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IN THE COURT OF APPEALS OF IOWA

CLERK SUPREME COURT

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed November 26, 1980

vs.

)

GARY JOSEPH ROTH,

)

0-202

63741

Defendant-Appellant.

)

Discretionary review from Woodbury District Court - George F. Davis, Judge.

Defendant challenges through discretionary appeal trial court's overruling of motion to suppress. Warrantless search of locked automobile trunk pursuant to police inventory procedures held unreasonable search in violation of Fourth Amendment proscriptions. - REVERSED.

Jody Dible and Paul D. Miller, Woodbury County Public Defender, Sioux City, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, Douglas Staskal, Assistant Attorney General, and Patrick C. McCormick, Woodbury County Attorney, for plaintiff-appellee.

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

SNELL, J.

Defendant challenges by way of discretionary appeal pursuant to section 814.6(2)(a), The Code 1979, the trial court's overruling of his motion to suppress. We reverse.

On April 11, 1979, at about 3:00 a.m., approximately one mile north of Sloan, Iowa, on highway 75, police officer Royce McGuire stopped an automobile owned by defendant Gary Roth in which defendant was a passenger. The driver was arrested for operating a motor vehicle while under the influence of an alcoholic beverage. Defendant was arrested for public intoxication. After McGuire took defendant and the driver into custody in McGuire's police car, police officer David Amick arrived on the scene. McGuire called a tow truck to impound defendant's automobile, which was partially on the shoulder of the road and on the traveled portion. As McGuire departed for the police station with defendant and driver, Amick commenced a warrantless inventory search of defendant's automobile. Amick removed the keys left by defendant in the automobile's ignition, and used them to unlock the automobile trunk. Inside the trunk Amick discovered a toolbox and a paper sack. Amick opened the toolbox, saw a number of tools, closed it, and listed a toolbox on his inventory sheet. He then looked inside the paper sack and discovered two pounds of marijuana. Amick seized the marijuana, and defendant was subsequently charged with possession of a controlled substance with intent to deliver in violation of section 204.401(1), The Code 1979. After a trial date was set, defendant moved to suppress the marijuana evidence. Hearing was held, the trial court overruled defendant's motion, and we now examine the trial court's decision under discretionary review.

Defendant contends the warrantless search of his automobile violated his constitutional rights. Consequently, our review is de novo. Bettuo v. Pelton, 260 N.W.2d 423, 425 (Iowa 1977). Defendant alleges his automobile was searched in violation of the Fourth Amendment to the United States Constitution and Article 1, Section 8 of the Iowa Constitution. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourth Amendment protections are enforceable against the states through the due process clause of the Fourteenth Amendment to the United States Constitution. Mapp v. Ohio, 367 U.S. 643, 655, 81 S. Ct. 1684, 1691, 6 L.Ed.2d 1081, 1090 (1961).

As an "effect," an automobile falls within the reach of the Fourth Amendment. Cady v. Dombrowski, 413 U.S. 433, 439, 93 S. Ct. 2523, 2527, 37 L.Ed.2d 706, 713-14 (1973). The Fourth Amendment prohibits warrantless searches only if they are unreasonable. South Dakota v. Opperman, 428 U.S. 364, 372, 96 S. Ct. 3092, 3099, 49 L.Ed.2d 1000, 1007 (1976) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 509-510, 91 S. Ct. 2022, 2059, 29 L.Ed.2d 564, 608 (1971) (Black, J., concurring and dissenting)). The reasonableness of a search within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case. Cooper v. California, 386 U.S. 58, 59, 87 S. Ct. 788, 790, 17 L.Ed.2d 730, 732 (1967). The general rule is that a warrantless search is per se unreasonable unless it falls under any of the carefully drawn exceptions to the warrant requirement. Camara v. Municipal Court, 387 U.S. 523, 528-29, 87 S. Ct. 1727, 1731, 18 L.Ed.2d 930, 935 (1967). Those seeking to justify a search under one of the exceptions have the burden to show the need for it, United States v. Jeffers, 342 U.S. 48, 51, 72 S. Ct. 93, 95, 96 L.Ed. 59, 64 (1951), State v. Shea, 218 N.W.2d 610, 613 (Iowa 1974), and must satisfy that burden by a preponderance of the evidence. Bettuo, 260 N.W.2d at 425.

