IN THE COURT OF APPEALS OF IOWA

No. 6-411 / 95-1706

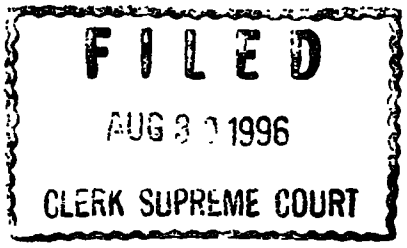
STATE OF IOWA,

Plaintiff-Appellee,

vs.

ROGER L. RUSSELL,

Defendant-Appellant.



Appeal from the Iowa District Court for Jackson County, David H. Sivright and David E. Schoenthaler, Judges.

Roger Russell appeals his convictions and sentences for possession with intent to deliver (methamphetamine), failure to affix a drug tax stamp, and carrying a concealed weapon in violation of Iowa Code sections 124.401(1)(c), 453B.12, and 724.4(1) (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Susan M. Crawford, Assistant Attorney General, and Phillip J. Tabor, County Attorney, for appellee.

Considered by Sackett, C.J., and Cady and Vogel, JJ.

SACKETT, C.J.

Defendant-appellant Roger Russell appeals his convictions and sentences for possession with intent to deliver (methamphetamine), failure to affix a drug tax stamp, and carrying a concealed weapon in violation of Iowa Code sections 124.401(1)(c), 453B.12, and 724.4(1) (1995). Defendant contends the district court erred in finding the search of his vehicle was supported by probable cause and exigent circumstances. We affirm.

Because the issues raised on appeal challenge the constitutionality of the State's actions, we examine the evidence before the trial court de novo. *State v. Vincik*, 398 N.W.2d 788, 789 (Iowa 1987); *State v. Nelsen*, 390 N.W.2d 589, 591 (Iowa 1986).

A Maquoketa police officer was patrolling at 2:15 a.m. on January 3, 1995, when the officer saw a car with the headlights on high beam and the driver failed to dim them when he met the officer. The driver of the car was later identified as the defendant. The officer turned his car around and, following defendant's vehicle, the officer saw defendant "moving side to side and kind of lunging." The officer turned on the flashing lights on his patrol car. Defendant pulled his car to the shoulder and stopped.

The officer approached the car and tapped on the driver's side window. When defendant rolled down the window, the officer smelled a strong air freshener and also smelled what he identified as a rotten egg or sulfur smell. He saw a police scanner

and two pairs of binoculars on the seat next to defendant. The officer told defendant he stopped him because he had not dimmed his lights. The charge was a violation of Iowa Code section 321.415(1) requiring drivers of oncoming cars to use low-beam headlights.

The officer asked defendant for his license and registration. The officer said defendant was nervous and trembling. Defendant opened his billfold and the officer saw considerable money in it, including $100 bills. Defendant initially said he had just been paid, but then he said he recently sold his pickup truck. He gave conflicting stories about the type of pickup truck.

The officer said he became suspicious because of defendant's nervousness. The officer asked defendant if the Guttenberg address shown on the license was correct. Defendant first said he lived in Canton, then in Monmouth. The officer asked about the police scanner and binoculars, but defendant said nothing.

The officer went to his car to run a check on the driver's license defendant had given him. The officer said because of defendant's nervousness he walked backwards to his vehicle and turned the spotlight on the car.

A backup officer arrived. The first officer told the second that on the basis of defendant's reactions he believed there were drugs or contraband in defendant's car.

The first officer wrote a citation charging defendant with failing to dim his lights. The second officer radioed a third officer, who suggested defendant be given the citation, told he was free to go, and then asked to consent to a search of his car.

The first officer returned to defendant's car and asked defendant to get out. The officer gave defendant a preliminary breath test. The test showed no evidence of alcohol.

The first officer led defendant back to his patrol car to sign the citation. Defendant signed it. He was allegedly free to go. The officer asked defendant if he could search his car. The officer asked defendant if there were drugs or alcohol in his car. Defendant said there was no alcohol in his car.

