IN THE COURT OF APPEALS OF IOWA

No. 3-429 / 11-0180
Filed June 26, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

FLAVIAN MCCLENDON HILL,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, D.J. Stovall (Motion to Suppress) and Robert B. Hanson (Trial), Judges.

Flavian Hill appeals from his conviction after a stipulated bench trial for possession of a controlled substance with intent to deliver, failure to possess a tax stamp, and two counts of assault while participating in a felony. **AFFIRMED.**

Nathaniel A. Tagtow of Tagtow & Lockwood, P.L.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Michael L. Bennett, Assistant Attorney General, John Sarcone, County Attorney, and Stephanie Cox, Assistant County Attorney, for appellee.

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

POTTERFIELD, J.

Flavian Hill appeals from his conviction for possession of a controlled substance with intent to deliver, failure to possess a tax stamp, and two counts of assault while participating in a felony. He argues the district court improperly denied his motion to suppress. In a pro se brief, he argues the State committed prosecutorial misconduct and his counsel was ineffective in several ways. We affirm, finding the district court properly denied the motion to suppress, the prosecutorial misconduct claim is not preserved for our review, and the record is insufficient for our review of Hill's ineffective-assistance-of-counsel claims.

I. Facts and proceedings.

On August 19, 2010, Des Moines Police Officer Scarlett received a call from an informant with concerns about activity occurring in a vehicle in a Radio Shack parking lot. The informant reported two African-American males in the vehicle and that the vehicle had "a lot of short-term traffic, people coming up and approaching the Avalanche for a short period and leaving." The informant said this was not the first time he had seen the vehicle and that activity. Scarlett was not on duty that day, so he passed this information to another officer—Officer Mock, who was on duty.

Mock and another officer, Officer Santizo, arrived at the parking lot and parked directly behind the vehicle matching the informant's description. Mock approached the driver's side of the vehicle, Santizo approached the passenger side. Hill was seated in the passenger side of the vehicle; he was the sole occupant. Santizo requested Hill's identification and returned to the squad car to run a check of the identification through the LENCIR system. Mock stayed on

the driver's side of the vehicle and observed Hill. He observed Hill moving quickly in the car and sweating profusely. Hill attempted to initiate conversation with Mock. These observations indicated to Mock that Hill was nervous.

Mock requested Hill step out of the vehicle because, based on his behavior, Mock believed Hill could be armed. Mock told Hill to face the car and place both of his hands above his head with his fingers interlaced. Mock held Hill's hands; Mock felt Hill start to pull his hands apart and tense up before he could start the pat-down search. Mock responded by attempting to handcuff Hill, when Hill pushed off the vehicle and turned to face Mock. Hill then pushed Mock and began to run away. The second officer returned to Hill's vehicle and attempted to gain control of Hill. Hill pushed the second officer and fled. Both officers pursued Hill. Eventually they caught up with him and used a taser to subdue Hill and take him into custody.

Police searched Hill when he arrived at the station and found a bag containing two grams of heroin separated into several smaller baggies and a stack of money in Hill's pockets. Hill was charged by trial information with four counts: possession of a controlled substance with intent to deliver, failure to possess a tax stamp, and two counts of assault while participating in a felony.

Hill filed a motion to suppress the heroin and any statements, arguing they were fruit of an illegal search. Hill argued the officers lacked reasonable suspicion or probable cause for the stop and warrantless search of Hill, the stop and warrantless search was based on an uncorroborated tip which was insufficient to constitute reasonable suspicion, and the arrest was made without probable cause.

The court held a hearing on the motion on December 17, 2010. Officer Scarlett testified regarding the information provided by the informant prior to the officers approaching the vehicle. He testified the informant was a prosecuting attorney with the drug and gang unit in Polk County who was working out across the parking lot from the vehicle, so he had an extended time to observe the situation. Scarlett had known the prosecutor for over four years, had worked on cases and attended trainings with the attorney, and knew him to be knowledgeable in his field—especially regarding search and arrest warrants. Officer Mock also testified, stating he initiated the stop on the evidence supplied by Scarlett. He also described the events of the stop and testified that he initiated the pat-down search out of concern for his safety after observing Hill's behavior.

The district court denied the motion to suppress, finding the officers had reasonable suspicion to initiate the stop, and Officer Mock properly conducted a pat-down search of Hill based on fear for his safety.

