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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-567 / 00-1961
Filed November 16, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RICHARD ALAN HAIGH,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Randall J. Nigg, District Associate Judge.

Richard Haigh appeals from his conviction and sentence for possession of marijuana in violation of Iowa Code section 124.401(5) (1999). **AFFIRMED.**

Thomas J. Straka of Day & Hellmer, P.C., Dubuque, for appellant.

Thomas J. Miller, Attorney General, Donald D. Stanley, Jr., Assistant Attorney General, Fred H. McCaw, County Attorney, and Alisha Stach and Timothy Gallagher, Assistant County Attorneys, for appellee.

Considered by Huitink, P.J., and Miller and Hecht, JJ.

MILLER, J.

Richard Alan Haigh appeals from his conviction for possession of marijuana in violation of Iowa Code section 124.401(5) (1999). He contends the trial court erred in denying his motion to suppress. We affirm.

I. BACKGROUND FACTS

Police were dispatched to the area of 331 Dorgan Street in Dubuque, Iowa to investigate a call reporting a suspicious person in the area knocking on the door and trying to enter the residence. Officer Phillip Hartung was one of the officers who to responded to the call. When Officer Hartung arrived at the scene he found Richard Haigh at the rear of the residence at 331 Dorgan on a deck next to the back door of the house. Officer Hartung "asked if I could talk to him for a minute" and Haigh came down from the deck and spoke to him.

Upon contact Officer Hartung detected a strong odor of alcohol on Haigh's breath, noticed that his speech was slurred, and that his eyes were bloodshot and watery. Hartung asked Haigh if he had been drinking that evening and Haigh stated that he had been drinking in East Dubuque and a cab had dropped him off on Dorgan shortly before Hartung arrived. Hartung also asked Haigh where he was trying to go or who he was looking for and Haigh told him that he was looking for his ex-girlfriend but could not provide an address for her.

After Officer Hartung observed Haigh's state of apparent intoxication he told Haigh he was under arrest for public intoxication and escorted him to his squad car. Prior to placing Haigh in the squad car Hartung advised Haigh he needed to pat him down and asked if he had any "weapons or needles or knives or anything on him or in his pockets." Haigh replied that he did not. Hartung

proceeded to search Haigh and located a plastic baggie in his front jeans pocket which contained a green leafy substance. Hartung then took Haigh to the police station for processing. The substance was later tested and confirmed to be marijuana. Haigh was charged by trial information with possession of marijuana, in violation of Iowa Code section 124.401(5) (1999), and public intoxication, in violation of Iowa Code section 123.46.

Haigh filed a motion to suppress. He sought suppression of the marijuana discovered during Officer Hartung's search incident to his arrest for public intoxication. Haigh argued the arrest was illegal and therefore the subsequent search based on that arrest was illegal and the evidence obtained from the search should be suppressed. Specifically, Haigh argued that the officer's "request" to speak to him was in fact an order to come off the private deck onto a public area. He asserted he did not come off the deck voluntarily but was merely surrendering to the officer's authority and therefore, the arrest for public intoxication was illegal under the Fourth Amendment.

The court held a hearing on the motion to suppress. Officer Hartung testified on behalf of the State. Sarah Petesch, Haigh's girlfriend at the time and at whose residence Haigh was arrested, testified for Haigh. Officer Hartung testified the facts were as set forth above. Petesch testified that she had seen Haigh at a bar in East Dubuque earlier the night of the arrest. They discussed Petesch giving Haigh a ride to her house, but he was going to get a ride with his friends and meet Petesch at her house later. Petesch also testified Haigh had permission to go to her house and be there at the time of his arrest.

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The district court overruled Haigh's motion to suppress. The matter proceeded to trial on the minutes of testimony and the record of the testimony at the suppression hearing. Haigh objected to admission of evidence of the marijuana on the same grounds presented through the motion to suppress. Although no express ruling on the objection appears in the record, it seems clear the trial court implicitly overruled it, as it considered the marijuana evidence. The court found Haigh guilty of possession of marijuana. The public intoxication charge was dismissed pursuant to agreement of the parties.

Haigh challenges the district court's denial of his motion to suppress. He contends he was on a private deck and only came onto the public area in submission to the authority of Officer Hartung and as his presence on public property was merely a result of this submission his arrest for public intoxication was illegal as was the search incident to the arrest. The State asserts Haigh did not submit to police authority but voluntarily left the deck area. In the alternative the State argues Haigh's apparent intoxication, admission to having been drinking, and admission to having taken a public conveyance to Petesch's residence provided the officer with probable cause to arrest Haigh for public intoxication.

