IN THE COURT OF APPEALS OF IOWA

No. 6-333 / 95-1436

STATE OF IOWA,

Appellee,

vs.

LARRY LEO QUIRK,

Appellant.

FILED
OCT 25 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Scott County, John A. Nahra, motion to suppress; James E. Kelley, trial; Edward B. deSilva, sentencing, Judges.

Larry Quirk challenges his conviction and sentence, following a bench trial of possession of marijuana with intent to deliver. **REVERSED AND REMANDED.**

Murray W. Bell of Newport, Bell & Oxley, Davenport, for appellant.

Thomas J. Miller, Attorney General, Roxann M. Ryan, Assistant Attorney General, William E. Davis, County Attorney, and Realff Ottesen, Assistant County Attorney, for appellee.

Considered by Cady, P.J., Streit, and Vogel, JJ.

CADY, P. J.

Larry Quirk appeals his conviction and sentence for possession with intent to deliver a controlled substance, in violation of Iowa Code section 124.401(1)(d)(1995). He claims the search of the trunk of his automobile which discovered the drugs was conducted in violation of the fourth amendment. We agree and reverse the conviction and remand the case for further proceedings.

On March 6, 1995, Sheriff Mike Bladel observed a car parked along the shoulder of the road while responding to a call of a house burglary in process. The Sheriff was approximately one mile from the burglary scene. It was early afternoon. The front of the car faced the direction of the burglary scene. The car did not match the description of the vehicle observed at the burglary scene. The two left tires of the vehicle were on the paved portion of the road. The Sheriff, who was wearing his uniform, pulled his unmarked vehicle behind the car.

As the Sheriff approached, he observed Quirk standing behind the open trunk of his vehicle making quick movements while zipping up a black sports bag. Quirk wrapped a shirt around something and dropped it into his trunk. He then quickly shut the trunk and walked towards the driver's door. Quirk did not match the description of the individuals involved in the burglary.

Sheriff Bladel asked Quirk to step back to the Sheriff's vehicle. Quirk responded that he had a flat tire and was just leaving. Quirk continued to move toward the driver's door. The Sheriff then ordered him back to the Sheriff's vehicle.

As Quirk started to walk towards the Sheriff's vehicle, he stopped at the rear door on the driver's side and began to remove a basket of dirty laundry. In fear for his safety, the Sheriff hid behind the door of his vehicle and pulled his gun. Quirk complied with the Sheriff's order to drop the basket and raise his hands. Sheriff Bladel patted Quirk down and found nothing. He then demanded the keys to the trunk. Quirk complied with the demand.

The Sheriff opened the trunk. He believed it may have contained a weapon. He also considered Quirk may have been involved in the burglary.

After opening the trunk, the Sheriff saw a shirt with plastic sticking out of it and the black sports bag. Quirk denied Sheriff Bladel's request to search the bag. Sheriff Bladel felt the sports bag and believed it contained plastic bags of processed marijuana. He opened the bag and discovered thirteen bags of approximately one pound of marijuana and another bag containing one-half pound of marijuana.

The State charged Quirk with possession of marijuana with intent to deliver and failure to affix drug tax stamps. Quirk filed a motion to suppress the seizure of the marijuana claiming the search was illegal. The district court denied the motion. It determined Sheriff Bladel had probable cause to believe contraband was present in the trunk of Quirk's car. The matter proceeded to a trial on stipulated facts.

The district court found Quirk guilty of the possession charge but not guilty of the drug tax stamp charge. Rick was sentenced to incarceration for up to five years.

Quirk appeals. The single issue for review is whether the district court erred in denying his motion to suppress evidence seized during the search of the trunk of his vehicle.

Quirk claims his fundamental constitutional right to be free from unreasonable searches and seizures was violated. Our review is de novo. *See State v. McKnight*, 511 N.W.2d 389, 391 (Iowa 1994). We resolve the question by making our own independent evaluation of the circumstances. *Id.*

We begin our analysis with the time-honored axiom that "a search or seizure conducted without a warrant is per se unreasonable under the fourth amendment subject only to a few specifically established and well-delineated exceptions." *State v. Lam*, 391 N.W.2d 245, 248 (Iowa 1986). The exception implicated in this case is commonly called the "automobile exception" to the warrant requirement. *See Carroll v. United States*, 267 U.S. 132, 158-9, 45 S. Ct. 280, 287, 69 L. Ed. 543, 549 (1925) (creating the exception); *California v. Acevedo*, 500 U.S. 565, 569-72, 111 S. Ct. 1982, 1985-87, 114 L. Ed. 2d 619, 627-29 (1991) (exploring the development of the exception). It permits the warrantless search of a vehicle, including the trunk, if the officer has probable cause to believe the trunk contains contraband or other evidence

of a crime before the search begins.[1] *Id. See State v. Edgington*, 487 N.W.2d 675, 678 (Iowa 1992).

