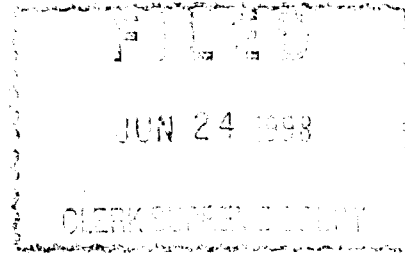


IN THE COURT OF APPEALS OF IOWA

No. 8-207 / 97-0952

Filed June 24, 1998



STATE OF IOWA,
Appellee,

vs.

ROBERT JOSEPH YAROLEM,
Appellant.

Appeal from the Iowa District Court for Jackson County, David E. Schoenthaler (motion to suppress) and David H. Sivright, Jr., (trial), Judges.

Robert Yarolem appeals from his conviction, following a bench trial, for possession of a controlled substance with intent to deliver while in possession of a firearm, in violation of Iowa Code sections 124.401(1)(c)(6) and 124.401(1)(e) (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, Martha J. Lucey, Assistant State Appellate Defender, and Julie Bettenhausen, student legal intern, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, and Phillip Tabor, County Attorney, for appellee.

Heard by Sackett, P.J., and Huitink and Streit, JJ.

HUITINK, J.

Robert Joseph Yarolem appeals from his conviction of possession of a controlled substance with intent to deliver, while in possession of a firearm, in violation of Iowa Code sections 124.401(1)(c)(6) and 124.401(1)(e). We affirm.

I. Background Facts and Proceedings.

The record contains evidence of the following: on October 24, 1996, at approximately 2:30 a.m., Sheriff's Deputy Steve Schroeder responded to a report of a man with a gun in Monmouth. While in Monmouth, he observed a Buick LeSabre parked outside the Piccadilly Tap. The vehicle's trunk was ajar and a gas can and siphon hose were next to it. Schroeder stopped to investigate the vehicle. Juliee Finn told Schroeder the Buick belonged to Brian Houston, who was inside the Tap. Schroeder followed Finn inside the Tap.

Once inside, Schroeder observed two men, later identified as Yarolem and Houston, in a walk-in cooler with glass doors. Schroeder saw one man set two glass containers and a device with wires by two black duffel bags. Schroeder approached the cooler and observed a syringe and a glass vial in a plastic carrying case on one of the bags. He opened the bag and found a wooden box of a type commonly used to carry illegal drugs. Schroeder then searched the other duffel bag. He found a pistol, a tote bag containing suspected methamphetamine, a digital scale, and other drug paraphernalia.

Schroeder subsequently obtained a search warrant for the Tap. Upon its execution, Schroeder discovered methamphetamine packaged in several packages, two scales, packaging materials, drug paraphernalia, a large sum of cash, and a .380 caliber semi-automatic pistol.

After a bench trial upon stipulated evidence, the district court convicted Yarolem of possession of a controlled substance with intent to deliver, while in possession of a firearm. The court sentenced Yarolem to an indeterminate prison term not to exceed twenty years. Yarolem was also fined \$1000.

On appeal Yarolem contends the district court erred in denying his motion to suppress evidence of the drugs and firearm. He argues Schroeder's warrantless search of the Tap violated his Fourth Amendment rights. The State maintains Schroeder's search was reasonable and fell under the plain view and exigent circumstances exceptions to the Fourth Amendment warrant requirement.

II. Standard of Review.

Yarolem's challenge to the district court's denial of his motion to suppress implicates his protection against unreasonable searches and seizures under the Fourth Amendment to the U.S. Constitution. U.S. Const., Amend. IV. We review constitutional issues de novo. *State v. Riley*, 501 N.W.2d 487, 488 (Iowa 1993). We consider the entire record including evidence presented at the suppression hearing and the trial. *State v. Cook*, 530 N.W.2d 728, 731 (Iowa 1995).

III. Motion to Suppress.

In denying Yarolem's motion to suppress, the district court found Schroeder lawfully entered the Tap. The court then found Schroeder's seizure of evidence was lawful because the objects were in his plain view.

