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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,)
)
vs.
JESSIE JAMES JONES,)
Defendant-Appellant.)

Filed August 25, 1981

1-119
65268

Appeal from Black Hawk District Court. Forest E. Eastman, Judge.

Defendant appeals his conviction for possession of a firearm by a felon in violation of section 724.26, The Code 1979. AFFIRMED.

James F. Whalen, Waterloo, Ia., for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa and Merle Wilna Fleming, Assistant Attorney General for plaintiff-appellee.

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

PER CURIAM

Defendant appeals his conviction of possession of a firearm by a felon in violation of section 724.26, The Code 1979. We affirm.

Defendant, Jessie James Jones, was charged by trial information for possession of a firearm by a felon. §724.26, The Code 1979. A stipulation was entered by the defense counsel and the State to the effect that Jones had been convicted of felonies in 1970 and 1973, and that he had not been pardoned nor had his civil rights restored.

Jones was arrested in the Waterloo Ramada Inn Coffee Shop on November 4, 1979, by Waterloo police officers Bagenstos and Hahn. Bagenstos and Hahn were responding to a report of a man with a gun in the Ramada Inn Coffee Shop. Officers Hahn and Bagenstos spoke to a man outside of the coffee shop, who said he saw a man in the coffee shop with a gun. The officers obtained a description of the man allegedly carrying a gun, his dress, and the location of the gun on his person, then entered the coffee shop and proceeded toward the person described. Officers Hahn and Bagenstos recognized the man as the defendant, Jesse James Jones, and knew him as a felon. Officer Hahn told the defendant he was suspected of carrying a gun, they were going to perform a pat-down search and he was to put his hands on the counter in front of him. A struggle ensued causing a gun to fall from the defendant's right hand. The defendant was subsequently convicted of violating section 724.26, The Code 1979, for possession of the hand gun by a felon.

I. The defendant's first contention on appeal is that section 724.26 does not apply to felons convicted before the effective date of section 724.26. That precise issue was considered by the Iowa Supreme Court in State v. Hall, 301 N.W.2d 729 (Iowa 1981). In Hall, the court held section 724.26 applied to a felon convicted before enactment of section 724.26, who even had his civil rights restored, but had not been pardoned, when the felon was found to be in possession of firearms after the effective date of section 724.26. Id. at 730-31. The critical questions after Hall are whether the person is a felon and whether the felon had possession of firearms after section 724.26 became operative.

Jones' status as a felon was established by the stipulation entered into by the defense counsel and the State. Incidentally, Jones' civil rights had not been restored as were the defendant's civil rights in Hall, and the Hall court still applied section 724.26. Regarding the second question, Jones' possession of a firearm after enactment of

section 724.26 was established by the evidence. There was no defense offered. Therefore, unless the evidence of Jones' possession of the weapon should have been suppressed or otherwise held inadmissible, which is the second issue raised by the defendant, the trial court's determination of the defendant's guilt will be affirmed.

II. The second issue raised by the defendant focuses on the propriety of the introduction of the gun, holster and ammunition clip seized by Officers Hahn and Bagenstos. Two sub-issues are encompassed by the defendant's main contention: A) whether the trial court properly overruled the defendant's trial objection to the admission of the seized evidence, and B) whether the officers conducted a constitutionally permissible search of the defendant.

A. Rule 11 of the Iowa Rules of Criminal Procedure details the requirements for a motion to suppress evidence seized in an allegedly unlawful manner. A motion to suppress evidence is to be made before trial unless there was no opportunity to do so at that time or the defendant was unaware of the factual grounds necessary to make the motion. Rule 11, Iowa R. Crim. P. The defendant waives his right to object to allegedly illegally seized evidence unless a pretrial motion to suppress has been made. State v. McCowen, 297 N.W.2d 226, 228 (Iowa 1980). However, in the exercise of its discretion, the trial court may entertain a motion to suppress at trial, upon good cause supported by affidavit of the movant. Id. Our review of a trial court's order overruling the motion to suppress, made in the form of an objection at trial is whether the trial court abused its discretion. Gateway Transportation Co. v. Phillips & Phillips Co., 261 N.W.2d 175 (Iowa 1978).

