IN THE COURT OF APPEALS OF IOWA

No. 1-603 / 90-1906

FILED
FEB 26 1992
CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

703

TERENCE SCOTT EDGINGTON,

Defendant-Appellant.

Appeal from the Iowa District Court for Clarke, Warren and Lucas Counties, Darrell Goodhue, Thomas S. Bown, and Robert A. Hutchison, Judges.

Edgington appeals from his conviction, following a bench trial, for four counts of burglary in the second degree and one count of theft in the second degree. **REVERSED.**

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonlubol, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Amy M. Anderson, Assistant Attorney General, Gary Kimes, Clarke County Attorney, John Doran, Assistant Warren County Attorney, and Paul M. Goldsmith, Lucas County Attorney, for appellee.

Heard by Donielson, P.J., Schlegel and Sackett, JJ.

SACKETT, J.

Defendant-appellant Terence Edgington appeals his conviction of burglary and theft. Defendant contends the district court should have suppressed evidence found when, following his arrest for driving while his license was under suspension, his vehicle was immediately impounded and inventoried by two police officers. The immediate impoundment was not lawful, and the officers did not follow the department's procedures when they impounded and inventoried the defendant's vehicle. The evidence found in the search should be suppressed. We reverse.

Two police officers thought defendant was speeding and began to follow his car. The officers recognized the car as defendant's. One of the officers knew the defendant's license was under suspension. The defendant's car pulled off the road and stopped. The officers stopped behind the defendant's car, turned on the flashing lights and approached the car. The defendant was asked for his driver's license. Defendant told the officers his license was suspended. The defendant was alone. After confirming defendant's license was suspended, the officers arrested defendant and placed him in the squad car.

The officers then began what they referred to as an inventory search of defendant's car. The search revealed the stolen items that form the basis of this charge. Defendant contends the search was not proper.

The burden is on the State to justify the search either on a probable cause basis or as incident to a lawful impoundment. See South Dakota v. Opperman, 428 U.S. 364, 370-71, 96 S. Ct. 3092, 3097, 49 L. Ed. 2d 1000, 1006 (1976); State v. Baldwin, 396 N.W.2d 192, 194 (Iowa 1986); State v. Kuster, 353 N.W.2d 428, 430-31 (Iowa 1984); State v. Casteel, 392 N.W.2d 168, 170 (Iowa App. 1986). The State does not argue there was evidence to suggest there was stolen property in the vehicle. See Casteel, 392 N.W.2d at 171. The State justified the search as an inventory search.

Routine inventories of vehicles impounded by law enforcement officers may be justified for (1) the protection of the owner's property while it remains in police custody, (2) the protection of the officers against claims or disputes over the property, and (3) the protection of the officers from potential danger. Opperman, 428 U.S. at 369, 96 S. Ct. at 3097, 49 L. Ed. 2d at 1005. See also State v. Roth, 305 N.W.2d 501, 504-05 (Iowa 1981). Even if these procedures are viewed as "searches" rather than routine inventories, they are almost universally permissible under the "reasonableness" standard of the fourth amendment. Opperman, 428 U.S. at 370-72, 96 S. Ct. at 3097-98, 49 L. Ed. 2d 1006-07. But it is necessary the inventories be conducted as an incident to the caretaking function of the police, in accord with the

established procedures, and not as a guise for a warrantless search. See Opperman, 428 U.S. at 375, 96 S. Ct. at 3100, 49 L. Ed. 2d at 1008-09.

The legal validity of the inventory search depends on the lawfulness of the underlying impoundment. Opperman, 428 U.S. at 375, 96 S. Ct. at 3100, 49 L. Ed. 2d at 1009 ("The . . . police were undisputedly engaged in a caretaking search of a lawfully impounded vehicle."); United States v. Wilson, 636 F.2d 1161, 1163 (8th Cir. 1980) ("both the initial seizure and subsequent search must be legitimate"); In re 1965 Econoline, 109 Ariz. 433, 435, 511 P.2d 168, 170 (1973); People v. Nagel, 17 Cal.App.3d 492, 497, 95 Cal.Rptr. 129, 133 (1971); United States v. Pannell, 256 A.2d 925, 926 (D.C. 1969); Dunkum v. State, 138 Ga.App. 321, 325, 226 S.E.2d 133, 136 (1976); People v. Brown, 100 Ill.App.3d 57, 64, 55 Ill.Dec. 429, 433, 426 N.E.2d 575, 579 (1981) ("require that the police act properly in taking possession of the vehicle"); State v. Boster, 217 Kan. 618, 624, 539 P.2d 294, 299-300 (1975); State v. Goodrich, 256 N.W.2d 506, 510 (Minn. 1977); State v. Peterson, 583 S.W.2d 277, 280 (Mo. App. 1979); Kelly v. State, 607 P.2d 706, 707 (Okla.Crim.App. 1980); Benavides v. State, 600 S.W.2d 809, 810 (Tex.Crim.App. 1980).("before an inventory search can be upheld as lawful there must be an inquiry into the lawfulness of the impoundment"); State v. Singleton, 9 Wash. App. 327, 511 P.2d 1396 (1973). See

