IN THE COURT OF APPEALS OF IOWA

No. 1-094 / 00-513
Filed April 27, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANGEL LATRISHA FOSTER,
Defendant-Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler (motion to suppress), Stephen C. Clarke (bench trial) and K.D. Briner (sentencing), Judges.

The defendant appeals her convictions and sentences, following a bench trial, for possession with intent to deliver marijuana and failure to affix a drug tax stamp. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Tricia A. Johnston, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Jack Lammers, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Zimmer and Miller, JJ.

ZIMMER, J.

Following a bench trial, Angel Foster appeals her convictions for possession with intent to deliver marijuana and failure to affix a drug tax stamp. On review, Foster contends the district court erred in denying her motion to suppress evidence obtained pursuant to a search. She also argues trial counsel was ineffective in failing to adequately preserve the suppression issue. We affirm.

I. Background Facts and Proceedings. In March of 1999, Officers Michael Dobson and Robert Duncan knocked on the door of 1500 Franklin Street in Waterloo in an effort to locate the owner of an illegally parked car. The house had an enclosed three-season porch with a doorway that led to the living room. The defendant, Angel Foster, answered the door and stepped on the porch to speak with the officers. She told them to wait while she went to get the owner of the vehicle. Officer Dobson asked Foster whether he could step inside the porch and she responded in the affirmative. When the officers entered the porch they immediately noticed the strong smell of marijuana. Larry Tillman then came to the door from inside the house and identified himself as the owner of the vehicle. He offered to move the car, left and did not return. The officers could hear someone inside the home spraying an aerosol can and saw a woman later identified as Nikki Love waving an incense stick near the doorway. The officers also noticed a partially burned marijuana cigarette on an ashtray on the front porch, near the doorway. At that point, Officer Dobson called for another car and a lab officer to collect the marijuana. Officer Duncan then entered the home and told the occupants that the officers knew they had been smoking marijuana and

they needed to turn it over. Foster stated they had smoked it already. The defendant, Nikki Love, and two small children were in the house at the time.

Nikki Love then called Julia Tillman, her mother. Tillman, the owner of the home, was at work. Officer Duncan spoke with Tillman on the phone and apprised her of what was transpiring at the home. Tillman then stated she was leaving work to come home and see what was going on.

Ed Tillman, a relative, came to the home and ordered everyone to leave. Officer Duncan told the occupants that if the officers left the home, everyone was required to leave. Foster, Tillman and Love then stood up and walked to a back hallway and closed a door behind them. Officer Dobson opened the door and told them the door had to remain open. When the three came out of the room, officers noticed the defendant had put on a coat while the other two had not. The officers, Foster, Tillman, Love, and the two children then vacated the house.

As Foster was leaving the house, officers became concerned she was attempting to remove evidence from the house in the overcoat she had put on. Officer Duncan asked her to remove her hand from the right pocket of the coat so he could search it. Foster then slipped her coat off. Officer Canby, who had arrived at the scene, caught the coat and checked the pocket. She discovered three baggies of marijuana. Foster was then placed under arrest. Julia Tillman arrived shortly thereafter and gave her consent to search the home.

Foster was subsequently charged with possession of marijuana with intent to deliver, in violation of Iowa Code section 124.401(1)(d) (1999), failure to affix a drug tax stamp, in violation of section 453B.12, and two counts of child endangerment, in violation of section 726.6(1)(a).

Foster filed a motion to suppress all evidence obtained from the search. After a hearing, the district court denied the request. Foster was tried at a bench trial on the first two counts and was found guilty as charged. Both counts of child endangerment were dismissed by agreement. At sentencing, the district court sentenced Foster to two concurrent, indeterminate terms of imprisonment not to exceed five years. The sentences were suspended and Foster was ordered to reside in a residential facility for one year. Foster appeals.

II. Motion to Suppress. Foster contends the district court erred in denying her motion to suppress because the search of her coat was not conducted pursuant to any recognized exception to the warrant requirement. Our review of the conclusion a district court reaches on a motion to suppress concerning Fourth Amendment issues is de novo. *State v. Gillespie,* 619 N.W.2d 345, 350 (Iowa 2000). The district court's factual findings on such a motion are binding if those findings are supported by substantial evidence. *Id.*

On June 23, 1999, Foster filed a motion to extend time for filing pretrial motions. On the same day, Foster filed her motion to suppress. On September 17, 1999, the court held a hearing on defendant's motion. At that hearing, the district court granted Foster's request to extend time. We therefore find Foster preserved this issue for appeal.

Because the search of Foster's coat was warrantless, it is per se unconstitutional unless is falls within a recognized exception. *Gillespie,* 619 N.W.2d at 350. The exceptions to the warrant requirement include searches based on consent, plain view, exigent circumstances, and searches incident to arrest. *State v. Breuer,* 577 N.W.2d 41, 45 (Iowa 1998). The State has the

burden of proving the exception by a preponderance of the evidence. *Gillespie,* 619 N.W.2d at 350. In its ruling on Foster's motion to suppress, entered September 28, 1999, the district court found the evidence obtained pursuant to the warrantless search of her person was admissible because 1) it "was supported by plain view coupled with a search incident to arrest," and 2) the officers had probable cause to effect her arrest.

