

IN THE COURT OF APPEALS OF IOWA

No. 3-460 / 92-1007

FILED

NOV 29 1993

CLERK SUPREME COURT

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STATE OF IOWA,

Appellee,

vs.

MARK GILMORE SWANSON,

Appellant.

STATE OF IOWA,

Appellee,

vs.

MITCHELL PAUL WETTSCHRECK,

Appellant.

Appeal from the Iowa District Court for Franklin County, Paul W. Riffel, Judge.

Defendants appeal their convictions for possession of a controlled substance with intent to deliver, and failure to affix revenue stamps pursuant to Iowa Code sections 204.401(1)(b) and 421A.12 (1991). **AFFIRMED.**

Michael Houser of Houser & Berkland, Belmond, and David Gronbeck, Minneapolis, Minnesota, for appellants.

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Bonnie J. Campbell, Attorney General; Julie Halligan Brown, Assistant Attorney General; James M. Drew, County Attorney; and Douglas Hammerand, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., and Sackett and Habhab, JJ. Donielson, J., takes no part.

HABHAB, J.

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Defendants Mark Swanson and Mitchell Wettschreck appeal their convictions for possession of a controlled substance with intent to deliver and failure to affix revenue stamps pursuant to Iowa Code sections 204.401(1)(b) and 421.12 (1991). They contend the district court erred in denying their motion to suppress evidence seized following allegedly illegal searches of their persons and the car in which they were traveling.

I. Background.

Swanson and Wettschreck were driving on Interstate Highway 35 in Swanson's car when they were stopped by Trooper Hollander. The car's rear license plate light was not functioning and the trooper issued a memo of faulty equipment to Swanson in the patrol car. The trooper then instructed Wettschreck to come to the patrol car to receive a warning for failure to wear a seat belt. Trooper Hollander detected a "strong and fresh" odor of marijuana coming from Wettschreck. He questioned Wettschreck about the smell and eventually Wettschreck told Hollander that he had smoked marijuana earlier in the day before leaving Colorado.

Trooper Hollander instructed Wettschreck to empty his pockets, and carried out a pat-down search. No contraband was found. The same procedure was then carried out on Swanson with no finding of contraband. Wettschreck and

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Swanson were ordered to stand in front of the vehicle while Hollander searched the passenger compartment. Hollander decided to call for back-up assistance before continuing his search. Trooper Pattison arrived and also detected the smell of marijuana. Hollander recovered a pair of folding scissors and a hemostat from the passenger compartment. He associated these two things with marijuana use.

Hollander next instructed Wettschreck to pull his shirt out of his pants. As Wettschreck complied, a plastic bag with a small amount of marijuana fell out of his pants. Wettschreck and Swanson were arrested, having now waited for approximately thirty to forty minutes since the stop.

Swanson's car was impounded and an inventory search was carried out. A search of the trunk revealed seven and a half pounds of marijuana taped closed in a paper bag. Swanson and Wettschreck were charged with possession of a controlled substance with intent to deliver and failure to affix revenue stamps pursuant to Iowa Code sections 204.401(1)(b), 421A.3 and 421A.12.

The defendants moved to suppress evidence seized during the search of Wettschreck's person and the search of Swanson's car. The motion was overruled. At the bench trial which followed, the only issue in dispute was whether the defendants possessed the marijuana with the specific intent to deliver. The defendants claimed it was for their own personal use. The district court determined that the defendants did intend to deliver the marijuana they

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possessed. They were each sentenced to an indeterminate term, not to exceed five years. The defendants appeal. We affirm.

The issue in this case is whether the trooper's actions after he stopped the vehicle violated the defendants' Fourth Amendment Rights. The defendants assert four violations of their Fourth Amendment Rights: (1) the seat belt warning and interrogation of passenger Wettschreck in the trooper's car was pretextual and went beyond the purposes of the initial reasonable stop; (2) the searches of Wettschreck and Swanson and the passenger compartment of the car were based on Trooper Hollander's unreliable sense of smelling marijuana, which itself was based on a prior invalid interrogation; (3) the smell of marijuana on the passenger did not create probable cause to search driver and passenger by asking them to pull their shirts out of their pants; and (4) there was no probable cause to arrest Swanson and search the trunk of his car, since he did not smell of marijuana or constructively possess it inside Wettschreck's pants.

II. Scope of Review.

Our scope of review on appeal of the trial court's ruling on the motion to suppress is de novo. State v. Scott, 409 N.W.2d 465. 468 (Iowa 1987). The claim of alleged constitutional violations requires this court to resolve the issue by making our own independent evaluation

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of the totality of circumstances. State v. Hilleshiem, 291 N.W.2d 314, 316 (Iowa 1980) (citation omitted). The State must prove by a preponderance of the evidence the search or seizure was lawful. State v. Bumpus, 459 N.W.2d 619, 622 (Iowa) cert. denied, 498 U.S. 1001 (1990) (citation omitted).

