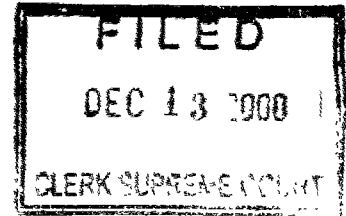


IN THE COURT OF APPEALS OF IOWA

No. 0-514 / 99-2002
Filed December 13, 2000



STATE OF IOWA,
Plaintiff-Appellee,

vs.

KEVIN ANDREW DRURY,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, J. G. Johnson
and Joseph Moothart, Judges.

Defendant appeals from his conviction for two counts of possession of a
controlled substance. He contends the court erred in overruling his motion to
suppress evidence. **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Robert P. Ranschau,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney
General, Thomas J. Ferguson, County Attorney, and Doug Eicholz, Assistant
County Attorney, for appellee.

Considered by Vogel, P.J., and Miller and Hecht, JJ.

MILLER, J.

Defendant Kevin Drury appeals from his convictions on two counts of possession of a controlled substance following bench trial. He contends the trial court erred in overruling his motion to suppress the drug evidence. We reverse and remand.

I. BACKGROUND FACTS AND PRIOR PROCEEDINGS

Kevin Drury was a passenger in a vehicle driven by his brother Chad Drury when the vehicle was stopped by Officer William Herkelman of the Black Hawk County Sheriff's Office because Chad was not wearing a safety belt. Officer Herkelman asked Chad if he could search the vehicle and Chad gave him consent to search. The officer then asked Chad to empty his pockets and performed a pat down search of Chad. Officer Herkelman found nothing illegal on Chad. He placed Chad in the back of the squad car and proceeded to make contact with Kevin, who was sitting in the front passenger seat.

The officer explained to Kevin that his brother had given him consent to search the vehicle and asked him to step out of the vehicle so he could conduct the search. Officer Herkelman told Kevin he was going to put him in the back seat of the squad car and told him that he was going to do a pat down search. He then asked Kevin if he had any illegal substances or weapons on him to which Kevin replied he did not. Herkelman testified he then asked Kevin, "You mind emptying your pockets onto the trunk of your car so I can do a pat down search?".¹ Kevin then began emptying things out of his pockets onto the trunk of

¹ There is some dispute in the record as to whether the officer "requested" Drury to empty his pockets or "ordered" him to do so. The district court noted that Drury could well have understood

the car and subsequently produced a baggie of marijuana. The officer asked Kevin what was in the bag and he stated it was marijuana. Officer Herkelman then conducted what he characterized as a "pat-down" for weapons. According to Officer Herkelman's testimony at the suppression hearing, "[U]pon checking the coin pocket in the pants, I found a small bag of a white substance." Later in his testimony Officer Herkelman testified that at the point when he found the small bag (0.8 of a gram) he was not in fact looking for weapons, but was doing a "search incident to finding the marijuana." The white powder was later found to be cocaine.

Kevin was charged with two counts of possession of a controlled substance in violation of Iowa Code section 124.401(5). He filed a motion to suppress the drug evidence alleging it was illegally seized from him and therefore should be suppressed. Following hearing on the motion the district court denied the motion. Kevin waived his right to jury trial and a trial to the bench followed. The court found him guilty on both counts. Kevin was sentenced to two terms of 180 days each to be served concurrently in the county jail. The court suspended the terms of imprisonment, placed him on probation for one year, and assessed fines totaling \$450, plus surcharges and costs.

Kevin argues on appeal that the district court erred in failing to suppress the drugs. He contends Officer Herkelman exceeded the scope of a permissible *Terry* search as he did not have reasonable grounds to believe Kevin was armed with a weapon. He further argues that the act of ordering him to empty his pockets exceeded the reach of a permissible *Terry* stop.

this request to be a command. We agree with the district court. However, even if the words are seen as a request, our conclusion is the same.

II. STANDARD OF REVIEW

Kevin challenges the district court's denial of his motion to suppress. This challenge is based on his constitutional right to be free from unreasonable searches and seizures, as guaranteed by the Fourth Amendment to the United States Constitution.² As such we review this constitutional question de novo in light of the totality of the circumstances. *State v. Canas*, 597 N.W.2d 488, 492 (Iowa 1999); *State v. Cadotte*, 542 N.W.2d 834, 836 (Iowa 1996). "We are bound by the findings of fact which underlie the district court's ruling if they are supported by substantial evidence." *Id.* In reviewing the district court's ruling, we consider both the evidence presented at the suppression hearing and that introduced at trial. *Canas*, 597 N.W.2d at 492. The adverse ruling on Drury's motion to suppress preserved error for our review. See *State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998).

