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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-648 / 89-36

STATE OF IOWA,

Appellee,

vs.

JUAN LUIS GARCIA,

Appellant.

265

Appeal from the Iowa District Court for Muscatine County, J. L. Burns and Edward B. deSilva, Jr., Judges.

Defendant appeals his conviction, following a bench trial, for possession of cocaine with intent to deliver. **REVERSED AND REMANDED FOR A NEW TRIAL.**

William L. Wegman, State Public Defender, and B. John Burns, Assistant State Public Defender, for appellant.

Thomas J. Miller, Attorney General, Amy M. Anderson, Assistant Attorney General, and Stephen J. Petersen, County Attorney, for appellee.

Heard by Oxberger, C.J., and Schlegel and Hayden, JJ.

OXBERGER, C.J.

Juan Luis Garcia (Garcia) appeals from his conviction, following a bench trial, for possession of cocaine with intent to deliver. He contends the district court should have suppressed evidence of drugs and drug paraphernalia seized during searches of his motel room and car. The State contends the district court erred in suppressing a gun found in Garcia's vehicle because the initial search of the glove compartment was a search incident to arrest. We reverse and remand for a new trial.

When there is an alleged denial of constitutional rights, we make our own evaluation of the totality of the circumstances in a de novo style of review. Polly v. State, 355 N.W.2d 849, 854 (Iowa 1984).

Muscatine police believed that Juan Garcia was dealing in drugs from his motel room. Police placed the room under surveillance for several days. Sergeant John LeMar of the Muscatine Police Department supervised the drug investigation involving Garcia. Eventually Sergeant LeMar was informed that Garcia did not have a driver's license. Sergeant LeMar then advised patrol officers to follow Garcia's car when he drove away from the motel and stop him for driving without a license. When the officers caught up to Garcia, he was stopped at a gas station and was away from his vehicle. Sergeant LeMar arrived approximately 30 seconds after the stop. Upon his arrival, Sergeant LeMar

opened the passenger's door of Garcia's car, and commenced what he believed to be an "inventory search" which yielded a gun. Garcia was thereupon arrested. While in police custody he signed a consent to searches of his car and motel room. These later searches disclosed drugs and drug paraphernalia.

Garcia was charged with possession of cocaine with intent to deliver. Garcia filed a motion to suppress items of evidence described as having been obtained by way of impoundment and inventory search of his vehicle. Garcia asserted the evidence was inadmissible because the impoundment was unreasonable and that the evidence was fruit of an arrest upon pretext.

The district court sustained Garcia's motion to suppress the gun found in his glove compartment. The district court determined:

> [T]he subsequent search by Sergeant LeMar violated the Defendant's rights against an unreasonable search and seizure. It did not follow the normal practices and procedures of the Muscatine Police Department. It does not fit within any of the recognized exceptions for warrantless searches.

The trial court overruled Garcia's motion to suppress evidence obtained as a result of his consent to search his motel room and automobile. The court said the consent was "freely and voluntarily given by the Defendant."

After a bench trial, Garcia was found guilty of possession of cocaine with intent to deliver. He has appealed from the resulting conviction.

I.

In most situations where a vehicle is impounded and an inventory is made, the issue is whether the arrest was proper. In the case at bar the inventory search is not dependent on the issue of whether Garcia was under arrest at the time Sergeant LeMar conducted the inventory search of the glove compartment.

When an individual is legally stopped while driving a vehicle, and it is determined that the individual does not have a valid driver's license, the police must determine what to do with the vehicle. The driver who has no license cannot be permitted to drive the vehicle from the scene. It makes no difference whether the driver is given a citation or is arrested and taken to the police station. In either situation, the status of the vehicle must be determined.

The Iowa Supreme Court in State v. Kuster, 353 N.W.2d 428, 431-32 (Iowa 1984), said the test for impoundment of a vehicle is reasonableness, and to be reasonable the police must:

> (i) . . . advise the operator "that his vehicle will be taken to a police facility or private storage facility for safekeeping unless he directs the officer to dispose of it in some other lawful manner," and (ii) comply with any reasonable alternative disposition requested.

Id.