also Annot. 48 A.L.R.3d § 5, at 551-54. But see U.S. v. Pappas, 613 F.2d 324 (1st Cir. 1979).

In the absence of statute or ordinance, there must be reasonable grounds for impounding the vehicle. Singleton, 511 P.2d at 399; Boster, 533 P.2d at 299; Cleveland v. State, 410 So.2d 1378 1379 (Fla. App. 1982); Granville v. State, 348 So.2d 641, 642 (Fla. App. 1977); State v. Lunsford, 655 S.W.2d 921, 923 (Tenn. 1983); State v. Jewell, 338 So.2d 633 (La. 1976); State v. Slockbower, 79 N.J. 1, 12, 397 A.2d 1050, 1053 (1979).

The burden of demonstrating the need to impound is on the State. State v. McDaniel, 156 N.J. Super. 347, 383 A.2d 1174, 1179 (1978); Singleton, 511 P.2d at 1400; Miller v. State, 403 So.2d 1307, 1313 (Fla. 1981); State v. Crosby, 403 So.2d 1217, 1219 (La. 1981); Drinkard v. State, 584 S.W.2d 650, 654 (Tenn. 1979).

For an impoundment of an arrestee's vehicle to be reasonable under the fourth amendment, the arresting officer should be required (1) to advise the arrested operator his or her vehicle will be taken to a storage facility unless he or she directs the officer to make other reasonable arrangements for the vehicle, and (2) to comply with any reasonable alternatives. See Kuster, 353 N.W.2d at 432. The police officers did not follow their department's procedures. The impoundment procedures of the officers' department provided in applicable part:

* * *

5.2 A vehicle may be impounded when one of the following conditions exist:

* * *

c) when the owner/operator is arrested from the vehicle and
   1) the vehicle can not be left legally parked, or
   2) the officer is unable to locate a responsible person, agreeable to the owner, to respond within a reasonable time to take control of the vehicle.

When asked what happened, the arresting officer said:

> Q. So what happened after you identified him? What conversation did you or Officer Delanoit have with him? A. I asked the Defendant for his driver's license. He said he didn't have a driver's license, that it was under suspension. I then confirmed that through DOT and got the Defendant out of the vehicle and placed him under arrest.
>
> Q. For? A. Driving under suspension.
>
> Q. Had any search of the car been done before he was placed under arrest for that? A. No, sir.
>
> Q. What happened then? A. At that point I placed the Defendant in my vehicle, went back up to my patrol car door -- excuse me -- to the Defendant's vehicle and began to do an inventory search.
>
> Q. And why is that? A. We're required by our policy and procedures on all vehicles impounded to conduct an inventory search.
>
> Q. What basically does that written procedure require, Officer? A. The requirements for inventory is that any vehicle that's been impounded, where the driver's been arrested, or it's parked in an unsafe place on a roadway or illegally parked.
>
> Q. And he'd been arrested? A. Yes, sir.
>
> Q. Okay. Do you always necessarily search the vehicle and impound it, or are there other alternatives? A. There are other alternatives. That's the officer's discretion. But I always

impound the vehicle if I arrest the driver. (emphasis supplied).

Q. All right. What if there is a passenger? A. If there is a passenger and they have a driver's license, valid driver's license, and if it would be okay with the arrested subject, then there is a chance that I would let them take the vehicle.

Q. Okay. There was no passenger here. He was placed under arrest. What reasons do you have included in the procedure, the procedural guide, for impounding the vehicle? A. What reasons?

Q. What reasons. A. Would be because the Defendant was arrested; and the vehicle, where it was parked, was in an unsafe place on the roadway.

Q. Is there not any reasons involving the safety of the items in the vehicle, if any? A. Yes, that's why we do the inventory so we know -- we can document what is in the vehicle and so that Defendant is protected and the City is protected.

The vehicle was off the road when stopped. While it probably should not have stayed there for an extended period, there was no showing it could be removed more quickly by a tow truck than by defendant's family or friends. No effort was made by the police to allow the defendant to provide for the care of the vehicle. No inquiry was made as to what defendant wanted done with this vehicle. The officer's testimony was that he always impounded cars when the driver who was alone in the car was arrested. He did not even consider alternatives.