III. MERITS

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Evidence obtained in violation of this provision is inadmissible in a prosecution, no matter how relevant or probative the evidence may be. *State v. Manna*, 534 N.W.2d 643, 643-44 (Iowa 1995).

² The rights guaranteed in the Fourth Amendment apply to the states through the fourteenth amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 81 S.Ct. 1684, 1694, 6 L.Ed.2d 1081, 1090 (1961).

Warrantless searches and seizures are per se unreasonable unless they fall within one of the carefully drawn exceptions to the warrant requirement. *Cadotte*, 542 N.W.2d at 836. Valid exceptions to the warrant requirement exist for those searches (1) consented to, (2) based on probable cause and exigent circumstances, (3) involving items in plain view, or (3) incident to arrest. *Id.* (citing *State v. Eubanks*, 355 N.W.2d 57, 58-59 (Iowa 1984)). The State has the burden of proving by a preponderance of the evidence that a warrantless search falls within one of the exceptions to the warrant requirement. *Id.*

It is not contested in this appeal that Officer Herkelman had a right to stop the vehicle because Chad was not was not wearing a seat belt. Nor is it contested that Herkleman had a right to search the vehicle in which Kevin was a passenger based on Chad's consent. Kevin also does not argue, nor could he successfully, that an officer who validly stops a car for a traffic violation, as Herkelman did here, may not order the passenger out of the car when doing so is necessary in order to conduct a "lawful search of the vehicle." See *State v. Becker*, 458 N.W.2d 604, 607 (Iowa 1990). Thus, Herkelman had the right to order Kevin out of the car in order to facilitate the lawful consent search of the vehicle. The crux of the appeal is based on what occurred after the officer ordered Kevin out of the car. Specifically, we must determine whether Herkelman was justified in telling Kevin he was going to perform a pat down search on him and requesting (or ordering) that he empty his pockets. We will address these issues separately.

A. Propriety of the Initiation of a Pat Down Search

As stated above, after Kevin exited the car at the request of Officer Herkelman, the officer stated "You mind emptying your pockets onto the trunk of your car so I can do a pat down search?" The State argues Officer Herkelman had a right to conduct this pat down search of Drury prior to searching the car in order to ensure his own safety. Herkelman testified he was going to place Drury in the back of the squad car while he was searching the vehicle and thus he was going to pat him down because he was not going to allow weapons in his squad car. Additionally, he testified he was the only officer there and he did not want two people walking around behind him while he was searching the vehicle. Thus, the State is arguing the pat down Herkelman informed Drury he was going to perform was justified under the officer safety exception.

The issue here is of course controlled by the landmark decision of *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), and its progeny. Under *Terry* an officer has authority to conduct a reasonable search for weapons for the officer's own protection, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual. *Id.* at 27, 88 S. Ct. at 1883, 20 L. Ed. 2d at 909; see also *Michigan v. Long*, 463 U.S. 1032, 1047-50, 103 S. Ct. 3469, 3480-81, 77 L. Ed. 2d 1201, 1218-19 (1983); *Ybarra v. Illinois*, 444 U.S. 85, 92-94, 100 S. Ct. 338, 343-44, 62 L. Ed. 2d 238, 246-47(1979); *Pennsylvania v. Mimms*, 434 U.S. 106, 112, 98 S. Ct. 330, 334, 54 L. Ed. 2d 331, 337-38 (1977).

The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,'

but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

Terry, 392 U.S. at 27, 88 S. Ct. at 1883, 20 L. Ed. 2d at 909 (citations omitted). In justifying this particular intrusion upon individuals' constitutionally protected interests the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906. The Fourth Amendment requires that at some point the reasonableness of a particular search or seizure can be subjected to the neutral, detached scrutiny of a judge. *Id.* The judge must then evaluate the reasonableness in light of the particular circumstances, and in making that assessment must employ an objective standard: "would the facts available to the officer at the moment of the seizure or search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Id.* at 21-22, 88 S. Ct. at 88, 20 L. Ed. 2d at 906.

