FILED
AUG 30 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

Filed August 30, 1983

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.) 3-77
68223

VANCE PARSONS, JR.,)

Defendant-Appellant.)

Appeal from Des Moines District Court, William S. Cahill, Judge.

Defendant appeals his conviction of second-degree burglary, a violation of Iowa Code § 713.5 (1983). AFFIRMED.

Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Michael K. Jordan, Assistant Attorney General, for plaintiff-appellee.

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

PER CURIAM

Defendant appeals his conviction of second-degree burglary, a violation of Iowa Code § 713.5 (1983). We affirm.

At about 11:30 on the night of November 2, 1981, a Burlington police officer saw defendant walking across a shopping center parking lot. All the stores in the shopping center except a bar were closed. The officer drove alongside defendant and asked him his name and for identification. Defendant told the officer his name but stated that he did not have any identification, that he was from out of town, and that he was going to the bar in the shopping center. The officer then left to continue on routine patrol. He subsequently heard a radio report that a burglary had been discovered at a pawnshop in the shopping center. The officer asserted that he then radioed to another police officer at the pawnshop and asked whether there was a Dr. Pepper pop machine there. The defendant had been carrying a can of Dr. Pepper when stopped. The officer who had been at the scene testified that at this time the first officer did not ask about the pop machine, though he did later. There was a pop machine in the pawnshop, which dispensed Dr. Pepper. The coins in it had been stolen.

After hearing of the pawnshop burglary, the first officer drove to the bar in the shopping center, where he found defendant. He asked defendant to leave the bar with him; once outside the officer frisked defendant, finding, among other things, a key which fit the pop machine of the burglarized pawnshop and a considerable quantity of change. The testimony is somewhat inconsistent, but at some point the officers apparently compared defendant's shoes with a drawing of a footprint found in the pawnshop. Defendant was arrested. The evidence seized from defendant was admitted at trial. The minutes of testimony stated that the police officers would testify that the owners of the pawnshop told them the

building had been locked that afternoon, and that property had been taken from the store. The minutes did not say explicitly that the officers would testify that they tried a key found in defendant's possession on the pop machine in the pawnshop, and found that it fit. At trial, the officers so testified.

During trial, the State moved in limine to bar testimony from two witnesses who had been in the county jail with defendant the previous weekend. There had been another burglary at the pawnshop, and two young men were arrested for it. According to one of the jail inmates, Ed Webb, he overheard these two new prisoners stating that they had not been caught when they burglarized the pawnshop before. The defendant wanted to call Webb to testify to what he had overheard; the State asserted that such testimony would be hearsay, that the declarant was not shown to be unavailable, and that the evidence would be immaterial. The State's motion in limine was sustained at that time; subsequently, defendant offered to present the excluded testimony, and examined Webb on an offer of proof. The court reserved ruling on the motion in order to research the question; the next morning, the State called the person who Webb claimed had made the statement in the jail, Emery Gordon. Gordon testified that he had never made such a statement, and that he had been out of town on the dates when the pawnshop was first broken into—the crime which is the basis for the present charge against defendant. Gordon testified that he would be willing to testify at defendant's trial that he had been out of town during the break-in with which defendant was charged. He was not asked whether he would be willing to testify to the statement overheard by Webb.

The trial court implied that the testimony was within a hearsay exception for declarations against penal interest, but held that the availability of the declarant to testify was fatal to defendant's attempt to come within the exception. The court also suggested that the evidence was not at all strong,

particularly as the testimony did not show that Gordon's reference to a "prior burglary" meant the burglary with which defendant was charged. Therefore, the court declined to allow Webb's testimony to be admitted. Defendant was found guilty of burglary in the second degree on both counts, the break-in of the pawnshop and the karate school.

It is from the resulting conviction and sentence that defendant appeals, asserting that: 1) the officer who detained defendant lacked specific and articulable facts upon which to base an investigatory stop; 2) even if the investigatory stop was proper, the officer lacked any reason to suspect defendant was armed and dangerous, so the frisk was improper; 3) testimony that a key seized from defendant fit a pop machine in the burglarized pawnshop was beyond the scope of minutes of testimony; 4) the court should not have excluded hearsay testimony that a prisoner in the county jail had admitted burglarizing the pawnshop; and 5) exclusion of the alleged admission by the jail inmate violated defendant's constitutional right to present witnesses in his favor. Our review of this matter is on assigned error, with the exception of those issues involving alleged violations of basic constitutional safeguards, which we review de novo, making an independent evaluation of the totality of the circumstances. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

We first address the contention that the trial court committed reversible error by admitting evidence seized in the stop-and-frisk of defendant. The Iowa Supreme Court, in State v. Cooley, 229 N.W.2d 755 (Iowa 1975), analyzed the polestar case of Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), and many cases from other jurisdictions dealing with the requisite cause for an investigatory stop and the admissibility of evidence obtained as a result. Cooley, 229 N.W.2d at 759-61. It is not necessary for us to reiterate the analysis set forth in Cooley. The law is well established that an officer may make an investigatory stop when he has specific and articulable facts to support a reasonable belief that

criminal activity may be afoot. Terry, 392 U.S. at 22-23, 88 S. Ct. at 1880-81, 20 L. Ed. 2d at 906-07; State v. Lamp, 322 N.W.2d 48, 51 (Iowa 1982); State v. Dixon, 241 N.W.2d 21, 23 (Iowa 1976). Furthermore, if he has reason to believe that the detainee may be armed and dangerous, the officer may conduct a limited search of the detainee's outer clothing. Terry, 392 U.S. at 30-31, 88 S. Ct. at 1884-85, 20 L. Ed. 2d at 911.