To justify impoundment of a car there must be a showing some reasonable necessity prompted the impoundment. For otherwise, police would be authorized to stop a car for a minor traffic violation, impound it and search it with

impunity. This is not in accord with the fourth amendment. The fourth amendment is not crushed by the four wheels of an automobile; automobiles do not work a forfeiture of privacy. United States v. Edwards, 554 F.2d 1331, 1339 (5th Cir. 1977); State v. McDaniel, 156 N.J. Super. 347, 358 , 383 A.2d 1174, 1179 (1978).

The evidence obtained in the search should be suppressed.

REVERSED.

Schlegel, J., concurs; Donielson, P.J. specially concurs.

DONIELSON, P.J. (specially concurring)

While I concur in the result, I write separately to express my reasoning and to examine an argument made by the State but not addressed by the majority.

I. **Inventory Search.** The State, first, contends the search was justified as an inventory search done to protect the interests of both the police and the defendant. The majority holds the decision to impound the defendant's vehicle was unreasonable, and therefore, the search was not reasonable as an inventory search. As it relates to this issue, I believe the officer's decision to impound the vehicle was unreasonable, but only in light of a specific provision in the Indianola Police Department written policy.

Sections 5.1 and 5.3 of the police policy state in relevant part:

> 5.1 The purpose of this policy is to establish reasonable procedures for the impoundment of vehicles by the Indianola Police Department. . . . Officers should consider the following guidelines when deciding whether or not to impound and inventory a vehicle:
>
> * * *
>
> 5.3 Officers should attempt the following alternatives prior to [police department] impoundment:
>
> a) insuring that the vehicle is legally parked and secure
>
> b) attempting to have a responsible person of the owner/operator['s] choosing, respond, within a reasonable time, to take control of the vehicle
>
> c) ask the owner/operator if he/she would prefer to arrange for a particular tow service under a private personal agreement - officers will not sign for the tow and response time must be reasonable . . . .(Emphasis added.)

While we are not called upon to decide the wisdom of these policies and procedures, their reasonableness is certainly clear. By these prescribed procedures an affirmative duty is placed upon an officer in a situation such as Officer Hamell found himself to offer an arrestee an alternative by which to avoid police department impoundment. In the instant case, there is no question but that the defendant was not given such an option. The procedures were not followed. The defendant was simply informed by Officer Hamell that his vehicle was to be impounded.

Because Officer Hamell failed to substantially comply with the Indianola Police Department policy regarding impoundment, I find the State has failed to meet its burden of showing by a preponderance of the evidence that the search was a reasonable inventory search under the totality of the circumstances. State v. Roth, 305 N.W.2d 501, 504 (Iowa), cert. denied, 454 U.S. 870 (1981). To that extent, I agree with the majority.

I do not believe there exists any constitutional basis for the section 5.3(b) and (c) duty prescribed by the Indianola Police Department policy, but once established, such a policy must be accounted for in our reasonableness analysis. See Colorado v. Bertine, 479 U.S. 367, 373-74, 107 S. Ct. 738, 742, 93 L. Ed. 2d 739, 747 (1987). I merely find Officer Hamell's noncompliance with the written policy in the instant case tips the scale in favor of a

finding that the impoundment was not reasonably necessary, and therefore, the search was unreasonable as an inventory search.

An officer in the field should not be unduly burdened with requirements and procedures which unnecessarily expand the duty the officer owes to the arrestee, and I have stated my belief that the courts should not impose such requirements in this context. See State v. Casteel, 392 N.W.2d 168, 175 (Iowa App. 1986)(Donielson, J. dissenting). Accordingly, I do not agree with the majority's proposition that in order for an impoundment to pass constitutional muster, "the arresting officer should be required (1) to advise the arrested operator his or her vehicle will be taken to a storage facility unless he or she directs the officer to make other reasonable arrangements for the vehicle, and (2) to comply with any reasonable alternatives."

This proposition completely ignores the United States Supreme Court's holding in Colorado v. Bertine, which squarely addresses this issue. 479 U.S. at 373-74, 107 S. Ct. at 742, 93 L. Ed. 2d at 747. The Court in Bertine cited its earlier decision in Illinois v. Lafayette, 462 U.S. 640, 103 S. Ct. 2605, 77 L. Ed. 2d 65 (1983), for the proposition that the "reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means," and concluded that

> here, as in Lafayette, reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure.

