

FILED

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IN THE COURT OF APPEALS OF IOWA
CLERK SUPREME COURT

DENNIS THEODORE BASAPOPOULOS,)

Appellant,)

Filed October 19, 1978

vs.)

THE HONORABLE ANTHONY R. SCOLARO,)

Appellee.)

664

2-61502

Certiorari to Linn District Court - Anthony R. Scolaro, Judge.

Certiorari action alleging trial court acted illegally in failing to suppress evidence seized during airport search. - Writ sustained.

Bruce Washburn, of Diehl and Washburn, Iowa City, for Appellant.

Jane F. Spande, Cedar Rapids, for Appellee.

Submitted to Donelson, Acting C.J., and Snell, Oxberger and Carter, JJ.

PER CURIAM

Plaintiff Dennis Hasapopoulos challenges, via certiorari, defendant Judge Anthony Scolaro's denial of his motion to suppress marijuana seized during an airport search. Writ sustained.

We are hampered in this case by the failure of the trial court to make findings of fact or conclusions of law, and failure of the State to file a brief and argument.

Plaintiff contends that the search and seizure at the airport violated his constitutional rights. Our review, therefore, consists of an independent evaluation of the totality of the circumstances surrounding the incident. State v. Iowa District Court in and for Johnson County, 247 N.W.2d 241, 245 (Iowa 1976).

We find the facts as follows: Hasapopoulos attempted to board a plane at the Cedar Rapids Airport. His luggage was visually checked because the x-ray machine which was customarily used had broken down. The City of Cedar Rapids contracted with Kelly Security to provide individuals to search passengers and their luggage. The purpose of the search was to detect "weapons, flammable materials, and any controlled substances that may be more than for personal use." Hasapopoulos did not consent to the search.

The Iowa Supreme Court has not ruled directly on airport searches. In State v. Carter, 267 N.W.2d 385 (Iowa 1978), however, the court was faced with an analogous situation - an indiscriminate search at a rock concert in a city auditorium. The court cited United States v. Davis, 482 F.2d 893 (9th Cir. 1973), an airport search case, with approval.

The Davis court said at page 913:

In light of that need, a screening of passengers and of the articles that will be accessible to them in flight does not exceed constitutional limitations provided that the screening process is no more extensive nor intensive than necessary, in the light of current technology, to detect the presence of weapons or explosives, that it is confined in good faith to that purpose, and that potential passengers may avoid the search by electing not to fly.

The State has not sought to explain the need for extending the Davis - authorized search for explosives and weapons to include "controlled substances that may be more than for personal use."

The Davis court continued at page 913 by saying:

Moreover, exercise of the constitutional right to travel may not be conditioned on the relinquishment of another constitutional right (here, the fourth amendment right to be free of unreasonable search) absent a compelling state interest.

In other words, the right to privacy inherent in the fourth amendment must be balanced with the right to travel. The latter right would become meaningless if passengers were free to carry weapons on board crowded airplanes all in the name of preserving passenger's fourth amendment rights. There is, therefore, a compelling State interest in protecting the safety of the travelling public sufficient to force some yielding of the right to privacy in the context of an airport search. The unlawful possession of a controlled substance, however, does not involve a threat to the safety of airplane passengers. We find that the Cedar Rapids Airport policy of searching for weapons and flammable materials is authorized under the Davis doctrine but that searches for "controlled substances that may be more than for personal use" are not.

Writ sustained.

Oxberger and Snell, JJ., concur. Carter and Donielson, JJ., concur specially.

CARTER, J. (specially concurring)

I concur in the result but not in all that is said in the majority opinion. I agree that the desire to locate controlled substances is not a constitutionally sanctioned purpose for searching the luggage of aircraft passengers. But I do not believe the fact that the search may have been partially motivated by an invalid purpose necessarily requires suppression of the fruits of the search. I believe the issue to be whether it has been demonstrated that there was some constitutionally sanctioned purpose for conducting the search, and, if so, whether the extent of the search exceeded that which was required for the sanctioned purposes.

In application of these principles to the present case I conclude that the motivation for the challenged search was primarily a constitutionally sanctioned one, i.e., to prevent weapons or explosives from being taken aboard commercial aircraft. See *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973). There is no indication that this reason was advanced as a subterfuge for an unsanctioned general search. See *United States v. Davis*, supra, at 909. It may be assumed that because of federal regulations the search would have taken place even if there had never been any intent to look for controlled substances.

Under such circumstances I do not find that petitioner's constitutional rights were violated unless the scope of the search exceeded that which is justified by the circumstances which rendered its initiation permissible. In application of the latter principle the court in *United States v. Kroll*, 351 F. Supp. 148, 153 (W.D. Mo. 1972), aff'd 481 F.2d 884 (8th Cir. 1973) stated:

Where an inspection of those things which probably could contain a weapon or explosives reveals nothing, the search cannot be expanded to include everything. . . that could possibly harbor a weapon or explosives.

The record in the present case strongly suggests that the search of petitioner's luggage went beyond those things which probably could contain weapons or explosives. It appears the persons conducting the search were reasonably satisfied such items were not present but continued the search for purposes of locating illegally possessed controlled substances. I therefore concur in the result.

Donielson, J., joins in this special concurrence.