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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Appellee,) Filed December 28, 1977
vs.)
DEBORAH ANNE PEARSON,) 312
Appellant.) 59860

Appeal from Jasper District Court - A. C. Omer, Judge.

Defendant appeals conviction of possession of marijuana, a violation of § 204.401(3), The Code, alleging that the trial court erred in overruling her motion to suppress. REVERSED.

Allan C. Somers, of Brierly, McCall, Girdner and Chalupa, of Newton, counsel for appellant.

Richard C. Turner, Attorney General of Iowa, Thomas A. Evans, Jr., Assistant Attorney General, and Charles Neighbor, Jasper County Attorney, counsel for appellee.

Heard by Allbee, C. J., Donielson, Snell, Oxberger and Carter, JJ.

DONIELSON, J.

Defendant-Deborah Anne Pearson appeals her conviction of possession of marijuana, a violation of § 204.401(3), The Code, alleging that the district court erred in overruling her motion to suppress. We agree with her position and accordingly reverse.

On May 7, 1976, at approximately 9:00 p.m., Newton police officer Harry Hewitt went on duty and was stationed on top of the Jasper County Courthouse to observe the area of the square around the Courthouse. To aid in his surveillance, Hewitt had binoculars and a walkie-talkie.

At approximately 2:15 a.m. on May 8, Hewitt observed a red pickup truck parked on the square which was apparently being driven by an individual later identified as the defendant. Hewitt testified at the suppression hearing that another vehicle belonging to an individual named Mick was double parked next to the truck. A patrol car then came up behind the Mick vehicle from the south, at which point the Mick vehicle took off, went around the block one time, and returned to the same spot and parked. Hewitt then observed an individual identified as Albert Thomas get out of the passenger side of the Mick vehicle, walk over to the driver's window of the truck, say a few words, and walk around and get into the passenger side of the truck. Based upon police records, Hewitt believed Thomas to be involved in local marijuana trafficking.

Both vehicles then drove away. Shortly thereafter, Hewitt observed the truck reenter the square and drive very slowly up the street past his position on the roof. Because of the truck's slow speed and the special lighting on the square, Hewitt testified that, using his binoculars, he was able to observe virtually the entire interior of the truck and its occupants. He observed Pearson driving and Thomas, sitting on the passenger side, sprinkling a dark substance onto a cigarette paper. Hewitt stated that based upon his training and personal observations regarding marijuana use, he believed that Thomas was in fact rolling a marijuana cigarette. He radioed these observations to Officer McPherren, who sighted the truck several blocks away. After McPherren turned on his red lights behind the truck, the pickup proceeded for two blocks and around two corners before coming to a stop in a private drive.

Officer McPherren then informed the defendant of Hewitt's observations and requested that she either surrender the contraband or be searched. Pearson told him to

obtain a search warrant. The officer then asked the occupants to get out of the truck and he leaned in through the door and retrieved a plastic bag of marijuana which was lying on the floor under the driver's seat. McPherren then placed the occupants under arrest.

Pearson contends that although police arguably were justified in making an "investigatory stop" pursuant to Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), they did not have authority to make the warrantless search of the vehicle and seizure of the plastic bag. Consequently, she argues, her motion to suppress should have been granted. See State v. Reese, ____ N.W.2d ____ (Iowa, filed November 23, 1977); United States v. Stevie, ____ F.2d ____ (8 Cir., filed November 17, 1977). Terry requires that we make an objective analysis, not one based upon the policeman's subjective theory. We must decide "whether the record discloses articulable objective facts [which] were available to the officer to justify the stop." State v. Donnell, 239 N.W.2d 575, 578 (Iowa 1976); State v. Cooley, 229 N.W.2d 755, 759-760 (Iowa 1975).

Even if we assume arguendo that reasonable grounds existed to justify an investigatory stop, we must still decide whether the subsequent warrantless search of the vehicle was lawful. In so doing, we are obligated to make an independent evaluation based upon the totality of the evidence. State v. Iowa District Court in and for Johnson County, 247 N.W.2d 241, 245 (Iowa 1976); State v. Snethen, 245 N.W.2d 308, 311 (Iowa 1976).

The State insists that the instant search falls within one of the recognized exceptions to the warrant requirement, the "moving vehicle exception," and therefore the warrantless search was lawful. State v. King, 191 N.W.2d 650, 654 (Iowa 1971). In Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1924), the United States Supreme Court held that in order to justify a warrantless automobile search it must be demonstrated that:

> "the seizing officer . . . [has] reasonable or probable cause for believing that the automobile which he stops and seizes has contraband . . . therein which is being illegally transported." 267 U.S. at 156; accord, Chambers v. Maroney, 399 U.S. 42, 48, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970).

However, we conclude that probable cause did not exist in the present case and therefore the warrantless search was impermissible. Although many searches resulting from

investigatory stops have been approved because of the applicability of the "plain view" exception, State v. Cooley, supra; State v. King, supra; State v. Donnell, supra, the officer in this case admitted that he did not see, smell or otherwise sense anything suspicious until after he ordered defendant and her passenger out of the vehicle and conducted a full search. Consequently, the "plain view" doctrine does not apply here.

Furthermore, the question of whether the police had probable cause to stop and search the vehicle or arrest its occupants was astutely answered by Officer McPherren himself. At the preliminary examination and suppression hearing, he admitted that he did not have probable cause when he stopped the vehicle, and would have had to let Pearson go in order to obtain a search warrant, so he decided to conduct the search as soon as he stopped the truck. At the suppression hearing, he also stated: "I didn't feel I had probable cause until I actually seized the stuff to make the arrest." We agree with Officer McPherren's perceptions and conclude that he misconstrued his authority under the Fourth and Fourteenth Amendments to the United States Constitution and the "moving vehicle exception" cases. See generally, State v. Davis, 228 N.W.2d 67 (Iowa 1975). They require that probable cause exist before a warrantless automobile search is conducted. See State v. McReynolds, 195 N.W.2d 102, 105 (Iowa 1972). We conclude that in the instant case the information possessed by the police officers prior to the search did not rise to the level of probable cause.

The burden is upon the State to demonstrate that the search falls within an exception to the Fourth Amendment warrant requirement and that the exigencies of the situation make a warrantless search imperative. State v. King, supra, at 654; State v. Ahern, 227 N.W.2d 164, 165 (Iowa 1975). Although this is an extremely close case, we hold that the State did not meet its burden and therefore reverse the district court. In so doing, we wish to note that we do not intend to impugn the integrity or judgment of the police officers. In cases such as this, judges face the same dilemma as law enforcement officers in determining whether conduct gives rise to "reasonable grounds to stop" or provides "probable cause to search or arrest." Upon a review of the facts of the instant case, we conclude that the trial court erred in its determination in this regard.

REVERSED.