In Terry the police officer had observed the defendant and two others "go through a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation." Id. at 22, 88 S. Ct. at 2d, 20 L. Ed. at 907. The behavior which the court concluded was sufficient to warrant investigation consisted of two of the men hovering about a street corner, pacing alternately along an identical route, pausing frequently to stare in the same store window, conferring with each other and with a third man who left swiftly, and rejoining him a couple of blocks away. The Supreme Court considered the nature and extent of the governmental interests involved and the concomitant intrusion upon constitutionally guaranteed rights:

> One general interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. It was this legitimate investigative function [the officer] was discharging when he decided to approach petitioner and his companions.
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> It would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further.

Id. at 22-23, 88 S. Ct. at 1880-81, 20 L. Ed. 2d at 906-07. With respect to the propriety of the search of defendant for weapons in the course of the investigation, the court noted that the behavior of the two men was consistent

with the officer's hypothesis that they were contemplating a robbery, and that it was reasonable for the officer to assume that they might be carrying weapons and to conduct a limited search to protect himself and others from possible danger. Id. at 28, 88 S. Ct. at 1883, 20 L. Ed. 2d at 910. The court then held:

> [w]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment. . . .

Id. at 30-31, 88 S. Ct. at 1884-85, 30 L. Ed. 2d at 911.

In the instant case the combination of circumstances was also what led the officer to suspect that defendant was involved in the burglary. The officer testified that he had patrolled the area in question for four years and did not recall ever seeing anyone in that area of the shopping center parking lot at that time of night. When the officer later learned that a burglary had been committed at a nearby pawnshop which contained a pop machine that dispensed Dr. Pepper, and recalled seeing defendant walking by himself about 40-45 feet from the pawnshop and drinking a Dr. Pepper, the specific and articulable facts to support a reasonable belief that criminal activity may have occurred were present, justifying further investigation. Terry, 392 U.S. at 22-23, 88 S. Ct. at 1880-81, 20 L. Ed. 2d at 906-07; State v. Lamp, 322 N.W.2d 48, 51 (Iowa 1982). For the reasons cited in Terry, the officer was also justified in conducting a pat-down search of defendant. 392 U. S. at 28, 88 S. Ct. at 1883, 20 L. Ed. 2d at 910.

Defendant raises two otner arguments on this appeal. First, he claims that testimony that a key seized from him fit the pawnshop pop machine exceeded the minutes of testimony. It is clear that a defendant is entitled to minutes of testimony which "fully and fairly" "alert defendant generally to the source and nature of the evidence against him." State v. Walker, 281 N.W. 2d 612, 614 (Iowa 1979); see Iowa R. Crim. P. 5(3). However, where no motion for continuance appears in the record, defendant is deemed to have waived any alleged error with regard to the admission of the disputed testimony. State v. Epps, 313 N.W.2d 553, 558 (Iowa 1981).

Defendant also contends that the exclusion of allegedly exculpatory hearsay testimony that a prisoner in the county jail had admitted burglarizing the pawnshop violated defendant's right to present witnesses in his favor. In an offer of proof made by defendant outside the presence of the jury, Ed Webb testified that he was in jail on Feburary 6, 1982, when the two persons arrested for burglary of the pawnshop defendant was alleged to have burglarized were brought into the jail. He testified that one of them stated that they had broken into the pawnshop previously and had not been apprehended at that time. Defendant contends that this testimony was both relevant and witnin an exception to the hearsay rule (admission against penal interest), and that the trial court therefore erred in excluding it.

The Iowa Supreme Court has previously held, that to be relevant and admissible, "[e]vidence tending to incriminate another must be confined to substantive facts and create more than a mere suspicion that such other person committed the offense." State v. Stump, 254 Iowa 1181, 1188, 119 N.W.2d 210, 214 cert. denied 375 U.S. 853, 84 S. Ct. 113, 11 L. Ed. 2d 80 (1963); State v. Rosenberg, 238 Iowa 621, 625, 27 N.W.2d 904, 907 (Iowa 1947). The excluded testimony in this

case cannot be said to meet this test, particularly in light of its hearsay nature and other evidence directly connecting defendant to the particular burglary in question. Because we find the evidence to have been properly excluded under Stump, we leave for another day the issue whether the unavailability of the declarant would be a prerequisite to the "admission against penal interest" exception to the hearsay rule.

Having considered and rejected each of contentions on appeal, we affirm the district court's decision.

AFFIRMED.