

IN THE COURT OF APPEALS OF IOWA

FILED

JUN 15 1989

CLERK SUPREME COURT

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
JESSE EPINGER,)
Defendant-Appellant.)

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9-162
88-764

Appeal from the Iowa District Court for Scott County
(132846-02), Edward B. deSilva, Judge.

The defendant appeals from his conviction, following a
bench trial, of possession of heroin with intent to
deliver. **REVERSED AND REMANDED.**

John O. Moeller, Davenport, for defendant-appellant.

Thomas J. Miller, Attorney General; Amy M. Anderson,
Assistant Attorney General; and Realff H. Ottesen,
Assistant County Attorney, for plaintiff-appellee.

Heard by Donielson, P.J., and Hayden and Sackett, JJ.

SACKETT, J.

Defendant Jesse Epinger appeals his conviction of possession of a controlled substance with intent to deliver in violation of Iowa Code section 204.401(1)(a). The issue we must address is whether the trial court erred in refusing to suppress evidence obtained from a search of a motel room occupied by defendant. We find no immediate justification for the warrantless search. We reverse and remand for new trial.

On December 31, 1987, a member of the Davenport Police Department who had been with the department since 1979, was a member of the Street Crime Vice Unit and who testified he had substantial experience in drug trafficking enforcement, observed syringes, a bottle containing a white powdered substance, what he believed to be a bag of marijuana and foil packets which he felt contained controlled substances, through the window of a motel room occupied by defendant. He also saw a female on the bed.

After observing the items the officer notified his partner, who was with him, of his observations. He talked with the motel manager and learned the room was rented to a female. A check was made of a motor vehicle in front of the motel room. It was determined the vehicle belonged to defendant. Another officer was requested and came to the scene. The officers took about ten minutes to determine they did not need a search warrant. The other two officers

looked through the window to verify the first officer's observations. One officer stationed himself near the room while two officers went to the door of the room and knocked. A female came to the door and the police officer told her he needed to talk with Jesse. Defendant looked out a window. The officer showed his badge and asked defendant to open the door. When asked why, he said he needed to talk to the defendant about a prostitution complaint. The door opened, the officer stepped in, told defendant to stand against the wall and frisked him. A search was made of the defendant and the room. Defendant objected to the admission of the items seized in the motel room. The trial court overruled defendant's motion. Defendant contends this was error.

Our review is de novo. When confronted with alleged constitutional violations, we make our own independent evaluation of the totality of the circumstances. State v. Hilleshiem, 291 N.W.2d 314, 316 (Iowa 1980).

Defendant first contends when the officer made the observations through the window he was not in a place he had a right to be. We disagree. We agree with defendant he had a protected privacy interest in his hotel room. See Hoffa v. United States, 385 U.S. 293, 301, 87 S.Ct. 408, 413, 17 L.Ed.2d 374, 381 (1966); Stoner v. California, 376 U.S. 483, 487-88, 84 S.Ct. 889, 891-92; 11 L.Ed.2d 856 (1964); United States v. Agapeto, 620 F.2d 324, 331 (2nd

Cir. 1980); State v. Holtz, 300 N.W.2d 888, 892 (Iowa 1981). Defendant does not, however, have the same protected privacy interest in the public or shared property of the motel he does in his rented room. See United States v. Bulman, 667 F.2d 1374, 1383-84 (11th Cir. 1982); Morullo v. United States, 328 F.2d 361, 36. (5th Cir.), cert. denied, 379 U.S. 850, 85 S.Ct. 93, 13 L.Ed.2d 53 (1964).

The area from where the officer observed the ten items through the window with drapes open was a public area of the motel. Defendant therefore gave up his right to privacy as to these observations. See Holtz, 300 N.W.2d at 892; Latham v. Sullivan, 295 N.W.2d 472, 476 (Iowa App. 1980).

Defendant next contends the circumstances did not justify a warrantless search. The State contends the search was justified because of the existence of exigent circumstances. Absent a warrant, the burden to show the officer's actions are lawful is on the State. State v. Short, 324 N.W.2d 317, 318 (Iowa 1982); State v. Ege, 274 N.W.2d 350, 353 (Iowa 1979). The burden of justifying a warrantless entry into a constitutionally protected area is on the government. See Vale v. Louisiana, 399 U.S. 30, 34, 90 S.Ct. 1969, 1971, 26 L.Ed.2d 409 (1970).

