FILED
AUG 23 1989
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-275 / 88-1022

STATE OF IOWA,

Appellee,

vs.

DAVID ALAN ORSCANIN,

Appellant.

843

STATE OF IOWA,

Appellee,

vs.

DAVID ARLAN BAILEY,

Appellant.

Appeal from the Iowa District Court for Franklin County, Stephen P. Carroll, Judge.

The defendants appeal from their conviction, following a consolidated jury trial, of second-degree burglary and second-degree theft; defendant Bailey was also found guilty of carrying a dangerous weapon. **AFFIRMED.**

William L. Wegman, State Public Defender, and Raymond E. Rogers, Assistant State Public Defender, for appellants.

Thomas J. Miller, Attorney General; Amy M. Anderson, Assistant Attorney General; and James M. Drew, County Attorney, for appellee.

Considered by Oxberger, C.J., and Hayden and Habhab, JJ.

OXBERGER, C.J.

David Alan Orscanin and David Arlan Bailey appeal from their conviction, following a consolidated jury trial, of second-degree burglary and second-degree theft. Bailey was also found guilty of carrying a dangerous weapon. Orscanin and Bailey contend, first, that the trial court erred by overruling their motion to suppress evidence obtained during a warrantless search of their car and, second, that an alleged theft from a truck stop does not constitute burglary because the truck stop was open to the public. Our scope of review is for the correction of errors at law. State v. Cuevas, 322 N.W.2d 910, 911 (Iowa App. 1982); Iowa R. App. P. 4.

On February 18, 1988, the co-owner of a truck stop on Interstate 35 discovered that $3,000 in cash and five hundred unstamped lottery tickets were missing from his office. The same day, an Iowa State Patrol trooper stopped a car he had observed speeding. He also noticed that the passenger was not wearing a seat belt. The driver of the car was Bailey and the passenger was Orscanin. The trooper gave Orscanin a citation for failing to wear a seat belt and issued a warning to Bailey for speeding. The trooper radioed a check on the two men and learned that there was an outstanding warrant from Worth County on Orscanin for third-degree theft.

Acting on this information, the trooper frisked Orscanin, handcuffed him, and placed him in the back seat

of the patrol car. He then searched Bailey's car, finding a knife and five hundred unstamped lottery tickets in the passenger compartment, and a large amount of cash in the trunk.

I. Search of Passenger Compartment

The defendant Orscanin claims the Belton[1] rule adopted by the Iowa Supreme Court in State v. Sanders, 312 N.W.2d 534, 539 (Iowa 1981), is not applicable here because the police had no reason to believe that co-defendant Bailey's car would contain any evidence relevant to the prior Worth County theft charge he was being arrested for. However, as Sanders at page 538 points out, there are two purposes for the vehicle warrantless search exception: (1) evidence might be secreted or destroyed, and (2) the necessity to remove weapons from arrestee's access.

Orscanin further contends that because he was handcuffed in the back seat of the trooper's car he could not possibly have gotten to Bailey's car to obtain a weapon. In State v. Shane, 255 N.W.2d 324, 327-28 (Iowa 1977), the court rejected the argument that the police may not search the vehicle after the suspect is handcuffed. The court said:

> We hold the police may see to the safe custody and security of suspects first and then make the

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1. New York v. Belton, 453 U.S. 454, 460, 101 S.Ct. 2860, 2864, 69 L.Ed.2d 768, 775 (1981).

limited search which the circumstances of the particular case permit. 847

In this case the police faced the added potential danger of Orscanin's companion Bailey. At Orscanin's request Bailey agreed to follow the patrol car to the police station. The police were justified in searching Bailey's vehicle after Orscanin had exited it to determine whether there might be any weapons that Bailey could get access to aid in Orscanin's escape.

The third basis on which Orscanin seeks reversal regarding the car search is that the search occurred more than thirty minutes after the stop. The original purpose of the stop was for speeding and a seat belt violation. The basis for the arrest occurred later when the dispatcher informed the trooper there was a theft warrant outstanding for Orscanin. If we were to run a stop watch we would start it at the time of the dispatcher's call. However, the supreme court in Sanders at page 538 said we will not apply a stop watch to these situations. We hold the time sequence in this case is reasonable.

II. Trunk Search

The defendants assert they did not consent to a search of the trunk but rather acquiesced to the trooper's apparent authority to conduct the search. While the trooper was searching the passenger compartment, Orscanin asked him if he had the right to do so and the trooper asserted he did. After searching the passenger compartment

the trooper asked the defendants: "What do you have in the trunk." Bailey pushed the button in the glove compartment opening the trunk lid.

The trooper did not claim he had authority to search the trunk. Orscanin was not intimidated by the trooper to respond to authority. He questioned the officer's right to search. There is no showing of force that overcome the defendant's will. The trooper did not ask Bailey to open the trunk lid; Bailey opened the trunk voluntarily.

III. Office - Public or Private?

Defendants contend the evidence is insufficient to permit the jury to find the office where the money was taken was an area "not being open to the public" as required by section 713.1 The Code.

The office was inside a truck stop, a place open to the public. The defendants claim that the statute does not state that burglary can occur when an insignificant portion of an occupied structure is not open to the public, especially when that part of the structure is not marked in any way as private.

In his motion for acquittal at the close of all the evidence, defense counsel Johnson said:

> First of all, your Honor, there has been no identity established, that Mr. Orscanin or Mr. Bailey were in fact present at Dudley's and able to steal any lottery tickets or money.
>
> Second of all, there is no establishment that the lottery tickets had an ascertainable value. If they did have such a value, it would be zero or, at most, less than $100. Obviously, if there's no

> identity, there's no ability for them to commit the theft at Dudley's. That's what we - I base my motion on, your Honor.

The issue now presented to this court is whether the area where the burglary occurred was a private area, was not raised in the trial court. Defense counsel DeMoss in his motion for acquittal did not raise the issue now urged in his motions for acquittal. Neither counsel raised the issue in a motion for new trial.

We deem the issue waived and do not address it on its merits. Conner v. State, 362 N.W.2d 449, 457 (Iowa 1985).

AFFIRMED.