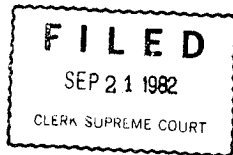


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

WILLIAM RICHARD ANGEL,)

Defendant-Appellant.)

Filed September 21, 1982 116

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67181

Appeal from Decatur District Court - Robert O. Frederick, Judge.

Defendant appeals from his conviction for possession of marijuana with intent to manufacture in violation of Iowa Code § 204.40(1) (1981). He contends that: (1) the evidence found as a result of the search of his car should have been suppressed because his consent was coerced; (2) the police visit to defendant's farm constituted an illegal warrantless search; (3) the search warrant for the farm was facially invalid and not based on probable cause and, therefore, the evidence seized as a result should have been suppressed; (4) certain items of evidence found in his car should have been excluded as immaterial; (5) the defendant's fourth and eighth amendment rights were violated when the police took the key from his personal property inventory folder and used it to open a padlock found on defendant's farm; and (6) the evidence was insufficient to show an intent to manufacture. REVERSED AND REMANDED FOR NEW TRIAL.

Robert A. Rolfe of Phipps & Rolfe, Lamoni, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Michael Jordan, Assistant Attorney General, for plaintiff-appellee.

Heard en banc.

SNELL, J.

Defendant appeals from his conviction for possession of marijuana with intent to manufacture in violation of Iowa Code § 204.401(1) (1979). He contends that: (1) the evidence found as a result of the search of his car should have been suppressed because his consent was coerced; (2) the police visit to defendant's farm constituted an illegal warrantless search; (3) the search warrant for the farm was facially invalid and not based on probable cause and, therefore, the evidence seized as a result should have been suppressed; (4) certain items of evidence found in his car should have been excluded as immaterial; (5) the defendant's fourth and eighth amendment rights were violated when the police took the key from his personal property inventory folder and used it to open a padlock found on defendant's farm; and (6) the evidence was insufficient to show an intent to manufacture.

Our scope of review is for errors at law. Iowa R. App. P. 4. However, we review de novo those portions of the record which bear upon the constitutional question of a valid search and seizure. State v. Koop, 314 N.W.2d 384, 387 (Iowa 1982).

I.

Defendant, William Richard Angel, was driving a leased automobile around midnight on September 20, 1980, when he was stopped for failure to observe a stop sign. When the attending officers asked defendant for his drivers' license they observed an uncased shotgun in the car and smelled a strong odor of what they believed to be marijuana. They asked defendant to get out of the car, removed the shotgun, and searched the interior. A few scattered leaves and seeds of marijuana were found. They then arrested defendant for driving through the stop sign, for carrying the uncased shotgun, and for possession of the controlled substance marijuana.

The police sought permission to search the trunk of defendant's car. Initially, the defendant denied the officers' request and consented to the search only after the officers told him that the car would be impounded and a search warrant obtained. The defendant testified that the officers also told him that he would be freed if no marijuana was found in the trunk. The trunk search revealed a small amount of marijuana scattered across the floor. In addition, the trunk contained a walkie-talkie radio, a pair of green-stained gloves, camouflage-type clothing, trash bags, and pruning shears. Defendant was taken to the Decatur County Jail where his keys and other personal belongings were inventoried.

Defendant was in jail for two days but was unsuccessful in his attempts to inform those at his residence of his arrest. In an attempt to notify these people, two officers went to his farm on September 22. They drove up the driveway, parked approximately five feet from the house, and stood next to their vehicle talking to the person who had come outside to greet them. During their discussion, the officers noticed some camouflage-type clothing, a green stained pair of gloves, and a pair of grass shears on the back porch. These items were similar to those found inside defendant's car.

The officers immediately went back to the sheriff's office and obtained a search warrant which the state concedes on appeal was invalid. After securing this warrant, they returned to the farm to search both the house and the other farm buildings. The door to a farrowing house was locked with a padlock. The officers broke the padlock, removed it, and searched the building. Inside they found a trash compactor with marijuana residue in it, a large number of empty trash bags, some containing marijuana residue, and twenty-four 2' x 8' drying screens containing marijuana residue. The officers seized this evidence as well as the padlock. When the officers returned to the sheriff's office, a key was removed from defendant's personal property inventory folder to determine whether it would

open the padlock. It did.