Officer Herkelman testified he was going to conduct the pat down search of Kevin to ensure his safety. However, he also testified that he had no reason to suspect Kevin was involved in any kind of illegal activity when he asked him to step out of the car, and that Kevin did not act suspicious in any way at any time during the traffic stop. This testimony demonstrates that Herkelman did not have the requisite "reasonable belief" that Kevin was armed and presently dangerous to justify the initiation of a pat down search. Furthermore, not only is there no testimony from the officer that he had any belief that Kevin was armed or dangerous, we cannot find that the facts available to the officer at the time of the search would have warranted a person of reasonable caution to believe that he was.

Certainly such determinations must be made by officers and courts on a case-by-case basis, taking into consideration all of the surrounding circumstances. However, none of the circumstances which might lead a reasonable person to believe Kevin was armed and presently dangerous can be found in the present record. There is no evidence in the record of any furtive movements or nervous behavior by Kevin, as was found in part to justify such a "reasonable belief" in *Maryland v. Wilson*, 519 U.S. 408, 410-11, 117 S. Ct. 882, 884, 137 L. Ed. 2d 41, 45 (1997). Nor is there any evidence in the record to indicate this stop took place late at night in a high crime district, other factors the Supreme Court has taken into consideration in finding an officer's actions reasonable for officer safety reasons. See *Adams v. Williams*, 407 U.S. 143, 144, 92 S. Ct. 1921, 1922, 32 L. Ed. 2d 612, 616 (1972).

We conclude there are no specific and articulable facts in the record which, taken together with rational inferences from those facts, justified Officer Herkelman in subjecting Kevin to a pat down search. See *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906. The State has failed to meet its burden to prove circumstances existed which would support a reasonable belief Kevin was armed and presently dangerous, thus allowing Officer Herkelman to conduct a pat down search. We conclude that because Officer Herkelman did not have the right to conduct a pat down search he was not justified in telling Kevin he was going to do so.³

³ We note the district court relied heavily on the other purpose for the search stated by Herkelman which was to determine if Drury possessed any illegal substances. This second purpose or justification for the pat down is not urged on appeal and thus we do not decide it here. However, we note the U.S. Supreme Court stated in *Terry* that this type of officer safety search, unlike a search without a warrant incident to arrest, is not justified by a need to prevent the disappearance or destruction of evidence of crime, and the sole justification for such a search is the protection of

B. Emptying of Pockets/Consent to Search

The State seems to argue in the alternative that it does not matter whether Officer Herkelman had the right to conduct a pat down search because Kevin voluntarily consented to the officer's request that he empty his pockets, which produced the bag of marijuana. The discovery of the marijuana then gave the officer grounds to conduct the pat down search during which the cocaine was found. Therefore, the State argues, whether Herkelman was justified in telling Kevin he was going to conduct the search is irrelevant because the evidence was discovered based on a consensual search. We disagree with this line of reasoning.

The Iowa Supreme Court has stated that if the State attempts to justify a search based on consent,

the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse consent is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.

Manna, 534 N.W.2d at 644 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49, 93 S.Ct. 2041, 2059, 36 L.Ed.2d 854, 875 (1973)). The burden is on the State to establish voluntariness by a preponderance of the evidence. *State v. Garcia*, 461 N.W.2d 460, 462 (Iowa 1990). "When reviewing the issue of voluntariness, we make an independent evaluation of the totality of the circumstances and determine whether the consent was voluntarily given." *Id.*;

the police officer (and others nearby). *Terry*, 392 U.S. at 29, 88 S. Ct. at 1884, 20 L. Ed. 2d at 910-11. See also *Ybarra*, 444 U.S. at 94, 100 S. Ct. at 343, 62 L. Ed. 2d at 246 (stating *Terry* cannot be seen as allowing any type of search for anything other than weapons).

Polly v. State, 355 N.W.2d 849, 854 (Iowa 1984). In this evaluation, we review the evidence de novo. *Garcia*, 461 N.W.2d at 462. "Consent to search must be unequivocal, specific, and freely and intelligently given." *State v. Howard*, 509 N.W.2d 764, 767 (Iowa 1993).

