

IN THE COURT OF APPEALS OF IOWA

No. 0-183 / 89-1596

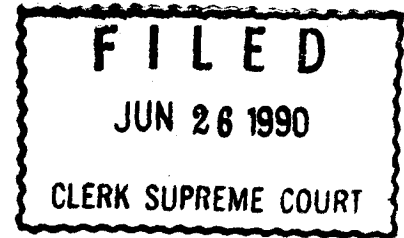
STATE OF IOWA,

Appellant,

vs.

SALVADOR JOSEPH SANCHEZ,

Appellee.



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Appeal from the Iowa District Court for Pottawattamie County, Keith E. Burgett, Judge.

In this criminal prosecution, the district court suppressed evidence resulting from an investigatory stop of a pedestrian, and from a subsequent pat-down search for weapons. The State has applied for discretionary review to challenge the suppression order, and the Iowa Supreme Court has granted discretionary review. **AFFIRMED.**

Thomas J. Miller, Attorney General; Amy M. Anderson, Assistant Attorney General; and E. A. Westfall, County Attorney; for the appellant.

Raymond E. Rogers, State Appellate Defender, and Patrick A. Sondag, of the Public Defender's Office, Council Bluffs, for the appellee.

Heard by Oxberger, C.J., and Donielson and Hayden, JJ.

HAYDEN, J.

The Pottawattamie County Sheriff's Office received an anonymous telephone tip a man was picking marijuana along a county road near the intersection of Highway 83 and M-16 County Road, approximately five miles east of Minden, Iowa. A deputy arrived at the intersection within ten minutes and found no one at that site. Deputy Ross continued driving west on Highway 83. Approximately one mile east of Minden, Ross saw a man sitting on a bridge banister. He parked the patrol car and walked over to the fellow sitting on the bridge. The defendant, Salvador Joseph Sanchez was smoking a hand-rolled cigarette, which he tossed into the creek. The deputy asked Sanchez what he was doing and Sanchez responded he was "just walking." When the deputy asked for identification, Sanchez produced a booking slip from a California jail.

The deputy noticed a long-bladed screwdriver and a "tarp hook" protruding from Sanchez' backpack. He then became suspicious Sanchez might be carrying concealed weapons. Ross thereupon performed a pat-down search for weapons. He found none, but he did find a green leafy substance which he believed to be marijuana. He then arrested Sanchez for possession of a controlled substance. A subsequent inventory search of the backpack yielded more marijuana. Sanchez was eventually charged with possession of a controlled substance with intent to deliver.

Sanchez filed a motion to suppress all evidence resulting from the investigatory detention and pat-down search based on a lack of probable cause. The district court sustained this motion and suppressed the evidence in question.

The State has filed a petition for discretionary review to challenge the order suppressing evidence. The supreme court has granted discretionary review.

The State contends the district court erred in applying the probable cause standard to defendant's motion to suppress. The State argues the applicable standard for an investigatory stop is reasonable cause. Because Ross had reasonable cause to stop Sanchez, the State asserts the investigatory detention was permissible.

The State further contends because the investigative detention was justified, the pat-down search for weapons was permissible because the deputy had reason to be concerned for his safety. This incident took place in an isolated spot at night. Ross knew Sanchez was carrying a dangerous-looking screwdriver and "tarp hook."

Although the standard under a Terry stop is "reasonable cause," State v Scott, 405 N.W.2d 829 (Iowa 1987), the State failed to preserve error. We affirm the district court.

Defendant's motion to suppress stated Deputy Sheriff Ross had no probable cause to stop and/or "pat search" the

defendant and therefore all of the fruits of the illegal search should be suppressed. The county attorney filed no resistance to this motion, nor did he raise the issue in the course of the hearing on the motion. At no time prior to its appeal did the State assert only "reasonable cause" is required to make the seizure. Even constitutional issues must first be raised in the district court to preserve error for appeal. State v. Hansen, 286 N.W.2d 163, 165-66 (Iowa 1979). The State's failure to do so constitutes a waiver of the reasonable cause issue.

The State makes a feeble attempt to argue it did not waive this issue because it had no way of knowing the court would utilize the wrong standard until it ruled on the motion to suppress. The cases relied on to support this contention are simply not analogous and this argument is without merit.

Furthermore, the county attorney has a duty, as do all attorneys, to inform a court on the applicable law. The Iowa Code of Professional Responsibility for Lawyers, EC-7-23 states:

The complexity of law often makes it difficult for a tribunal to be fully informed unless the pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it.

Regardless of whether or not the county attorney could have predicted the court would apply the wrong standard, he should have provided the court with the correct law.

AFFIRMED.