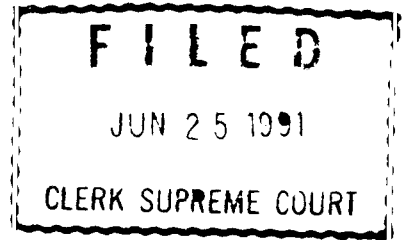


IN THE COURT OF APPEALS OF IOWA

No. 1-174 / 90-625



STATE OF IOWA,

Appellee,

vs.

JOSEPH J. BROWN,

Appellant.

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Appeal from the Iowa District Court for Woodbury County, Robert C. Clem and William E. Adams, District Associate Judges.

Defendant appeals the jury verdict finding him guilty of carrying a concealed weapon. **REVERSED.**

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonlubol, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Richard J. Bennett, Assistant Attorney General; Thomas S. Mullin, County Attorney; and Michael D. Andrew, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., and Sackett and Habhab, JJ.

**HABHAB, J.**

Sioux City police officers received an anonymous tip that two persons, Jason Palmer and an individual identified only as "Joe", would be involved in a gun-for-drugs exchange at the band shell in Grandview Park. The tipster gave no physical description of either Palmer or "Joe." The exchange of a gun for drugs was to occur at 2:00 p.m. on a certain date.

Police officers arrived at the band shell shortly after 2:00 p.m. on the specified date. They saw two persons standing at the band shell and two others walking away. There is no evidence that the officers saw any type of exchange taking place.

The two remaining persons at the band shell did not act suspiciously, nor did they do anything illegal. They stayed for about five minutes, then walked to a nearby motorcycle and drove away. The police officers followed the motorcycle until it parked and the two men were dismounting. The officers then stopped and frisked the two men. One of them, Joseph J. Brown, was found to have a gun in his waistband. He was charged with carrying weapons, a violation of Iowa Code section 724.4. A jury found him guilty of that charge, and he has appealed from the resulting conviction.<sup>1</sup>

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1. We note that the county attorney purposely failed to appear at the court-conducted hearing on defendant's motion for new trial and motion in arrest of judgment. It is also called to our attention that no written resistance to the aforesaid motions was filed by the county attorney's

Brown contends the district court should have suppressed all evidence resulting from the warrantless stop and search which yielded the gun. He argues the police officers had no reasonable cause to stop and frisk him; he asserts the officers had no specific and articulable cause to believe that criminal activity was afoot. In this respect, when we consider the alleged violation of constitutional safeguards, we are obliged to make an independent evaluation of the totality of the circumstances shown by the entire record. State v. Campbell, 326 N.W.2d 350, 352 (Iowa 1982).

A warrantless search and seizure is per se unreasonable, and evidence obtained thereby is inadmissible unless the State proves by a preponderance of the evidence that a recognized exception to the warrant requirement applies. State v. Folkens, 281 N.W.2d 1, 3 (Iowa 1979). We believe the trial court held the search to be valid under the "stop and frisk" rule of Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). The Iowa Supreme Court has discussed the applicable law in a Terry stop case stating:

When a stop is challenged on the basis that reasonable cause did not exist, the State must show that the stopping officer had "specific and articulable cause to support a reasonable belief that criminal activity may have occurred State v. Aschenbrenner, 289 N.W.2d 618, 619 (Iowa

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office. The county attorney did appear at the time of sentencing.

1980)(emphasis added). Circumstances giving rise to suspicion or curiosity will not suffice. State v. Dixon, 241 N.W.2d 21, 23 (Iowa 1976). The officer is bound by the true reason or reasons for making the stop, that is, the officer may not rely on reasons that he or she could have had but did not actually have. Aschenbrenner, 289 N.W.2d at 619. If the State fails to meet its burden the evidence obtained as a result of the stop must be suppressed. State v. Reese, 259 N.W.2d 6793, 796 (Iowa 1977).

State v. Lamp, 322 N.W.2d 48, 51 (Iowa 1982).

The State argues the anonymous tip was sufficiently corroborated and cites Alabama v. White to support its position. In Alabama v. White, the police received an anonymous tip which indicated that a woman named Vanessa White would be leaving apartment 235-C at the Lynwood Terrace apartments. The informant also indicated this woman would be driving an old brown Plymouth station wagon with the right taillight lens broken. The informant added that the woman would be going to Dobey's Motel and would be in possession of an ounce of cocaine inside a brown attache case. Alabama v. White, 496 U.S.\_\_\_\_, \_\_\_\_, 110 S. Ct. 2412, \_\_\_\_, 110 L. Ed. 2d 301, 306-307 (1990).

The United States Supreme Court in Alabama gave credit to the proposition that because an informant is shown to be right about some things, he is probably right about other facts he has alleged including the potential involvement of criminal activity. Id. at 310 (citations omitted). The Court was also influenced by the fact that the caller had the ability to predict respondent's future behavior "because it demonstrated inside information - a special

familiarity with respondent's affairs." Id. The court recognized that the general public would not have specific knowledge of the defendant's activities on that day.

In reviewing Alabama, we find it to be distinguishable from the case at bar. In the current case, Sergeant McCormick received second-hand information from an unknown tipster. The information was never corroborated or verified. The police had information that two individuals were involved. The tipster said one individual was named Jason Palmer and the other was named Joe. Information as to the gender of Joe was not given. The only other information given to the police officer was that the two individuals would be at the band shell in a public park in Sioux City.

One officer who was on the scene testified that when he and another officer arrived he suspected they were too late. McCormick witnessed two individuals at the band shell and two individuals walking away from the band shell. He did not witness an exchange and saw nothing which could lead him to believe any type of criminal activity was taking place.

Nonetheless, McCormick had the two individuals who had been standing at the shell followed when they left on their motorcycle. McCormick did not have the other two individuals followed for he did not feel they were close enough to the band shell. The arresting officer testified he believed the pair were attempting to elude the police

while they were being followed because they turned into an alley. However, he later testified that had the motorcycle continued down the alley, the pair would have arrived at the residence listed for Mr. Brown.

The tipster provided the police with no details beyond the fact that two individuals would be in a public park making a gun-for-drugs exchange. There was no information detailing future activity or any specific details relating to facts which would not be easily obtainable. These are two of the elements relied on by the Alabama court in determining whether the tip in that case was reliable.

The United States Supreme Court has held "the police officer is not entitled to seize and search every person whom he sees on the streets or of whom he makes inquiries." Sibron v. New York, 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968). The record clearly establishes the officers lacked reasonable cause to stop Brown. The officers proceeded on unverified information supplied by an anonymous tipster. We find the district court erred in failing to suppress the evidence which was seized as the result of the warrantless search and we accordingly reverse and remand this case for a new trial.

For us to hold otherwise would subject our citizens to a stop and search based almost totally on unverified information from an unidentified, disgruntled source.

**REVERSED AND REMANDED.**