The State argues that by simply complying with the officer's "request" to empty his pockets Kevin consented to the search. We agree that the record clearly demonstrates that Kevin complied with Herkelman's "request" and emptied his pockets without spoken objection. It is equally clear that once Kevin emptied his pockets and produced the marijuana this gave the officer grounds to conduct the following search. The issue which we must decide is whether a preponderance of the evidence shows that Kevin's emptying of his pockets was done voluntarily, that is without "duress or coercion, express or implied." The State contends that Kevin has not shown that his willingness to empty his pockets was the result of duress or coercion and that he was not "in custody" at the time the officer made the "request." The State asserts that the officer was merely asking Kevin some questions and he could have refused to answer or comply and merely walked away at any point. The State's argument would improperly place the burden on Kevin to prove absence of consent. It also would improperly focus on whether or not Kevin was in "custody," when the focus should instead be on whether or not he had been "seized."

First, the State has misstated Iowa law in saying it is up to Kevin to show that his willingness to empty his pockets was a result of coercion. In fact the exact opposite is true. It is well established law that it is not the defendant's burden to show his consent was not voluntarily given without coercion, but

instead is the State's heavy burden to prove by a preponderance of the evidence that the consent was willing and voluntary. See *Howard*, 509 N.W.2d at 767; *Garcia*, 461 N.W.2d at 462 ("The burden is upon those seeking to apply the exceptions to prove their applicability by a preponderance of the evidence"); *State v. Folkens*, 281 N.W.2d 1, 3 (Iowa 1979).

Second, while the State is correct that at the time the officer "requested" Kevin to empty his pockets he was not "in custody" for purposes of necessitating Miranda warnings, this is simply not the issue here. For the purposes of our Fourth Amendment inquiry here we must determine whether Kevin had been "seized" at the time the "request" was made, not whether he was "in custody" for purposes of the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 865 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

"A person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497, 509 (1980). A seizure does not take place merely because an officer approaches an individual on the street or other public place and asks a few questions so long as the person feels free "to disregard the police and go about his business." See *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 2386, 115 L. Ed. 2d 389, 398 (1991); *California v. Hodari D.*, 499 U.S. 621, 628, 111 S. Ct. 1547, 1552, 113 L. Ed. 2d 690, 698 (1991); *Florida v. Royer*, 460 U.S. 491, 497, 103 S. Ct. 1319, 1324, 75 L. Ed. 2d 229, 236 (1983); *Terry*, 392 U.S. at 19 n.16, 88 S. Ct. at 1879 n. 16, 20 L. Ed. 2d at 905 n.16 ("Only when the officer, by means of

physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.").

[T]he crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business."

Bostick, 501 U.S. at 437, 111 S. Ct. at 2387, 115 L. Ed. 2d at 400 (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569, 108 S.Ct. 1975, 1977, 100 L.Ed.2d 565, 571 (1988)).

When Officer Herkelman removed Kevin from the car he "requested" that he empty his pockets and told him he was going to do a pat down search. Officer Herkelman testified that if Kevin had responded, "No. I'm going to walk away," when requested to empty his pockets, he would have allowed him to do so. This testimony, however, is completely inconsistent with facts established by other testimony given by Officer Herkelman. While he may have requested that Kevin empty his pockets -- although we and the trial court have both questioned whether this was in fact a request -- it is clear and undisputed from Officer Herkelman's own testimony that the part of his statement to Kevin regarding the pat down was in no way a question or request. Officer Herkelman simply *told* Kevin he was going to pat him down. There was no opportunity for Kevin to say, "No. I'm going to walk away," because he was being *told* by a police officer that he was going to be patted down.

We conclude in view of all the surrounding circumstances, the particular police conduct, and the setting in which the conduct occurred, that no reasonable person would have believed he or she was free to leave after Officer Herkelman's statement to Kevin. Kevin had clearly been "seized" when the "request" to empty

his pockets was made immediately after the officer's unambiguous statement that he was going to conduct a pat down search. See, e.g., *Mayes v. United States*, 653 A.2d 856, 860-61 (D.C. App. 1995) ("It is undisputed that, having both been ordered out of the car and 'frisked,' Mayes was 'seized,' as that term is used in the Fourth Amendment.").

