IN THE COURT OF APPEALS OF IOWA

No. 7-858 / 07-0236
Filed January 16, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHN FEREGRINO, JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Gary K. Anderson, Judge.

John Feregrino, Jr. appeals his conviction, following a trial to the court, for operating while intoxicated (OWI), first offense. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Kyle Jones and Christine Shockey, Assistant County Attorneys, for appellee.

Considered by Huitink, P.J., and Miller and Eisenhauer, JJ.

MILLER, J.

John Feregrino, Jr. appeals his conviction, following a trial to the court, for operating while intoxicated (OWI), first offense. He contends the district court erred in denying his motion to suppress and that his trial counsel was ineffective for failing to assure his waiver of jury trial was knowing, voluntary, and intelligent. We affirm in part, reverse in part, and remand.

The record reveals the following facts. On July 4, 2006, at approximately 3:45 a.m. Carter Lake police officer Ron Hansen was on duty and heard loud music coming from a vehicle. The music could be heard from one hundred feet or more away. Officer Hansen stopped the vehicle for being in violation of a city ordinance regarding excessive noise and told the driver he was stopping him for loud music. The driver and sole occupant of the vehicle was the defendant, Feregrino. Officer Hansen detected a strong odor of alcoholic beverage on Feregrino's breath and asked him if he had been drinking, to which Feregrino replied, "Not a whole lot." Feregrino's speech was slurred, and his eyes were watery and bloodshot. Officer Hansen issued Feregrino a citation for violation of the noise ordinance.

Hansen then asked Feregrino to step out of the car and requested he submit to some field sobriety tests, to which Feregrino agreed. Officer Hansen performed the horizonal gave nystagmus test and Feregrino failed it. Feregrino could not or would not perform any other field sobriety tests and could not or would not submit a proper sample for a preliminary breath test. Hansen arrested Feregrino for OWI and took him to the police station. At the station Feregrino

was given a Datamaster breath test which showed an alcohol concentration of 0.199.

On August 16, 2006, the State charged Feregrino, by trial information, with OWI, first offense, in violation of Iowa Code section 321J.2 (2005). Feregrino filed a motion to suppress, and two additional amended and substituted motions to suppress and dismiss, contending the Officer Hansen's stop was illegal because the Carter Lake noise ordinance was unconstitutionally vague under both the state and federal constitutions. The court overruled the motion, finding the ordinance was not unconstitutional and that Officer Hansen had reasonable cause to stop Feregrino for violating it.

On November 14, 2006, Feregrino appeared with counsel in court and requested a trial on the minutes of evidence and the record made at the suppression hearing. Feregrino signed a written waiver of his right to jury trial.[1] The district court engaged Feregrino in a very short colloquy concerning his waiver of jury trial and heard Feregrino's third amended and substituted motion to suppress and dismiss in which he renewed his argument on the unconstitutionality of the city ordinance. In an order filed November 29, 2006, the court overruled Feregrino's renewed motion to suppress, found him guilty of OWI, and dismissed a charge of violating the city noise ordinance because someone other than Officer Hansen had improperly amended the original citation. The court subsequently sentenced Feregrino to serve thirty days in jail with all but two days suspended.

[1] Although the waiver was not actually filed until November 29, the same day the court's written order finding Feregrino guilty was filed, the court apparently accepted it at the November 14 hearing.

Feregrino appeals his conviction, contending the court erred in denying his motion to suppress and that his trial counsel was ineffective for failing to assure his wavier of jury trial was knowing, voluntary, and intelligent. We first address his contention that the stop by Officer Hansen was illegal because the Carter Lake ordinance is unconstitutionally vague under both the state and federal constitutions. [2]

A challenge to the district court's ruling on a motion to suppress implicates the Fourth Amendment to the United States Constitution.[3] *State v. Otto*, 566 N.W.2d 509, 510 (Iowa 1997). We review constitutional issues de novo. *State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998). In doing so, we make an independent evaluation of the totality of the circumstances as shown by the entire record. *Id.* We give deference to the trial court's findings of fact because of its opportunity to assess the credibility of witnesses, but we are not bound by those findings. *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001).

The Fourth Amendment to the United States Constitution guarantees a person's right to be free from unreasonable search and seizure. U.S. Const. amend. IV. Evidence obtained in violation of this provision is inadmissible in a prosecution, no matter how relevant or probative the evidence may be. *State v.*

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[2] The language of the state and federal constitutions protecting citizens against unreasonable search and seizure is substantially identical and we have consistently interpreted the scope and purpose of article I, section 8, of the Iowa Constitution to track with federal interpretations of the Fourth Amendment. *State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998); *State v. Showalter*, 427 N.W.2d 166, 168 (Iowa 1988). Accordingly, we analyze the validity of the stop here similarly under both the federal and state constitutions.

[3] The rights guaranteed by the Fourth Amendment apply to the states through the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 1694, 6 L. Ed. 2d 1081, 1090 (1961).

