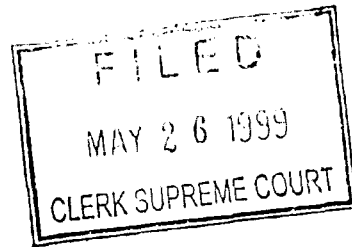


IN THE COURT OF APPEALS OF IOWA

No. 9-156 / 98-13
Filed May 26, 1999



STATE OF IOWA,
Appellee,

vs.

BRYAN LEE MUELLER,
Appellant.

Appeal from the Iowa District Court for Black Hawk County, Van D. Zimmer,
Judge.

Bryan Mueller appeals his conviction for failure to affix a drug tax stamp.

REVERSED AND REMANDED FOR NEW TRIAL.

Linda Del Gallo, State Appellate Defender, and Tricia Johnston, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney
General, Thomas J. Ferguson, County Attorney, and Anthony Janney, Assistant
County Attorney, for appellee.

Heard by Sackett, C.J., Vogel, J., and Schlegel, S.J.*, but decided en banc.
Mahan and Zimmer, JJ., take no part.

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

VOGEL, J.

Bryan Mueller appeals his conviction for failure to affix a drug tax stamp. We reverse and remand for a new trial.

Background facts. In September of 1995, Mueller, Grant Williamson, Dusty Smith, and Jeremiah Gantois began renting a house in Waterloo, Iowa owned by James Bauch. In early October of 1995, Williamson contacted Bauch to inform him that some of the other tenants had been causing intentional damage on the property. Bauch spoke to Williamson and Gantois, telling them to inform whoever was causing the damage to “knock it off,” or he would take legal action.

Later that month Williamson contacted Bauch again and told him that someone was continuing to damage the property. Bauch contacted the police on a Thursday or Friday, but was unable to speak to the particular officer he requested.¹ Bauch left town for the weekend, and on Monday, October 23, reported the damage to the police. Bauch, a judge in the First Judicial District, asked Officer Mike Briggs to meet him at the house to inspect the damage. Briggs asked Officer Bob Kramer to accompany them and take photographs. Upon arrival at the house, Bauch knocked on the door and told Gantois that he needed to come in to inspect the damage. Bauch testified that Gantois either said OK, or simply stepped aside.²

¹ The district court ruling indicated that Bauch specifically wanted to speak to the officer responsible for investigating crimes against property.

² Gantois was not called as a witness at trial.

Officers Briggs and Kramer followed Bauch into the house. As the officers inspected the damage with Bauch, Officer Briggs noticed a tray in a bedroom which appeared to contain marijuana. At that point, Briggs asked each tenant if they would consent to a search for drugs. Two tenants, including Mueller, denied their consent. Briggs then obtained a warrant and seized approximately 121 grams of marijuana in Mueller's bedroom.

Mueller was charged with second-degree criminal mischief, possession with the intent to deliver marijuana, and failure to affix a drug tax stamp. The district court denied his motion to suppress. Mueller subsequently pled guilty to a reduced charge of third-degree criminal mischief charge, and a bench trial was held on the remaining charges. The district court found Mueller guilty of possession of a controlled substance and failure to affix a drug tax stamp. Mueller appeals only his drug tax stamp conviction and sentence, as the time period for challenging the other conviction has expired.

I. Scope of review. As Mueller claims his constitutional rights were violated, our review is de novo. *See State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998). We make an independent evaluation of the totality of the circumstances as shown by the entire record. *See Id.*

II. Motion to suppress. Mueller contends the district court erred in denying his motion to suppress the seized evidence. He asserts that none of the exceptions to

a warrantless search existed at the time of the initial entry and search of the house, and therefore the subsequent warrant, search and seizure were invalid.

Both the United States and Iowa Constitutions protect individuals against unreasonable searches and seizures by government officials. *See* U.S. Const. amend. IV; Iowa Const. art. I, § 8. A search and seizure without a valid warrant is per se unreasonable unless it comes within one of the recognized exceptions: consent, search incident to arrest, probable cause and exigent circumstances, or plain view. *See State v. Manna*, 534 N.W.2d 642, 644 (Iowa 1995). The State must prove one of these exceptions by a preponderance of the evidence. *State v. Predka*, 555 N.W.2d 202, 206 (Iowa 1996); *State v. Bakker*, 262 N.W.2d 538, 546 (Iowa 1978).

Mueller clearly has standing to challenge the search because he has a reasonable expectation of privacy in his home. *See State v. Baker*, 441 N.W.2d 388, 390-91 (Iowa App. 1989). However, as a tenant, that right is not absolute. *See State v. Koop*, 314 N.W.2d 384, 387 (Iowa 1982). A landlord may enter rental property to make necessary repairs if the tenants are given twenty-four hours notice, and may enter the premises without warning in the case of an emergency. *See* Iowa Code § 562A.19 (1995). A landlord may also receive permission to enter the premises from any of the tenants. *See generally United States v. Matlock*, 415 U.S. 164, 167-71, 94 S. Ct. 988, 992-93, 39 L. Ed. 2d 242 (1974); *State v. Cadotte*, 542 N.W.2d 834, 836 (Iowa 1996); *State v. Knutson*, 234 N.W.2d 105, 107 (Iowa 1975).

