

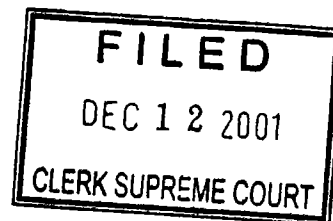
IN THE COURT OF APPEALS OF IOWA

No. 1-569 / 00-1991
Filed December 12, 2001

**STATE OF IOWA,
Plaintiff-Appellant,**

vs.

**SCOTT DAVID CHERECK,
Defendant-Appellee.**



Appeal from the Iowa District Court for Pottawattamie County, Timothy O'Grady, Judge.

The State was granted discretionary review to challenge the district court's grant of the defendant's motion to suppress. **AFFIRMED.**

Thomas J. Miller, Attorney General, Mary E. Tabor, Assistant Attorney General, Richard Crowl, County Attorney, and Jeffrey R. Tekippe, Assistant County Attorney, for appellant.

Glenn A. Shapiro of Gallup & Schaefer, Omaha, Nebraska, for appellee.

Heard by Sackett, C.J., and Mahan and Hecht, JJ.

000533

SACKETT, C.J.

The supreme court granted discretionary review to the State to challenge the district court's partial grant of Chereck's motion to suppress. The State claims the officers' warrantless entry into the defendant's mobile home was supported by exigent circumstances or the emergency aid exception. We affirm.

I. Background facts.

In early September 2000 the Iowa Division of Narcotics Enforcement received information from the Omaha police that a methamphetamine laboratory was being operated in a mobile home near Honey Creek in rural Pottawattamie County. Although no information on the reliability of the informant was provided, officers investigated a mobile home on a dead end gravel road which matched the description given by the confidential informant. They observed no activity the first day.

When an agent and an investigator drove by the mobile home two days later, they smelled ether, an ingredient they knew was used to manufacture methamphetamine. Because they were in plain clothes, they called a uniformed deputy to the scene who arrived within five minutes. The agent then approached the home and knocked on the door. He described the odor of ether outside the front door as "just unbelievable." On the ground near the door were several coffee filters, another item which can be used when manufacturing methamphetamine.

After knocking on the door, the agent heard a voice inside yell, "It's the cops." He then heard footsteps and pounding as if items were being moved around. The agent opened the door and entered. The ether fumes inside were

even stronger. He ordered the occupants outside. The investigator then entered the home and did an additional sweep through the mobile home to be sure everyone had left. On his way out he saw a pan containing black sludge which appeared to be the source of the ether fumes. He carried the pan outside. The defendant's hands and clothing had sludge on them similar to the sludge in the pan. After evacuating the occupants, the State obtained a warrant and searched the mobile home.

II. District court proceedings.

The defendant was charged with manufacturing more than five grams of methamphetamine, possession of a precursor with intent to manufacture a controlled substance, and keeping a premises for using, possessing, or selling controlled substances, in violation of Iowa Code sections 124.401(1)(b)(7), 124.401(4), and 124.402(3) (1999). He filed a motion to suppress claiming the officers' warrantless entry had violated the Fourth Amendment and the later application for a search warrant had been based upon information gained from the officer's initial, illegal entry.

The district court sustained the motion to suppress with respect to the fruits of the illegal entry into the residence. It ruled the State could not use evidence pertaining to the contents of the cake pan, the clothing which the defendant wore at the time of the entry, the condition of his hands, or the strength of the odor of ether inside the premises. The court denied the motion to suppress with respect to evidence gathered after the officers returned with a search warrant. The court found the corroborated information from the informant, the odor outside of the home, and the presence of the coffee filters were a

sufficient basis for issuance of the warrant regardless of any information obtained after the officers' illegal entry.

III. Claims on appeal.

The State's application for discretionary review was granted. It argues the district court read the exigency exception to the warrant requirement too narrowly when it refused to recognize the health and safety danger and the potential destruction of evidence averted by the officers' decision to evacuate the home and remove the ether source. The defendant claims that after the agent evacuated the occupants the exigency had abated and there was no basis for the investigator to enter the home. In its reply brief the State asserts the pan of sludge should be admissible under the inevitable discovery doctrine.

IV. Analysis.

We review constitutional questions de novo. *State v. Gogg*, 561 N.W.2d 360, 363 (Iowa 1997). With a few exceptions, a warrantless search is per se unreasonable. *State v. Emerson*, 375 N.W.2d 256, 258 (Iowa 1985). The State has the burden to prove by a preponderance of the evidence that an exception applies. *State v. Carlson*, 548 N.W.2d 138, 140 (Iowa 1996). Two possible exceptions are probable cause coupled with exigent circumstances and rendering emergency aid.

A. Exigent circumstances. The district court noted the officers had no information firearms were present, had no information anyone inside was injured, had time to call for a uniformed deputy and to wait for his arrival, and did not consider the circumstances so dire they had to wear protective gear when entering the mobile home. The court found, "[a]ny asserted danger to officers

resulted from their warrantless entry onto defendant's property." As our supreme court has stated:

The ultimate issue . . . is whether an emergency or urgent need for the warrantless entry existed. A warrant will be required unless an immediate major crisis in the performance of duty afforded neither time nor opportunity to apply to a magistrate.

State v. Brecunier, 564 N.W.2d 365, 368 (Iowa 1997) (quoting *State v. Hatter*, 342 N.W.2d 851, 855 (Iowa 1983)). We find no such emergency or urgent need. The State has failed to prove by a preponderance of the evidence that an exception applies. Accordingly, we affirm the decision of the district court to suppress "any evidence seized from the illegal entry of defendant's residence on September 14, 2000" and "the fruits of the illegal entry"

B. Emergency aid. The State argues its entry was necessary to provide emergency aid to those inside the mobile home because of the danger caused by the ether fumes. The emergency-aid exception is subject to strict limitations. *State v. Carlson*, 548 N.W.2d 138, 141 (Iowa 1996). We find this claim to be without merit. The officers heard voices and noises inside the mobile home. It was clear the occupants were not unconscious. Although the ether fumes may have been strong, there was no need for the officers to enter the home to evacuate its occupants or to render emergency aid to them.

C. Inevitable discovery. Finally, in its reply brief, the State argues evidence relating to the pan containing sludge should not have been suppressed because it inevitably would have been discovered when the search warrant was executed. It does not appear from the record before us that this claim was raised in or ruled on in the trial court. This issue was not preserved for our review. We

do not address claims raised for the first time on appeal. *Donald Newby Farms, Inc. v. Stoll*, 543 N.W.2d 289, 297 (Iowa Ct. App. 1995).

AFFIRMED.