On October 21, 1980, defendant moved to suppress evidence obtained in the search of the house and other buildings on his farm. During the suppression hearing held November 5, 1980, he moved orally to supplement his suppression motion to include items gained in the initial search of his automobile. Both of these motions were denied. On April 15, 1981, he filed a motion in limine seeking to exclude certain testimony of the arresting and investigating officers. This motion was also denied. On April 15, 1981, the jury returned a verdict of guilty upon which judgment was entered and sentence imposed. Defendant then instituted this appeal.

II.

Defendant's first contention is that the arresting officers coerced him into consenting to the search of his trunk, making the search invalid and the evidence found in the trunk subject to his motion to suppress. This argument is without merit. An officer who has probable cause to believe a vehicle contains contraband may make a warrantless search of the vehicle for that contraband material without violating the constitutional protections provided by the fourth amendment. Ross v. United States, U.S. , 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982); Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 545 (1925). Probable cause to search the trunk in the instant case was adequately provided by the fact that a strong odor of marijuana permeated the car's interior and marijuana leaves and seeds were discovered on the car's seat and floor.

III.

Defendant's next contention is that the officers' visit to his farm constituted an illegal warrantless search and therefore, their testimony as to items they observed on the porch should have been suppressed. We disagree with defendant since we do not regard this visit as a search in the constitutional sense. On

similar facts, the Iowa Supreme Court in State v. Dickerson, 313 N.W.2d 526, 532 (Iowa 1981), identified the controlling issue to be whether the officers' intrusion infringed upon defendant's reasonable expectation of privacy. Id. There, the sheriff's deputies drove up a gravel lane to defendant's farmhouse, knocked on the door and, when no one responded, took photographs of stolen goods through the window. The court held that the officers did not invade defendant's expectation of privacy by coming to his door since a "sidewalk, pathway, common entrance or similar passageway offers an implied permission to the public [and police] to enter which necessarily negates any reasonable expectation of privacy in regard to observations made there." Id. at 531-32 (quoting Lorenzana v. Superior Court, 9 Cal. 3d 626, 629, 511 P.2d 33, 35, 108 Cal. Rptr. 585, 587 (1973)). Those items a person knowingly exposes to the public, even at home, are not protected under the fourth amendment. See Katz v. United States, 389 U.S. 347, 351-52, 88 S. Ct. 507, 511, 19 L. Ed. 2d 576, 582 (1967).

In the instant case the officers never left the driveway area of defendant's property. The driveway was unobstructed and offered the public access to the home. The green stained gloves, pruning shears and camouflage clothing were located on and inside the back porch and were clearly visible from the officers' position on the driveway. We find, therefore, that these items were exposed to the public and not the subject of fourth amendment protection. The defendant's rights were not violated by the officers' visit and subsequent observations. Accordingly, we find no error in admitting this evidence.

IV.

Defendant also objected to the admission into evidence of exhibits consisting of items seized from his car when he was arrested. He challenges this evidence as being irrelevant, immaterial, and incompetent because it related to the possession of a controlled substance charge which allegedly did not occur in Decatur County.

There was conflicting testimony on whether the incident did or did not take place in Decatur County. We believe, however, that this presented a question of fact and that there is substantial evidence to support the finding that the charge did occur in Decatur County. See State v. Schrier, 300 N.W.2d 305, 309 (Iowa 1981).

In addition, we note that the determination of relevancy is within the discretion of the trial court, the test being whether the inference is more probable with the evidence than without it. State v. Sharkey, 311 N.W.2d 68, 70 (Iowa 1981). Since the items found in defendant's car are the type often used in the manufacture of marijuana, the inference that defendant was engaged in this activity is more probable with the inclusion of this evidence. The trial court did not abuse its discretion in so ruling.

V.

Defendant's next contention concerns the items seized from his farm pursuant to the invalid search warrant. The defendant asserts that these items should have been suppressed.

