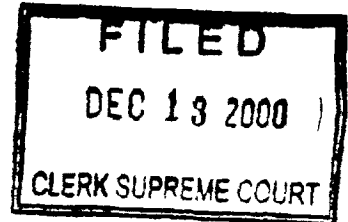


IN THE COURT OF APPEALS OF IOWA

No. 0-605 / 99-1636
Filed December 13, 2000



STATE OF IOWA,
Appellee,

vs.

GARY STEVEN WESTCOTT,
Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Carlynn D. Grupp, Judge.

Defendant appeals the judgment and sentence entered following his conviction of possession of methamphetamine, possession of marijuana, and interference with official acts. **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, Tricia A. Johnston, Assistant State Appellate Defender, and Lisa Lemons, Student Legal Intern, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, John P. Sarcone, County Attorney, and Carlyle Dalen, Assistant County Attorney, for appellee.

Heard by Streit, P.J., and Vogel and Hecht, JJ.

VOGEL, J.

Gary Steven Westcott appeals the judgment and sentence entered following his conviction of possession of methamphetamine in violation of Iowa Code sections 124.401(5), as amended, and 124.206(4)(a) or (b) (1997), possession of marijuana in violation of Iowa Code sections 124.401(5), as amended, and 124.204(4)(m) (1997), and interference with official acts in violation of Iowa Code section 719.1 (1997). We find the district court erred in denying Westcott's motion to suppress the evidence obtained during an unlawful search. We reverse and remand.

Background facts. On November 9, 1998, Westcott was stopped and issued a citation for failure to wear a safety belt. After issuing the citation, the officer removed Westcott from his vehicle and conducted both a pat-down search and a more extensive search. Drugs were found on Westcott. He was arrested and, subsequently, charged with possession of methamphetamine, possession of marijuana, and interference with official acts. Westcott filed a motion to suppress the drug evidence seized from him during the searches. The motion was overruled on February 9, 1999. Westcott was convicted by a jury on July 27, 1999. He now appeals.

Standard of review. In assessing alleged violations of constitutional rights, our standard of review is de novo. *State v. Washburne*, 574 N.W.2d 261, 263 (Iowa 1997). We conduct an independent evaluation of the totality of the circumstances as shown by the entire record. *State v. Astello*, 602 N.W.2d 190, 195 (Iowa App. 1999). In reviewing the district court's ruling on a motion to

suppress, we consider both the evidence presented during the suppression hearing and that introduced at trial. *State v. Orozco*, 573 N.W.2d 22, 24 (Iowa 1997). An adverse ruling on a motion to suppress will preserve error for our review. *State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998).

Search and Seizure. Westcott appeals, alleging the search performed by the officers violated his Fourth Amendment right to privacy and, therefore, should have been excluded from evidence at trial. The State alleges the search was reasonable, as it fell within the search incident to arrest exception to the warrant requirement. The State thus contends the trial court was correct in overruling Westcott's motion to suppress the evidence.

The Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution protect individuals against unreasonable searches and seizures. *State v. Canas*, 597 N.W.2d 488, 492 (Iowa 1999). Searches and seizures conducted without prior approval by a judge or magistrate are per se unreasonable unless they fall within one of the recognized exceptions to the warrant requirement. *Id.* The State has the burden to prove by a preponderance of the evidence that a warrantless search falls within one of the exceptions. *State v. Cline*, 617 N.W.2d 277, 282 (Iowa 2000).

The Fourth Amendment does not protect against all government searches. *Breuer*, 577 N.W.2d at 45. Rather, the law is well established in Iowa that the Fourth Amendment protects only against unreasonable government intrusion upon a person's legitimate expectation of privacy. See *State v. Fox*, 493 N.W.2d 829, 831 (Iowa 1992); see also *State v. Becker*, 458 N.W.2d 604, 608 (Iowa

