IN THE COURT OF APPEALS OF IOWA

FILED
FEB 24 1981
CLERK SUPREME COURT

Filed February 24, 1981

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
NATHAN LEE BURGS,)
Defendant-Appellant.)

0-380
63262

Appeal from Polk District Court - John N. Hughes, Judge.

The defendant appeals his conviction of theft in the second degree in violation of section 714.1(4), The Code 1979. REVERSED AND REMANDED.

James B. Morris III, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Julie F. Pottorff, Assistant Attorney General; Dan Johnston, Polk County Attorney; for plaintiff-appellee.

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

OXBERGER, C.J.

Defendant, Nathan Burgs, appeals his conviction of theft in the second degree in violation of section 714.1(4), Supplement to The Code 1977. We reverse and remand.

Burgs was arrested and charged with this offense following the execution of a search warrant which revealed, among other things, stolen stereo equipment and a stolen flute. A jury found him guilty of the charge. He appeals that conviction. Our review is on error assigned. Iowa R. App. P. 4.

Burgs challenges the sufficiency of the warrant. He moved to suppress the evidence on that ground and his pre-trial motion was overruled. Without unnecessary elaboration of the facts, we find the warrant was sufficient as far as informant's reliability and underlying circumstances. Burgs argues the flute which was seized was not listed with particularity on the warrant and the state did not prove an exception to justify its taking. We agree. Section 808.3, Supplement to The Code 1977, provides property to be seized shall be described with such specificity so as to enable an independent reasonable person with reasonable effort to ascertain and identify the property. Upon issuance of a warrant an officer is authorized to search for the property specified. § 808.4. Id.

The property specified on the warrant in this case was 1) marijuana and 2) stereo equipment and televisions which defendant stated to an informant were stolen merchandise. We do not find the flute to be sufficiently related to the described property to justify its seizure under the terms of the warrant.

Officers are not necessarily limited to a seizure of goods described in the search warrant. United States v. Clark, 531 F.2d 928 (8th Cir. 1976); State v. Hardesty, 153 N.W.2d 464 (Iowa 1967). One exception to the warrant limitation is the plain view doctrine. In order for reasonable seizure under this exception, it must be shown 1) the initial intrusion was lawful, 2) the discovery of evidence was inadvertant, and 3) the incriminating nature of the evidence was immediately apparent. United States v. Clark, 531 F.2d 928, (8th Cir. 1976). While we find the first two requirements were met in this case, we find the state failed to show the incriminating nature of the flute at the time of its seizure.

At the suppression hearing the state conceded the contraband or stolen nature of the property must be determined before seizure under this doctrine. No evidence was

offered to show that the officers considered this flute to be stolen or relevant to any criminal activity or prosecution. Because of the usual, innocuous character of a flute, we find such evidence was necessary.

The trial court found the catch-all phrase in the warrant, "any property relevant and material as evidence in a criminal prosecution," allowed the incriminating nature of the property to be determined after the search. We find this to be error as such a broad application does not meet the requirement of immediate apparentness.

Burgs' motion to suppress should have been sustained as to the flute. Finding reversible error, we need not address the other issues raised.

REVERSED AND REMANDED FOR NEW TRIAL.

All judges concur except Carter, J. and Donielson, J., who dissents.

CARTER, J. (dissenting)

I dissent. Where police are searching for stolen merchandise pursuant to a tip from an informant, it is not reasonable to expect them to know precisely which of several items discovered are stolen. This circumstance serves to distinguish the investigation of a stolen property crime from other types of crime with respect to seizure of evidence. When several items identified as stolen property in a search warrant proceeding are located in the execution of the warrant, it may be inferred that other items located in plain view are also stolen. Musical instruments are not so dissimilar from stereo equipment and television sets to dispel this inference in the present case. I would hold that neither this issue nor the other assignments of error require reversal of the conviction.

Donielson, J., joins in this dissent.