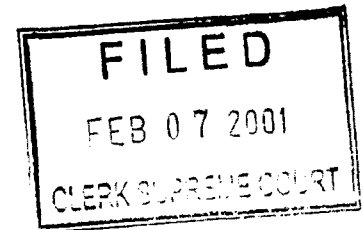


IN THE COURT OF APPEALS OF IOWA

No. 0-825 / 00-624
Filed February 7, 2001



STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT DAVID SYKES,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Nancy Baumgartner,
District Associate Judge.

Sykes appeals the court's judgment and sentence on criminal charges of
possession of a controlled substance. **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and John P. Messina,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Denise A. Timmins, Assistant
Attorney General, Denver D. Dillard, County Attorney, and Laurie J. Craig and
William C. Croghan, Assistant County Attorneys, for appellee.

Heard by Streit, P.J., and Hecht and Vaitheswaran, JJ.

STREIT, P.J.

Robert Sykes's bad day got worse when police officers found drugs in the motel room where they had gone to arrest him for domestic abuse assault. Sykes appeals his conviction for two counts of possession of a controlled substance; he claims his Fourth-Amendment rights were violated. We reverse and remand.

I. Background Facts & Proceedings.

In November 1999 Cedar Rapids police had an arrest warrant for domestic abuse assault for Robert David Sykes when they received an anonymous telephone call stating Sykes was staying with Karen Ryan at a local Econolodge. They confirmed Karen Ryan had rented room 114 at the Econolodge.

Three police officers went to room 114 and told the man responding to their knocks they had an arrest warrant for Robert Sykes. While the officers were waiting for the man to open the door, they heard someone remove and replace the toilet tank lid. After entering the room, the officers confirmed the man was Robert Sykes and arrested and handcuffed him. One officer then went to the bathroom, removed the toilet tank lid, and found a plastic bag containing cocaine and a plastic bag containing marijuana.

Sykes was charged with two counts of possession of a controlled substance. Sykes brought a motion to suppress the drugs found during the search of the toilet tank. He and the county attorney agreed to submit the motion to the court on only one item of evidence—a two-page police report concerning

Sykes's arrest. The motion was denied. Sykes was found guilty of each possession charge after a bench trial on the minutes of testimony.

Sykes appeals. He claims the warrantless search of the toilet tank violated the Fourth Amendment.

II. Standard of Review.

Our standard of review is de novo when we assess an alleged violation of a constitutional right. *State v. Washburne*, 574 N.W.2d 261, 263 (Iowa 1997). We conduct an independent evaluation of the totality of the circumstances as shown by the entire record. *State v. Astello*, 602 N.W.2d 190, 195 (Iowa Ct. App. 1999). In reviewing the district court's ruling on a motion to suppress, we consider both the evidence presented during the suppression hearing and that introduced at trial. *State v. Orozco*, 573 N.W.2d 22, 24 (Iowa 1997).

III. The Merits.

The Fourth Amendment protects people against unreasonable searches and seizures. U.S. Const. amend. IV. A warrantless search is generally unreasonable. *United States v. Basinski*, 226 F.3d 829, 833 (7th Cir. 2000). When the government obtains evidence via a warrantless search, it must prove by a preponderance of the evidence that an exception to the warrant requirement applies. *Id.*

The State argues we need not determine whether an exception to the warrant requirement applies in this case because Sykes abandoned the drugs in the tank of the motel room toilet. Abandoned property is not subject to Fourth-Amendment protection because such "protection only extends to places and

items for which a person has a reasonable expectation of privacy, and no person can have reasonable expectation of privacy in an item that he has abandoned.” *Id.* at 836. Whether a person intended to abandon something is determined by examining the available objective facts, including the person’s words and acts. *Id.*; *State v. Bumpus*, 459 N.W.2d 619, 625 (Iowa 1990). Sykes may have hid the drugs, but he hid them in a toilet tank in a motel room in which he had a reasonable expectation of privacy.¹ He did not lose that expectation simply because he was arrested. See 1 Wayne R. LaFare, *Search and Seizure* § 2.3(a), at 471-72 (3d ed. 1996). The State must thus prove an exception to the warrant requirement applies to justify the officers’ warrantless search of the motel room.

