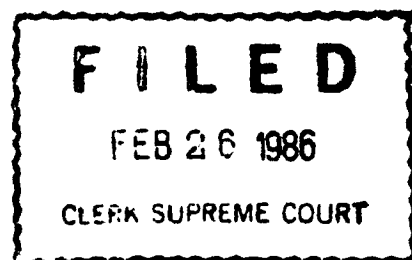


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

ALAN KENT LAGE,)

Defendant-Appellant.)

Filed February 26, 1986

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5-656
85-497

Appeal from the Iowa District Court for Johnson County (No. 15735)

L. Vern Robinson and Ansel J. Chapman, Judges.

Defendant appeals his judgments and sentences for possession of a controlled substance with intent to deliver, marijuana, and possession of a controlled substance with intent to deliver, cocaine, both in violation of Iowa Code section 204.401. **AFFIRMED.**

Philip B. Mears of Mears, Zimmerman & Mears, Iowa City, for defendant-appellant.

Thomas J. Miller, Attorney General; Ann DiDonato, Assistant Attorney General; and Dorothy Maher, Assistant County Attorney, for plaintiff-appellee.

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

Defendant, Alan Lage, appeals his judgments and sentences for possession of two controlled substances (marijuana and cocaine) with intent to deliver in violation of Iowa Code section 204.401 on the ground the evidence should have been suppressed under the search and seizure limitations of the fourth amendment of the United States Constitution.

On October 20, 1984, Officers Clark and Fort were dispatched to 25 Lincoln Avenue in Iowa City, Iowa, to investigate a possible breaking and entering in response to a citizen's call to the police station. When the officers arrived at the address, it was 7:00 p.m. and quite dark. They talked to several individuals in the house, determining that the tenant of the house was moving out and had broken a window on the side of the house, which led to the police report. Officer Fort remained in the house, speaking to Lage and his female friend while Officer Clark accompanied the tenant, Michael Rush, to the police car to make a call to the police station to verify Rush's leasehold interest. After that fact was confirmed, Officer Clark and Rush began walking towards the back of the house at Rush's behest to observe the broken window.

Before reaching the window, Officer Clark passed a vehicle parked in the drive. It was later determined that the vehicle was driven to the residence by Lage, although its owner was his female friend. When the officer glanced in the vehicle he saw a cellophane bag in plain view on the front seat containing a plant-like substance which looked like marijuana. The officer testified it was standard police operating procedure for the protection of the officer to view the interior of vehicles when passing. He continued to the back of the house where he observed the broken window, then he returned to the front driveway. He shined his flashlight into the car to confirm his first observation of what he believed to be contraband. He called Officer Fort out of the house,

who directed the beam of his flashlight into the car, and opined the bag contained marijuana.

In response to Officer Fort's request, Lage and his female friend were called outside the house. Officers Clark and Fort testified that they did not remove the bag until they gave defendant his Miranda warnings; however, Judge Chapman found they had removed it prior to the warnings. Following the warnings, Lage then made certain oral incriminating statements to the officers.

Defendant made a pretrial motion to suppress the physical evidence and the oral statements. Judge Chapman found the warrantless seizure justified by the "plain view" doctrine in that the officers were legitimately on the property in the first place and they had inadvertently discovered the contraband. Judge Chapman also found the oral statements admissible in that defendant made a knowing, intelligent, voluntary waiver of his rights following the full Miranda warnings.

I.

Our review of the constitutionality of a search and seizure is de novo consisting of an independent evaluation of the relevant circumstances in their entirety. State v. Dickenson, 313 N.W.2d 526, 530 (Iowa 1981); State v. Folkens, 281 N.W.2d 1, 3 (Iowa 1979); State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

The analytical framework for this issue was established in the landmark case of Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564, reh'g denied 404 U.S. 874, 92 S. Ct. 26, 30 L. Ed. 2d 120 (1971). While warrantless searches are per se unreasonable unless an exception is present, Coolidge established that evidence found in plain view falls within such an exception which does not violate search and seizure principles. Three classes of plain view situations exist: the so-called open view, post-intrusion, and pre-intrusion.

See State v. Davis, 228 N.W.2d 67, 71-72 (Iowa 1975). The latter two apply exceptions to this case.

