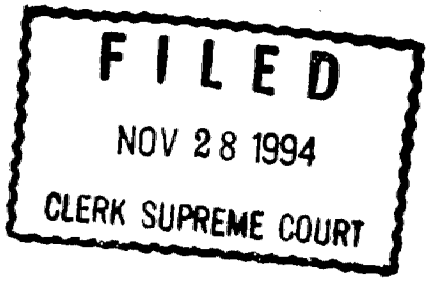
IN THE COURT OF APPEALS OF IOWA

No. 4-282 / 93-1003



STATE OF IOWA,

Appellee,

vs.

BILLY J. HALIBURTON,

Appellant.

Appeal from the Iowa District Court for Scott County, Max R. Werling and David E. Schoenthaler, Judges.

Billy Haliburton appeals his conviction, following a jury trial, for possession of cocaine and failure to affix a drug tax stamp. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Robert P. Ewald, Assistant Attorney General, William E. Davis, County Attorney, and Hugh Pries, Assistant County Attorney, for appellee.

Heard by Donielson, C.J., Huitink, J., and McCartney, S.J.*

*Senior judge from the second judicial district serving on this court by order of the Iowa Supreme Court.

McCARTNEY, S.J.

The defendant, Billy J. Haliburton, appeals from judgments and sentences imposed upon him based upon his convictions of the offenses of possession of a controlled substance, to wit, cocaine, contrary to section 204.401 of the Iowa Code, and upon his failure to affix a drug tax stamp, contrary to sections 421A.3 and 421A.12 of the Iowa Code.

The defendant asserts upon appeal that the trial court erred in failing to grant his motion to suppress evidence. He further asserts that the trial court erred in failing to grant a motion for a directed verdict based upon his claim that the evidence was insufficient to support a conviction of failure to affix a drug tax stamp.

We affirm.

On January 9, 1993, one Lewis rented a motel room in the Davenport area. Within a day, the Davenport Police Department received complaints that the room's occupant was receiving a large number of visitors and a large number of phone calls.

The Scott County Drug Task Force created a special unit, Hotel Interdiction Drug Enforcement (HIDE), to deal with illicit drug operations in the area, and officers, specially trained in vice and narcotics units, were advised of this unusual activity, both as to the frequency of phone calls to the motel room and the numbers of persons coming and going.

As a consequence, HIDE commenced surveillance of the motel room on January 11, 1993.

During this period of time, the defendant was present at the motel room, and when Lewis and another person left in an automobile to go to another location, Haliburton stayed at the motel.

On the following day, the defendant and Lewis, with the defendant driving, proceeded by car from the motel to the Western Union office. It was apparent to the officers that they were smoking a marijuana cigarette while in the automobile. This observation was based upon the experience of the officers in observing how marijuana is consumed, the way the cigarette was handed back and forth, the extra long inhalations, the fact that the cigarette was hand-rolled. These factors were consistent with marijuana usage.

At the Western Union office, Lewis proceeded to wire $2000 in currency to another city. One officer had followed Lewis into the Western Union office. This transmission of money in this fashion was also indicative of drug transactions. At that time and by radio the officer inside the Western Union office notified another officer who had the defendant under surveillance in the car that a wire transfer was being effected, and at that point the officer observing the defendant approached him and asked him to get out of the car. The officer then asked the defendant to place his hands on the hood of the car, which the defendant did not do. The defendant kept

attempting to reach into his right-front pocket. Although the officer advised him to quit such activity, the defendant continued to try to reach into his pocket. At this time the officer put his hand into the defendant's pocket and discovered a cellophane bag containing fourteen rocks of crack cocaine worth approximately twenty-five dollars to fifty dollars per unit.

Haliburton was then placed under arrest, and a further search of the automobile and of the motel room ensued with the consequence that evidence of drug usage was located in both locations.