Warrantless searches and seizures are unreasonable unless justified under a recognized exception to the warrant requirement of the fourth amendment. Holtz, 300

N.W.2d at 892; State v. Folkens, 281 N.W.2d 1,²⁴¹ 3 (Iowa 1979). The burden is on the State to justify the entry came under an exception. Holtz, 300 N.W.2d at 892. The State contends exigent circumstances existed which justified the warrantless entry.

A finding of exigency for a warrantless entry to make an arrest requires consideration among other things of whether:

1. a grave offense is involved;
2. the suspect is reasonably believed to be armed;
3. there is probable cause to believe the suspect committed the crime;
4. there is strong reason to believe he is on the premises;
5. there is strong likelihood of escape if not apprehended; and
6. the entry, though not consented to, is peaceable.

Holtz, 300 N.W.2d at 893; State v. Jones, 274 N.W.2d 273, 275-76 (Iowa 1979). These factors are not all inclusive and each case must be judged on its own facts. See Dorman v. United States, 140 U.S. App. D.C. 313, 320-21, 435 F.2d 385 (1970). See also People v. Oliver, 417 Mich. 366, 338 N.W.2d 167, 175 (1983).

The focus must be on whether there was an immediate major crisis that afforded neither the time nor the opportunity to apply for a warrant. Dorman v. United States, 435 F.2d 385, 391 (D.C. Cir. 1970). The question is the reasonableness of the officer's actions under the particular circumstances. United States v. Johnson, 561

F.2d 832, 842 (D.C. Cir. 1977). A major criteria is whether there was risk of the suspect's escape or the possibility unless taken evidence would be concealed or destroyed. State v. Jackson, 210 N.W.2d 537, 540 (Iowa 1973). Did the situation dictate an immediate response by the police rather than a wait for the neutral and detached judgment of a magistrate or judge. People v. Reed, 393 Mich. 342, 362, 224 N.W.2d 867 (1979), cert. denied sub. nom.; Reed v. Michigan, 422 U.S. 1044, 95 S.Ct. 2660, 45 L.Ed.2d 696 (1975).

The State seeks to justify the search because they contend there was a basis for the defendant to escape or to destroy the evidence. We reject the State's argument there was a reasonable basis to believe defendant would escape. Looking to Holtz, 300 N.W.2d at 893, for guidance, we find no basis for believing defendant would escape if not apprehended. There was only one door to the motel room and it could readily be observed and kept under surveillance while the warrant was obtained. The police observed one person in the motel room and thought there was a second. There were three police officers on the scene. There is no testimony from the officers they were concerned about escape prior to going into the room. The State has not shown there was a basis to believe the persons in the room would escape.

The State argues the items could have easily been destroyed, removed or hidden. The State had the burden to advance facts to support a finding destruction was probable. Because the persons involved were confined to a single motel room and the only door to the room was under surveillance, we find no evidence to support a finding the items could be removed or hidden.

The only real issue is would the evidence be destroyed in the time necessary to get a warrant. See Latham, 295 N.W.2d at 477. There is no evidence as to the time anticipated to obtain a warrant nor is there any indication the officers even considered this factor in arriving at the decision they made, as contrasted to Jackson, 561 F.2d 832, where the court considered the officer had conferred with a United States attorney and considered the length of time necessary to obtain the warrant. We must assume with twenty-four-hour availability of magistrates, a warrant could have been rapidly obtained.

There is no testimony from the officers as to why they felt it necessary to shortcut procedures. The officer first observing the items testified

A. After I had observed the items on the table, and I did call for one of the other officers to come directly to my area, I did stand by and keep an eye on the items on the table. At a certain time, I did observe two individuals inside of the room.

The officers did however testify they could guard the door but could not without the possibility of detection observe

all the activity in the motel room. Stakeouts may alert persons to the presence of a police officer. Johnson, 561 F.2d at 844.

Defendant was not aware the room was under observation. The items were still visible through the window when the officers entered the motel. We determine the State has not met the necessary burden. Holtz, 300 N.W.2d 890-91. The evidence obtained through the warrantless search should be suppressed. The officer's observations made through the open drapes would, of course, be admissible. We reverse and remand for new trial.

REVERSED AND REMANDED.