In Kuster, the court further noted that "something more must be shown to justify impoundment of a car than that it would otherwise be left unattended." Id. at 432. Here Garcia's car was parked next to the gas pumps. It was reasonable to move the car from the pumps.

Garcia testified that he told the two stopping police officers that his sister could pick up his car. He said the officers told him to wait for a while. The State offered no evidence bearing on the issue of whether the police offered Garcia another method other than impoundment of the vehicle to dispose of the vehicle. The trial court did not refer to this issue in its ruling.

The Kuster rule imposes the burden on the State to show that the operator of the vehicle was offered an alternative other than impoundment of the vehicle. In State v. Casteel, 392 N.W.2d 168, 171 (Iowa App. 1986), this court cited the failure of the police to offer the vehicle operator an alternative to impoundment as one of the reasons for declaring the impoundment search illegal.

We hold that the trial court was correct in suppressing evidence of the gun, because the impoundment search was illegal, in that the police failed to offer Garcia an alternative to impoundment of his vehicle.

The State contends the trial court was in error in concluding the gun was seized pursuant to an illegal inventory search. The State urges the gun was admissible pursuant to a search incident to arrest.

The trial court found the police had sufficient reasonable suspicion to stop Garcia's vehicle, and when Garcia admitted he did not have a valid driver's license, they had probable cause to arrest Garcia. The trial court, although it found the arrest lawful, held the search of the glove compartment was illegal. The court cited the case of Amador-Gonzalez v. United States, 391 F.2d 308, 313 (5th Cir. 1968), as holding:

> The lawfulness of the arrest does not always legitimate a search. General or exploratory searches are condemned even when they are incident to a lawful arrest. The arrest must not be a mere pretext for the otherwise illegitimate search.

The court also cited United States v. Hollman, 541 F.2d 196, 197-98 (8th Cir. 1976), as holding:

> An arrest may not be used as a pretext to search for evidence. The circumstances justifying the search in each case must give rise to probable cause and reasonableness.

Although the trial court did not specifically state that the basis for its conclusion that "It [the search] does not fit within any of the recognized exceptions for warrantless searches" was a pretextual search, it is evident that was the court's implied holding. "[A] pretextual arrest occurs when police employ an arrest based on probable cause as a device to investigate or search for evidence of an unrelated offense for which probable cause is lacking." United States v. Trigg, 878 F.2d 1037, 1039 (7th Cir. 1989). C.f. United States v. Guzman, 864 F.2d 1512, 1515 (10th Cir. 1988). Consequently, the arrest

serves as a means to circumvent the warrant requirements of the fourth amendment. Id.

Upon our review of the record, we concur with the trial court finding the search was pretextual. Sergeant LeMar testified that Garcia would not have been arrested if the gun had not been found. He testified that Garcia was being investigated for possible drug violations.

In State v. Aschenbrenner, 289 N.W.2d 618 (Iowa 1980), the Iowa Supreme Court said: "Officers are bound by their true reason for making the stop. They may not rely on reasons they could have had but did not actually have." Id. at 619. Based on Sergeant LeMar's statement that Garcia would not have been arrested but for the gun, it is obvious that the search for the gun was prior to the arrest. Therefore, the search of the glove compartment was not incident to the arrest. Since the gun was illegally seized, the subsequent arrest was unjustified and was pretextual. Even if we were to hold that the arrest was not pretextual and held the arrest valid, there would be no basis for a search of the vehicle. There was no evidence of the crime of operating a vehicle without a license inside the vehicle. The State does not claim the search was for safety reasons. There is no evidence Garcia was violent.

In Kuster, the court cited, with approval from a New Jersey court, the following:

> This is a salutary rule, for otherwise police would be authorized to freely stop a car for a minor traffic infraction, impound it and search it with immunity. Surely such a circumstance is not consonant with the Fourth Amendment. As the court in United States v. Edwards, 554 F.2d 1331, 1339 (5th Cir. 1977), said: "The fourth amendment is not crushed by the four wheels of an automobile; automobiles do not work a forfeiture of privacy."

Kuster, 353 N.W.2d at 432.