Hill stipulated to trial on the minutes, executing a written waiver of jury trial and stipulation to the minutes. Trial was held January 24, 2011. The court engaged Hill in a colloquy and determined his waiver was made knowingly, intelligently, and voluntarily. Based upon the minutes of testimony, the court found Hill guilty of all four counts, and sentenced him to concurrent terms not to exceed ten years on count one and three separate indeterminate five-year terms on counts two, three, and four. Hill appeals from these proceedings.

II. Analysis.

We review the denial of a motion to suppress evidence claimed to be obtained by an illegal search or seizure de novo. *State v. Pals*, 805 N.W.2d 767, 771 (Iowa 2011). We review ineffective-assistance-of-counsel claims de novo. *State v. Buchanan*, 800 N.W.2d 743, 747 (Iowa Ct. App. 2011).

A. Motion to suppress.

Hill first argues the court improperly denied his motion to suppress. He argues the officers did not have sufficient cause to conduct an investigatory stop or to conduct a pat-down search.

1. Investigatory stop. Both parties agree Hill was stopped at the time the officers approached his vehicle and asked for his identification. An officer may stop an individual or vehicle where there is reasonable suspicion that a criminal act has occurred or is occurring. *State v. Kreps*, 650 N.W.2d 636, 641 (Iowa 2002). In order to conduct an investigatory stop, an officer must be able to point to "specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant that intrusion. In determining the reasonableness of the particular search or seizure, the court judges the facts against an objective standard." *Id.* Reasonable suspicion is a lesser standard than probable cause; reasonable suspicion can arise from information that is less reliable than probable cause. *State v. Walshire*, 634 N.W.2d 625, 626 (Iowa 2001).

An anonymous call without any other indicia of reliability cannot form the basis for reasonable suspicion for a stop. *Id.* The amount of time an officer has known an informant is probative as to whether the informant is reliable, as is the

informant's maturity level and reliability in the past. *State v. Hoskins*, 711 N.W.2d 720, 727 (Iowa 2006). Also probative to reliability is whether other corroborative evidence exists to the informant's information—for example, finding the vehicle in the location stated by the informant. *See id.*

Here, the police knew the informant and that he was a reputable source of information. Further, when the police arrived at the described location, they confirmed the vehicle matched the description and location provided by the informant. We find reasonable suspicion that a criminal act had occurred or was occurring existed for the stop of Hill by the police officers. *See Kreps*, 650 N.W.2d at 641.

2. Pat-down search. Hill also argues the police officers did not have a reasonable belief he was armed to order him out of the vehicle and subject him to a pat-down search. "[A]n officer may make a protective, warrantless search of a person when the officer, pointing to specific and articulable facts, reasonably believes under all the circumstances that the suspicious person presents a danger to the officer or to others." *State v. Riley*, 501 N.W.2d 487, 489 (Iowa 1993). We evaluate the officer's actions according to what a reasonably prudent officer would believe in the situation. *Id.* Furtive movements alone may justify a pat-down search by an officer. *Id.* However, mere presence in a neighborhood known for drug activity alone does not. *State v. Bergmann*, 633 N.W.2d 328, 333 (Iowa 2001).

Here, the officer observed Hill's nervousness, jerky behavior, and his attempts to engage the officer in unsolicited conversation. This, coupled with the

suspicion that Hill was selling drugs out of the vehicle, justified the officer's pat-down search of Hill. *See id.*

B. Prosecutorial misconduct.

Hill argues the State engaged in prosecutorial misconduct by failing to disclose evidence and uing a false testimony. Trial was held on the minutes of testimony in this case. No objection was made to the minutes of testimony; the district court was not made aware of any problem. We find this issue is not preserved for our review. *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.").

C. Ineffective assistance of counsel.

Trial in this case was conducted on the minutes of testimony pursuant to Hill's agreement and waiver of jury trial. Hill argues his counsel was ineffective because counsel

> fail[ed] to investigate the crime scene and subpoena eye witnesses such as the store clerk at the Radio Shack, the ambulance attendant and the attendant's records and the Snap Fitness Gym entrance and exit records where [the eye witness] stated that he viewed the alleged act taking place. In addition [counsel] should have obtained both tapes (from both patrol vehicles' cameras) and Mr. Hill's telephone records from the night in question[.]