In South Dakota v. Opperman the United States Supreme Court held that noninvestigative inventory searches¹ of automobiles in lawful custody may be valid if conducted pursuant to standard police procedures that respond to the need to (1) protect the owner's property while in police custody, (2) protect the police against claims over allegedly stolen or lost property, or (3) protect the police from potential danger. Opperman, 428 U.S. at 369, 96 S. Ct. at 3097, 49 L.Ed.2d at 1005. In Opperman an inventory search of a locked automobile lawfully impounded by the police was prompted by the presence of valuables in plain view on the dashboard, back seat, and back floorboard. The Opperman court upheld the search of the unlocked glove compartment as part of the inventory search, reasoning that "... once the policeman was lawfully

¹ A noninvestigative search is one whose reasonableness does not depend on the presence of probable cause and whose purpose is not to investigate criminal activity. United States v. Chadwick, 433 U.S. 1, 10 n.5, 97 S. Ct. 2476, 2482-83 n.5, 53 L.Ed.2d 538, 547 n.5 (1977); South Dakota v. Opperman, 428 U.S. 364, 370 n.5, 96 S. Ct. 3092, 3097 n.5, 49 L.Ed.2d 1000, 1006 n.5 (1976).

inside the car to secure the personal property in plain view, it was not unreasonable to open the unlocked glove compartment, to which vandals would have had ready and unobstructed access once inside the car." Opperman, 428 U.S. at 376 n.10, 96 S. Ct. at 3100 n.10, 49 L.Ed.2d at 1009 n.10.

Opperman, however, does not legitimate all inventory searches of vehicles in lawful custody conducted pursuant to standard police procedures. Justice Powell, in a concurring opinion, by which a majority was obtained, cautioned, "Upholding searches of this type provides no general license for the police to examine all the contents of such automobiles." Opperman, 428 U.S. at 380, 96 S. Ct. at 3102, 49 L.Ed.2d at 1012. The search conducted in Opperman did not include the automobile trunk because it was locked. Justice Marshall points out that Opperman did not decide the validity of searching a locked glove compartment or locked trunk as part of an otherwise legitimate inventory search of a vehicle. Opperman, 428 U.S. at 385 n.1, 96 S. Ct. at 3105 n.1, 49 L.Ed.2d at 1015 n.1 (Marshall, J., dissenting). The legitimacy of an inventory search still depends on its reasonableness. See Opperman, 428 U.S. at 372, 96 S. Ct. at 3099, 49 L.Ed.2d at 1007 (quoting Coolidge v. New Hampshire, 403 U.S. 443, 509-510, 91 S. Ct. 2022, 2059, 29 L.Ed.2d 564, 608 (1971) (Black, J., concurring and dissenting)). The test is whether the intrusion was reasonable under the circumstances and therefore nonviolative of Fourth Amendment proscriptions. See Opperman, 428 U.S. at 372, 96 S. Ct. at 3099, 49 L.Ed.2d at 1007; Coolidge v. New Hampshire, 403 U.S. 443, 509-10, 91 S. Ct. 2022, 2059-60, 29 L.Ed.2d 564, 608 (1971) (Black, J., concurring and dissenting). Resolution of the question of reasonableness requires a weighing of the governmental and societal interests advanced to justify the intrusion against the constitutionally protected interest of the individual citizen in the privacy of his effects. Opperman, 428 U.S. at 378, 96 S. Ct. at 3101, 49 L.Ed.2d at 1010 (Powell, J., concurring); United States v. Bloomfield, 594 F.2d 1200, 1202-03 (8th Cir. 1979); United States v. Lawson, 487 F.2d 468, 475-76 (8th Cir. 1973).

The Woodbury County Sheriff's Department had developed a standard procedure of conducting an inventory search of every vehicle taken into custody. Officer Amick's search, conducted according to established procedure, promoted the goals of protecting

