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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Plaintiff-Appellee,

vs.

BARRY RANDALL NEIBERGER,

Defendant-Appellant.

Filed September 30, 1987

272

6-372
85-1678

Appeal from the Iowa District Court for Pocahontas County (No. CR37-0585), Newt Draheim, Judge.

Defendant appeals from his conviction for unauthorized possession of an offensive weapon, asserting that certain evidence was obtained in violation of his constitutional rights and should have been suppressed. **REVERSED AND REMANDED.**

Charles Harrington, Chief Appellate Defender and Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Christie J. Scase, Assistant Attorney General; and H. Dale Huffman, Pocahontas County Attorney, for plaintiff-appellee.

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

OXBERGER, C.J. 273

In this appeal, defendant Barry Neiberger challenges his conviction following a bench trial before Judge Newt Draheim for the unauthorized possession of an offensive weapon in violation of sections 724.1(2) and 724.3 of the Iowa Code. Specifically, Neiberger argues that Judge Albert Habhab erred in refusing to suppress certain evidence obtained in an allegedly illegal manner. As explained below, we find Neiberger's contention to be premised upon solid underpinnings, and reverse and remand the case for a new trial.

A brief discussion of the facts will aid in an understanding of the issues presented in this appeal. The record discloses that at approximately 11:00 p.m. on April 25, 1985, Pocahontas police officer Kent Rotert received a telephone call from a man named Bill Henderson. Henderson told Rotert that he had been assaulted and that he wished to press charges against his assailant. Rotert then drove to the home of Craig Gallup and Rania Greer, where Henderson was. When Rotert arrived, Henderson and the defendant came out of the house and explained the details of the alleged assault. Rotert then asked the two to accompany him to the police station to file a formal complaint. The defendant and Henderson agreed, and followed Rotert to the station in the defendant's pick-up truck. The defendant was not a suspect in the claimed assault against Henderson.

After the defendant, Rotert and Henderson had entered the police station, Pocahontas police officer Curtis Anderson received a radio dispatch concerning a report that the defendant had a sawed-off shotgun behind the seat of his pick-up truck. Without further inquiry, Anderson proceeded to the police station where he searched the defendant's truck without having first obtained a search warrant. When the search failed to produce the shotgun, Anderson went into the police station, spoke with Rotert, and ascertained that the shotgun was not on the defendant's person. After Anderson and Rotert finished taking the defendant's

statement concerning the assault upon Henderson, they began questioning him about the shotgun. Eventually, Anderson told the defendant that he could not leave the police station; the defendant was kept at the police station for approximately one to two hours while Anderson set out to locate the shotgun. Anderson eventually arrived at the home of Rania Green and discovered the shotgun in the defendant's wife's diaper bag.

Although the defendant has proffered several theories in challenging the seizure of the shotgun, we find one theory dispositive; consequently, we address this theory alone. The defendant argues that because he was illegally detained at the police station, the evidence seized as a result of his detention should have been suppressed. We agree.

At the outset, it is important to note that at the hearing held on the defendant's motion to suppress, the state agreed that the defendant had been detained in violation of his fifth and fourteenth amendment rights. See State v. Stevens, 394 N.W.2d 388, 390-91 (Iowa 1986); State v. Ahart, 324 N.W.2d 317, 319 (Iowa 1982). Consequently, the state agreed that any statements made by Neiberger during the period of his illegal detention could not be offered into evidence. Moreover, there is no dispute that Officer Anderson lacked probable cause to search the defendant's vehicle. See Ahart, 324 N.W.2d at 317. It is additionally significant to note, however, that the exclusionary rule further bars the use of evidence discovered as a result of illegal police conduct. Wong Sun v. United States, 371 U.S. 471, 484-85, 83 S.Ct. 407, 415-16, 9 L.Ed.2d 441, 453 (1963); State v. Hatter, 342 N.W.2d 851, 856 (Iowa 1983). It is thus well-established that evidence obtained in such a manner must be suppressed unless it is found that intervening events broke the causal connection between the unlawful act and the discovery of the evidence in question. Hatter, 342 N.W.2d at 856. In this connection, the ultimate question is "whether, granting establishment of

the primary illegality, the evidence to which instant objection is made has been [obtained] by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Wong Sun v. United States, 371 U.S. at 487-88, 83 S.Ct. at 417, 9 L.Ed.2d at 455. In making this determination, it is incumbent upon us to examine the defendant's claim by making an independent evaluation of the totality of the circumstances. State v. Conger, 375 N.W.2d 278, 279 (Iowa App. 1985). This is the equivalent of a de novo review. Id.

We think it clear that the evidence challenged in the present case was discovered as a direct result of the defendant's illegal detention and the illegal search of his vehicle. As delineated above, the defendant was illegally detained for approximately one to two hours while the police questioned him concerning the shotgun and searched his vehicle without a warrant. After meeting with no success, Officer Anderson then eventually proceeded to the home of Rania Green, where the defendant had been earlier that evening, and recovered the gun in the defendant's wife's diaper bag. We do not think that these activities on the part of Anderson can be said to constitute an independent investigation purging the taint of the prior illegal police activities; rather, when Anderson failed to find the gun on the defendant's person or in his pick-up truck, Anderson merely looked elsewhere. Clearly, had Anderson found the gun in the defendant's pick-up, it would have been suppressed; we do not think that the "fortuitous" fact that the gun was housed elsewhere is a sufficient item of attenuation to break the causal connection between the illegal police activities and the discovery of the gun. See Hatter, 342 N.W.2d at 857. Moreover, as Anderson testified, the defendant and his wife would have left Pocahontas and returned to their residence out of town if the defendant had not been detained. In these circumstances, we conclude that the judgment must be reversed and the case remanded for a new trial.

REVERSED AND REMANDED.

Donielson, J. concurs; Sackett, J. dissents.

SACKETT, J. (dissenting) 276

I agree with the majority that the officer exceeded his bounds in detaining defendant and searching his truck without a warrant. While I do not condone the officer's conduct, I believe the issue we must address is whether defendant's wife consented to the search of her diaper bag. The trial court found she did. I find no reason to disturb those findings. I would affirm the trial court.