The State asserts that Bauch's entry and presence in the house were valid under several theories. We disagree with the district court conclusion that an emergency existed which validated Bauch's presence. Bauch's delay in investigating the damage after the last report by Williamson does not support that a true emergency existed. However, based on Gantois' lack of resistance, even acquiescence, to Bauch's entry coupled with the informal, oral lease agreement which allowed Bauch to come and go as he pleased to make repairs, we agree that Bauch lawfully entered the premises.

However, the key issue is whether the *officers'* entry and search for evidence of criminal mischief were valid. It is undisputed that the officers did not ask permission to enter the house or conduct their search, nor did they ask Bauch if he had secured the tenants' consent. Even though Gantois did not resist the officers' entry, a consent to a search must be an intentional waiver of a known right and not merely a submission to authority. *See Bumper v. North Carolina*, 391 U.S. 543, 548-49, 88 S. Ct. 788, 792, 20 L. Ed. 2d 797 (1968); *see also State v. Morales*, 395 N.W.2d 655, 659 (Iowa App. 1986) (holding that the State failed to meet its burden of showing that consent to enter defendant's apartment was voluntarily given where none of the detectives testified that they sought or received express consent to enter defendant's apartment and the most that could be ascertained from the record was that no one denied the detectives entry nor requested that they leave). We agree with the district court that the State did not meet its burden to prove the search was consensual.

The State asserts that once Bauch was lawfully on the premises, he could consent to the officers' presence. Mueller disagrees. Both rely on *State v. Koop*, 314 N.W.2d 384 (Iowa 1982), as support.

In *State v. Koop*, the landlord of an apartment house encountered two men in ski masks descending the stairs from the second floor. The landlord called the police who observed fresh pry marks and wood chips at the doors of the upstairs apartments. The officers entered one of the apartments to determine if there had been a burglary. While the officers were in the apartment, two men entered the apartment with evidence of a recent burglary. The Iowa Supreme Court found the facts were sufficient to constitute such an emergency as to permit the landlord's entry to the apartment under Iowa Code section 562A.19(2)(1979). *Id.* at 387. The court further reasoned that if the landlord's entry was proper, "it follows so was that of the officers if made to carry out the landlord's purpose." *Id.*

While a landlord may under some circumstances be able to consent to a search of a tenant's home, we do not believe it was proper in this case. Bauch asked the officers to accompany him to gather evidence of criminal mischief so charges could be brought against the alleged perpetrators. This is in stark contrast to the circumstances in *Koop*, where the supreme court noted:

There was no search here in the conventional sense. This entry and subsequent examination of the apartment were not to discover evidence against defendants. On the contrary, the entry was for the tenant's protection. The fact that it turned out otherwise was simply a stroke of ill-luck for defendants.

Alternatively, the State argues that the officers' knowledge of the damage provided probable cause which, when combined with the ongoing damage, created an exigency.

We generally examine six factors to determine whether an exigency existed; however, these factors are not inclusive, nor must each one be satisfied for a finding of exigency. *See State v. Hatter*, 342 N.W.2d 851, 854 (Iowa 1983). The factors include proof of:

(1) a grave offense, (2) a suspect reasonably believed to be armed, (3) probable cause to believe the suspect committed the crime, (4) strong reason to believe the suspect is on the premises, (5) strong likelihood of the suspect's escape if not apprehended, and (6) peaceable (if not consensual) entry.

State v. Brecunier, 564 N.W.2d 365, 367 (Iowa 1997) (citation omitted).

We decline to find that an exigency existed under these circumstances as the majority of these factors were not present at the time of the search. There was simply no emergency or urgent need that justified the warrantless entry. *See Hatter*, 342 N.W.2d at 855.

Finally, the State argues that even if the search was unlawful, the exclusionary rule should not apply because the officers' actions were reasonable under the circumstances. However, we do not believe it was reasonable for the officers to believe that Bauch could consent to their entry, to procure evidence of criminal mischief, when the tenants were present and available to consent for themselves.

As we find the initial search was unreasonable, all evidence seized in the subsequent search was also tainted. The admission of this evidence amounts to prejudicial error which requires reversal.

Because of our holding on this issue, we need not address Mueller's ineffective assistance of counsel claim.

Having considered all other issues properly before us on appeal, we hereby reverse Mueller's conviction and sentence for failure to affix a drug tax stamp.

REVERSED AND REMANDED FOR NEW TRIAL.