

IN THE COURT OF APPEALS OF IOWA

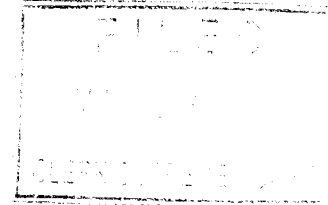
No. 9-176 / 98-0649

Filed May 26, 1999

STATE OF IOWA,
Appellee,

vs.

MICHAEL TODD SCULLARK,
Appellant.



Appeal from the Iowa District Court for Black Hawk County, Thomas N. Bower (pretrial motions), and Leonard D. Lybbert (trial), Judges.

Michael Scullark appeals from his conviction, following a jury trial, for possession with intent to deliver crack cocaine, tax stamp violation, and interference with official acts. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and James G. Tomka, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly A. Griffith, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Streit and Zimmer, JJ.

PER CURIAM

Michael Scullark appeals his convictions for possession with intent to deliver crack cocaine in violation of Iowa Code section 124.401(1)(c)(2), a tax stamp violation in violation of Iowa Code section 453B.2, and interference with official acts in violation of Iowa Code section 719.1. Scullark claims the district court erred in failing to grant his motions to suppress evidence and for judgment of acquittal.

Background facts: In the early hours of July 29, 1997, a Waterloo police officer observed Scullark briefly leaning into the window of a vehicle that stopped in the street near where he was sitting on two separate occasions. Suspecting Scullark was selling drugs to the individuals in the vehicles the officer and his partner approached Scullark and another individual and asked if they would consent to a pat-down search. Scullark refused and fled. At one point during the chase, Scullark fell to the ground and one of the officers observed a pill bottle on the ground where Scullark had fallen. The officer picked up the bottle after Scullark was subdued. The pill bottle contained crack cocaine. Scullark denied the pill bottle belonged to him.

Trial court proceedings: The State charged Scullark with possession with intent to deliver cocaine base, a tax stamp violation, and interference with official acts. The district court denied Scullark's motion to suppress in which he claimed the officers lacked probable cause to search him. The court found the officers were justified in making an investigatory stop. The court concluded Scullark's flight from the officers, coupled with the other circumstances, gave the officers sufficient cause

so as to meet Fourth Amendment requirements. A jury found Scullark guilty of all charges. The court sentenced Scullark to an indeterminate twenty-year prison term.

Appellate claims: On appeal, Scullark contends the mere act of leaning into the windows of two vehicles did not give the officer reasonable cause to stop and search him. He argues any evidence obtained by the officers was in violation of his constitutional rights. Scullark also argues the evidence presented to the jury was insufficient to support his conviction. He maintains the officer never saw money or drugs actually change hands, and the pill bottle containing the cocaine could have been on the ground before he fell. He asserts there is no link between the pill bottle and him.

The State responds Scullark failed to preserve his constitutional challenges to the evidence for appeal. It notes his motion to suppress evidence merely states “the evidence gathered in this case was collected in violation of the Defendant’s 4th, 5th, and 6th Amendment rights” The State argues *State v. Washington*, 257 N.W.2d 890, 895 (Iowa 1977), holds such a general motion fails to preserve any issue for appellate review. The State also argues Scullark does not have standing to challenge the seizure of drugs the officer located on the ground but not on his body, since he denies owning or possessing the pill bottle. The State concedes Scullark preserved the issues of (1) whether the officer had reasonable suspicion to stop him, and (2) whether the officer’s conduct resulted in a “seizure” of Scullark.

Suppression of evidence: Because a constitutional issue is involved, review is de novo. *State v. Hofmann*, 537 N.W.2d 767, 769 (Iowa 1995). The court makes an independent evaluation of the totality of the circumstances as shown by the record. *State v. Cook*, 530 N.W.2d 728, 731 (Iowa 1995).

Scullark claims the court erred in refusing to suppress evidence because the initial encounter between Scullark and the police was an invalid *Terry* stop. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). There the Court recognized the authority of officers to stop an individual, absent probable cause, for the purpose of investigating unusual behavior which reasonably causes them to believe criminal activity is afoot. 392 U.S. at 22, 88 S.Ct. at 1880, 20 L.Ed.2d at ---. "A police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." *State v. Cooley*, 229 N.W.2d 755, 759 (Iowa 1975) (quoting *Terry*). "(I)n justifying the particular intrusion the police 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 760 (quoting *Terry*). Scullark's activities observed by the officer, and the surrounding circumstances provided grounds for further inquiry. A police stop-and-frisk is constitutionally valid if the 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 1980). Not all personal intercourse between policemen and citizens involves a seizure