The State argues two exceptions to the warrant requirement apply in this case: search incident to arrest and exigent circumstances. The search incident to arrest exception allows police officers to “search [an] arrestee’s person and the area ‘within his immediate control’—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.” *Chimel v. California*, 395 U.S. 752, 763, 89 S. Ct. 2034, 2040, 23 L. Ed. 2d 685, 694 (1969); see also *Vale v. Louisiana*, 399 U.S. 30, 33, 90 S. Ct. 1969, 1971, 26 L. Ed. 2d 409, 413 (1970) (stating a search incident to an arrest

¹ A person challenging a warrantless search must demonstrate he possessed a legitimate expectation of privacy in the particular area searched. *United States v. McCaster*, 193 F.3d 930, 933 (8th Cir. 1999). Specifically, that person must show “both a subjective expectation of privacy and that the expectation is objectively reasonable” *Id.* Here, the State apparently has never argued Sykes did not have an expectation of privacy in the motel room. It thus has waived that argument. See *Basinski*, 226 F.3d at 837 n.2; *United States v. Torres*, 949 F.2d 606, 608 (2d Cir. 1991); *United States v. Nechy*, 827 F.2d 1161, 1164-65 (7th Cir. 1987).

must be substantially contemporaneous with the arrest and confined to the immediate vicinity of the arrest). We know the following facts from the police report: Sykes's arrest occurred in an Econolodge motel room; when the officers entered the room, there was a "sink directly to [their] left and a bathroom to the right;" the drugs were found in the toilet tank in the bathroom; and Sykes was in handcuffs during the search. The facts we do not know include the following: the size and layout of the motel room; the size and layout of the bathroom; whether the bathroom door was closed before the search; and where Sykes was when he was arrested. The proven facts do not disclose whether the toilet was in the area within Sykes's immediate control. *Cf. State v. Shane*, 255 N.W.2d 324, 328 (Iowa 1977) (finding a search under a mattress in a motel room was a valid search incident to an arrest where the motel room was "small," the arrestee was seen placing something underneath the mattress when police officers entered the room, and the officers were searching for armed robbers). The State has not proven by a preponderance of the evidence a valid search incident to arrest.

The State also argues the exigent circumstances exception applies to this case.

When police officers, acting on probable cause and in good faith, reasonably believe from the totality of circumstances that (a) evidence or contraband will imminently be destroyed or (b) the nature of the crime or character of the suspect(s) pose a risk of danger to the arresting officers or third persons, exigent circumstances justify a warrantless entry, search or seizure of the premises.

United States v. Kunkler, 679 F.2d 187, 191-92 (9th Cir. 1982) (footnotes omitted); see also *United States v. Young*, 909 F.2d 442, 446 (11th Cir. 1990).

Here, the State urges the officers “acted reasonably in retrieving the [drugs] before obtaining a warrant” because they heard someone remove and replace a toilet tank lid and thus knew “evidence may [have been] in the toilet and at risk of destruction due to immersion in water.” The police report shows the officers came to the Econolodge to serve Sykes with an arrest warrant for domestic abuse assault. The police report also confirms the officers may have become suspicious when, while Sykes was delaying opening the motel room door for them, they heard a toilet tank lid being removed and replaced. It does not establish, however, an exigency so compelling that the officers’ warrantless search was objectively reasonable under the circumstances. See *Young*, 909 F.2d at 446. In this case, the sound described in the police report did not sufficiently warn of the imminent destruction of drugs or other evidence—the fact the officers’ hunch that Sykes was hiding something was substantiated does not excuse their warrantless search. The State did not prove exigent circumstances by a preponderance of the evidence. We reverse the trial court’s ruling on the motion to suppress and remand for a new trial.

REVERSED AND REMANDED.