defendant's valuables and protecting the police against claims. However, these legitimate governmental goals are not significant in the instant case. Except in rare cases, there is little danger associated with impounding unsearched automobiles. Opperman, 428 U.S. at 378, 96 S. Ct. at 3101, 49 L.Ed.2d at 1010 (Powell, J., concurring); Bloomfield, 594 F.2d at 1203. In Opperman the goals of protecting police against claims and protecting the owner's valuables were important because the owner's valuables were exposed in plain view in the automobile, posing an increased likelihood of vandalism and theft. By contrast, in the case at bar, these goals are of relatively minor importance because the contents of the trunk were concealed from plain view and safeguarded by a lock. Moreover, in the sparsely populated farm area of Sloan, Iowa, the automobile easily could have been moved to eliminate its being a traffic hazard, then locked and left with little risk of a break-in to its locked trunk. In another United States Supreme Court case, Cady v. Dombrowski, the Court held the search of a locked trunk valid where the police had reason to believe it contained a gun and was vulnerable to intrusion by vandals. Dombrowski, 413 U.S. at 448, 93 S. Ct. at 2531, 37 L.Ed.2d at 718. But this goal of protecting the public through the search of the locked trunk that justified the search in Dombrowski is absent in the case at bar.

Whereas the governmental interests in searching defendant's locked trunk are relatively weak in the instant case, defendant's expectation of privacy in the trunk's contents was reasonably strong. The expectation of privacy extends to personalty located outside as well as inside the home. See Arkansas v. Sanders, 442 U.S. 753, 766, 99 S. Ct. 2586, 2593, 61 L.Ed.2d 235, 246 (1979); United States v. Chadwick, 433 U.S. 1, 7, 9-11, 97 S. Ct. 2476, 2481, 2482-83, 53 L.Ed.2d 538, 545, 547-48 (1977). "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." Coolidge, 403 U.S. at 461-62, 91 S. Ct. at 2035, 29 L.Ed.2d at 580. By locking the trunk in which he placed his personal property, defendant manifested a reasonable expectation of privacy in the trunk's contents, similar to the expectation of a person who seals his personal effects in a secured piece of luggage. Cf. Chadwick, 433 U.S. at 11, 97 S. Ct. at 2483, 53 L.Ed.2d at 548 (warrantless search of double-locked footlocker invalid); Sanders, 442 U.S. at 766, 99 S. Ct. at 2593-94, 61 L.Ed.2d at 246 (warrantless search of closed suitcase invalid); Bloomfield, 594 F.2d at 1202-03

(inventory search of zipped knapsack invalid); United States v. Schlies, 582 F.2d 1166, 1170, 1172-73 (8th Cir. 1978) (inventory search of closed briefcase invalid). See also Wimberly v. Superior Court of San Bernardino County, 16 Cal.3d 557, 567-68, 128 Cal. Rptr. 641, 648, 547 P.2d 417, 423-24 (1976) (locked trunk is area of car in which defendant has greatest reasonable expectation of privacy); Estate v. Patino, 394 A.2d 365, 369-70 (N.J. Sup. Ct. App. 1978) (trunk is distinctly separate part of car in which there is reasonably greater expectation of privacy than in passenger compartment).

The result we reach today is consistent with the pronouncement in Opperman and is in accord with United States v. Lawson, 487 F.2d 468 (8th Cir. 1973). Although postdating Lawson, Opperman, in our judgment, does not overrule Lawson by word, tenor, or effect. In Lawson the police impounded defendant's automobile and conducted an inventory search of it according to a written police regulation. A .22 caliber revolver found in the automobile's locked trunk led to defendant's conviction of two federal firearms violations. The United States Court of Appeals for the Eighth Circuit found the search of the locked trunk unreasonable in violation of the Fourth Amendment, stating that:

[w]hile police custody may justify reasonable measures to protect the vehicle itself (i.e., rolling up the windows and locking the doors), or property within plain view in the automobile, such reasonable protective measures do not extend to breaking into a locked trunk.

Lawson, 487 F.2d at 475.

In the instant case, as in Lawson, the intrusion into the locked trunk is excessive and unreasonable. Cf. State v. Hatfield, 364 So.2d 578, 580-81 (La. 1978) (inventory search of locked automobile trunk according to standard police practice unreasonable). But cf. United States v. Martin, 566 F.2d 1143, 1145 (10th Cir. 1977) (inventory search of locked automobile trunk according to standard police practice reasonable); State v. Roberson, 156 N.J. Super. 551, 553-57, 384 A.2d 195, 196-98 (Super. Ct. App. Div. 1978) (inventory search of locked automobile trunk according to standard police practice reasonable); State v. Vigil, 86 N.M. 388, 390-91, 524 P.2d 1004, 1006-07 (Ct. App.), cert. denied, 86 N.M. 372, 524 P.2d 988 (1974), cert. denied, 420 U.S. 955, 95 S. Ct. 1339, 43 L.Ed.2d 432 (1975) (inventory search of locked automobile trunk according to standard police practice reasonable).