The fourth amendment would have little application to motor vehicles if police were allowed to search the glove compartments of all vehicles when the police have suspicion that the operators have no driver's license. It is not unreasonable to require the police to cite need for evidence or safety to justify intrusion into private compartments of vehicles. No such justifications are demonstrated here.

II.

Having determined Garcia was illegally in custody at the time he gave written consent to a search of his vehicle and motel room, we proceed to determine whether the consent was a result of fruit of a poisoned tree. The United States Supreme Court in Brown v. Illinois, 424 U.S. 590, 599, 45 L. Ed. 2d 416, 95 S.Ct. 2254 (1975), said the ultimate question is:

> "whether granting establishment of the primary illegality, the evidence to which the instant objection is made has been . . . [obtained] by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

Id. at 599, 95 S. Ct. at 2259, 45 L. Ed. 2d at 424 (quoting

Wong Sun v. United States, 371 U.S. 471, 487-88, 83 S. Ct. 407, 417, 9 L. Ed. 2d 441, 455 (1963)).

The Brown court further stated:

> The temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct are all relevant. The voluntariness of the statement is a threshold requirement.

Id. at 603-04, 95 S. Ct. at 2261-62, 45 L. Ed. 2d at 427 (citations and footnotes omitted).

In State v. Hatter, 342 N.W.2d 851 (Iowa 1983), the Iowa Supreme Court, in applying the Brown criteria, held Hatter's confession inadmissible. Id. at 857. Hatter was arrested in his home without an arrest warrant. He was taken to the police station and, after being given his Miranda warnings, he confessed. Id. The court said:

> In holding such evidence to be tainted fruit of the unlawful entry which resulted in the warrantless arrest for the crime involving Karen, we note that the temporal proximity between the warrantless arrest and defendant's confession as to the alleged crime involving Deborah was relatively short [four hours]. The record also fails to show a single intervening event of significance between the entry and arrest and the confession.

Id. The court cited the case of Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), where an intervening event accrued to permit the admission of a confession obtained after an illegal arrest. Hatter, 342 N.W.2d at 857. Wong Sun was illegally arrested and then released on his own recognizance after a lawful

arraignment. He then returned voluntarily several days later to make the inculpatory statement.

The facts in this case, however, are more closely related to those in Hatter than Wong Sun. Garcia was taken to the police station after he was arrested, given his Miranda warnings, then he signed a consent form for a search. The State in its brief argues: "The State contends that Garcia's freewill to consent to the search of his car and motel room was not overcome because the gun was allegedly illegally seized." The supreme court in Hatter said: "'The voluntariness of the statement is a threshold requirement.'" Hatter, 342 N.W.2d at 856-57 (quoting Brown, at 604, 95 S. Ct. at 2262, 45 L.Ed. 2d at 427). In other words, in examining the issue of whether a consent or confession obtained after an illegal arrest is admissible, the first step is to determine whether the confession or consent is voluntary. Then we determine whether there are any intervening events of significance between the arrest and consent or confession.

The State also places great weight on the fact that Garcia was given his Miranda warnings in the written consent form. In Brown, the United States Supreme Court said:

> The Miranda warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered.

Brown, at 603, 95 S. Ct. at 2261, 45 L. Ed. 2d at 427.

The record does not show the time period between the arrest and the consent search. It appears to be a very short time period. In Hatter, four hours was held insufficient time period to remove the taint. The burden is on the State to prove the "temporal proximity of the arrest and the confession." Because there is no evidence of the time period, the State has failed to meet its burden on this issue.

The second component of the Brown test is "the presence of intervening circumstances." The State cites neither the Brown nor the Hatter case in its brief, nor has it suggested any intervening circumstances. We have searched the record and found none. After the invalid arrest, Garcia was taken to the police station where his consent to search was obtained.

We conclude, as did the Iowa Supreme Court in Hatter, that "[t]he record fails to show a single intervening event of significance between the entry and arrest and the confession." Hatter, 342 N.W.2d at 857. Here, the scenario is slightly different: illegal seizure of the gun, invalid arrest based on invalid seized gun, followed by a consent search, but the result is the same. The evidence obtained in the consent search was the tainted fruit of an invalid arrest and must be suppressed.

We reverse and remand for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.