The "plain view" doctrine only applies to post-intrusion searches and seizures. Three criteria exist for determining whether the contraband was in plain view: (1) Was there prior justification for the intrusion into an otherwise constitutionally protected area; (2) Was the incriminating nature of the object seized "immediately apparent"; (3) Was the discovery of the evidence inadvertent. See State v. Davis, 228 N.W.2d at 71 (citing Coolidge, 403 U.S. at 466-69, 91 S. Ct. at 2038-40, 29 L. Ed. 2d at 583-85).

Defendant apparently concedes a "prior justification" existed and the incriminating nature of the contraband was "immediately apparent," but takes issue with the "inadvertence" requirement. Defendant contends the police officer was snooping and his actions in shining the flashlight into the vehicle a second time was intentional, not inadvertent.

The distinction between an intentional act and inadvertent act is not the relevant inquiry, but rather the proper focus is the distinction between planned searches and inadvertent searches. See Davis, 228 N.W.2d at 71. (The inadvertence requirement is to prevent planned warrantless searches.) While the two concepts may overlap, intentional and planned searches are not mutually coexistent. Stated otherwise, not all intentional searches are necessarily planned searches as defined by the fourth amendment. Officer Clark no doubt intended to place his beam of light inside the vehicle and direct it to the suspicious bag, but this is not the same as planning a search in advance and claiming inadvertence as a pretext to avoid getting a warrant.

The Coolidge court stated that inadvertent seizures are allowed, "but where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different."

403 U.S. at 470, 91 S. Ct. at 2040, 29 L. Ed. 2d at 585. We cannot find the officers knew in advance that contraband was in the vehicle and there is no suggestion that use of a flashlight to check the inside of the vehicle which is standard police operating procedure was a pretext to avoid obtaining a warrant. We conclude Officer Clark's discovery of the contraband was accidental or inadvertent in that no prior knowledge existed so that the search cannot reasonably be characterized as "planned."

A similar situation was addressed in Texas v. Brown, 460 U.S. 730, 103 S. Ct. 1535, 75 L. Ed. 502 (1983), where the court held that a police roadblock in an area where narcotics traffic was thought to take place which led to discovery of a green balloon containing heroin in a glove compartment was not inadvertent. The court found "there is no indication in the record that [the police] had anything beyond [a] generalized expectation . . . the 'inadvertence' requirement of 'plain view,' properly understood, was no bar to seizure here." 460 U.S. at 744, 103 S. Ct. at 1543-44, 75 L. Ed. 2d at 515. Nothing in the record indicates the police had any suspicion that the vehicle contained drugs before the initial glance through the windshield. Had the police stopped the vehicle with the suspicion that drugs were contained therein, then a different situation would arise. The intentional act of shining a flashlight into a vehicle in this manner does not negate the inadvertence requirement.

Defendant also contends that after the officers were informed that Rush was a tenant, the investigation ended. We cannot adopt defendant's characterization of the facts. Officer Clark went to check the broken window at Rush's request and the investigation was not complete until the window was examined. On his way towards the window, the officer looked into the vehicle for security purposes and saw a suspicious container. After examining the window, Officer Clark shined his flashlight into the vehicle and determined a search was necessary.

Using a flashlight to illuminate an area which could be observed during daylight raises no obstacles for search and seizure analysis. See Texas v. Brown, 460 U.S. at 740, 103 S. Ct. at 1541, 75 L. Ed. 2d 512; State v. Lamp, 322 N.W.2d 48, 52 (Iowa 1982); State v. Cullor, 315 N.W.2d 808, 811 (Iowa 1982) (citing United States v. Johnson, 506 F.2d 674, 676 (8th Cir. 1974), cert. denied, 421 U.S. 917, 95 S. Ct. 1579, 43 L. Ed. 2d 784 (1975)).

We reject defendant's characterization that probable cause had dissipated and that the police were snooping when the contraband was discovered. The initial view into the vehicle was prior to investigating the broken window. At this time the suspicion arose. After the window was checked, the second view into the vehicle confirmed Officer Clark's original suspicion. Even after rigorous cross-examination, Officer Clark maintained he saw the container inside the vehicle without using a flashlight before he investigated the broken window. We are unwilling to conclude, as defendant urges us, that Officer Clark did not glance and see the container before he investigated the window because it was too dark. Had Officer Clark not seen the container before he investigated the broken window, our decision may have been different. It is perfectly reasonable to believe Officer Clark did glance into the vehicle without a flashlight just as a precaution and that he did spot the container.