The defendant asserts that his constitutional rights were violated because of the warrantless search made of the car. He asserts that the officers lacked any probable cause to arrest him and that the warrantless search was therefore illegal under the Fourth and Fifteen Amendments to the United States Constitution and Article I Section 8 of the Iowa Constitution. In the alternative, the defendant in his motion to suppress asserts that reasonable suspicion did not exist for the officers to stop him and to search him pursuant to a Terry stop. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1877 (1968).

Where a defendant asserts a violation of constitutional rights, our review is de novo. State v. Lamp, 322 N.W.2d 48 (Iowa 1982).

The Fourth Amendment to the federal Constitution prohibits unreasonable searches and seizures. In analyzing

this constitutional prohibition, courts have created exceptions to the rule that warrantless searches and seizures are unreasonable. If the search or seizure was made incident to a lawful arrest, such is not per se unreasonable, depending on the place and time. State v. Shane, 255 N.W.2d 324 (Iowa 1977).

A lawful arrest is predicated upon probable cause. It emanates from the totality of the circumstances, that a crime is being committed and that the person arrested is involved in its commission. While mere suspicion that a crime has been committed and that the defendant has committed it do not give rise to a lawful arrest the circumstances do not require a conviction that the arrested person is in fact guilty. State v. Gregory, 327 N.W.2d 218 (Iowa 1982), modified in 331 N.W.2d 140 (Iowa 1983).

The circumstances here give rise to the probable cause necessary to sustain a valid and lawful arrest.

The motel room was a beehive of activity, both as to a great number of phone calls and a large number of people calling at the room, remaining a few minutes, and then leaving. Experienced narcotics officers testified that this is an indicia of illicit drug dealing. The defendant was at the motel for two days, during the period of time surveillance was maintained. He was alone in the motel room on occasions while the registered occupant of the motel room, Lewis, was absent. The attempt to wire

transfer $2000 in cash was another indicia of drug dealing. The observation by the narcotics officers that Lewis and the defendant were smoking an illicit substance, i.e. marijuana, was yet another circumstance supporting probable cause that an offense was being committed by the defendant. The presence of out-of-state vehicles and the presence of numerous other vehicles at the motel room all tended to substantiate the belief that illicit drug dealing was taking place at the motel room and by the defendant.

The arrest being lawful, we hold that the search was appropriate as to time and location. The search was immediate with the defendant making numerous attempts to place his hand into his pocket, contrary to instructions given him by the officer. The search of the pocket was appropriate under those circumstances. Rawlings v. Kentucky, 448 U.S. 98, 65 L. Ed. 2D 633 (1980). Since the defendant alternatively argues that the officer had no reasonable suspicion that warranted stopping and searching him under Terry, supra, we address that issue.

Investigatory stops are appropriate under Terry v. Ohio if the officer has cause to believe criminal activity was afoot. Such evidence does not rise to the level of probable cause. State v. Scott, 409 N.W.2d 465 (Iowa 1987).

The circumstances set forth above warranted a stop of the defendant under Terry. The search then made of the defendant was appropriate since the officer had

reasonable belief that evidence of criminal activity would be concealed or destroyed by the defendant. These are exigent circumstances that permit a warrantless search. State v. Eubanks, 355 N.W.2d 57 (Iowa 1984).

Although an officer does not articulate the legal basis for the arrest or the Terry stop and consequent searches, if the circumstances support either the arrest or the Terry stop, such observable demonstrable facts control the situation. State v. Oliver, 341 N.W.2d 744 (Iowa 1983).

Based upon the foregoing, we agree that the officer had probable cause to make the arrest with the resulting search--and in any event that under the exigent circumstances then existing and after an appropriate Terry stop, the search was proper and lawful.

Haliburton moved for a directed verdict of acquittal based on alleged insufficiency of the evidence to support a conviction for failure to affix a drug tax stamp in violation of Chap. 421A, Iowa Code. The district court denied Haliburton's motion.