II. STANDARD OF REVIEW

A motion to suppress implicates the Fourth and Fourteenth Amendments of the United States Constitution. *State v. Wiese*, 525 N.W.2d 412, 414 (Iowa 1994), *overruled on other grounds by State v. Cline*, 617 N.W.2d 277 (Iowa 2000). We review this constitutional issue de novo and make an independent evaluation of the totality of the circumstances as shown by the entire record.

State v. Howard, 509 N.W.2d 764, 767 (Iowa 1993). "We give deference to the district court's fact findings due to its opportunity to assess the credibility of witnesses, but we are not bound by those findings." *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001). In reviewing the trial court's ruling, we consider both the evidence presented at the suppression hearing and the evidence introduced at trial. *State v. Canas*, 597 N.W.2d 488, 492 (Iowa 1999). The adverse ruling on Haigh's motion to suppress preserved error for our review. *State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998).

III. MERITS

Haigh claims on appeal that his motion to suppress should have been sustained because he did not voluntarily leave the private deck area and come onto the public area, but instead did so only in submission to Officer Hartung's authority and therefore his subsequent arrest for public[1] intoxication was illegal.[2] Haigh bases his argument on our supreme court's decision in *State v. Lake*, 476 N.W.2d 55 (Iowa 1991).

In *Lake* an officer stopped a vehicle based on his belief the driver was operating while intoxicated. The officer then ordered the driver out of the vehicle. At or near the time that the driver got out of the vehicle the passenger also stepped out of the vehicle and spoke to the officer. Based on the officer's observations the passenger, Kathy Lake, was charged with public intoxication. The case was tried to the court and the judicial magistrate found that Lake's exiting from the vehicle was not a voluntary act but was a submission to police

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[1] Haigh does not argue that the area he came down onto and where he was placed under arrest was not a "public place" for purposes of §123.46.

[2] Although not expressly stated, Haigh's argument must be seen as claiming that because the arrest was illegal the search incident to the arrest was also illegal.

authority and acquitted her on the charge of public intoxication. *Lake*, 476 N.W.2d at 57. The supreme court affirmed the magistrate's decision, stating

> A strong showing was made by the State that defendant's departure from the confines of the motor vehicle was not in submission to the officer's authority. However, based on the totality of the circumstances, we believe this was an issue of fact. The magistrate could only be reversed on this issue if it appears as a matter of law that defendant's departure from the vehicle was not a surrender to the police officer's authority. We are unable to make that finding on the present record.

Id. The court also stated that "the magistrate was on sound ground in concluding that action taken in submission to police authority will negate the volition required for even a general intent crime." *Id.*

Here Officer Hartung testified at the suppression hearing that after he observed Haigh on the deck he "asked if I could talk to him for a minute and Mr. Haigh came down from the deck and I spoke to him right there." There is no substantial evidence in the record to show Hartung did anything more than ask to speak to Haigh and that Haigh then voluntarily left the private deck and proceeded onto the public area to speak with the officer. It does not appear the officer ordered or compelled Haigh to come off the deck. In ruling on Haigh's motion to suppress the district court found, based on the evidence, that Haigh did come off the deck in response to the officer's request to speak to him, but did so as his own voluntary act and not in surrender to the officer's authority as in *Lake*.

The determination of whether Haigh voluntarily left the deck or did so in submission to Officer Hartung's authority was an issue of fact for the district court's determination. *Lake*, 476 N.W.2d at 57. Although our review is de novo because Haigh raises a constitutional question, we give deference to the district court's factual findings. *See Turner*, 630 N.W.2d at 606; *State v. Moriarty*, 566

N.W.2d 866, 868 (Iowa 1997). The evidence in the record that bears on this fact issue consists primarily of Officer Hartung's testimony at the suppression hearing. Based on our review of the evidence, and giving appropriate deference to the trial court's factual finding on the issue, we also find Haigh's choice to leave the deck was voluntary and was not in submission or surrender to the officer's authority. Therefore, we affirm the district court's overruling of Haigh's motion to suppress and affirm his conviction. Our resolution of this issue makes it unnecessary for us to reach the State's alternative argument regarding probable cause to arrest based on Haigh having taken a public conveyance to Petesch's home while arguably intoxicated.

AFFIRMED.