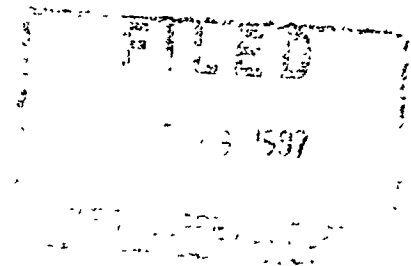


IN THE COURT OF APPEALS OF IOWA

No. 7-420 / 96-1802
Filed 10/29/97

000375



STATE OF IOWA,
Appellee,

vs.

ANDREW M. BREUER,
Appellant.

Appeal from the Iowa District Court for Des Moines County, Thomas R.
Brown, District Associate Judge.

Defendant appeals the court's denial of his motion to suppress evidence and the sentence and judgment entered upon his conviction of possession of marijuana in violation of Iowa Code section 124.401(3). **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney
General, Patrick C. Jackson, County Attorney, and Ronald Robertson, Assistant
County Attorney, for appellee.

Considered by Sackett, P.J., and Streit and Vogel, JJ.

STREIT, J.

Andrew M. Breuer appeals the denial of his motion to suppress evidence and his conviction for possession of illegal substances in violation of Iowa Code section 124.401(3). Breuer asserts the deputy who issued him the citation unlawfully entered the stairwell of his duplex, in which he had a legitimate expectation of privacy. After entering the stairwell and being admitted into Breuer's residence, the deputy discovered Breuer was in possession of marijuana. We reverse the denial of Breuer's motion to suppress and his conviction.

I. Background Facts & Proceedings.

On May 5, 1996, a Sunday, at approximately 9:25 p.m., deputy sheriff Dideriksen received a complaint that a black S-10 pickup was driving recklessly on Mechanic Street in Middletown, Iowa. The complainant said the owner might live near the railroad tracks by Boundary Street. The deputy went to that area and "started knocking on some doors." He saw a black S-10 pickup parked on High Street and ran a registration check on the truck. The search revealed Breuer owned the truck and possibly lived at a house on High Street.

The deputy went to the house where Breuer lived upstairs. There were two doorways on the outside of the house. One doorway was the entrance to the lower level living quarters and the other was the doorway to Breuer's upstairs lodgings. Breuer's outside entry to this living area was actually two doors: a wooden door and a storm door (a screen and glass door). There was a doorbell on the outside of the

house, which rang in Breuer's quarters. The deputy rang the doorbell. When no one answered, he opened the storm door, and stepped through the opened wooden door. He climbed up the stairs leading to Breuer's residence. The stairwell was maintained by Breuer; he cleaned it and paid for the electricity lighting the stairwell. At the top of the stairwell there was another doorway. The door was closed.

The deputy knocked and Breuer opened the door. The odor of burning marijuana seeped into the stairwell. The deputy asked if he could come in and Breuer acquiesced. The deputy told Breuer he was there to inquire about Breuer's driving; there had been a complaint. While talking to Breuer, the deputy saw marijuana on a coffee table in an ashtray. The deputy asked what he was doing and Breuer stated he had just smoked a joint. He asked Breuer where the rest of the drugs were and Breuer showed him seeds, roaches, rolling papers, and a plastic bag of marijuana. The deputy issued Breuer a citation for possession of a controlled substance.

Breuer waived his right to a jury trial. He filed a motion to suppress the evidence the deputy seized from his residence, arguing the deputy illegally entered his stairwell and the evidence flowing from this entry was tainted. His motion was denied. The court found Breuer guilty of possession of a controlled substance and sentenced him.

II. Violation of the Fourth Amendment by Search Without a Warrant.

Where it is alleged constitutional rights have been denied, we make an evaluation of the totality of the circumstances, which amounts to a de-novo style

review. *State v. Showalter*, 427 N.W.2d 166, 168 (Iowa 1988). Iowa courts have interpreted the scope and purpose of the Iowa Constitution to track federal interpretations of the Fourth Amendment. *See id.* Thus, in making a decision on this issue, this court looks not only to Iowa state case law, but federal case law.

The question litigated in the defendant's motion hearing in district court, and again on appeal, is whether the deputy violated the Fourth Amendment when he opened the door and entered the stairwell leading to Breuer's residence without obtaining a warrant. The trial court analyzed the question by looking to porch cases and dealing with the stairwell as if it were an enclosed porch. The trial court also considered whether the deputy thought Breuer had an expectation of privacy in the stairwell. This analysis is flawed.