The search warrant was based upon the observations made by the officers while visiting defendant's farm. The State concedes the warrant was invalid because it did not specify the exact time at which the officers made their observations, nor did it contain the mandatory endorsements required under Iowa Code § 803.3 (1979). Nevertheless, the admission of evidence obtained pursuant to an invalid warrant does not automatically constitute constitutional error; it may amount to 'harmless error' only. State v. Freeman, 297 N.W.2d 363, 367 (Iowa 1980).

The tainted evidence erroneously admitted at trial consisted of a trash compactor, garbage bags, and several window screens, all containing marijuana residue. The evidence properly admitted included those items seized from defendant's car (green stained gloves, pruning shears, camouflage clothing, trash

bags, and a walkie-talkie), and the testimony of the officers who visited the farm and observed similar items on the back porch. The State's expert witness testified that the items properly admitted into evidence, as well as those improperly admitted, were characteristic of items used in the manufacture of marijuana. Both the tainted and untainted evidence were admitted to prove that defendant was engaged in this activity.

The difficulty with the State's assertion of harmless error is that possession of the items properly admitted is consistent with explanations other than "intent to manufacture," particularly when defendant owned a farm. The improperly admitted evidence found at the farm, however, which included a trash compactor and several window screens containing marijuana residue, is more directly related to manufacturing marijuana. Introduction of these items may have made the difference to the jury in assessing reasonable doubt to convict for possession of marijuana with intent to manufacture rather than to convict, for commission of the lesser crime of possession. For this reason we cannot conclude the error was harmless. Defendant is therefore entitled to a new trial.

VI.

Defendant also contends that his fourth and eighth amendment rights were violated when officers removed his key from the personal property inventory folder at the jail and tested to see whether it would unlock the padlock they had removed from one of his farm buildings. In substance, defendant challenges the warrantless second examination by police of an item properly obtained and inventoried during a custodial search pursuant to arrest. This issue has frequently been addressed, though not by the Iowa courts. The United States Supreme Court in United States v. Edwards, 415 U.S. 800, 806-07, 94 S. Ct. 1234, 1238-39, 39 L. Ed. 2d 771, 777-78 (1974), held that once the defendant is lawfully arrested and in custody, the personal effects in his possession may lawfully be searched and seized

without a warrant so long as it is done within a reasonable time after the arrest. In Edwards, defendant's clothing was removed from his personal property locker the morning following the arrest and examined by authorities.

In State v. Carriger, 123 Ariz. 335, 599 P.2d 788 (1979), a case more factually similar to the instant case, the defendant's personal effects including two keys were placed in a personal property locker. The keys were removed about 97 days after the arrest to determine whether they would fit a briefcase in which stolen property was found. The court in Carriger relied on Edwards to uphold the warrantless seizure and use of the key. Id. at 338, 599 P.2d at 791.

In United States v. Grill, 484 F.2d 990 (5th Cir. 1973), the court held that where defendant's key had been inventoried at the time of his arrest, there was no fourth amendment violation when police brought the lock taken from a bag containing cocaine to the jail to determine whether defendant's key fit the lock. In Grill, the court articulated the theory upon which these holdings are based:

The underpinning of these cases is that the items in question have been exposed to police view under unobjectionable circumstances, so that no reasonable expectation of privacy is breached by an officer's taking a second look at matter with respect to which expectation of privacy already has been at least partially dissipated.

Id. at 991.

We believe this is the correct analysis and find, therefore, that the use of defendant's key in the instant case presented no violation of his constitutional rights. Nevertheless, the evidence sought to have been protected by the padlock on the farrowing house for purposes of privacy is inadmissible as the fruit of an illegal search.

VII.

Defendant also argues that unless he was found in possession of marijuana needing further processing, he could not have had the requisite intent to

manufacture. Marijuana is a controlled substance defined under Iowa Code § 204.101 (1979). The legislature, in drafting this definition, did not distinguish between processed and unprocessed marijuana. Moreover, Iowa Code § 204.101(15) (1979) defines manufacturing to include both the processing and the packaging of a controlled substance. Defendant's issue here is without merit.

VIII.

Finally, defendant challenges the sufficiency of the evidence to support the conviction. In light of our holding that a new trial is mandated, this issue is moot.

REVERSED AND REMANDED FOR NEW TRIAL.