III. Issuance of Seat Belt Warning.

The defendants claim that Trooper Hollander had no authority to call Wettschreck back to his patrol car to issue a seat belt warning.

Swanson's vehicle was stopped because the license plate light was out, in violation of state law. When an officer observes a traffic offense--however minor--he has probable cause to stop the driver of the vehicle. State v. Cummins, 920 F.2d 498, 500 (8th Cir. 1990), cert. denied, ____ U.S. ____, 112 S. Ct. 429, 116 L. Ed. 2d 448 (1991). Therefore, the initial stop of the vehicle was lawful.

When the officer approached the vehicle, he observed neither occupant was wearing a seat belt. After issuing a repair order to Swanson, the officer had the passenger, Wettschreck, come back to the patrol car to issue him a seat belt warning.

In Pennsylvania v. Mimms the United States Supreme Court stated "once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without

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violating the Fourth Amendment's proscription of unreasonable searches and seizures." Pennsylvania v. Mimms, 434 U.S. 106, 111 n.6, 98 S. Ct. 330, 333, 54 L. Ed. 2d 331, 337 (1977) (emphasis added).

In State v. Becker, 458 N.W.2d 604, 607 (Iowa 1990), our supreme court noted that an officer did not have authority to order a passenger out of a car unless "some articulable suspicion exists concerning a violation of law by that person." See also State v. Stevens, 394 N.W.2d 388, 391 (Iowa 1986) cert. denied, 479 U.S. 1057 (1987) (once officer has reasonable cause to believe passenger violated the law, the officer can order the passenger out of the car to determine if there is probable cause to arrest). We find that because Wettschreck was in violation of the seat belt ordinance Trooper Hollander had authority to have Wettschreck come back to the patrol car so he could issue Wettschreck a seat belt warning.

The defendants suggest that the issuance of the seat belt warning was merely a pretext for the trooper to conduct further investigation. We find nothing in the record to support that position. However, even if Trooper Hollander did issue the seat belt warning so he could question Wettschreck, the detainment was proper because the officer did have a proper, albeit a secondary reason for the further detainment of the passenger. State v. Garcia, 461 N.W.2d 460, 463-64 (Iowa 1990), cert. denied, 499 U.S. 909 (1991).

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IV. Search of Passenger Compartment of Swanson's Vehicle.

The defendants next claim that Trooper Hollander's search of the interior of the vehicle violated their Fourth Amendment Rights.

A police officer may search an automobile without a warrant when probable cause and exigent circumstances exist. State v. Eubanks, 355 N.W.2d 57, 59 (Iowa 1984). Probable cause exists where "facts and circumstances known by the police when they began the search were 'sufficient in themselves' for a person 'of reasonable caution' to believe contraband or evidence of criminal activity was in the vehicle." United States v. Caves, 890 F.2d 87, 90 (8th Cir. 1989) (citation omitted). The exigent circumstances requirement is satisfied "when the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained." Eubanks, 355 N.W.2d at 59 (quoting Chambers v. Maroney, 399 U.S. 42, 51, 90 S. Ct. 1975, 1981, 26 L. Ed. 2d 419, 428 (1970)); see also State v. Cain, 400 N.W.2d 582, 585 (Iowa 1987) (exigency requirement for warrantless search of vehicle is always satisfied by vehicle's inherent mobility).

We agree with the State that Trooper Hollander had probable cause to conduct a warrantless search of the car under the automobile exception. While Trooper Hollander was writing out the seat belt warning, he detected the smell of marijuana. Wettschreck then admitted to either smoking marijuana or being around a smoker, although he

claimed it had occurred several hours earlier in Colorado. However, the smell was "fresh" and "strong" leading the trooper to believe it had been recently smoked. See Eubanks, 355 N.W.2d at 59 (patrolman had sufficient probable cause to search the vehicle and its contents after the patrolman smelled the odor of marijuana when he approached defendant's car); Caves, 890 F.2d at 91 (odor of burnt marijuana on defendant's breath and person, when considered in context of circumstances confronting the trooper, was sufficient to establish probable cause to search the automobile); see generally Annotation, "Odor of Narcotics as Providing Probable Cause for Warrantless Search," 5 A.L.R. 4th 681, 688-95 (1981 & Supp. 1989) (listing the large majority of cases as holding that odor of marijuana, standing alone, provided probable cause for warrantless search of an automobile and its contents).

The defendants next claim the officer made two searches of the passenger compartment of the vehicle in violation of State v. Derifield, 467 N.W.2d 297 (Iowa App. 1991). We find Derifield distinguishable.