First, the question cannot be settled by classifying the stairwell as either a protected or unprotected area under the Fourth Amendment. The decision is not that simple because the Fourth Amendment protects people, not places.¹ *Katz v. United States*, 389 U.S. 347, 351 (1967). Second, the focus in this analysis must be on whether Breuer had a legitimate expectation of privacy in the stairwell, not on what the deputy's expectations were. *See Warden v. Hayden*, 387 U.S. 294 (1967).

¹ Although this is the holding of *Katz*, generally, courts have held that an apartment resident has no expectation of privacy in the common hallways of an apartment building, at least where there is no attempt to secure the building against non-residents by the use of a locked outer door. *See United States v. Acosta*, 965 F.2d 1248, 1252 (3d Cir. 1992); *State v. Eddy*, 519 A.2d 1137, 1141 (R.I. 1987) ("The [unsecured] hallway of an apartment building is a 'public' place for purposes of interpreting the Fourth Amendment, and [it] may be entered by police without a warrant").

To determine whether Breuer had a legitimate expectation of privacy in the stairwell, we consider: (1) whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment; (2) whether Breuer's interest in privacy would be recognized in light of concepts of real or personal property law, *Showalter*, 427 N.W.2d at 170; (3) whether Breuer had authority to exclude others from the stairwell; (4) whether Breuer took reasonable precautions to maintain privacy, *see U.S. v. Burnett*, 890 F.2d 1233, 1237 (D.C.Cir. 1989); and (5) whether the public had access to and view of the stairwell. *See State v. Solberg*, 861 P.2d 460, 465-67 (Wash. 1993); *State v. Wren*, 768 P.2d 1351, 1356 (Idaho App. 1989).

In this case, when the deputy entered Breuer's stairwell, he infringed upon personal and societal values protected by the Fourth Amendment. Breuer was a tenant, not an owner, of the stairwell. The stairwell, however, was exclusively part of Breuer's rental space—not a common area used by others. A deputy has no more right to intrude upon the rental space of a tenant than he does the living space of an owner.

The State cites many authorities which hold, generally, a tenant does not have a reasonable expectation of privacy in common areas of an apartment complex. *See e.g. United States v. Acosta*, 965 F.2d 1248 (3d Cir. 1992); *United States v. Holland*, 755 F.2d 253, 254 (2d Cir. 1985); *United States v. Wilkes*, 451 F.2d 938, 940-41 (2d Cir. 1971). But the rental area here is not a common area in any sense. It is a house

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divided into an upstairs and a downstairs residence. The stairwell is inside the four walls of the house. The stairwell led only to Breuer's residence and the other tenant would have no reason to and never did enter Breuer's stairwell. The stairwell was part of Breuer's rental space. He maintained the space, including paying the electricity for the lighting and cleaning it. The stairwell and area inside the outer doors was available for the safe keeping of Breuer's personal property. Breuer's interest would be recognized in light of concepts of real or personal property law.

Breuer had the authority to exclude others from the stairwell and did so. No one used the stairwell except Breuer and his guests. When visitors arrived at Breuer's home, they would ring the doorbell outside and he would come downstairs to greet them. The deputy is the first person who had ever come to the top of the stairwell and knocked on Breuer's inside door to enter. The State argues the front door was open, however, the record shows Breuer took reasonable precautions to maintain the privacy of the stairwell. He testified he always kept the bottom door shut, but despite his efforts a swell in the door would sometimes cause it to open. Also, the storm door was closed. The screen portion of the closed door, by its very nature is porous and allows air to flow into the portal. Also, the screen, by its very nature excludes those not welcomed into the home—insects and the public.

The evidence presented to the district court justifies a finding the stairwell was closed to the public. Presumably, only Breuer and his landlord had a key to enter the

stairwell. The public did not have access to or view of the stairwell. Two doors on the house must be opened before entering the stairwell.

Because Breuer had a legitimate expectation of privacy in the stairwell, the deputy needed to obtain a warrant before entering. The deputy's entrance into Breuer living quarters without a warrant infringed on Breuer's Fourth Amendment rights.