1990); *see also State v. Flynn*, 360 N.W.2d 762, 764-65 (Iowa 1985). Thus a Fourth Amendment violation is said to have occurred when the government unreasonably intrudes upon an individual's reasonable or legitimate expectation of privacy. *United States v. Karo*, 468 U.S. 705, 712, 104 S. Ct. 3296, 3302, 82 L. Ed. 2d 530, 539 (1984); *accord State v. Winkler*, 552 N.W.2d 347, 351 (N.D. 1996). Under this rule, the government must obtain a search warrant prior to searching, or entering, an area where a person possesses a reasonable expectation of privacy, subject to certain well-established exceptions. *See State v. Kitchen*, 572 N.W.2d 106, 108 (N.D. 1997). These exceptions include searches based on consent, plain view, exigent circumstances, and searches incident to arrest. *State v. Howard*, 509 N.W.2d 764, 767 (Iowa 1993). Evidence obtained in violation of the Fourth Amendment is inadmissible at trial under the exclusionary rule. *See State v. Ahart*, 324 N.W.2d 317, 318 (Iowa 1982) (citing *Wong Sun v. United States*, 371 U.S. 471, 484-85, 83 S. Ct. 407, 415-16, 9 L. Ed. 2d 441, 453-54 (1963)).

The stop, citation and search. Westcott was stopped by Officer Espeland for failing to wear a seatbelt. Shortly thereafter, Officer Wernet, a member of the Mason City drug task force, came on the scene. Officer Espeland approached Westcott, advised him of why he had been stopped and asked to see his license and proof of insurance. Westcott turned over his driver's license and Officer Espeland returned to his vehicle to complete a citation for failure to wear a seatbelt and a written warning for failure to show proof of insurance.

Officer Espeland then returned to Westcott's vehicle, issued him the citation and warning and returned his driver's license to him. At that point, having concluded the purpose of the stop, Officer Espeland, along with Officer Wernet, asked Westcott if he would consent to a search of his vehicle. The record is void of Westcott's response to this request and we do not assume consent was given. Officer Espeland testified at trial as follows, "I gave - - I issued the gentleman his citation. Asked him to search his vehicle. Subsequently I had him exit and stand up on the sidewalk." After removing Westcott from the vehicle, Officer Espeland conducted a pat-down search.

Officer Espeland testified he felt something in Westcott's pocket. He felt assured, however, that Westcott did not have a weapon on his person, so he proceeded to search Westcott's vehicle. He found no contraband in the vehicle. The officers then approached Westcott and asked him several times to remove his hands from his pockets. Westcott refused. Officers Espeland and Wernet then each grabbed an arm, struggled with Westcott, and forcibly removed his hands from his pockets. A baggie flew through the air and broke as it landed on the wet sidewalk. At what point the officers informed Westcott he was under arrest varies with the testimony of the two officers. Officer Wernet testified Westcott was placed under arrest when the baggie of powder flew out of his hand and landed on the ground. Officer Espeland verified this account on direct examination but testified on cross-examination that Westcott was placed under arrest before that time, when he started to struggle and resisted taking his hands out of his pockets. After the baggie landed on the ground, Officer Espeland

attempted to confiscate the powdery substance from the sidewalk and returned to Westcott. He then continued his search and found marijuana in Westcott's right, front pocket.

Westcott argues the search was unreasonable as it was conducted without a warrant and did not fall into one of the recognized exceptions. Therefore, he contends, the exclusionary rule should apply and the evidence should have been suppressed from the trial. The State acknowledges the actions engaged in by the two officers were in violation of the Fourth Amendment but claims the defendant's actions in resisting police orders to remove his hand from his pocket provided clear grounds to arrest him for interference with official acts and allowed a search incident to that arrest. The State contends the struggle leading to a valid arrest cleansed their prior actions and validated the search.

Wescott does not, nor could he, contest the initial stop for the seatbelt violation. The officers, upon spotting Westcott driving without his seatbelt, were justified in stopping him and issuing a citation for the minor offense. Upon issuance of the citation, however, it is clear Officer Espeland's purpose in stopping Wescott had concluded. The citation had been written, signed by Westcott and given to him. The officers no longer had a legitimate need, nor could they articulate an additional reason, to detain him. See *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968) (holding a police officer must be able to point to specific and articulable facts which reasonably warrant such an intrusion). Officer Espeland testified he did not suspect

Westcott had a weapon and had observed no suspicious behavior or nervous mannerisms from Westcott. See *Pennsylvania v. Mimms*, 434 U.S. 106, 110-11, 98 S. Ct. 330, 333, 54 L. Ed. 2d 331, 337 (1977) (establishing an officer may request the driver get out of the vehicle during a *lawful detention*). The police actions that transpired after that point were neither associated with the original stop nor inspired by any suspicious behavior demonstrated by Westcott during the issuance of the citation.