When a law enforcement officer claims authority to conduct a search he announces in effect that there is no right to resist the search. See *Bumper v. North Carolina*, 391 U.S. 543, 550, 88 S. Ct. 1788, 1792, 20 L. Ed. 2d 797, 803 (1968). We have already concluded that Officer Herkelman's assertion of authority to conduct the pat down search was unjustified as he had no right to conduct a pat down under the facts and circumstances shown by the record. The situation created by such an assertion "is instinct with coercion- - albeit colorably lawful coercion. Where there is coercion there cannot be consent." *Id.*

We conclude that Kevin's implied, unspoken consent to Herkelman's request to empty his pockets was not voluntarily given but was instead merely a submission to asserted authority, an authority that was wrongly asserted in this instance. It is the State's burden to prove consent was freely and voluntarily given. See *Howard*, 509 N.W.2d at 767; *Garcia*, 461 N.W.2d at 462. "This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Bumper*, 391 U.S. at 548-49, 88 S. Ct. at 1792, 20 L. Ed. 2d at 802; see also *State v. Carter*, 267 N.W.2d 385, 387 (Iowa 1978) (finding that acquiescence without objection to a search carried on by one with apparent authority to do so is not enough to establish voluntary consent); *State v. Smith*, 178 N.W.2d 329, 333 (Iowa 1970) ("The consent to the search must be an

intentional waiver of a known right and not merely a submission to authority."). We find the State has failed to meet its burden to prove Kevin consented voluntarily, without implied duress or coercion, rather than merely acquiescing to Officer Herkelman's unwarranted assertion of authority. Therefore, the emptying of Kevin's pockets which led to the discovery of the marijuana does not fall within the consent, or any other, exception to the warrant requirement. The marijuana was thus discovered unlawfully in violation of Kevin's Fourth Amendment rights and should not have been admitted at his trial. The district court erred in denying Kevin's motion to suppress.

Evidence obtained in violation of the Fourth Amendment is inadmissible at trial under the exclusionary rule. *State v. Breuer*, 577 N.W.2d 41, 45 (Iowa 1998). "An unlawful search taints all evidence obtained in the search or through leads uncovered by that search and bars its subsequent use." *State v. Ahart*, 324 N.W.2d 317, 318 (Iowa 1982). The rule bars from trial any physical, tangible material obtained either during or as a direct result of an unlawful invasion. *Wong Sun v. U.S.*, 371 U.S. 471, 485, 83 S. Ct. 407, 415, 9 L. Ed. 2d 411, 454 (1963). Any evidence obtained as a direct result of the unlawful search is classified as the infamous "fruit of the poisonous tree." See *Wong Sun*, 371 U.S. at 488, 83 S. Ct. at 417, 9 L. Ed. 2d at 455.

As noted above, once Kevin produced the marijuana, Officer Herkelman had probable cause to conduct a more thorough search. The cocaine was discovered as a result of this more thorough search. We have determined the marijuana was discovered through violation of Kevin's Fourth Amendment right to be free from illegal search and seizure, therefore should have been suppressed,

and was inadmissible at his trial. The cocaine was detected as a result of the unlawful discovery of the marijuana. Thus, the cocaine must also be suppressed as it is fruit of the poisonous tree.

VI. CONCLUSION

For all of the reasons stated above we conclude the trial court erred in overruling Kevin's motion to suppress. The officer was not justified in conducting a pat down search immediately following Kevin's removal from the vehicle as he could not, at that point in the encounter, point to any specific and articulable facts which would warrant a reasonable person confronted with the same surrounding circumstances to believe Kevin was armed and presently dangerous. Officer Herkelman himself testified he did not suspect Kevin of any kind of illegal activity and that Kevin had not done anything suspicious during the traffic stop. As Officer Herkelman would not have been justified in conducting a pat down search at that time, he likewise did not have the right to tell Kevin he was going to do so.

We further find that Kevin's implied, unspoken consent, if it was consent at all, by emptying his pockets was not given voluntarily, without implied duress or coercion. The officer's unambiguous statement that he was in fact going to conduct a pat down search, accompanied by his "request" that Kevin empty his pockets, created a situation where no reasonable person would believe he or she was free to walk away. When a law enforcement officer claims authority, he or she in effect announces that the individual has no right to resist the search. Such a situation is inherently coercive, and any "consent" is not voluntary. Kevin's act of emptying his pockets was merely an acquiescence to an assertion of authority

by Officer Herkelman, an unwarranted assertion here, and as such is not enough to show voluntary consent.

Therefore, the discovery of the marijuana came about through a violation of Kevin's Fourth Amendment right to be free from unreasonable search and seizure and should have been found to be inadmissible at trial and suppressed. The cocaine was detected and obtained as a direct result of the discovery of the marijuana and thus should also have been suppressed as fruit of the poisonous tree. We therefore must reverse and remand to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.