Yes.

The Court: Okay. And that's still what you want to do?

The Defendant: Yes.

Khouanmany now claims counsel was ineffective in failing to file the motion to suppress.¹

To prove counsel was ineffective, Khouanmany has to prove counsel failed to perform an essential duty and prejudice resulted. See *State v. Clay*, 824 N.W.2d 488, 495 (Iowa 2012). If she fails to prove either prong, her claim will fail. See *id.* Normally, ineffective-assistance claims are preserved for possible postconviction relief proceedings, but this claim can be resolved on direct appeal as the record is adequate to address it. See *id.* at 494.

Because we find any motion to suppress based on the stop of Khouanmany's vehicle would have been denied, Khouanmany cannot prove counsel failed to perform an essential duty. See *State v. Dudley*, 766 N.W.2d 606, 620 (Iowa 2009) (“[C]ounsel has no duty to raise an issue that has no merit.”). As the State points out in its brief, the police needed only reasonable suspicion to stop the vehicle. See *State v. Kreps*, 650 N.W.2d 636, 641 (Iowa 2002) (“One exception to the warrant requirement allows an officer to stop an individual or vehicle for investigatory purposes based on a reasonable suspicion that a criminal act has occurred or is occurring.”).

¹ Khouanmany acknowledged on the record she made the decision to not file a motion to suppress. She does not claim that her decision was made unknowingly or unintelligently or that counsel otherwise failed to properly advise her regarding the motion to suppress. See *State v. Carroll*, 767 N.W.2d 638, 644 (Iowa 2009) (explaining that to challenge a guilty plea based on ineffective assistance of counsel a defendant must show that such plea was involuntary or unintelligent because of counsel's failure). She accepted a favorable plea agreement in an apparent exchange for a decision to not pursue a motion to suppress. We choose to resolve this case on grounds other than her failure to account for her participation in the decision to waive filing a motion to suppress.

The police had a tip that a strong smell of marijuana was emanating from a specific hotel room. They investigated the tip, and trained and experienced officers confirmed the smell of fresh marijuana. No one answered the door when the officers knocked, and they could not hear anyone inside. Yet five minutes later, two women came running out of the room, one of them with a suitcase, and headed in different directions. Based on this information the officer had a reasonable suspicion to stop Khouanmany's vehicle as she attempted to drive away.

The purpose of the stop is to confirm or dispel the officer's suspicions. *Id.* Once the vehicle is stopped, the officers may order the driver out of the vehicle without offending the Fourth Amendment. *Pennsylvania v. Mimms*, 434 U.S. 106, 111 n.6 (1977) (“[T]he police officers may order the driver to get out of the vehicle without violating the Fourth Amendment’s proscription of unreasonable searches and seizures.”). Khouanmany makes no claim that we should interpret the Iowa Constitution differently. When Khouanmany was removed from the vehicle, the officers could once again smelled a strong odor of fresh marijuana emanating from the vehicle, which justified the subsequent search of the suitcase the officers saw Khouanmany remove from the hotel room. *See State v. Eubanks*, 355 N.W.2d 57, 59 (Iowa 1984) (finding the officer had probable cause to search the vehicle and its contents when the officer smelled the odor of marijuana emanating from the vehicle).

As the stop of Khouanmany's vehicle and subsequent search was valid, counsel had no duty to file a meritless motion to suppress the evidence obtained

from the search. See *Dudley*, 766 N.W.2d at 620. In addition, both counsel and the court discussed the motion to suppress with Khouanmany at the guilty plea proceeding, and she indicated she understood and approved of counsel's decision not to file the motion. Khouanmany's claim that counsel was ineffective in failing to file the motion to suppress is rejected.

AFFIRMED.