Probable cause to search a vehicle exists when the facts and circumstances would lead a reasonably prudent person to believe the vehicle contains contraband. *Edgington*, 487 N.W.2d at 678 (quoting *United States v. Strickland*, 902 F.2d 937, 942-43 (11th Cir. 1990)). The facts and circumstances to support probable cause include what the police officers have heard, what they know, and what they have observed in light of their training. *Id.*

Probable cause is derived from factual and pragmatic considerations of everyday life. *State v. Dawdy*, 533 N.W.2d 551, 555 (Iowa 1995). The analysis is not technical, nor based on the mind set of a legal technician. *Id.* It is not evaluated from the remote vantage of a library. *State v. Green*, 540 N.W.2d 649, 655 (Iowa 1995). *See Jackson v. United States*, 302 F.2d 194, 196 (D.C. Cir. 1962). Instead, probable cause is based on common sense conclusions about ordinary human interaction and behavior as viewed from the skill and knowledge of a reasonable police officer. *See Ornelas v. United States*, 517 U.S. ___, ___, 134 L. Ed. 2d 911, 918-919, 116 S. Ct. 1657, 1661 (1996).

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[1] We have traditionally recognized the "automobile exception" is applicable if probable cause and exigent circumstances exist at the time of the search. *State v. Edgington*, 487 N.W.2d 675, 678 (Iowa 1992). Exigency, however, is satisfied by a vehicle's inherent mobility. *Id.; State v. Cain*, 400 N.W.2d 582, 585 (Iowa 1987).

Probable cause means less than would justify a conviction. *Dawdy*, 533 N.W.2d at 555. Conversely, it means more than a mere suspicion or hunch. *State v. Swartz*, 244 N.W.2d 553, 554 (Iowa 1976). It is the same level of cause necessary to support a warrant. *State v. Shea*, 218 N.W.2d 610, 614 (Iowa 1974). The justification for creating an exception to the warrant requirement for automobiles does not similarly justify relaxing the level of probable cause to support a search. *Pennsylvania v. Talley*, 634 A.2d 640, 643 (Pa. Super. 1993).

There are several pieces of information relevant to the probable cause determination in this case. They begin with the knowledge and observations of Sheriff Bladel as he approached Quirk's vehicle and conclude the moment the Sheriff opened the trunk. Our task is to examine all these circumstances in light of our governing principles.

The first circumstance we consider is whether the Sheriff was responding to a reported burglary of a house at the time he came upon Quirk's vehicle. This circumstance may have made the Sheriff more alert and watchful as he drove to the crime scene, but has little impact on our probable cause analysis. Probable causation rests on a nexus between criminal activity, the subject of the search and the place to be searched. *Green*, 540 N.W.2d at 655. In this case there were no facts to tie Quirk or his vehicle to the burglary. Dispatch had given the Sheriff a description of the vehicle and occupants suspected in the burglary. Neither Quirk nor his vehicle matched the description. Furthermore, the position of Quirk's vehicle indicated it had

been traveling toward the crime scene, not away from it. *See United States v. Macias*, 546 F.2d 58, 61 (5th Cir. 1977) (flight can be a factor in a probable cause determination). There were no facts to believe Quirk was involved in the burglary.

We additionally consider Quirk's furtive movements in the trunk as Sheriff Bladel pulled his unmarked car behind Quirk's vehicle, followed by Quirk's actions in abruptly closing the trunk top. Probable cause may evolve from circumstances arising from an investigatory stop of a vehicle. *See State v. Edington*, 487 N.W.2d at 678. Moreover, an officer may consider a person's response to seeing a police officer. *See State v. Wullner*, 401 N.W.2d 214, 218 (Iowa App. 1986).

We find the furtive actions and conduct by Quirk added only a suspicion of criminal activity. This is because the Sheriff observed nothing, and had no other information, to tie the furtive movements to contraband or other evidence of a crime. *See State v. Predka*, ___ N.W.2d ___ (Iowa 1996) (nervousness of driver, together with marijuana odor emanating from car and observation by officer of screen and plastic bags in car justified comprehensive search of car). Quirk's efforts to keep the Sheriff from observing the contents of his trunk, without more, does not establish probable cause to believe the trunk contains contraband. *See People v. West*, 615 N.E.2d 1217, 1221 (Ill. App. 1993) (rummaging in glove box by passenger did not give officer probable cause where officer did not see passenger hide any object); *State v. Smith*, 438 S.E.2d 554, 560 (W. Va. 1993) (furtive gesture by occupant of vehicle insufficient to establish probable cause without other causative facts to connect

gesture to presence of contraband or other evidence of a crime). The automobile exception to the warrant requirement does not eliminate a motorist's a legitimate privacy interest in a vehicle. *California v. Carney,* 471 U.S. 386, 390-93, 85 L. Ed. 2d 406, 413-15, 105 S. Ct. 2066, 2068-70 (1985). Thus, the mere exercise of a privacy interest by a motorist can not necessarily imply criminal activity.