In the case at bar, defendant's counsel maintains he was not sufficiently apprised by the minutes of testimony of the operative facts surrounding the seizures of the gun, holster and ammunition clip to enable him to file a pretrial motion to suppress. The relevant portions of the minutes of testimony of Officers Hahn and Bagenstos are as follows:

> OFFICER STEVEN BAGENSTOS: This witness will testify to being on duty on November 4, 1979, and that he was dispatched to the Ramada Inn Coffee House on a report of a man with a gun; that he arrived at the Ramada Inn with Sgt. Hahn that they spoke to a man who said he had seen the Defendant a [sic] gun on his person; that he received a description of where the man was, how he was dressed, and where the gun was.
>
> That Sgt. Hahn was familiar with the Defendant and his past record; that they approached the Defendant and

> that a struggle followed with the Defendant and he pulled the gun out of his holster where the officer had been told it was.
>
> That the officer got the gun out of his hand . . .
>
> SGT. HAHN: This witness will testify to being on duty on November 4, 1979, and that he went to the Ramada Inn to assist on a dispatch of a man with a gun.
>
> That he arrived at the Ramada Inn and spoke to a man about the Defendant; that the received the information about who had it; where he was, how dressed and a physical description.
>
> That he and Officer Bagenstos went to the location of the Defendant; that he knew the Defendant's past record and by sight; that they approached the Defendant [sic] Defendant had a gun [sic] in his right hand; that the officer took the gun away; that the Defendant was taken to the police station and booked in.

Defense counsel claims that as he interpreted the above minutes of testimony, no basis for a motion to suppress existed in that he thought the defendant's gun was drawn before the officers actually confronted the defendant. That explanation is not very persuasive on the issue of good cause. The minutes of testimony chronologically detail the course of events on the evening of the defendant's arrest. In the minutes of each officer's expected testimony, mention of the gun always followed mention of the initial confrontation. That indicates the officers were actually aware of a gun only after the confrontation. A reasonable interpretation of the minutes would at the very least suggest the propriety of a motion to suppress should be investigated. State v. Cole, 295 N.W.2d 29, 39 (Iowa 1980). In ruling on the objection, the trial court concluded that defense counsel's misinterpretation of the minutes by itself was not good cause to entertain the motion to suppress at trial. Gateway Transportation Co. v. Phillips & Phillips Co. 261 N.W.2d 175, 177 (Iowa 1978). On that basis, the trial court properly exercised its discretion in overruling the objection to the introduction of the evidence seized by the officers.

B. Although our resolution of the first of defendant's asserted grounds for reversal is dispositive, we note that the officers could have frisked the defendant. A police officer may stop a person without the otherwise necessary probable cause to arrest if an articulable and reasonable suspicion of criminal activity is demonstrated. Terry v.

Ohio, 292 U.S. 88 C. Ct. 1868, 1880, 20 L. Ed.2d 889, 906-907 (1968). The intrusion of a stop and frisk is less than the intrusion occasioned by an arrest or full search, and the standard to determine reasonableness is consequently lower. State v. Donnell, 239 N.W.2d 575, 577 (Iowa 1976); Dunaway v. New York, 99 S. Ct., 2248, 2255 (1979).

Officers Bagenstos and Hahn were dispatched to the Ramada Inn to investigate a report of a man with a gun. Upon arrival at the coffee shop, both officers spoke with an informant who indicated a desire to have his identity kept confidential. The informant described the man he claimed possessed a gun and indicated the location of the gun on the suspect's person. Upon that information the officers approached the defendant and recognized him as a convicted felon. The officers at that stage had an articulable and reasonable suspicion of criminal activity. The report of a man with a gun coupled with the officers' knowledge that the man was a felon met the articulable and reasonable suspicion that the defendant was in violation of section 724.26, The Code 1979. If the officers' reliance of the informer was reasonable they had sufficient basis to frisk the defendant.