The Fourth Amendment protects citizens from unreasonable and warrantless searches and seizures. U.S. Const. Amend. IV. Warrantless searches and seizures are per se unreasonable unless they fall within one of the recognized exceptions to the warrant requirement. *State v. Carlson*, 548 N.W.2d 138, 140 (Iowa 1996). The State has the burden of showing by a preponderance of evidence the officers' actions were reasonable under an exception. *State v. Predka*, 555 N.W.2d 202, 206 (Iowa 1996).

The exceptions to the warrant requirement applicable to these facts are: (1) the plain view doctrine; and (2) probable cause coupled with exigent circumstances. *See Id.* Evidence may be seized without a warrant under the plain view doctrine if two conditions are met: (1) the intrusion of the police was lawful; and (2) the incriminating nature of the evidence is immediately apparent. *State v. Chrisman*, 514 N.W.2d 57, 60 (Iowa 1994)(citation omitted).

We agree with the district court Schroeder lawfully entered the Tap. Finn did not object to Schroeder following her into the building. Schroeder was investigating the Buick and had a right to speak to the vehicle's owner, whom Finn said was inside the Tap. After entering the Tap, Schroeder observed a syringe and a glass vial in a plastic carrying case on a duffel bag inside the cooler. Schroeder testified he did not

disturb the case until the incriminating nature of the evidence was immediately apparent to him. The record includes the following:

- Q. At what point did it become apparent to you what was inside the carrying case?
- A. When I got a little closer look, I could see -- with the carrying case being translucent, I could see what appeared to be a hypodermic needle inside the carrying case.
- Q. Okay. And that was when you went into the cooler to examine it more closely?
- A. Yeah.
- ...
- Q. And prior to -- Am I correct in thinking that prior to opening it [the carrying case], it was apparent to you what was in it?
- A. Yes.

We find Schroeder's search and seizure of the carrying case and its contents was justified under the plain view exception to the warrant requirement of the Fourth Amendment. Schroeder was lawfully on the premises; therefore, he was entitled to search and seize the evidence once the incriminating nature was immediately apparent to him. *See Id.*

We find Schroeder's discovery of the drug paraphernalia near the duffel bags provided probable cause to search the bags.

Probable cause for arrest or for search and seizure exists where the circumstances are "sufficient in themselves to warrant a man of reasonable caution in the belief" that criminal activity is in progress or has occurred. These conditions "are not technical, they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."

State v. Dawdy, 533 N.W.2d 551, 555 (Iowa 1995)(quoting *United States v. Dawdy*, 46 F.3d 1427, 1430-31 (8th Cir.1995)(citations omitted)).

The court may consider a number of factors in determining whether exigent circumstances support a warrantless search. *See State v. Brecunier*, 564 N.W.2d 365, 367 (Iowa 1997) (“factors include proof of (1) a grave offense, (2) a suspect reasonably believed to be armed, (3) probable cause to believe the suspect committed the crime, (4) strong reason to believe the suspect is on the premises, (5) strong likelihood of the suspect's escape if not apprehended, and (6) peaceable (if not consensual) entry”)(citations omitted). In *Brecunier*, the supreme court noted:

We have found that exigent circumstances usually exist where there is danger of violence and injury to the officers or others; risk of the subject's escape; or the probability that, unless taken on the spot, evidence will be concealed or destroyed.

Id. at 368 (quoting *State v. Hatter*, 342 N.W.2d 851, 855 (Iowa 1983)(citations omitted)).

In this case the potential threat to Schroeder's safety was real and substantial. Schroeder found himself in a isolated place facing three suspected and potentially armed suspects. In addition, there was a high probability the contraband would be concealed or destroyed if Schroeder left the premises to obtain a search warrant. The duffel bags were relatively small and mobile. Based on these facts, we find Schroeder's actions were reasonable and his warrantless search of the bags was permitted under the exigent circumstances exception to the Fourth Amendment warrant requirement. *See Id.* at 367-68.

We conclude the district court properly denied Yarolem's motion to suppress.

The decision of the district court is affirmed.

AFFIRMED.