IN THE COURT OF APPEALS OF IOWA

FILED
NOV 16 2001
CLERK SUPREME COURT

No. 1-549 / 00-1643
Filed November 16, 2001

**STATE OF IOWA,**
Plaintiff-Appellee,

**vs.**

**ANDREW DEAN SKOLA,**
Defendant-Appellant.

---

Appeal from the Iowa District Court for Johnson County, Sylvia A. Lewis, District Associate Judge (suppression hearing), and Douglas S. Russell, Judge (trial).

Andrew Skola appeals from his conviction and sentence for possession of marijuana, third or subsequent offense. **REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.**

Linda Del Gallo, State Appellate Defender, and James G. Tomka, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Denise A. Timmins, Assistant Attorney General, J. Patrick White, County Attorney, Linda M. Paulson, Assistant County Attorney, and Kevin McKeever, Student Legal Intern, for appellee.

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

**EISENHAUER, J.**

Andrew Skola appeals from his conviction and sentence for possession of marijuana, third or subsequent offense, in violation of Iowa Code section 124.401(5) and 124.204(4)(m) (1999). He contends the district court erred in denying his motion to suppress. We reverse.

***I. Background Facts and Proceedings.*** On July 29, 1999, Officers Batcheller and Gaarde went to the Forest View trailer park in Iowa City to serve an arrest warrant on Andrew Skola. An alert had been placed on the arrest warrant stating that Skola was known to carry or be around guns, and that he may be violent.

When the officers arrived at the residence, a female standing on the porch notified them Skola was inside and called for him. When Skola appeared at the door, the officers informed him they had a warrant for his arrest. Skola immediately stepped out of the residence, quickly closed the door behind him, and allowed the officers to handcuff him.

Skola informed the officers there was no one else in the home. Officer Batcheller entered the home to perform a visual search of the immediate area. He observed a large white male "peeking around the corner." Officer Batcheller ordered the male to come out and secured him.

Once the male was in custody, Officer Batcheller searched the residence for additional people. He discovered a three-foot-tall marijuana bong located in the hallway in plain view. After completing his search, Officer Batcheller seized the bong.

Skola was charged with possession of marijuana, third or subsequent offense, in violation of Iowa Code sections 124.401(5) and 124.204(4)(m). Skola brought a motion to suppress the evidence obtained during the search of his home, which the trial court denied. A jury subsequently found Skola guilty, and he was sentenced to six months in the county jail.

Skola appeals. He contends the district court erred in denying his motion to suppress.

***II. Scope of Review.*** Our review of the conclusion a district court reaches on a motion to suppress concerning Fourth Amendment issues is de novo. *State v. Gillespie,* 619 N.W.2d 345, 350 (Iowa 2000). We give deference to the district court's factual findings, but are not bound by them. *State v. Turner,* 630 N.W.2d 601, 606 (Iowa 2001).

***III. Motion to Strike.*** The State has filed a motion to strike Skola's supplemental appendix, arguing it includes exhibits that were not introduced in the district court. The purpose of these exhibits is simply to illuminate some background facts that do not affect the outcome of this appeal. Therefore, the State's motion to strike the supplemental appendix is denied.

***IV. Motion to Suppress.*** Both the United States Constitution and the Iowa Constitution protect persons from unreasonable searches and seizures. *See* U.S. Const. amend. IV; Iowa Const. art. I, § 8. A warrantless search is per se unreasonable unless it falls within a recognized exception. *State v. Cline,* 617 N.W.2d 277, 282 (Iowa 2000). The exceptions to the warrant requirement include searches based on consent, plain view, exigent circumstances, and searches incident to arrest. *State v. Breuer,* 577 N.W.2d 41, 45 (Iowa 1998). It

is the State's burden to prove by a preponderance of the evidence that a search falls within a recognized exception. *Cline,* 617 N.W.2d at 282.

Skola contends the search conducted of his home was an impermissible search incident to arrest. A search of an arrestee's person and the areas within his or her immediate control is justified as long as that search is substantially contemporaneous to the arrest and confined to the immediate vicinity of the arrest. *State v. Canas,* 597 N.W.2d 488, 492 (Iowa 1999). The purpose of a search incident to arrest is to prevent the arrestee from destroying evidence or gaining possession of a weapon that could be used to resist arrest or effect an escape. *Id.* In order for a search of a residence to be valid under this exception, the arrest must take place within the residence, not somewhere outside. *Id.*

The State agrees the search of Skola's home was not a search incident to arrest. Instead, the State contends the search was valid under the "protective sweep" exception to the warrant requirement. The United States Supreme Court recognized this exception to the Fourth Amendment protection against unreasonable searches in *Maryland v. Buie,* 494 U.S. 325, 334, 110 S. Ct. 1093, 1098, 108 L. Ed. 2d 276, 286 (1990). Under the protective sweep exception, an arresting officer may look in the spaces immediately adjoining the place of arrest, as a precautionary matter, without probable cause or reasonable suspicion to do so. *Buie,* 494 U.S. at 334, 110 S. Ct. at 1098, 108 L. Ed. 2d at 286. The purpose of this protective sweep is to protect the arresting officers from a third party attack. *Id.* at 335, 110 S. Ct. at 1099, 108 L. Ed. 2d at 287.

While the Iowa Constitution cannot be interpreted to provide less protection than is provided by the United States Constitution, we may interpret

our constitution to provide greater protection for our citizens' constitutional rights. *Cline*, 617 N.W.2d at 285. Iowa has recognized the "cursory safety check exception" to the search warrant requirement of its constitution. *State v. Holland*, 389 N.W.2d 375, 381 (Iowa 1986). Like a protective sweep, a cursory safety check allows an arresting officer to conduct a quick and cursory check of an arrestee's quarters immediately subsequent to an arrest. *Id.* Under this exception, an officer may even check an arrestee's dwelling if the arrest is near the door but outside the dwelling. *Id.* However, in order to conduct a cursory safety check the officer must have "reasonable grounds to believe that there are other persons present inside who might present a security risk." *Id.* (citing *United States v. Kolodziej*, 706 F.2d 590, 596 (5th Cir. 1983)).

Under the protective sweep exception to the Fourth Amendment of the United States Constitution, Officer Batcheller may have been justified in making initial entry into the atrium area of Skola's home because Skola was arrested in the doorway of the trailer and Officer Batcheller took "one step" inside and looked around. However, Officer Batcheller violated the Iowa Constitution in doing so because there is no evidence he had reasonable grounds to believe there were other persons inside when he opened the door and entered the residence. Although the trial court found the officer knew there was at least one other person in the trailer, the record indicates this knowledge was obtained only after he entered the trailer in violation of Skola's rights. Therefore, we reverse Skola's conviction.

**REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.**

Vogel, P.J., concurs; Miller, J., concurs specially.

000458

**MILLER, J.** (concurring specially)

In approving a warrantless "protective sweep" as an incident to an arrest the Supreme Court held "there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Maryland v. Buie*, 494 U.S. 325, 334, 110 S. Ct. 1093, 1098, 108 L. Ed. 2d 276, 286 (1990). I believe this states the same test set forth in *State v. Holland*, 389 N.W.2d 375, 381 (Iowa 1986), quoted in the majority opinion, and would therefore find it unnecessary to discuss whether the Iowa Constitution provides greater protection than the United States Constitution in this area. In all other respects I fully concur in the majority opinion.