The plain view doctrine allows for the seizure of an object found in plain view if the intrusion by the police was lawful and the incriminating nature of the object is immediately apparent. *State v. Chrisman,* 514 N.W.2d 57, 60 (Iowa 1994). While the plain view doctrine would apply to the seizure of the marijuana cigarette found on the porch, we are unable to see how it applies to the search of Foster's coat. At the time the officers decided to search Foster's coat, no marijuana was visible in the pocket. Therefore the fruits of the search are not admissible under the plain view exception to the warrant requirement.

We next consider whether the search of Foster's person was a valid search incident to lawful arrest. A search of an arrestee's person and the areas within his or her immediate control is justified as long as that search is substantially contemporaneous to the arrest and confined to the immediate vicinity of the arrest. *State v. Canas,* 597 N.W.2d 488, 492 (Iowa 1999). The purpose of the search is to prevent the destruction of evidence or to gain possession of a weapon that could be used to resist arrest. *Id.* In determining whether the search incident to arrest exception applies we must consider "whether the arrest was valid and, if so, whether the search was reasonable both

as to the area covered and the time within which it was made." *State v. Derifield,* 467 N.W.2d 297, 299 (Iowa Ct. App. 1991).

At the time the search of Foster's coat took place, no arrest had been made. However, "a search incident to an arrest need not be made *after* a formal arrest if it is substantially contemporaneous with it, provided probable cause for the arrest existed at the time of the search." *State v. Peterson,* 515 N.W.2d 23, 25 (Iowa 1994); *see also State v. Harvey,* 242 N.W.2d 330, 338-39 (Iowa 1976). In determining whether probable cause existed to effect an arrest, Iowa has adopted an objective assessment of the arresting officer's conduct in making the arrest. *State v. Meyer,* 543 N.W.2d 876, 879 (Iowa 1996). "So long as the officer is legally permitted and objectively authorized to do so, an arrest is constitutional." *Id.* (*citing State v. Hoffman,* 537 N.W.2d 767, 770 (Iowa 1995)).

We then consider whether probable cause existed for an arrest at the time the officers searched Foster's coat. Probable cause exists when a reasonable person, viewing the facts and circumstances within the officer's knowledge, would believe that an offense is being committed. *State v. Harris,* 490 N.W.2d 561, 563 (Iowa 1992). The facts must rise above mere suspicion but need not be strong enough to sustain a guilty conviction. *Id.* Here, the officers had more than a mere suspicion. They smelled the distinctive odor of marijuana emanating from the home. They saw the remnants of a marijuana cigarette on the porch.[1] They observed the occupants of the home trying to cover up the smell of marijuana by using aerosol spray and by waving an incense candle. When Foster was asked

[1] "Close proximity to contraband, especially when it is in plain view, is sufficient to justify a suspect's arrest, at least for further investigation." *State v. Horton,* ___ N.W.2d ___, ___ 2001 WL 274783, *5 (Iowa 2001).

to turn over the marijuana, she informed Officer Duncan "they had smoked it all already." We agree with the district court's conclusion that these facts and circumstances gave the officers probable cause to arrest Foster and Love for possession of marijuana. Additionally, the search was substantially contemporaneous to Foster's arrest because it occurred just prior to Foster's arrest. Likewise, the area of the search was confined to the immediate vicinity of Foster's person. Therefore, the search of Foster's coat was a valid search incident to a lawful arrest.

Foster contends there were no exigent circumstances that would have required the warrantless search of her coat. However, "[i]t is well-settled that a search incident to an arrest requires no additional justification." *Peterson,* 515 N.W.2d at 24. Therefore, the State was not required to show exigency existed. Because the search of Foster's coat was part of a search incident to a lawful arrest, we find the district court properly denied Foster's motion to suppress the fruits of that search.

Although the State was not required to show exigency existed to sustain this search, we conclude exigent circumstances existed to search the coat defendant was wearing. When defendant, Love and Tillman were told they had to leave the premises, all three went to a back room and attempted to close the door. After being told they could not do so, officers heard the three "shuffling around" in the room and saw defendant coming out of the room wearing a coat. Officers observed Foster "fidgeting" or attempting to move something in her right coat pocket as she was attempting to leave the house. Officers reasonably believed defendant was trying to conceal and remove evidence from a house

they believed would later be searched by consent or pursuant to a warrant. Although the district court did not reach the issue, we conclude exigent circumstances were present, which when coupled with the existing probable cause to arrest, relieved officers of the warrant requirement.

III. Ineffective Assistance of Counsel. Foster argues that counsel was ineffective for failing to file a motion to suppress before the deadline for pretrial motions had expired. Because the court granted Foster an extension to file pretrial motions, we find counsel breached no duty.

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

AFFIRMED.