We hold that the search of the locked trunk of defendant's automobile was unreasonable under all the circumstances and was therefore in violation of the Fourth Amendment mandate. Nor does a different result obtain by applying the more specific criteria since defendant's reasonable expectation of privacy is not outweighed by the government's interests in making an inventory of the automobile's contents. See Opperman, 428 U.S. at 1010 (Powell, J., concurring). To validate this search would culminate the reality of Justice Marshall's observation that the conservation of mere possibilities of property interests would be elevated above privacy and security interests protected by the Fourth Amendment. Opperman, 428 U.S. at 396, 96 S. Ct. at 3110, 29 L.Ed.2d at 1021 (Marshall, J., dissenting). Our conclusion obviates consideration of defendant's argument that the search also violated the provisions of Article 1, Section 8 of the Iowa Constitution.

All evidence seized in the search is inadmissible in court. State v. Smith, 178 N.W.2d 329, 332 (Iowa 1970). The trial court erred in overruling defendant's motion to suppress.

REVERSED.

All judges concur, except Donielson and Carter, JJ., who dissent.

DONIELSON, J. (dissenting)

I.

I dissent on the grounds that the majority has misread and unjustifiably expanded the holding of South Dakota v. Opperman, which I find to be controlling on the question of the validity of this search.

Under Opperman, a routine inventory search of an automobile in lawful custody is reasonable and therefore valid under the fourth amendment if the search is carried out according to standard police procedures and in good faith. Opperman, 428 U.S. 364, 369, 375-76, 96 S. Ct. 3092, 3097, 3100, 49 L. Ed. 2d 1000, 1005, 1009 (1976). Inventory searches are justified by the need to protect the owner's property while in police custody, the need to protect police against claims for stolen or lost property, and the need to protect police from potential danger. Opperman, 428 U.S. at 369, 96 S. Ct. at 3097, 49 L. Ed. 2d at 1005. Applying the Opperman standard to the instant case, I find the intrusions into the locked trunk and the brown paper bag contained therein valid. The police had lawfully taken defendant's car into custody following an arrest of the driver for OMVUI and defendant's arrest for public intoxication. The search of the car was conducted according to standard procedures used by the sheriff's department for inventory searches whenever a car is taken into custody. Before turning the car keys over to the private towing company that had been called to impound defendant's car, the police officer inventoried the contents of the car according to established police procedures. There is no suggestion in the record, nor do the appellants claim, that the search was not legitimately motivated by the desire to safeguard any valuables defendant may have had in the car, one of the police motives recognized as appropriate and justified in Opperman. Based upon these considerations, I think the Opperman test was satisfied and the searches of the trunk and paper bag were valid.

As I interpret Opperman, then, a routine automobile inventory search conducted pursuant to established police procedures and in good faith is reasonable and the inquiry need proceed no further. However, the majority of this court would read Opperman to mean that such searches are not automatically reasonable and that the reasonableness of a good faith inventory search conducted pursuant to standard police procedure depends on a balance between the governmental interest served by the search and the defendant's reasonable expectations of privacy in his or her personal effects. In other words, the majority's interpretation of Opperman would convert a routine search, the

validity of which depends under Opperman on the very fact that it is routine, into a search depending for its validity on independent judgment. While this reading of Opperman may have been suggested by Justice Powell's concurring opinion, Opperman, 428 U.S. at 378, 96 S. Ct. at 3101, 49 L. Ed. 2d at 1010, I do not believe that this is a correct interpretation of the holding of the Opperman majority. In fact, Justice Powell himself finally concludes that a routine inventory search is permissible. Opperman, 428 U.S. at 384, 96 S. Ct. at 3105, 49 L. Ed. 2d at 1014. I might add that the four dissenting justices in Opperman all agree that the opinion holds that a routine inventory search is constitutional. Opperman, 428 U.S. at 384-85, 96 S. Ct. at 3015, 49 L. Ed. 2d at 1014 (Marshall, J., dissenting). I find the interpretation of Opperman advanced by the majority today particularly disturbing because it virtually ignores the objective standard established by that decision in favor of a more subjective inquiry into an accused's expectation of privacy; furthermore, this emphasis on subjectivity is unquestionably contrary to the very concept of a routine inventory search, where subjective expectations are irrelevant. Therefore, applying what I perceive to be the more accurate reading of Opperman to the facts of this case, I would uphold the validity of the search of the trunk and the paper bag.