We next additionally consider Quirks actions in failing to follow the directives of the Sheriff, and reaching into the back seat of the car. These additional circumstances could reasonably engender some concern for the safety of the officer. Consequently, a protective weapons search of the vehicle would be justified. *See State v. Riley,* 501 N.W. 2d 487, 490 (Iowa 1993); *See generally,* Jeffrey F. Ghent, Annotation *Search & Seizure: "Furtive" movement or gesture as justifying police search,* 45 A.L.R.3rd 581 (1972 & 1992 Supp.)

Roadside encounters between police and suspects can be extremely dangerous, especially when the suspect is in control of a weapon in the vehicle. *Michigan v. Long,* 463 U.S.1032, 1049, 103 S. Ct. 3469, 3481, 77 L. Ed. 2d 1201, 1220 (1983). Consequently, when an officer possesses a reasonable belief a suspect may gain immediate control of a weapon, the warrantless search of the passenger compartment of the vehicle is permitted. *Id.* However, this exception to the warrant requirement is strictly circumscribed by the exigencies which justified its initiation. *Long,* 463 U.S. at 1051, 103 S. Ct. at 3481, 77 L. Ed. 2d at 1221 (quoting *Terry v. Ohio,* 392 U.S. 1, 26, 88 S. Ct. 1868, 1882, 20 L. Ed. 2d 889, 908 (1968). Thus, the search

extends only to those areas where a weapon could be immediately retrieved. *Id.; State v. Riley*, 501 N.W.2d 487, 489-90 (Iowa 1993). It would not extend to a closed trunk.

Since protective search would not extend to the trunk, we must consider if the additional circumstances of failing to obey the Sheriffs commands and reaching into the backseat, together with the other circumstances, provide probable cause to search the trunk. We conclude probable cause did not exist to search the trunk.

In *Edgington*, the court found probable cause to search the trunk of a vehicle after officers found a loaded handgun concealed in the passenger compartment of the vehicle. The officers found the gun late at night while conducting a search incident to an arrest of a motorist, initially stopped for speeding, who did not have a permit to carry a concealed weapon. *Edgington*, 487 N.W.2d at 677-78. The court reasoned the totality of the circumstances gave officers "a reasonable belief that the trunk might contain other weapons." *Id.*

In this case, Sheriff Bladel reasonably believed Quirk may have access to a weapon within the passenger compartment of the vehicle based on his conduct and gestures. However, the Sheriff failed to act on that belief by conducting the protective search within the area of the vehicle where the gestures took place to determine if weapons were present. If a protective search would have revealed the presence of an illegal weapon in the passenger area of the vehicle, probable cause would have existed to further search the trunk for other weapons. *Edgington*, supra.

Instead, at the time the Sheriff opened the trunk, he possessed only an unconfirmed belief a weapon may be within the passenger compartment of the vehicle together with a mere suspicion some illegal object may be in the trunk. Without confirming the presence of a weapon or some other evidence of a crime within the passenger area of the vehicle, we do not believe probable cause existed to search the trunk.

The protective search permitted by *Terry* and its progeny is not based on probable cause, but a reasonable belief of danger. *See Michigan v. Long*, 463 U.S. at 1046, 103 S. Ct. at 3481, 77 L. Ed. 2d at 1217-18. The *Terry* principles do not extend to the area of the trunk of the vehicle, and we refuse to apply them to this case to elevate a mere suspicion into probable cause.

We conclude the search of the trunk violated Quirk's fourth amendment rights. Consequently, the drugs were improperly admitted into evidence at trial. We reverse the conviction and remand the case for further proceedings.

REVERSED AND REMANDED.

Vogel, J., concurs; Streit, J., partially dissents.

STREIT, J. (Concurring in part and dissenting in part)

I respectfully dissent. I would affirm the trial court's finding that probable cause to search the trunk existed as the result of Quirk's unusual responses to the sheriff's clear commands. Quirk's furtive activities of quickly wrapping something in his shirt, tossing it in the trunk, and slamming the trunk shut when the sheriff's vehicle approached is sufficient reason to raise a suspicion. Quirk's ignoring the command of the sheriff to come back to the patrol vehicle, his reaching into the back seat, his ignoring of another command to not open the car door, is sufficient to elevate this suspicion to probable cause that Quirk was concealing something illegal in the trunk.

Under the automobile search exception permitting the search of an entire vehicle, the sheriff's search was legal. *Chambers v. Maroney,* 399 U.S. 42, 51, 90 S. Court. 1975, 1981, 26 L. Ed. 2d 419, 428 (1970); *Carroll v. United States,* 267 U.S. 132, 153-56, 45 S. Court. 280, 69 L. Ed. 543, 551-52 (1925). The automobile exception is a variation of the exigent circumstances doctrine. *State v. Eubanks,* 355 N.W.2d 57, 59 (Iowa 1984). An automobile search can extend to any portion of the vehicle where the officer has reason to believe the item could be concealed. *United States v. Ross,* 456 U.S. 798, 825, 102 S. Court. 2157, 2172, 72 L. Ed. 2d 572, 584 (Iowa 1982).

I would affirm the trial court's denial of defendant's motion to suppress.