The first officer went to defendant's car and began searching, starting on the passenger side. The officer found a loaded .45 caliber Ruger handgun under the cushion and placed defendant under arrest. Defendant was handcuffed and put in the squad car. On further search, the officer found a tan container containing three baggies filled with what was later identified as methamphetamine.

Defendant was charged by trial information with possession with intent to deliver, failure to affix a drug tax stamp, and carrying a concealed weapon, in violation of Iowa Code sections 124.401(1)(c), 453B.12, and 724.4(1) (1995). On February 24, 1995, defendant filed a motion to suppress all evidence seized based on a violation of his constitutional rights against warrantless searches and seizures. The district court overruled the motion to suppress.

The first officer testified he believed he had probable cause to search the vehicle based on defendant's nervousness and answers to questions. He maintained he wanted to search the vehicle for safety reasons. The district court rejected the first

officer's testimony as not credible on the issue of his motivation for the search being a concern for safety. The court found these concerns were not mentioned or relayed to the other officers and, prior to the search, defendant was secure in the first officer's car and had been told he was free to go. The trial court found there was insufficient evidence the first officer reasonably believed under the circumstances at the time of the search defendant presented a danger at the scene or to others.

The trial court went on to find defendant's movements prior to the stop, defendant's nervousness, the cash in his billfold, his inconsistent answers to direct questions, the police scanner and binoculars on the front seat, the early morning hour, defendant's prior contact with law enforcement, and the odor from defendant's car, when taken together, justified the search.

Defendant was found guilty as charged and was sentenced to a term of incarceration not to exceed twenty-five years on the possession charge, five years on the drug tax stamp charge, and two years on the weapons charge, the charges to run concurrently. Defendant has appealed.

Defendant contends the first officer did not have probable cause to search his vehicle. He argues he was released when the officer told him he was free to go. He maintains when the officer ordered him out of the car a second time to conduct a search, the original ground for stopping his vehicle no longer provided the necessary justification for a further search. He notes he was walking around the area for fifteen minutes before the officer searched the vehicle. Defendant points out this relative

freedom from restraint belies the officer's testimony he had reason to be afraid for his safety. He further notes the district court rejected this argument while ruling on the suppression motion.

A search and seizure without a valid warrant is per se unreasonable unless it comes within a recognized exception to constitutional warrant requirements, such as consent, search incident to arrest, probable cause and exigent circumstances, or plain view. *State v. Lamp*, 322 N.W.2d 48, 53 (Iowa 1982); *State v. Schrier*, 283 N.W.2d 338, 342 (Iowa 1979). In the absence of a warrant, the burden is on the State to demonstrate that a search and seizure was lawful. *State v. Oliver*, 341 N.W.2d 25, 32 (Iowa 1983); *State v. Ahart*, 324 N.W.2d 317, 318 (Iowa 1982); *State v. Shea*, 218 N.W.2d 610, 613 (Iowa 1974).

It is well established that a police officer may search an automobile without a warrant when probable cause and exigent circumstances exist. *See Coolidge v. New Hampshire*, 403 U.S. 443, 459-60, 91 S. Ct. 2022, 2035, 29 L. Ed. 2d 564, 579 (1971); *State v. Holderness*, 301 N.W.2d 733, 736 (Iowa 1981); *State v. Olsen*, 293 N.W.2d 216, 218 (Iowa 1980).

Probable cause to search a vehicle exists when the circumstances lead a reasonably prudent person to believe the vehicle contains contraband. *See State v. Edgington*, 487 N.W.2d 675, 678 (Iowa 1992); *see also State v. Cullor*, 315 N.W.2d 808, 811 (Iowa 1982). The exigency requirement is always satisfied by a vehicle's

inherent mobility. *California v. Carney*, 471 U.S. 386, 105 S. Ct. 2066, 85 L. Ed. 2d 406 (1985); *State v. Lam*, 391 N.W.2d 245 (Iowa 1986).

We agree with the trial court's finding that here the officer had sufficient probable cause to search the vehicle and its contents. *See State v. Eubanks*, 355 N.W.2d 57, 58-59 (Iowa 1984).

We affirm.

AFFIRMED.