The fact that the officer walked past the vehicle, returned to the vehicle, and used his flashlight to illuminate the interior of the vehicle during the second observation does not make the search "planned in advance." Cf. Texas v. Brown, 460 U.S. at 734, 740, 103 S. Ct. at 1538, 1542, 75 L. Ed. 2d at 508, 512-13 ("When the [officer] saw the [suspicious container], he shifted his position in order to obtain a better view of the interior of the glove compartment . . . the fact that the officer 'changed his position' and 'bent down at an angle so he could see what was inside' Brown's car, is irrelevant to fourth amendment analysis.

The general public could peer into the interior of Brown's automobile from any number of angles; there is no reason [the officer] should be precluded from observing as an officer what would be entirely visible to him as a private citizen.") Defendant claims after the broken window was checked, the investigation ended and the second view into the vehicle was a separate investigation. We disagree. The initial view into the vehicle, the checking of the broken window, and the subsequent view into the vehicle with a flashlight were all parts of one, continuous, and ongoing investigation.

II.

To validly conduct a warrantless seizure under the pre-intrusion exception, probable cause and exigent circumstances must be present. State v. Eubanks, 355 N.W.2d 57, 59 (Iowa 1984); State v. Cullor, 315 N.W.2d at 812; State v. Holtz, 300 N.W.2d 888, 892-93 (Iowa 1981); State v. Davis, 228 N.W.2d at 72. This exception actually falls outside the Coolidge parameters and requires that the material be viewed in an area protected by an expectation of privacy from a vantage point where the viewer had a right to be. State v. Davis, 228 N.W.2d at 72. It has been recognized that "the most common case where a pre-intrusion view of material in an area protected by an expectancy of privacy coupled with exigent circumstances permits an intrusion and seizure is the automobile case. In this situation, the mobility of the car and potential loss of the evidence it contains frequently provides the exigency." Id. (citations omitted). It is well-established that "[a] nonintrusive plain view establishes only the lawfulness of the observation itself (looking into a parked vehicle with a flashlight) and not the lawfulness of any subsequent intrusion and seizure." State v. Cullor, 315 N.W.2d at 812 (citing 1 W. LaFare, Search and Seizure § 2.2, at 245 (1978)).

It is clear that the officers had a right to be at the particular vantage point to observe the parked vehicle in plain sight because they were still investi-

gating the burglary. Probable cause may be present when an object is in plain view of an officer who is standing outside of a vehicle. State v. Cullor, 315 N.W.2d at 811. It is important to note that a vehicle has a lesser expectation of privacy, especially when the vehicle is suspected of transporting contraband, than a home. See United States v. Ross, 456 U.S. 798, 823, 102 S. Ct. 2157, 2171, 72 L. Ed. 2d 572, 592-93 (1982). Spotting a suspicious container in a vehicle's interior through use of a flashlight is sufficient to establish probable cause. We have little difficulty in finding that the visual inspection of the interior of the vehicle was proper.

As to the exigent circumstances, we are cognizant that every vehicle has inherent mobility and to make this requirement a meaningful criteria we must not find such circumstances present each time a vehicle is present. The exigent circumstances exist only if the vehicle may be moved and the evidence it contains may be lost if the police do not act immediately. State v. Cullor, at 813 (citing Hambens v. Maroney, 399 U.S. 42, 51, 90 S. Ct. 1975, 1981, 26 L. Ed. 2d 419, 428 (1970), reh'g denied 400 U.S. 856, 91 S. Ct. 23).

We find such circumstances present here. The defendant was moving out of a leased premises and it is reasonable to conclude the vehicle would be moved shortly thereafter. Moreover, the type of contraband (marijuana and cocaine) would have been easily disposed of should the officers have left the premises to obtain a warrant. It is not necessary for the police to post a guard with the vehicle until a warrant is obtained. State v. Cullor, 315 N.W.2d at 811.

Our holding should not be read to indicate that every time the police discover contraband in a vehicle that a warrantless search is authorized, but, under the facts of this case, the warrantless search and seizure was appropriate.

For these reasons, trial court's decision is affirmed.

AFFIRMED.