II.

Even applying Opperman as interpreted by the majority of this court, however, it would appear that the challenged search was reasonable. The defendant may have expected that his privacy would be preserved in both the locked trunk and the paper bag. However, under Opperman, any emphasis on an accused's expectation of privacy in an attempt to invalidate a routine inventory automobile search is misplaced. A locked part of a car is hardly analogous to locked or even closed pieces of personal luggage in which it may be said that a defendant has a reasonable expectation of privacy. See United States v. Chadwick, 433 U.S. 1, 13, 97 S. Ct. 2476, 2484, 53 L. Ed. 2d 538, 549 (1977). Because personal luggage is intended as a repository of personal effects and is not subject to regular inspections and official scrutiny on a continuing basis, one's reasonable expectation of privacy in an automobile is legally less than the reasonable expectation of privacy one might have in personal baggage. See id. Additionally, because brown paper bags provide only minimal protection against accidental or deliberate intrusions and because reasonable persons do not ordinarily associate brown paper bags with the expectation of privacy, the owner of such a bag does not have a

reasonable expectation of privacy once the bag is lawfully seized. United States v. Ross, ____ F.2d ____, ____, 27 Crim. L. Rptr. 2169, 2170 (D.C. Cir. 1980). When weighed against the government's substantial interest in making an inventory of the car's contents before turning the car over to a private impoundment service, defendant's minimal or nonexistent expectation of privacy in the locked trunk and paper bag is insufficient to tip the balance in his favor.

Furthermore, I find it significant that we are asked to determine the validity of a search into part of an automobile. As the Opperman majority notes, the expectation of privacy with respect to one's car is significantly less than that relating to one's home or office. Opperman, 428 U.S. at 368, 96 S. Ct. at 3096, 49 L. Ed. 2d at 1004. The automobile, unlike the home, is basically public in nature. Opperman, 428 U.S. at 368, 96 S. Ct. at 3096, 49 L. Ed. 2d at 1005. Its primary function is transportation along the public thoroughfares; it is not designed to serve as a place for safekeeping personal effects. Id. (quoting Cardwell v. Lewis, 417 U.S. 583, 94 S. Ct. 2464, 41 L. Ed. 2d 325 (1974)). Furthermore, cars, unlike homes, are subject to pervasive and on-going governmental regulation, including periodic inspections and licensing requirements. Opperman, 428 U.S. at 368, 96 S. Ct. at 3096, 49 L. Ed. 2d at 1004. Finally, the element of mobility inherent in the automobile mandates less rigorous warrant requirements for car searches. Opperman, 428 U.S. at 367, 96 S. Ct. at 3096, 49 L. Ed. 2d at 1004. Given these considerations, it is reasonable that one should have a lesser expectation of privacy in a car or in part of a car.

Two further points made by the majority today merit discussion. First, it is pointed out that the search conducted in Opperman did not include the trunk of the car because the trunk was locked. This statement derives from the testimony of one of the police officers who presumably was present during the search. Opperman, 428 U.S. at 380 n.6, 96 S. Ct. at 3102 n.6, 49 L. Ed. 2d at 1012 n.6 (Powell, J., concurring). This point is of questionable persuasiveness, however, since the fact that the car itself was locked obviously did not deter the police from searching it. Second, the majority asserts that Opperman does not overrule Lawson. While I admit that Lawson is not expressly overruled by Opperman, I believe that it is in effect overruled because Opperman adopts an objective standard for routine inventory searches rather than a subjective one. The Lawson court acknowledges that its decision to invalidate the search was reached without direct guidance from the Supreme Court. U.S. v. Lawson, 487 F.2d 468, 470

(8th Cir. 1973). It seems to me undeniable that Opperman provides such guidance and that Lawson would be differently decided today on the basis of Opperman. At the very least, Opperman casts such serious doubt on the result in Lawson that I do not think the latter can legitimately be relied on as precedent.

To summarize, because my reading of Opperman would preclude an inquiry into defendant's expectation of privacy and would validate an inventory search if made pursuant to established police procedures and in good faith, I would affirm defendant's conviction.

Carter, J., joins in this dissent.