Bertine, 479 U.S. at 373-74, 107 S. Ct. at 742, 93 L. Ed. 2d at 747.

Furthermore, I find no support for the existence of such a duty in the pre-Bertine Iowa Supreme Court case cited as authority by the majority, State v. Kuster, 353 N.W.2d 428, 432 (Iowa 1984). In this connection, the court in Kuster merely quotes a treatise which discusses the issue as follows:

> It is submitted that for an impoundment of an arrestee's vehicle to be reasonable under the fourth amendment, the arresting officer should be required (i) to advise the arrested operator "that his vehicle will be taken to a police facility or private storage facility for safekeeping unless he directs the officer to dispose of it in some other lawful manner," and (ii) to comply with any reasonable alternative disposition requested. Surely, the police should not be expected to undertake delivery of the auto to some distant point or to make any other disposition which would be more onerous than having the vehicle brought to the station. But if the driver asks that his car be left at the scene and the circumstances are such that it can be lawfully parked in the vicinity, then his wishes should be respected. 2 W. LaFave, Search and Seizure § 7.3, at 559 (1978).

See Kuster, 353 N.W.2d at 431-32 (emphasis added). The language quoted in Kuster is ambiguous as to whether the officer must inform the arrestee that he or she has options or, rather, must simply accommodate any reasonable, unsolicited request made by the arrestee. Moreover, the

context of the quote in the opinion offers no guidance as to its intended contribution to Iowa law.

I believe the latter interpretation is the only appropriate standard to be applied in the absence of a statute, ordinance, or police policy establishing a duty for the officer to advise an arrestee of options. Such an interpretation would place Iowa in line with the United States Supreme Court's fourth amendment reasoning in Bertine.

Therefore, I believe the decision of this court today simply holds the Indianola Police Department to the policies and procedures it has prescribed for itself. To the extent the majority opinion is read as establishing a fourth amendment duty to advise an arrestee of his or her option to propose an alternative disposition of the vehicle, I dissent.

II. **Search Incident to Arrest.** Finally, I do not agree with the State's argument that the search is justifiable as a search incident to the defendant's lawful arrest; however, because we are to affirm the trial court if any reason for affirmance appears in the record, I feel the argument should be addressed.

The State contends the defendant's fourth amendment rights were not violated because a loaded gun was discovered under the driver's seat of the vehicle pursuant to the search incident to arrest exception. Discovery of the gun, the State asserts, gave the officers probable

cause to search the rest of the vehicle as well under the automobile exception.

The search incident to a lawful arrest exception "has long been considered valid because of the need 'to remove any weapons that [the arrestee] might seek to use in order to resist arrest or effect his escape' and the need to prevent the concealment or destruction of evidence." New York v. Belton, 453 U.S. 454, 457, 101 S. Ct. 2860, 2862, 69 L. Ed. 2d 768, 773 (1981) (quoting Chimel v. California, 395 U.S. 752, 763, 89 S. Ct. 2034, 2040, 23 L. Ed. 2d 685, 694 (1969)). Such searches are an exception to the warrant clause and are also deemed to be reasonable. Id. at 459, 101 S. Ct. at 2863, 69 L. Ed. 2d at 774. The scope of the search incident to arrest exception has been extended to cover a search of the passenger compartment of an automobile, the occupants of which the officer has lawfully arrested. Id. at 460, 101 S. Ct. at 2864, 69 L. Ed. 2d at 775. However, for the exception to apply, the search must be conducted contemporaneously with the arrest. See id.("[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."); see also State v. Shane, 255 N.W.2d 324, 327 (Iowa 1977) (search must be substantially contemporaneous with the arrest).

In State v. Shane, the Iowa Supreme Court held "the police may see to the safe custody and security of suspects

first and then make the limited search which the circumstances of the particular case permit." 255 N.W.2d at 328. Similarly, in State v. Sanders, the supreme court upheld, as a search incident to arrest, a search in which the officers found evidence in the passenger compartment of an automobile after ordering the occupants from the car and handcuffing them. 312 N.W.2d 534, 537 (Iowa 1981).

In the instant case, Officer Hamell arrested the defendant, placed him in the back seat of the patrol car, and only then proceeded to search the passenger compartment of the defendant's vehicle. While the instant case is similar to the Sanders case, the important difference is that in the instant case, the possibility that the defendant could obtain a weapon or destroy evidence contained in the vehicle was so remote as to negate the rationale underlying the exception. I, therefore, conclude the search that produced the gun cannot be justified as a search incident to a lawful arrest, and accordingly, the illegal discovery of the gun cannot be used to justify subsequent searches.

I concur in the result.