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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-566 / 93-1756

STATE OF IOWA,

Appellee,

vs.

FRANK FRANCIS PENNIMAN,

Appellant.

Appeal from the Iowa District Court for Sac County, Gary L. McMinimee, Judge.

Frank Penniman appeals the judgment and sentence entered upon his convictions, following a jury trial, of possession of marijuana, possession of a controlled substance with intent to deliver, and failure to affix a tax stamp. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Annette L. Hitchcock, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, David P. Jennett, County Attorney, and Pamela Dettmann, Assistant County Attorney, for appellee.

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

HUITINK, J.

Frank Penniman appeals the judgment and sentence entered upon his convictions, following a jury trial, of possession of marijuana, possession of a controlled substance with intent to deliver, and failure to affix a tax stamp in violation of Iowa Code sections 204.401(3), 204.401(1)(c)(6), 421A.12 and 421A.7(1) (1991). We affirm.

On December 24, 1992, Iowa State Patrol Trooper Phillip Hesnard observed a van driven by Penniman traveling seventy-two miles per hour in a fifty-five-mile-per-hour zone just west of the Sac City limits. When the van entered the city limits, Hesnard observed the van traveling at sixty-six miles per hour in a thirty-five-mile-per-hour zone. Hesnard testified he believed the driver was trying to run from him and stopped the van for speeding. As Hesnard approached the driver's side of the van, Penniman began to exit the vehicle. Hesnard ordered Penniman to get back into the van, and Hesnard stood at the driver's side window.

Hesnard saw a black nylon bag on the driver's side floor and asked what it was. Penniman stated nothing was in the bag. Hesnard testified his practice is to always be on the lookout for drugs, alcohol, and weapons. He asked if he could take a look at it, Penniman picked up the bag and began to unzip it. Hesnard testified he took the bag from Penniman at this point for safety purposes. The bag contained a brass pipe, a green leafy substance, and other drug paraphernalia.

Believing he had probable cause to search the rest of the van, Hesnard radioed for Officer Kenny McClure to bring a drug dog to the van. Penniman contended Hesnard could not search the van without a warrant. The dog arrived and alerted Hesnard and McClure to a yellow packet containing marijuana and drug paraphernalia and a camera case containing methamphetamine. Penniman was arrested for possession of marijuana, possession of a controlled substance, methamphetamine, and failure to affix a tax stamp.

Penniman moved to suppress all evidence seized as a result of this encounter. At the hearing on this motion Penniman admitted he was speeding. Hesnard testified he took the bag as Penniman began to open it for safety concerns. Hesnard also testified Penniman stated he would not mind if he looked in the bag. After seeing the contents of the bag, Hesnard explained he believed he had probable cause to search the van.

Penniman testified he did not give Hesnard permission to look in the bag. Rather, Penniman stated he started to hand the bag to Hesnard when Hesnard grabbed it away from him. The district court concluded Hesnard had probable cause to search the van and overruled the motion.

On appeal Penniman contends the reason given for Hesnard's stop of his van was pretextual, as Penniman is a known member of the Sons of Silence Motorcycle Gang. He further contends that even if the stop was lawful, the

subsequent searches of his black nylon bag and van were conducted without a warrant, without probable cause or exigent circumstances, and without valid consent.

The motion to suppress raises a Fourth-Amendment challenge to the evidence obtained during this encounter. Our review on this constitutional issue is therefore de novo. State v. Riley, 501 N.W.2d 487, 488 (Iowa 1993).

Penniman first claims that Hesnard stopped his van because he recognized him as a member of the Sons of Silence and suspected he was involved in criminal activity. We disagree.

When a stop is challenged on the basis that reasonable cause did not exist, the State must show the officer had specific and articulable cause to support a reasonable belief that criminal activity may have occurred. State v. Lamp, 322 N.W.2d 48, 51 (Iowa 1982). Hesnard testified he stopped the van for speeding both outside and inside the Sac City limits. He also testified he believed the van was trying to outrun him.