III. Exceptions to the Warrant Requirement.

Warrantless searches violate the Fourth Amendment unless they fall within one of the exceptions to the warrant requirement. *See State v. Cook*, 530 N.W.2d 728, 731 (Iowa 1995) (citing *Katz*, 389 U.S. at 357). When a warrantless search is challenged, the State must prove the search is within an exception to the warrant requirement. *State v. Moriarty*, 566 N.W.2d 866, 867 (Iowa 1997). Exceptions to the warrant requirement include consent, probable cause coupled with exigent circumstances, and searches incident to lawful arrests. *Id.* The Iowa Code has extended the search incident to arrest exception. *See Iowa Code* § 805.1(4) (1995). This section authorizes an officer to conduct a search, of the same scope as the constitution authorizes for a search incident to a custodial arrest, contemporaneously with the officer's issuance of a citation when that officer has probable cause to make a custodial arrest but chooses to issue a citation instead. *Cook*, 530 N.W.2d at 731.

The deputy did not have consent to enter Breuer's stairwell. Probable cause that Breuer had committed a crime was not coupled with exigent circumstances. The

only exception the State can rely upon is that the deputy had probable cause to arrest Breuer.

Under Iowa Code section 804.7(1) a police officer can arrest a person without a warrant for six reasons.² None of the six reasons are applicable here. The alleged reckless driving offense was not committed in the deputy's presence. *See id.* 804.7(1). The deputy did not know a public offense had in fact been committed. *See id.* 804.7(2). Reckless driving and speeding, which the deputy thought Breuer had committed, are not indictable offenses. *See id.* 804.7(3). The deputy had no information from another law enforcement agency. *See id.* 804.7(4). The alleged crime was not domestic abuse. *See id.* 804.7(5)(6). It is important the deputy did not give Breuer a citation for reckless driving or speeding, the offenses the State contends gave him the right to enter Breuer's stairwell. An initially unconstitutional search is not validated by reason of its success. *State v. Swartz*, 244 N.W.2d 553, 555 (Iowa 1976).

² 1. For a public offense committed or attempted in the peace officer's presence. 2. Where a public offense has in fact been committed, and the peace officer has reasonable ground for believing that the person to be arrested has committed it. 3. Where the peace officer has reasonable ground for believing that an indictable public offense has been committed and has reasonable ground for believing that the person to be arrested has committed it. 4. Where the peace officer has received from the department of public safety, or from any other peace officer of this state or any other state or the United States, an official communication by bulletin, radio, telegraph, telephone, or otherwise, informing the peace officer that a warrant has been issued and is being held for the arrest of the person to be arrested on a designated charge. 5. If the peace officer has reasonable grounds for believing that domestic abuse, as defined in section 236.2, has occurred and has reasonable grounds for believing that the person to be arrested has committed it. 6. As required by section 236.12, subsection 2. Iowa Code § 804.7 (1995).

Because the deputy did not have probable cause to arrest the defendant, the State cannot meet its burden of proving an exception to the warrant requirement. The entrance into Breuer's stairwell was an unreasonable search that violated Breuer's Fourth Amendment Rights.

IV. Fruit of a Poisonous Tree.

The State argues the Breuer consented to the officer's entry into his residence and consensually turned over marijuana. The State also argues after the deputy entered Breuer's residence, the drugs were in the officer's plain view. Physical evidence or verbal statements resulting from unlawful search or seizure are inadmissible except when sufficiently attenuated from the search or seizure. *See Wong Sun v. United States*, 371 U.S. 471, 485-88 (1963). Breuer's consent to have the deputy enter his dwelling after the deputy's illegal entry into the stairwell, his consent to a further search of his dwelling, and his verbal statements regarding drugs, are "fruit of a poisonous tree" tainted by the initial illegal entry. *See id.* The evidence should have been excluded. For these reasons, the trial court erred in dismissing Breuer's motion to suppress and considering the illegally obtained evidence in trial. A new trial is ordered.

REVERSED AND REMANDED.

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SACKETT, J. (concurring in part and dissenting in part)

I concur in part and dissent in part. I am in complete agreement with the majority's well-reasoned decision that the deputy needed a search warrant to enter the stairwell and the entry was unreasonable.

However, I find defendant consented to the officer's entrance to the room where the marijuana was located and consented to showing the officer the seeds and marijuana. For this reason, I would affirm the conviction.