Although the Supreme Court has determined a pat-down of a suspect is reasonable for officer safety, the officer must have some "reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." *Terry*, 392 U.S. at 27, 88 S. Ct. at 1883, 20 L. Ed. 2d at 909. In the record before us, neither Officer Espeland nor Officer Wernet expressed any specific and articulable reasons in which a "reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.* In fact, they offer no articulable arousal of suspicions at all; no furtive or suspicious movements, no nervous actions or mannerisms, no hesitancy or failure to cooperate at this point. See *State v. Riley*, 501 N.W.2d 487, 490 (Iowa 1993) (recognizing furtive movements coupled with additional suspicious circumstances can provide probable cause for a warrantless search); see also *State v. Predka*, 555 N.W.2d 202, 207 (Iowa 1996) (finding nervousness during a legitimate stop can be one of several considerations in determining probable cause to search). The only support the officers offered for subjecting Westcott to a pat-down search came

from Officer Espeland. He testified, "I wanted to do basically a drug interdiction to see if there was any drugs in the vehicle." The Supreme Court in *Knowles v. Iowa*, 525 U.S. 113, 119 S. Ct. 484, 142 L. Ed. 2d 492 (1998), has determined a "search incident to citation" is not a valid exception under the Fourth Amendment. See *State v. Jenkins*, ___ N.W.2d ___, ___ (Iowa 2000); see also *State v. Gillespie*, ___ N.W.2d ___, ___ (Iowa 2000). The Court stated that the two primary reasons for allowing a "search incident to arrest" exception are simply not present in issuing a citation. *Id.* at 117-18, 119 S. Ct. at 488, 142 L. Ed. 2d at 498. The first reason, officer safety, is greatly reduced in a citation situation as opposed to a custodial arrest, due to the brief nature of the police encounter where the temporarily detained person will be free to leave upon receipt of their citation. *Id.* at 117, 119 S. Ct. at 487-88, 142 L. Ed. 2d at 498. In reviewing Westcott's case, officer safety was no longer a concern following the issuance of the citation, as officers had noted no suspicious, negative or threatening behavior. The second reason noted in *Knowles* to justify a search incident to arrest is the need to preserve evidence for subsequent use at trial. *Id.* at 118, 119 S. Ct. at 488, 142 L. Ed. 2d at 499. Once the citation had been issued, however, no further evidence needed to be obtained to prosecute the offense. No further evidence of a seatbelt violation could have been found by searching Westcott or his vehicle. The possibility of officers stumbling upon evidence completely unrelated to the traffic offense is too remote to justify such an invasion to Fourth Amendment privacy. *Id.* We find, therefore, the officers had

no legitimate reason to prolong the contact with Westcott or conduct a pat-down search of his person.

The State claims the search was valid because it fell under the search incident to arrest exception. It contends that despite Officer Espeland's earlier illegal actions, Westcott's resistance to their attempts to remove his hands from his pocket provided probable cause to arrest him for interference with official acts and made the subsequent search a valid search incident to that arrest. The State cites *State v. Dawdy*, 533 N.W.2d 551, 555 (Iowa 1995), for the proposition that the resulting struggle by Westcott provided probable cause for an arrest for interference with official acts, which allowed the officers to search incident to arrest. We find, however, that *Dawdy* can be distinguished from the present case in that prior to the attempted arrest of Dawdy, officers found the discarded narcotics in the fresh snow by the vehicle and, therefore, had probable cause to arrest him. *Dawdy*, 533 N.W.2d at 554. In addition, they informed Dawdy of his arrest prior to the struggle. *Id.* In the present case, it is unclear from the conflicting testimony of the officers when Westcott was arrested. However, on direct examination, both officers indicated the arrest did not occur when the struggle ensued but at some later point when the narcotics were revealed. This undermines the State's position that Westcott was searched incident to his arrest for interference with official acts. Upon our de novo review of the totality of the circumstances, we find the record is simply not sufficiently clear to "cleanse" the prior conduct of the officers' and transform the search to a valid search incident to arrest. We find the search and seizure of Westcott was unreasonable under

the Fourth Amendment, as the officers neither operated under a warrant nor a valid exception to the warrant requirement. Accordingly, we find the motion to suppress should have been sustained and the evidence seized should have been excluded from the trial. We reverse and remand for proceedings consistent with this decision.

REVERSED AND REMANDED.