Denial of a motion for judgment of acquittal based on the alleged insufficiency of the evidence is reviewed on the "substantial evidence" standard, State v. Schrier, 300 N.W.2d 305 (Iowa 1981), with the evidence considered in the light most favorable to the State. State v. LaPointe, 418 N.W.2d 49 (Iowa 1988). This "favorable light" includes the making of any legitimate inferences and presumptions which

may fairly and reasonably be deduced from the evidence in he record. State v. Blair, 347 N.W.2d 416 (Iowa 1984). However, the reviewing court must consider all of the evidence and not just the evidence which supports the verdict. Id. at 419 (Iowa 1984). However, the reviewing court must consider all of the evidence and not just the evidence which supports the verdict. Id. at 419 (Iowa 1984). Direct and circumstantial evidence are equally probative so long as the evidence raises "a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture." State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981).

Haliburton argues there was insufficient evidence to support his conviction for failure to affix a drug tax stamp. He essentially makes three arguments.

First, he asserts Iowa Code section 421A.1(3)(c) excludes controlled substances such as crack cocaine because cocaine may be sold by weight. Second, Haliburton claims because section 421A.1(6) gives examples of pills, capsules, and microdots as "dosage units," the legislature intended to include only substances that are pharmaceutical in nature and which, unlike cocaine, involve a precise unit of measurement. Finally, Haliburton points out that Iowa Code chapter 204 defines "ultimate user" as persons lawfully possessing a controlled substance. Iowa Code § 204.101(26) (1991). Haliburton claims this is relevant because Iowa Code section 421A1(6) states "dosage unit"

means "the unit of measurement in which a substance is dispensed to the ultimate user."

Haliburton's arguments are without merit.

First, Iowa Code section 421A.1(3)(c) defines "dealer" as one who deals in "ten or more dosage units of a taxable substance which is not sold by weight." While it is possible to sell any drug by weight, the statute does not use the word "may." Instead, the word "is" evinces the legislature's intent that the issue is a factual one to be determined by the evidence presented at trial. It is thus relevant the State provided the uncontroverted testimony of a police officer that crack cocaine was "typically" sold by the dosage unit of one rock, even though it was possible to buy larger quantities by weight.

Second, Haliburton argues that Iowa Code section 421A.1(6) was intended to include only substances which are pharmaceutical in nature and involve a precise unit of measurement. This argument ignores the plain language of the statute. The statute expressly states that the term "[d]osage unit includes, But is not limited to, one pill, one capsule, or one microdot." Iowa Code § 421A.1(6) (emphasis added). The legislature merely provided three examples of dosage units in common existence at the time the law was enacted in 1990. Similarly, there is no support anywhere in the statutory language for the contention the drug tax stamp law was intended to apply to drugs which are only pharmaceutical in nature.

Third, Haliburton argues the definition of "ultimate user" from Iowa Code section 204.101(26) is applicable to the term "ultimate user" as employed in section 421A.1(6). This analysis leads to the conclusion that the "ultimate user" in Iowa Code section 421A.1(6) can only be a person who "lawfully possesses" the drug. This analysis is easily exposed as faulty. The definition of "ultimate user" in Iowa Code section 204.101(26) is specifically restricted to its use in Chapter 204. See Iowa Code § 204.101 (1991) (introduction clause: "As used in this chapter . . . "); see also Iowa Dep't of Transp. v. Iowa Dist. Ct. for Woodbury County, 488 N.W.2d 174, 175 (Iowa 1992) (legislature's use of express term "this chapter" in section 321J.4(8) means "chapter 321J" only). Because the term "ultimate user" is not defined in Chapter 421A, it retains its ordinary meaning. See State v. Petrie, 478 N.W.2d 620, 622 (Iowa 1991) ("This court normally construes statutes on the basis of their ordinary and commonly understood meanings") (citations omitted); State ex rel. Turner v. Drake, 242 N.W.2d 707, 709 (Iowa 1976) (when a statute contains no express definition of a word or words, "courts will construe these words according to their approved usage").

We determine there is sufficient evidence the 14 rocks of crack cocaine found in Haliburton's possession were "dosage units" for the purposes of the Iowa drug tax stamp law. The district court did not err in denying the motion for a judgment of acquittal.

Accordingly, the convictions, judgments, and sentences entered thereon, are affirmed.

AFFIRMED.