In Derifield, an officer stopped and arrested the defendant for OWI. Id. at 293. The officer seized a pipe on the console between the seats and performed a search of the entire passenger compartment. Id. He found nothing else. Id. After the officer and the defendant left the scene, a different officer performed a second warrantless search of the passenger compartment and discovered

marijuana under the driver's seat. Id. We held in Derifield that the second search of the passenger compartment was invalid because warrantless searches must be "strictly circumscribed by the exigencies which justify its initiation." Id. at 300. When the second officer conducted his search, "there were no exigencies remaining from the arrest to justify the initiation of a second, warrantless search." Id.

In the present case we agree with the State that there was only one search of the passenger compartment. Trooper Hollander was in the middle of searching the passenger compartment when he became concerned about the movements of the defendants. He therefore stopped his search and called for back-up. Once back-up arrived he continued the search.

We find the exigencies which justified the initiation of the warrantless search still remained when Trooper Hollander returned to his search upon the arrival of back-up. We therefore find no Derifield problem.

V. Search of Wettschreck's Tucked Shirttail Area.

The defendants next claim their Fourth Amendment rights were violated by Trooper Hollander's search of Wettschreck's tucked shirttail area. The defendants characterize this search as a strip search.

Trooper Hollander testified he then requested Wettschreck to pull his shirt out of his pants. When he did so a bag of marijuana came up with his shirt. Trooper

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Hollander then reached into Wettschreck waistband and retrieved the Baggie and placed both defendants under arrest for possession of marijuana.

The district court found and we agree that "[w]hile Swanson and Wettschreck attempt to characterize the search as a "strip search," there is no credible evidence in the record to justify such a finding. Neither party was forced to disrobe, there was no visual exposure or examination of their genital areas."

We find the surrounding facts established probable cause to believe Wettschreck was in possession of marijuana. Therefore, Trooper Hollander's order that Wettschreck pull out his shirttail was reasonable.

VI. Search of the Trunk of the Vehicle.

After the defendants were placed under arrest, an inventory search of the automobile revealed seven and one-half pounds of marijuana in the trunk of the car. The defendants argue there was not probable cause to arrest defendant Swanson or to search the trunk of Swanson's vehicle.

Probable cause exists for an arrest if the "facts and circumstances within the officer's knowledge . . . are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." Caves, 890 F.2d at 93 (quoting

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Michigan v. DeFillippo, 443 U.S. 31, 37, 99 S. Ct. 2627, 2632, 61 L. Ed. 2d 343, 349-50 (1979).

We find both probable cause for the arrest of Swanson and for the search of the trunk. See State v. Edgington, 487 N.W.2d 675, 678 (Iowa 1992) (probable cause to search trunk when weapon found in passenger compartment of automobile). We recognize that "mere association with a known or suspected criminal, or mere presence in that person's automobile, does not create probable cause to arrest." Caves, 890 F.2d at 94 (citations omitted). In this case, however, other factors might have indicated to a reasonable police officer that Swanson was not an innocent driver.

Swanson's passenger admitted to marijuana use. Swanson and Wettschreck had been traveling in the automobile together for hours. The strength of the marijuana odor was inconsistent with Wettschreck's claim that he had smoked marijuana hours earlier back in Colorado. A hemostat, with burnt residue which smelled strongly of marijuana, and small scissors were discovered inside the passenger compartment. Swanson had constructive possession of the drug paraphernalia. State v. Rudd, 454 N.W.2d 570, 571 (Iowa 1990) (constructive possession exists when the accused maintains dominion and control of the place where the substances are found). Also a Baggie of marijuana was found on Wettschreck.

Under the circumstances, we are persuaded that a reasonable police officer could conclude that Swanson was knowingly playing a role in the possession and interstate transportation of illegal drugs. We find there was sufficient probable cause to arrest Swanson and to believe the vehicle's trunk contained contraband.

In addition, we find the warrantless search of the trunk was a constitutionally permissible impoundment and inventory search of the vehicle. Officers may conduct a reasonable inventory of the contents of a lawfully impounded vehicle without either a search warrant or probable cause for a warrantless search. South Dakota v. Opperman, 428 U.S. 364, 370-71, 96 S. Ct. 3092, 3097, 49 L. Ed. 2d 1000, 1006 (1976). See also State v. Baldwin, 396 N.W.2d 192, 194 (Iowa 1986). The State may use incriminating evidence found during a valid inventory search. See State v. Roth, 305 N.W.2d 501, 508 (Iowa), cert. denied, 454 U.S. 870 (1981). However, the legality of the underlying inventory search depends on the lawfulness of the underlying impoundment. Baldwin, 396 N.W.2d at 194.

We find Swanson's vehicle was lawfully impounded after his and Wettschreck's lawful arrest. We therefore find the search of vehicle's trunk was proper as part of an inventory search.

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We affirm the district court's denial of the defendants' motion to suppress the marijuana found in the trunk.

AFFIRMED.