

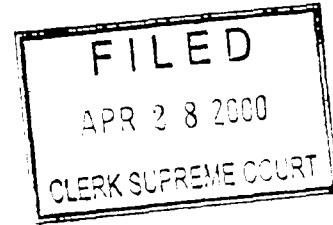
IN THE COURT OF APPEALS OF IOWA

No. 0-156 / 99-0550
Filed April 28, 2000

STATE OF IOWA,
Appellee,

vs.

AARON ANDREW MERWIN,
Appellant.



Appeal from the Iowa District Court for Linn County, Nancy L. Baumgartner and Jane F. Spande, District Associate Judges.

Defendant appeals the judgment and sentence entered following his conviction of possession of a controlled substance (marijuana). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Nan Jennisch, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, ~~Denver~~ D. Dillard, County Attorney, and Brian D. Claney, Assistant County ~~Attorney~~, for appellee.

Heard by Vogel, P.J., and Mahan and Miller, JJ.

000588

VOGEL, P.J.

Allen Andrew Merwin, defendant, appeals the judgment and sentence entered following his conviction of possession of a controlled substance (marijuana). Merwin claims he did not consent to a search of his person, which lead to the seizure of marijuana in his coat pocket. We affirm.

Background facts. Merwin was a passenger in a car that was involved in a traffic stop. Illegal narcotics were confiscated from the driver and one of the other two passengers. Officer Fort, the arresting officer, and Merwin differ in their accounting of events. Officer Fort testified that while removing Merwin from the car, he asked if Merwin "had anything on him," referring to drugs. Merwin stated, "yes, in my pocket." Officer Fort then reached into his pocket and found a baggie of marijuana. Merwin testified he could not recall his exact response to Officer Fort's question but thought he responded with "do what you have to do" or a similarly ambiguous phrase.

After Merwin was charged with possession of a controlled substance, he filed a motion to suppress the seized marijuana. The trial court, in its limited ruling, found the statement "do what you have to do" implied consent to search, and denied the motion. Merwin, was convicted following trial on the minutes of testimony, and appeals.

Scope of review. In assessing alleged violations of constitutional rights, our standard of review is de novo. *State v. Washburne*, 574 N.W.2d 261, 263 (Iowa 1997). We conduct an independent evaluation of the totality of the circumstances as shown by the entire record. *State v. Astello*, 602 N.W.2d 190,

000509

195 (Iowa App. 1999). In reviewing the district court's ruling on a motion to suppress, we consider both the evidence presented during the suppression hearing and that introduced at trial. *State v. Orozco*, 573 N.W.2d 22, 24 (Iowa 1997). An adverse ruling on a motion to suppress will preserve error for our review. *State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998).

Motion to suppress. During the suppression hearing, the trial court heard the factual representations surrounding the search from both the officer and the defendant. The court then made the following ruling:

Based on the testimony I have heard, the officers did have reason to get the other passengers out of the car because they were searching incident to an arrest and, under the circumstances, and with your client's own testimony as I have written it down, the officer asked what he had in his pocket and he said his answer was ambiguous, he wouldn't really say one way or the other, and then he told the officer to "Do what you have to do". I think that Mr. Claney is right. You don't have to say "You have my consent to search". I think, arguably, he has a right to make an inference that that was a consent to get in his pocket. I will uphold the search.

The brief fact findings set forth in the trial court's ruling limit our ability to review this decision on appeal. However, "[w]e are obliged to affirm an appeal where any proper basis appears for a trial court's ruling, even though it is not one upon which the court based its holding." *Citizens First Nat. Bank v. Hoyt*, 297 N.W.2d 329, 332 (Iowa 1980). Although we find the phrase "do what you have to do" is too ambiguous to find consent in this case, we can still affirm the ruling on the motion to suppress on another applicable basis.

Warrantless search. A search without a valid warrant is per se unreasonable unless it falls within a recognized exception to constitutional warrant requirements, including probable cause to search and exigent

circumstances. *State v. Eubanks*, 355 N.W.2d 57, 58 (Iowa 1984). "[P]robable cause exists when a reasonably prudent person would believe that evidence of a crime will be discovered in the place to be searched." *State v. Moriarty*, 566 N.W.2d 866, 868 (Iowa 1997).

Officer Fort, before searching Merwin, was aware that drugs had already been recovered from two of the other people in the vehicle. After the driver told Officer Fort there were drugs in his coat pocket, the officer attempted to retrieve the coat. Merwin grabbed it, then released it upon Officer Fort's request. Marijuana was found in the pocket and the driver was placed under arrest. Merwin was later ordered out of the car so that a search of the vehicle, incident to the arrest of the driver, could be conducted. See *State v. Becker*, 458 N.W.2d 604 (Iowa 1990) (holding police can order passengers out of the vehicle to complete a search of the automobile incident to arrest). Then, Officer Fort asked Merwin whether he "had anything on him." See *State v. Riley*, 501 N.W.2d 487 (Iowa 1993) (concluding an officer can question a passenger during an investigatory stop); see also *State v. Scott*, 518 N.W.2d 347 (Iowa 1994) (stating such a question does not constitute a search). Under Officer Fort's version of the facts, "in my pocket" established a likelihood that Merwin was a participant in the criminal acts that were discovered and factored into the determination of probable cause to complete a search of Merwin. As Officer Fort conducted a pat down search of Merwin, he felt the baggie, later identified as containing marijuana. Coupled with the exigency of the circumstances at hand, we find

000191

there was probable cause for the warrantless search of Merwin, to overrule the motion to suppress and affirm the conviction and sentence.

AFFIRMED.

000102