Manna, 534 N.W.2d 642, 643-44 (Iowa 1995). "The Fourth Amendment requires a police officer must have reasonable cause to stop an individual for investigatory purposes." *Terry v. Ohio,* 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968); *State v. Tompkins*, 507 N.W.2d 736, 738 (Iowa Ct. App. 1993). "An investigatory stop is considered a seizure within the meaning of the Fourth Amendment and must be 'supported by reasonable suspicion to believe that criminal activity may be afoot.'" *United States v. Ameling*, 328 F.3d 443, 447 (8th Cir. 2003) (quoting *United States v. Arvizu*, 534 U.S. 266, 273, 122 S. Ct. 744, 750, 151 L. Ed. 2d 740, 749 (2002)).

"[S]tatutes are cloaked with a presumption of constitutionality." *State v. Seering,* 701 N.W.2d 655, 661 (Iowa 2005) (citations omitted). One who challenges a statute's constitutionality "bears a heavy burden, because [he] must prove the unconstitutionality beyond a reasonable doubt." *Id.* (citation omitted). In doing so, he or she is required to refute every reasonable basis upon which we could declare the statute constitutional. *Id.* If we can construe a statute in more than one way, one of which is constitutional, we must adopt the constitutional construction. *Id.* The presumption of constitutionality which attaches to statutes also attaches to ordinances. *See Ackman v. Bd. of Adjustment*, 596 N.W.2d 96, 104 (Iowa 1999).

> Vague statutes are proscribed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In order to avoid a vagueness problem, a penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. If a statute lacks clearly defined prohibitions, then it is void for vagueness.

State v. Gonzalez, 718 N.W.2d 304, 309 (Iowa 2006) (internal citations and quotations omitted). Vague statutes offend several important principles.

> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abut[s] upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.

State v. Bower, 725 N.W.2d 435, 441-42 (Iowa 2006) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 2298-99, 33 L. Ed. 2d 222 227-28 (1972) (internal citations and quotations omitted)). "Due process merely requires that a standard of conduct be reasonably ascertainable 'by reference to prior judicial decisions, similar statutes, the dictionary, or common generally accepted usage.'" *State v. Baker*, 688 N.W.2d 250, 255 (Iowa 2004) (quoting *State v. Sullivan*, 298 N.W.2d 267, 270 (Iowa 1980)).

The Carter Lake nuisance ordinance at issue provides, in relevant part, "Noise emanating from a motor vehicle that can be heard from a distance of one hundred (100) feet or more" is a violation of the ordinance. We conclude a plain reading of the ordinance defines the offense with sufficient definiteness such that an ordinary person could easily understand what conduct is prohibited. It is a violation of the ordinance to have any sound coming out of a vehicle that is

plainly audible to any person at the proscribed distance. Furthermore, the ordinance does not encourage arbitrary and discriminatory enforcement because the distance standard provides an explicit guideline to those charged with enforcing the ordinance. *See Moore v. City of Montgomery*, 720 So.2d 1030, 1032 (Ala. Crim. App. 1998); *Commonwealth v. Scott*, 878 A.2d 874, 878 (Pa. Super. Ct. 2005). If a law enforcement officer can hear sounds from a musical device coming from a vehicle at the proscribed distance then the ordinance has been violated. *Id.* Similar ordinances and statues limiting excessive noise from vehicles at various distances have been upheld against vagueness challenges. *See, e.g., Moore*, 720 So.2d at 1031-32; *Davis v. State,* 710 So.2d 635, 635-36 (Fla. Dist. Ct. App. 1998); *State v. Ewing*, 914 P.2d 549, 556-57 (Haw. Ct. App. 1996); *State v. Medel*, 80 P.3d 1099, 1103 (Idaho Ct. App. 2003); *Scott*, 878 A.2d at 878-79; *Holland v. City of Tacoma*, 954 P.2d 290, 295-96 (Wash. Ct. App. 1998).

Accordingly, we conclude the Carter Lake ordinance is not unconstitutionally vague and Feregrino's challenge to the ordinance is without merit. Officer Hansen thus had reasonable cause to stop Feregrino for a violation of the ordinance. The district court did not err in denying Feregrino's motion to suppress and concluding the evidence gathered during the stop was admissible.

Feregrino next contends his trial counsel was ineffective for failing to assure his waiver of jury trial was knowing, voluntary and intelligent, in accordance with the procedures for such waiver set forth in Iowa Rule of

Criminal procedure 2.17(1). Claims that raise constitutional questions, such as the alleged ineffective assistance of counsel, are reviewed de novo. *State v. Watson*, 620 N.W.2d 233, 235 (Iowa 2000).