To conduct an investigatory frisk, police officers, as stated above, do not have to demonstrate a probable cause to arrest. Thus, the Aguilar-Spinelli (Aguilar v. Texas, 378 U.S. 108, 84, S. Ct. 1509, 12 L. Ed. 723 (1964); Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed.2d 637 (1969)) standards for establishing the reliability of informants to obtain a warrant need not be satisfied. Officers, however, must still act only on information upon which it is reasonable to rely. It has been said that citizens who confront an officer with details of suspicious activity should be given serious attention and considerable weight by the officer. United States v. Sierra-Hernandez, 581 F.2d 760, 763 (9th Cir. 1978). Some types of informants, having less motive to fabricate information, are inherently more trustworthy than others types of informants. There was that distinction drawn in State v. Mattingly, 220 N.W.2d 865, 869-70 (Iowa 1974), where an uncompensated volunteer police agent required less supportive indicia of reliability than a paid informant to attain the same level of reliability. The fact that identified, in contrast to anonymous informers, can be more readily found guilty of a misdemeanor adds to their reliability. See Adams v. Williams, 407 U.S. 143, 92 S. Ct. 1962, 32 L. Ed.2d 612 (1972); § 708.7(4), The Code 1979. In light of those principles, we conclude the informant in this case was not so unreliable as to preclude Officers Hahn

and Bagenstos from relying on the information and forming an articulable and reasonable suspicion of criminal activity once they identified the defendant as a felon. The police officers' knowledge of the suspect's criminal background coupled with the report made by the informant outside the coffee shop constituted sufficient grounds for a Terry-type investigatory search. See Adams v. Williams, 407 U. S. 143, 92 S. Ct. 1921, 32 L. Ed.2d 612 (1972).

III. The defendant raises a third issue, whether he was denied effective assistance of counsel by his attorney's failure to file a pretrial motion to suppress evidence. In light of our conclusion that Officers Hahn and Bagenstos were justified in performing a Terry-type "stop and frisk" search of the defendant, we need not discuss the substantive merits of the defendants ineffective assistance of counsel claim. Our reasoning is as follows.

The basis of an ineffective assistance of counsel claim is that due to counsel's failure to meet minimum performance standards, the defendant's right to a fair trial was compromised. Clessan v. State, 258 N.W.2d 330, 332 (Iowa 1977). Necessarily the defendant must establish some sort of prejudice to that right resulting from his attorney's alleged incompetence. State v. Veverka, 271 N.W.2d 744, 750-51 (Iowa 1978); State v. Rand, 268 N.W.2d 642, 648-49 (Iowa 1978); Thomas v. Wyrick 535 F.2d 407, 413-17 (8th Cir. 1976). In accordance with those principles, the Iowa Supreme Court, in Long v. Brewer, 253 N.W.2d 549, (Iowa 1977), held that even if the attorney in that case had made a mistake there was not reversible error since the defendant could not establish that his attorney's failure to perform within the range of normal competency substantially prejudiced the defendant's right to a fair trial. Id. at 558.

In the case at bar, the defendant was not prejudiced by his attorney's failure to file a pretrial motion to suppress. We have concluded that Officers Hahn and Bagenstos had reasonable cause to suspect criminal activity and consequently would have been justified in frisking the defendant. Once the requirements for a Terry type stop are satisfied, a frisk is permissible if limited in scope to a pat down of the person's outer clothing necessary to discover weapons that might be used to injure the officer. Terry v. Ohio, 392 U. S. 1, 20 L. Ed.2d 889, 88 S. Ct. 1868 (1968). Without question, if the officers had frisked the defendant in this case, they would have discovered the weapon and could have seized it at that time. This is not a situation where the officers

exceeded the limited scope of a stop and frisk search. See Sibron v. New York, 392 U.S. 40, 65, 20 L. Ed.2d 917, 936, 88 S. Ct. 1889, 1909 (1968). Consequently, the evidence obtained would not have been suppressible even if the defendant's attorney filed a pretrial motion to suppress. The defendant has failed to establish prejudice. Consequently, there has been no reversible error.

AFFIRMED.