that implicates the fourth amendment. *Terry*, 392 U.S. at 19 n.16, 88 S.Ct. at 1879 n.16, 20 L.Ed.2d at 905 n.16. A seizure occurs "only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Id.*; *United States v. Bowles*, 625 F.2d 526, 532 (5th Cir. 1980). When the officers approached, they asked to search Scullark for drugs. He refused. When one officer told Scullark he had a basis for searching him, Scullark fled. The officers made no show of force, nor did Scullark submit to their authority until he finally was caught and handcuffed. *See California v. Hodari D.*, 499 U.S. 621, 623-29, 111 S.Ct. 1547, 1549-52, --- L. Ed. 2d --- (1991). We determine the initial contact between the officers and Scullark was justified under the circumstances. The court did not err in refusing to suppress evidence from this initial inquiry.

Once Scullark fled, the officers had grounds to pursue, stop, and detain him. During the foot chase, Scullark slipped and fell. One officer saw a pill bottle on the ground as Scullark got up. Scullark denied any connection to the pill bottle. Only the "victim of the unlawful search and seizure" can complain of an unreasonable search. *Goldstein v. United States*, 316 U.S. 114, 120, 62 S.Ct. 1000, 1003, 86 L.Ed. 1312. In order to claim the pill bottle should be suppressed it must be obtained through an illegal search or seizure. Scullark was not "seized" in the initial encounter and was not searched until after he was captured after the chase. Scullark cannot demonstrate the evidence was seized from him. *State v. Dixon*, 241 N.W.2d 21, 23-4 (Iowa 1976).

He does not have standing to challenge evidence not seized from him. Finally, picking a piece of evidence up off the ground simply is not a search.

Insufficient evidence: Scullark claims the district court erred in not granting his motion for judgment of acquittal on the ground the evidence was insufficient to support the jury's verdict. We review for errors at law. *State v. Phams*, 342 N.W.2d 792, 795 (Iowa 1983). A jury's guilty verdict is binding upon us unless we conclude the record lacks substantial evidence to support such a finding. *State v. Bush*, 518 N.W.2d 778, 779 (Iowa 1994). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Taft*, 506 N.W.2d 757, 762 (Iowa 1993). The relevant question in our review "is whether, after viewing all the evidence in the light most favorable to the prosecution, any rational trier of facts could have found the essential elements of the crime beyond a reasonable doubt." *Id.* We conclude it could.

Scullark argues the verdict had to be based on speculation because he was not observed making drug transactions and there was no link between him and the pill bottle containing the cocaine base. What Scullark calls speculation are the legitimate inferences which flow from the evidence. Given the circumstances in which Scullark was approaching vehicles, a reasonable fact finder could infer he was dealing drugs. Given his actions when questioned and the circumstances of the foot chase and the discovery of the pill bottle, a reasonable fact finder could infer Scullark either

dropped or discarded the bottle during the chase. The district court did not err in denying Scullark's motion for judgment of acquittal.

AFFIRMED.

No. 98-0649. [9-176] STATE v. SCULLARK

Appeal from the Iowa District Court for Black Hawk County, Thomas N. Bower and Leonard D. Lybbert, Judges. **AFFIRMED.** Considered by Sackett, C.J., and Streit and Zimmer, JJ. Per Curiam. (7 pages \$2.80)

Michael Scullark appeals his convictions for possession with intent to deliver crack cocaine and interference with official acts claiming the district court erred in failing to grant his motions to suppress evidence and for judgment of acquittal. Around 1:00 a.m., a police officer observed Scullark briefly leaning into the window of a vehicle that stopped in the street near where he was sitting. Suspecting Scullark was selling drugs to the individuals in the vehicles the officer and his partner approached Scullark and another individual and asked if they would consent to a pat-down search. Scullark refused and fled. At one point during the chase, Scullark fell to the ground and one of the officers observed a pill bottle on the ground where Scullark had fallen. The pill bottle contained crack cocaine. Scullark denied the pill bottle belonged to him. The district court denied Scullark's motion to suppress in which he claimed the officers lacked probable cause to search him. The court found the officers were justified in making an investigatory stop. Scullark's activities observed by the officer, and the surrounding circumstances provided grounds for further inquiry. We determine the initial contact between the officers and Scullark was justified under the circumstances. Scullark claims the district court erred in not granting his motion for judgment of acquittal on the ground the evidence was insufficient to support the jury's verdict. Scullark argues the verdict had to be based on speculation. What Scullark calls speculation are the legitimate inferences which flow from the evidence. The district court did not err in denying Scullark's motion for judgment of acquittal.