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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA 442

STATE OF IOWA,)

Plaintiff-Appellee,) Filed March 24, 1981

vs.)

GORDON LEE FISHER,) 0-449
64777

Defendant-Appellant,)

and

RANDY LEE CLAUDE,)

Defendant-Appellant.)

Appeal from Wright District Court - E. J. Flattery, Judge.

Defendants appeal from judgment entered on their conviction after a jury trial for possession of a controlled substance, amphetamines, with intent to deliver for a profit, in violation of section 204.401(1), The Code 1979, contending 1) that trial court should have suppressed evidence that amphetamines were found in defendants' gas station and 2) that there was no substantial evidence that they intended to make a profit on the sale of amphetamines. AFFIRMED.

Gary L. Berkland and James E. Houser of Belmond, Iowa, for defendants-appellants.

Thomas J. Miller, Attorney General of Iowa, and John P. Messina, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendants, Gordon Lee Fisher and Randy Lee Claude, appeal from judgment entered on their conviction after a jury trial for possession of a controlled substance, amphetamines, with intent to deliver for a profit, in violation of section 204.401(1), The Code 1979. They contend 1) that trial court should have suppressed evidence that amphetamines were found in defendants' gas station and 2) that there was not substantial evidence that they intended to make a profit on the sale of amphetamines. We affirm.

Defendants were jointly charged by county attorney's information with possession of a controlled substance, amphetamines, with intent to deliver for profit. Defendants filed separate but identical motions to suppress asserting that the searches were illegal under the United States and Iowa Constitutions. Trial court, in its joint ruling on the motions to suppress, found that at 5 a.m. on February 15, 1979, a police officer making a routine check of doors found an unlocked overhead door at defendants' gas station. The officer entered and, although finding nothing further that was suspicious, proceeded into the office area where he saw a safe with its door partially opened. A padlock with a key in it was lying on top of the safe. The safe was too small to have secreted a person. The door to the safe was opened approximately two inches; the police officer opened the door further and saw an open cardboard box containing pills which the officer thought to be amphetamines. He called for assistance by other police officers. The officers then decided to obtain a search warrant, but the defendants, who arrived accompanied by their attorney, consented to the search and signed written consent forms. The officers then completed the search of the station, during which they found a bank bag containing five "100 lot" packs of amphetamines in clear plastic wrap, four $20 bills, and a slip of paper with names and $20 written on it.

From these facts, the court concluded that the officer was justified in entering the building and in looking in places where a burglar might have been hiding, but that he should not have looked inside the partially-opened safe. The court held that the exigency exception to the warrant requirement applied only so long as the officer was satisfying himself that there was no one in the building and therefore excluded from evidence the capsules found in the safe. The court also concluded that defendants' consent to a further search of the building was voluntarily given and that the second search was therefore proper.

The defendants were tried jointly by a jury which returned a verdict of guilty of possession of amphetamines with intent to deliver for profit. Trial court overruled defendants' motion for new trial and in arrest of judgment. Thereafter defendants each filed a notice of appeal; the appeals were consolidated by order of the clerk of the supreme court.

I. Suppression of Evidence. Defendants contend that trial court erred in denying their motion to suppress evidence because 1) the search and seizure of evidence was in violation of the state and federal constitutions and 2) the consents to search executed by defendants were obtained by coercion and duress. Defendants agree with trial court's order suppressing evidence of amphetamines which were found in defendant's partially-opened safe after the police investigated an unlocked door at the gas station. Defendants argue that evidence from the second search and seizure should have been suppressed since it occurred as a result of consents given under coercion and duress. We disagree.

Since defendant's challenge to the consent search raises a constitutional issue, we make a **de novo** review of the totality of the circumstances to determine whether consent was ". . . voluntary or was the product of duress or coercion, express or implied . . . ." Schneckloth v. Bustamonte, 412 U.S. 218, 227, 93 S. Ct. 2041, 2047-48, 36 L. Ed. 2d 854, 863 (1973); State v. Folkens, 281 N.W.2d 1, 3 (Iowa 1979). Voluntariness of consent must be shown by a preponderance of the evidence. Folkens, 281 N.W.2d at 3.

Assuming without deciding that the first search was illegal and that the evidence seized as a result was properly suppressed, as found by trial court, we find that the second search resulted from consent voluntarily given by the defendants. We further note that the coercive atmosphere allegedly present in police-citizen encounters does not in itself invalidate consent. See Schneckloth, 412 U.S. at 240, 247, 93 S. Ct. at 2054, 2057, 36 L. Ed. 2d at 870, 874. In this case, the consent was read and signed in the presence of defendants' independently retained legal counsel. At that time defendants were neither under arrest nor in police custody. They knew that the police officers were in the process of acquiring a search warrant which they could have resisted, thus necessitating a probable cause determination. We agree with trial court's determination that these factors, as well as the absence of any overt acts, threats of force or violence, promises, or any other indications of subtle coercion, present a case of free and unrestrained choice. See United States v. Watson, 423 U.S. 411, 424-25, 96 S. Ct. 820, 828, 46 L. Ed. 2d 598, 607 (1976). We conclude no error occurred by admission of the evidence obtained from the second search.

II. Sufficiency of the Evidence. Defendants next contend that their motion for a new trial and motion in arrest of judgment should have been granted on the grounds that the evidence failed to show they held the amphetamines for the purpose of making a profit and that the evidence was insufficient to support the verdict. We disagree.

In our review of this issue, we review the evidence in the light most favorable to the State; all reasonable inferences tending to support the conviction are accepted as established. State v. Taylor, 287 N.W.2d 576, 577 (Iowa 1980). Determining the credibility of witnesses remains with the factfinder. We determine only if the result below is supported by substantial evidence, "...such evidence as could convince a rational trier of fact that defendant was guilty beyond a reasonable doubt." State v. Robinson, 288 N.W.2d 337, 339 (Iowa 1980). Circumstantial evidence may be used to prove intent to deliver for profit, see State v. Didley, 264 N.W.2d 732, 733 (Iowa 1978); the inference to be drawn from the circumstantial evidence is the jury's function. State v. Metcalf, 260 N.W.2d 857, 861 (Iowa 1972). All of the evidence, however, must be considered in determining the sufficiency of the evidence to support a guilty verdict. Robinson, 288 N.W.2d at 340.

Here, the evidence shows that defendants possessed in their gas station a money bag with five "100 lot" packages of amphetamines in clear plastic wrap, four $20 bills, and a slip of paper with names and $20 written on it. The defendants told the police that they kept their drug money separate from their gas station money. The State's expert witness testified that one who buys with intent to resell, purchases a "jar" or "1,000 lot" of amphetamines which is then divided into "100 lot" packages, selling for $20 a package and that the physical evidence found in defendants' money bag was consistent with the pattern of one who is in the business of selling drugs for a profit. This testimony, elicited on direct examination, is permissible under State v. Oppedal, 232 N.W.2d 517, 524 (Iowa 1975). See State v. Heck, No. 63714, slip op. at 4 (Iowa filed February 18, 1981).

We find the jury's verdict was supported by substantial evidence and conclude no error occurred on this issue. Having found no error on the issues raised by defendants, we affirm the trial court's judgment.

AFFIRMED.