

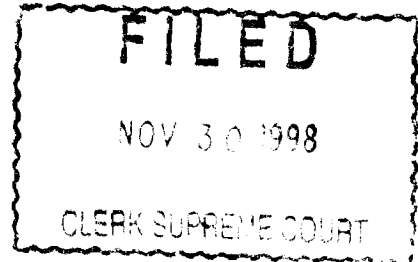
IN THE COURT OF APPEALS OF IOWA

No. 8-546 / 97-1760
Filed November 30, 1998

STATE OF IOWA,
Appellee,

vs.

COREY ANDREW REYNOLDS,
Appellant.



Appeal from the Iowa District Court for Wapello County, James P. Rielly
(motion to suppress), James D. Jenkins (motion to suppress), Annette J. Scieszinski
(trial), Judges.

Corey Reynolds appeals his convictions for possession with intent to deliver
and failure to affix a drug tax stamp. **AFFIRMED.**

Patrick W. O'Bryan, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney
General, Victoria Siegel, County Attorney, and Paul Zingg, Assistant County
Attorney, for appellee.

Heard by Streit, P.J., and Vogel and Mahan, JJ.

VOGEL, J.

Corey Reynolds appeals his convictions for possession with intent to deliver and failure to affix a drug tax stamp. We find no error in the denial of Reynolds' motion to suppress and subsequently affirm.

Background facts. On February 2, 1996, Ottumwa police officers assisted the Mahaska County Sheriff's Department in the execution of a search warrant for stolen property at an Ottumwa residence shared by Reynolds and Chris Perkins. The warrant was issued on the basis of allegations that stereo equipment taken in a Mahaska County burglary had been delivered to the residence. The informant also advised Mahaska County officials that fifteen pounds of marijuana had been moved out of the house over the last several weeks. Although this allegation was discussed with the Ottumwa officers, the warrant concerned the stereo equipment only. Before beginning the search, the officers determined that if they came across any drugs or drug paraphernalia during the search, they would cease the search and obtain a second warrant.

During the search, Ottumwa police officer Kevin Ward observed a small silver scale on a vanity in Reynolds' bedroom. He called the scale to the attention of officer Michael Tupper, who recognized it as being the size and type used for the weighing of illegal drugs. Tupper also observed several posters depicting marijuana and its use in Perkins' bedroom. Continuing his search for stereo equipment, Tupper looked under a bed where he observed, among other things, a stereo speaker and a backpack.

Tupper observed several inches of a large-diameter, plastic tube protruding from the backpack, which he recognized to be part of a marijuana-smoking device commonly known as a bong. Unable to see clearly due to the limited light, Tupper began to pull items out from under the bed to see what was behind them. Tupper removed the backpack, which was almost completely unzipped. In addition to the plastic tube, Tupper observed within the backpack several plastic bags containing a green, leafy substance which he believed to be marijuana. At this point Tupper stopped the search, left the residence and applied for a search warrant for illegal drugs and marijuana.

After obtaining the warrant, Tupper returned to the residence to execute the search. Officers seized assorted drug paraphernalia and substances which later tested positive for marijuana.

Reynolds was charged with possession with intent to deliver and failure to affix a drug tax stamp, class "D" felonies in violation of Iowa Code sections 124.401(1)(d) and 453B.12. Reynolds filed a motion to suppress the evidence seized from his residence. The motion was denied, as was Reynolds' motion to reconsider. Reynolds eventually waived his right to a jury trial and agreed to a trial on a stipulation of the evidence. Twice prior to trial, and again at trial, Reynolds renewed his motion to suppress. The motion was denied each time. After a trial in June of 1997, the district court issued its ruling, finding Reynolds guilty as charged. Reynolds now appeals.

Scope of review. As Reynolds alleges a violation of his constitutional rights, our standard of review is de novo. *See State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998). Under that standard, we must independently evaluate the totality of the circumstances as shown by the entire record. *State v. Howard*, 509 N.W.2d 764, 767 (Iowa 1993).

Motion to suppress. Reynolds asserts the district court erred in failing to suppress the seized drug evidence because the search warrant was based upon information obtained through Officer Tupper's warrantless and illegal search of the backpack.

The fourth amendment of the federal constitution protects against unreasonable searches and seizures. U.S. Const. amend. IV; *see also* Iowa Const. art. I, § 8. A search and seizure without a valid warrant is per se unreasonable unless it comes within one of the recognized exceptions: consent, search incident to arrest, probable cause and exigent circumstances, or plain view. *See State v. Manna*, 534 N.W.2d 642, 644 (Iowa 1995).

Under the plain view exception, the seizure of an object found in plain view is justified if two conditions are met: (1) the intrusion of the police was lawful, and (2) the incriminating nature of the object was immediately apparent. *State v. Chrisman*, 514 N.W.2d 57, 60 (Iowa 1994) (citing *Horton v. California*, 496 U.S. 128, 136, 110 S. Ct. 2301, 2308, 110 L. Ed. 2d 112, 123 (1990)). The burden is on the

State to prove the applicability of the plain view exception. *Id.* at 60; *State v. Oliver*, 341 N.W.2d 744, 745 (Iowa 1983).

Reynolds asserts that because the backpack was not large enough to hold stereo equipment, Tupper should have obtained a warrant before moving the backpack and examining its contents. However, Tupper's presence in the home and search under the bed were clearly lawful under the initial warrant. Furthermore, Tupper's removal of the backpack was reasonable to further his search for stereo equipment given the lack of lighting under the bed. The only possible illegal intrusion would have been if Tupper, after identifying the bong and pulling the backpack out from under the bed, had moved things around in the backpack to uncover the baggies of marijuana. In other words, if Tupper had *searched* the backpack, such search would have been illegal without a proper warrant. However, upon repeated questioning, Tupper never stated that he actually moved anything in the backpack. He stated: "I don't know if I had to move the bong around. The backpack was open, and I, probably, held it and looked into it." Tupper's testimony was that the back pack was three-quarters unzipped, giving him a view of some of the contents of the bag. We find that the plain view exception applied to this search. The incriminating nature of the bong and baggies were immediately apparent to Tupper because of his knowledge and experience. This evidence, in addition to Tupper's observations of the posters and scale, provided probable cause for issuance of a valid second warrant. *But cf. State v. Showalter*, 427 N.W.2d 166, 168 (Iowa 1988) (warrant is invalid where probable

cause is based solely upon illegally obtained evidence). Accordingly, the search and seizure of drugs and drug paraphernalia under the second warrant were valid. For these reasons, we find Reynolds' motion to suppress was properly denied.

Having considered all issues properly before us on appeal, we affirm the convictions and sentence of Corey Reynolds.

AFFIRMED.