STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0807

State of Minnesota,
Respondent,

vs.

James Stewart Elliott,
Appellant.

Filed April 7, 2014
Affirmed
Bjorkman, Judge

Hennepin County District Court
File No. 27-CR-11-15667

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Elizabeth R. Johnston, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Hooten, Judge; and Randall, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

BJORKMAN, Judge

Appellant challenges his conviction of fifth-degree possession of a controlled substance, arguing that he received ineffective assistance of counsel because his attorney did not file a suppression motion, and that the interests of justice require that his conviction be reversed. We affirm.

FACTS

Around 3:30 a.m. on April 14, 2011, Minneapolis Police Officers Jamy Schwartz and George Judkins passed a gold Chrysler stopped at an intersection. Officer Judkins, who was driving, ran the license-plate number and learned that the registered owner had a suspended license. As Officer Judkins was checking the license-plate number, Officer Schwartz observed that one of the vehicle's license-plate lights was not working, and decided to make a traffic stop. Officer Judkins turned the squad car around, spotted the gold Chrysler pulling into a Walgreens parking lot, and pulled in behind it.

The doors of the Chrysler "flew open and everybody got out really quickly," which made the officers concerned about their safety. As the officers approached, the driver, appellant James Stewart Elliott, and one of the passengers moved toward the front door of the Walgreens. Officer Judkins described their demeanor as "hurried" and "nervous." Officer Schwartz told them to stop, but they disregarded the order and entered the store.

Officer Judkins saw Elliott back away from Officer Schwartz while "fidgeting," digging in his pants pockets, and saying "what, what." As Officer Schwartz placed

Elliott in handcuffs, Officer Judkins saw a plastic baggie containing a "crystalline white substance" drop from Elliott's hand. This substance was later determined to be methamphetamine.

Elliott was charged with fifth-degree possession of a controlled substance. A jury found him guilty and the district court sentenced him to 21 months' imprisonment. This appeal follows.

D E C I S I O N

I. Elliott did not receive ineffective assistance of counsel.

Elliott argues that his trial attorney was ineffective because she did not bring a motion to suppress the drugs seized during the stop. Both the federal and state constitutions guarantee a defendant the right to counsel. U.S. Const. amend. VI; Minn. Const. art. 1, § 6. A defendant is denied this right when his or her attorney fails to provide "adequate legal assistance." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984) (quotation omitted).

To prevail on an ineffective-assistance-of-counsel claim, an appellant must "affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland*, 466 U.S. at 688, 694, 104 S. Ct. at 2064, 2068). "There is a strong presumption that a counsel's performance falls within the wide range of reasonable professional assistance." *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986) (quotation omitted). And we defer, in particular, to counsel's

decisions regarding trial strategy. *Schneider v. State*, 725 N.W.2d 516, 522 (Minn. 2007). Failure to raise meritless claims does not constitute deficient performance. *Schleicher v. State*, 718 N.W.2d 440, 449 (Minn. 2006).

Elliott argues that his attorney's representation fell below an objective standard of reasonableness because his challenge to the stop and seizure had merit, and the district court would likely have granted a suppression motion, resulting in dismissal of the charges. In short, both prongs of the *Strickland* analysis turn on the likely merits of a suppression motion.

An officer may perform a limited investigatory stop if he or she has a "particularized and objective basis for suspecting the particular person stopped of criminal activity." *State v. Anderson*, 683 N.W.2d 818, 822-23 (Minn. 2004) (quotation omitted). "Generally, if an officer observes a violation of a traffic law, no matter how insignificant the traffic law, that observation forms the requisite particularized and objective basis for conducting a traffic stop." *Id.* We review the legality of a limited investigatory stop de novo. *Carter v. State*, 787 N.W.2d 675, 678 (Minn. App. 2010).

Officer Schwartz testified that a license-plate light was out on the vehicle that Elliott was driving—an equipment violation. Elliott asserts that there is a dispute as to whether "the car actually had an out tag light," and Officer Judkins decided to initiate the stop to investigate whether the driver had a valid license. We are not persuaded. Both officers testified that one of the Chrysler's rear license-plate lights was not working. Officer Schwartz observed this prior to the stop and Officer Judkins noted it when he

pulled in behind the vehicle. Because the lack of an operating license-plate light violates the law, we conclude that the traffic stop was valid.

Elliott next argues that the officers inappropriately expanded the scope of the traffic stop because the license-plate search indicated that the registered driver was a woman and "[a]ny suspicion of criminal activity should have been allayed once [Elliott] a male, exited the driver's seat of the car." We disagree. First, the driver's gender did not resolve the issue of the suspected equipment violation. Second, the behavior of Elliott and the other vehicle occupants made the officers suspicious and concerned about their safety.

An officer may expand the scope of a stop "to include investigation of other suspected illegal activity" if the officer has "reasonable, articulable suspicion of such other illegal activity." *State v. Wiegand*, 645 N.W.2d 125, 135 (Minn. 2002). Elliott and the other occupants immediately exited the vehicle after it came to a stop. Both officers characterized this conduct as a safety threat. *See State v. Britton*, 604 N.W.2d 84, 88-89 (Minn. 2000) ("We are deferential to police officer training and experience and recognize that a trained officer can properly act on suspicion that would elude an untrained eye."). Further, Elliott did not follow the officers' instructions to stop, appeared to be nervous, and fidgeted and rummaged in his pants' pockets. On this record, we conclude that reasonable suspicion supported the officers' expansion of the traffic stop. *See State v. Flowers*, 734 N.W.2d 239, 252 (Minn. 2007) (officers had reasonable suspicion of illegal activity where the defendant made "suspicious movements" and did not initially comply with attempts to pull him over); *State v. Krenik*, 774 N.W.2d 178, 183 (Minn. App. 2009)

(officers had reasonable suspicion sufficient to justify a pat search where the defendant disobeyed officer commands to keep her hands out of her pockets), *review denied* (Minn. Jan. 27, 2010).

Because Elliott's challenge to the stop and seizure was not likely to succeed, we conclude that trial counsel was not ineffective for failure to bring a suppression motion and there is no reasonable probability that the outcome of this proceeding would have been different if trial counsel had done so. *See Gates*, 398 N.W.2d at 561 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome." (quotation omitted)). Elliott is not entitled to reversal based on ineffective assistance of counsel.

II. The interests of justice do not require this court to reverse Elliott's conviction.

A party's "[f]ailure to object to the admission of evidence generally constitutes waiver of the right to appeal on that basis." *State v. Vick*, 632 N.W.2d 676, 684 (Minn. 2001). A narrow exception exists "in rare cases to examine a new issue as justice requires, provided it is not prejudicial to either party to do so." *State v. Sontoya*, 788 N.W.2d 868, 874 (Minn. 2010).

Elliott argues that his attorney's failure to bring a suppression motion was so clearly erroneous that the interests of justice require intervention. But he does not explain how the alleged error presents a "new issue" or constitutes "extraordinary circumstances." *See id.* at 874-85. As discussed above, the failure to bring the motion does not support an ineffective-assistance-of-counsel claim because the decision whether

to bring the motion was a matter of trial strategy and the motion was unlikely to succeed. Accordingly, the interests of justice do not require further examination of this issue.

Affirmed.