Hill also argues his trial counsel provided ineffective representation by making promises of leniency to him, encouraging him to accept a trial on the minutes of testimony, deciding he should stipulate to the minutes though he has now discovered certain elements of the minutes of testimony were false, and failing to file a motion in arrest of judgment. He also argues he is entitled to an

"evidentiary hearing as to whether he knowingly and intelligently waived his right to a trial by a jury of his peers."

We may do two things with a claim alleging ineffective assistance of counsel on direct appeal: "decide the record is adequate to decide the claim," or "choose to preserve the claim for determination under chapter 822." Iowa Code § 814.7(3) (2011). Generally we "prefer to leave ineffective-assistance-of-counsel claims for postconviction relief proceedings." *Buchanan*, 800 N.W.2d at 748. These proceedings "allow an adequate record of the claim to be developed" and allow the attorney to "respond to defendant's claims and explain his or her conduct, strategies, and tactical decisions." *Id.* The record on review is insufficient for our review of the decisions made by counsel and Hill. We therefore preserve Hill's claims for postconviction relief proceedings.

AFFIRMED.

Eisenhauer, C.J., concurs; Tabor, J., concurs specially.

TABOR J., (specially concurring)

I disagree with the majority's conclusion the Des Moines police officers had reasonable suspicion to seize Hill based on an uncorroborated report provided to their colleague in the narcotics unit, even though the tip came from a reliable source.

Narcotics Officer Scarlett testified at the suppression hearing that the tipster reported "a lot of short-term traffic, people coming up and approaching the Avalanche for a short period and then leaving." Scarlett provided no context for that information. Presumably the officer could have testified that, based on his experience and training, he drew an inference from those reported facts that there might be illegal drug activity occurring in the Radio Shack parking lot, but he did not do so. *See generally State v. Baumann*, 759 N.W.2d 237, 240-41 (Minn. Ct. App. 2009) (finding reasonable suspicion for dog sniff in common area of apartment complex where manager reported "high volume" of short-term traffic and trained narcotics investigator drew inference of drug trafficking). Moreover, the informant did not tell Officer Scarlett how long he had been watching the vehicle. And Officer Scarlett did not elaborate on how many people constituted "a lot" of traffic.

Patrol Officer Mock testified: "By the nature of the call and the call from Officer Scarlett, we had a good hunch that narcotics activity was probably involved." Of course, an officer making a *Terry* stop must be able to articulate more than a "hunch" or an unparticularized suspicion. *Terry v. Ohio*, 392 U.S. 1, 27 (1968). Here, the officers identified the vehicle at the location indicated by the informant, but they did not independently corroborate any short-term foot traffic

interacting with its occupants. And the vehicle had only one occupant, as opposed to the two occupants reported by the informant. I do not find on the record made at the suppression hearing that the officers voiced the minimal level of objective justification necessary to seize Hill.

I also disagree with the majority's conclusion that the officers had reason to believe Hill was armed and dangerous at the time they decided to frisk him. The record did not show Hill was in a neighborhood notorious for narcotics trafficking. Officer Mock testified he perceived Hill to be nervous because he "moved around pretty quickly and erratically throughout the car," and was sweating and chatty. Nervousness is one factor to consider in deciding if an officer has reasonable suspicion that weapons are present. *Bergmann*, 633 N.W.2d at 333. But it cannot be a stand-alone justification for conducting a pat-down. *See State v. McGinnis*, 608 N.W.2d 605, 611 (Neb. Ct. App. 2000). Even law-abiding citizens experience nerves during encounters with police.

And unlike the majority, I do not read *Riley* as allowing "furtive movements" alone to provide reasonable suspicion that a suspect is hiding a weapon. 501 N.W.2d at 490. In *Riley*, a passenger failed to provide identification when asked to do so by a trooper. *Id*. at 487. That circumstance, coupled with the passenger's act of reaching under the seat, provided cause for the officer to look there for a weapon. *Id*. at 490. Here, Hill did provide identification at the officers' request. This was not a case like *Bergmann*, 633 N.W.2d at 333, where the officers had past experience with Hill or saw him associating with a known drug dealer. It was only after Hill refused to consent to search that the officers decided he posed a threat to their safety.

I concur in the majority's result because the police were entitled to search Hill incident to arresting him for assault after he engaged in physical contact with the officers. *See State v. Dawdy*, 533 N.W.2d 551, 555–56 (Iowa 1995) (holding resistance to invalid seizure may constitute independent grounds for arrest).