To establish an ineffective assistance claim, a defendant must typically show that (1) his counsel failed to perform an essential duty, and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). However, when the alleged failure of duty is a failure to assure compliance with rule 2.17(1), upon a demonstrated inadequacy of counsel's performance, prejudice is presumed. *State v. Stallings*, 658 N.W.2d 106, 112 (Iowa 2003) ("Because the right to a jury trial is so fundamental to our justice system, we conclude this is one of those rare cases of a 'structural' defect in which prejudice is presumed.").

A trial by jury is required unless the defendant "voluntarily and intelligently waives a jury trial in writing and on the record . . . ." Iowa R. Crim. P. 2.17(1). Rule 2.17(1) "requires the court to conduct an in-court colloquy with defendants who wish to waive their jury trial rights." *State v. Liddell*, 672 N.W.2d 805, 811-12 (Iowa 2003). The court in *Liddell* found that the "on the record" language from rule 2.17(1) requires some in-court colloquy or personal contact between the court and the defendant, to ensure the defendant's waiver is knowing, voluntary, and intelligent. *Id*. at 812.

Our supreme court has suggested a five-part inquiry that "constitute[s] a sound method by which a court in an in-court colloquy may determine whether a

defendant's waiver of his right to a jury trial is knowing, voluntary, and intelligent." *Id*. at 811.

> [T]he court should inquire into the defendant's understanding of the difference between jury and nonjury trials by informing the defendant:
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> 1. Twelve members of the community compose a jury,
> 2. the defendant may take part in jury selection,
> 3. jury verdicts must be unanimous, and
> 4. the court alone decides guilt or innocence if the defendant waives a jury trial.
>
> Importantly, . . . we also urge[ ] judges to "ascertain whether [the] defendant is under [the] erroneous impression that he or she will be rewarded, by either court or prosecution, for waiving [a] jury trial."

Id. at 810-11 (quoting *Stallings*, 658 N.W.2d at 111) (third through fifth alterations in original). However, the court clarified that these "five subjects of inquiry are not 'black-letter rules' nor a 'checklist' by which all jury-trial waivers must be strictly judged. . . . The ultimate inquiry remains the same: whether the defendant's waiver is knowing, voluntary, and intelligent." *Id*. at 814. Thus, substantial compliance with the five-factor inquiry is acceptable. *Id*. Sufficient compliance with rule 2.17(1), and the voluntary and intelligent nature of the defendant's waiver, must appear in the present record. *See Stallings*, 658 N.W.2d at 111 (holding that "posttrial reconstruction of the record will not suffice to show a valid waiver").

On November 14, 2006, Feregrino appeared before the district court. At that time his attorney stated to the court that Feregrino had signed a written waiver of jury trial, stated that Feregrino would state on the record his wish to waive a jury trial, and asked for a trial on the minutes of evidence and the record

made at the suppression hearing. The written waiver indicated that Feregrino understood (1) he had a right to a trial by a jury of twelve persons; (2) that if he waived his right to a jury trial he would not help in selecting a jury and the verdict would not longer have to be unanimous because his case would be decided solely by a single judge; and (3) with all that in mind he knowingly and voluntarily waived his right to jury trial. At that time the court inquired, "Mr. Feregrino, you've had a sufficient amount of time to talk to [your attorney]?" Feregrino answered, "Uh-huh, yes, sir." The court then asked, "And you wish to waive a jury trial and submit the case as indicated by [your attorney]?" Feregrino replied, "Yes, sir." This is the entirety of the in-court colloquy concerning waiver of a jury trial.

In its colloquy with Feregrino the district court did not mention, or inquire into Feregrino's understanding of, any one or more of the "five subjects of inquiry" suggested in *Stallings* and *Liddell*. While we recognize the court need not assure a defendant's awareness and understanding of all five of those subjects, in the absence of an inquiry or colloquy concerning any of those subjects we conclude the record does not demonstrate a voluntary and intelligent waiver.

Counsel failed to ensure substantial compliance with the requirements of rule 2.17(1) and thus breached an essential duty. Prejudice is presumed. *Stallings*, 658 N.W.2d at 112.[4]

[4] The State urges that *Stallings* should be overruled, insofar as it holds that defense counsel's failure of duty in connection with defendant's waiver of a jury trial is presumptively prejudicial. Although the State's arguments may well have merit, this court must decline the invitation to overrule *Stallings*, heeding an earlier admonition of

Based on our de novo review of the record, and for the reasons set forth above, we conclude the district court did not err in denying Feregrino's motion to suppress, as the Carter Lake ordinance is not unconstitutionally vague and thus Officer Hansen had reasonable cause to stop Feregrino. We further conclude Feregrino's counsel rendered ineffective assistance by not ensuring Feregrino's waiver of jury trial was a voluntary and intelligent waiver. We therefore reverse Feregrino's conviction and remand for trial to a jury unless Feregrino voluntarily and intelligently waives his right to a trial by jury. *See id.*

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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our supreme court. *See State v. Eichler*, 248 N.W.2d 587, 578 (1957) ("If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves.").