IN THE COURT OF APPEALS OF IOWA

No. 4-024 / 93-473

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

VINCENT EDWARD JONES,

Appellant.

Appeal from the Iowa District Court for Polk County, Vincent M. Hanrahan, Judge.

Defendant appeals his conviction for possession of a controlled substance. **VACATED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Shari Barron, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Mary Tabor, Assistant Attorney General; John P. Sarcone, County Attorney; and Greg Brandt and Frank Severino, Assistant County Attorneys, for appellee.

Heard by Oxberger, C.J., Sackett, J., and Critelli, S.J.*

*Senior judge from the 5th Judicial District serving on this court by order of the Iowa Supreme Court.

CRITELLI, S.J.

The State charged Vincent Edward Jones with possession of a controlled substance, crack cocaine, in violation of Iowa Code section 204.401(3) (1993). Jones subsequently filed a motion to suppress the crack cocaine seized in an allegedly illegal vehicle stop. The matter proceeded to a hearing.

At the hearing, Officer Robert Boyd testified he and his partner were eating dinner at a restaurant located near the TNT lounge. The officers noticed a van drive into the parking lot across the street from the TNT. The driver left the engine running. The passenger, who was later identified as Jones, got out of the van, crossed the street, and entered the TNT. Approximately two minutes later, Jones returned to the van. The officers then stopped the van and asked Jones to get out of the car. Boyd asked Jones to open his mouth were he found one rock of crack cocaine.

Boyd further testified the TNT is located in an area known for high drug traffic. He also testified drug transactions are accomplished by stopping in the parking lot across the street and quickly running into the lounge to purchase drugs.

Jones argued the officers did not have reasonable cause to believe criminal activity had occurred. Jones claimed his conduct was susceptible to legitimate explanations and as such would not lead a reasonable person

to believe a crime had occurred. The district court denied the motion to suppress. The matter proceeded to a trial on stipulated facts.

The court found Jones guilty as charged, entered judgment and sentenced him to one year in the county jail. The court suspended the sentence and placed Jones on probation for one year. Jones appeals.

Because we are confronted with an alleged constitutional violation, we resolve the issue by making our own independent evaluation of the totality of the circumstances. See State v. Lamp, 322 N.W.2d 48, 50 (Iowa 1982); State v. Hilleshiem, 291 N.W.2d 314, 316 (Iowa 1980).

"Our law is well settled that the police may stop and briefly detain a person for investigative purposes if the officer has 'reasonable cause to believe a crime may have occurred.'" State v. Rosenstiel, 473 N.W.2d 59, 61 (Iowa 1991) (citations omitted). The reviewing court considers "the totality of the circumstances--the whole picture." United States v. Sokolow, 490 U.S. 1, 8, 109 S. Ct. 1581, 1585, 104 L. Ed. 2d 1, 10 (1989) (quoting United States v. Cortez, 449 U.S. 411, 417, 101 S. Ct. 690, 695, 66 L. Ed. 2d 621, 628 (1981)). While an unparticularized suspicion will not do, an officer may make an investigatory stop with "considerably less than proof of wrongdoing by a preponderance of the evidence." Id.

Most of these cases were cited as authority in State v. Richardson, 501 N.W.2d 495 (Iowa 1993). Richardson vacated the decision of the court of appeals and affirmed the judgment of the district court in a law and fact situation that has some similarity to the case at hand. Id. at 497. In Richardson, the trial court overruled a motion to suppress evidence seized in an investigatory stop. Id. at 496.

In Richardson, the defendant was observed in an automobile parked near a chain link fence next to a marina at 12:40 a.m. Id. All the businesses in this area were closed at that time, and there were no residences in the vicinity. Id. The police officer knew that the marina area had frequently been burglarized. Id. The officer felt that defendant operated his vehicle in a deliberately-furtive manner when the officer began to pull up and approached defendant's vehicle. Id.

The defendant in Richardson urged that there could be a legitimate explanation for his presence at this location at this time of night. Id. at 497. However, the court found that reasonable cause could still exist to investigate conduct which is subject to a legitimate explanation and turns out to be wholly lawful. Id. (citing Reid v. Georgia, 448 U.S. 438, 441, 100 S. Ct. 2752, 2754, 65 L. Ed. 2d 890, 894 (1980)).

How does the operative fact situation in Richardson compare to the facts in this case? The van in which Jones

was a passenger parked in a lot across the street from the TNT Lounge at 10:00 on a Saturday night. There is no question that the bar was open and there was considerable activity of people entering and exiting the bar at that time. The driver of the van kept the engine running while Jones walked across the street, into the bar, and returned two minutes or so later and reentered the van. There was nothing suspicious or furtive in the way the van then left the parking lot just prior to the stop and search of Jones.

There was no testimony by Officer Boyd that he observed any exchange between Jones and any other individual at or near the door of the TNT Lounge, such as money for narcotics. There was no testimony that Jones was familiar to Boyd as a known narcotics user or trafficker. There was no testimony that the vehicle in which Jones was a passenger was known to be used either by narcotics users or narcotics traffickers. In fact, there is nothing other than the fact that Jones's driver did not turn off the ignition of the van, that Jones entered the TNT Lounge and returned after about two minutes, and that Officer Boyd was aware from his experience that drug purchasers would make quick entrances and exits from this location. That is all there is. Is it enough?

Did Boyd have a reasonable cause to believe a crime may have occurred? Did Boyd have a particularized and objective basis for suspecting Jones was involved in

criminal activity? We do not know the rationale adopted by the trial court.

Some legitimate explanations for Jones's activity could include his interest in determining if the TNT Lounge had a cover charge that evening, his interest in determining that the TNT Lounge had a band or other entertainment that evening, or his interest in determining if an expected friend, male or female, was present in the club. If necessary, we could add a number of additional legitimate explanations to those set forth above.

All individuals have a constitutionally protected right of privacy. They have a right to be unhampered in their activity, to not be stopped by a police officer, and, as in this case, have their mouths forceably opened and a flashlight used to observe the contents of their mouth unless adequate and sufficient reason for such treatment exists. Would it be legitimate, proper, and constitutional for the Des Moines Police to position themselves at the doors of Veterans Auditorium on the eve of a rock concert and stop and frisk each person who entered because past experience would indicate that <u>some</u> of these entering individuals would have controlled substances in their possession? That broadcast intrusion would be just as constitutionally impermissible as we find the police activity to have been this evening and in this fact situation.

The stopping and searching of individuals who choose to enter and then leave a lounge such as the TNT and to do so from vehicles that are not disengaged and do so even with the reputation of the TNT Lounge and drug activity therein is impermissibly broad in its scope and stops and searches under these circumstances are not conducted with a reasonable cause to believe crime is being committed as necessary to make such stops and searches legitimate or constitutional.

We hold that under these particular facts and circumstances, Officer Boyd did not have reasonable cause to believe that Jones was involved in criminal activity. Jones's search was unconstitutional and the motion to suppress should have been sustained.

We therefore vacate the judgment entered against Jones and remand these proceedings to the district court for retrial.

VACATED AND REMANDED.