Our supreme court has recently examined the criteria for a police officer to stop a vehicle for investigative purposes.

> When a peace officer observes a traffic offense, however minor, the officer has probable cause to stop the driver of the vehicle. Pennsylvania v. Mimms, 434 U.S. 106, 111, 98 S. Ct. 330, 333, 54 L. Ed. 2d 331, 337 (1977); United States v. Cummins, 920 F.2d 498, 500 (8th Cir. 1990), cert. denied, --- U.S. ---, 112 S. Ct. 428, 116 L. Ed. 2d 448 (1991). A peace officer may also stop and briefly detain a person for investigative purposes if the officer has reasonable cause to believe a

> crime may have occurred or criminal activity is afoot. Terry v. Ohio, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884-85, 20 L. Ed. 2d 889, 911 (1968); State v. Rosenstiel, 473 N.W.2d 59, 61 (Iowa 1991).

State v. Mitchell, 498 N.W.2d 691, 693 (Iowa 1993).

State troopers have probable cause to stop a vehicle for speeding. Iowa Code § 805.1(6) (1993). Penniman admitted he was speeding; therefore Hesnard had reasonable grounds to stop the vehicle.

Hesnard also testified he did not know it was Penniman driving the van until Penniman began to exit the van after the stop. Simply because it is Hesnard's routine to be on the lookout for weapons, drugs, and alcohol during vehicle stops does not mean the stop of Penniman's vehicle was pretextual. We find nothing in the record to support Penniman's claim that the initial stop of his vehicle was for reasons other than speeding.

We also disagree with Penniman's intention that the search of his black bag was unlawful.

A warrantless search and seizure is per se unreasonable under the Fourth Amendment unless it falls within a recognized exception such as consent, search incident to arrest, probable cause and exigent circumstances, or plain view. State v. Howard, 509 N.W.2d 764, 766 (Iowa 1993) (citations omitted). The State must prove the legality of the search and seizure by a preponderance of the evidence. Id.

In the course of approaching Penniman's van for investigation of the speeding violation, Hesnard saw a black nylon bag from the driver's side window. The bag was in Hesnard's plain view, and he believed it was large enough to hold a weapon. In this case two exceptions for a warrantless search are relevant: consent and probable cause coupled with exigent circumstances.

Both parties testified Hesnard asked whether he could take a look in the bag. Penniman testified he did not consent to the search. Whether Penniman verbally consented to Hesnard's request, the record shows Penniman picked up the bag and began to open it in response to the request. Penniman also testified he started to hand the bag to Hesnard. Cooperation is evidence of voluntariness. State v. Garcia, 461 N.W.2d 460, 464 (Iowa 1990). There is no evidence of threats or coercion. Based on totality of the circumstances, we conclude Penniman voluntarily consented to the search of the bag.

Even if Penniman did not consent to the search of the bag, Hesnard had grounds to seize and search the bag based on probable cause and exigent circumstances. Both parties testified Hesnard grabbed the bag after Penniman began to open it himself. Hesnard stated he took the bag for safety reasons. Given his initial perception of the bag and Penniman's opening of the bag, a legitimate concern for his safety justified taking the bag from Penniman. See Mimms, 434 U.S. at 110, 98 S. Ct. at 330, 54 L. Ed. at 336-37

(citations omitted) ("we have before expressly declined to accept the argument that traffic violations necessarily involve less danger to officers than other types of confrontations.") Based on the totality of the circumstances, probable cause and exigent circumstances also warranted the taking and search of the bag.

Penniman's last contention, that the search of his van was without probable cause, is also without merit.

Probable cause for a vehicle search can be established by the officer's discovery of an illegal weapon or other contraband. State v. Edgington, 487 N.W.2d 675, 678 (Iowa 1992). Although no weapon was found, Hesnard's search of the bag revealed marijuana and drug paraphernalia. Hesnard's discovery of the contraband established the necessary probable cause to search the van. The exigency requirement is satisfied by the van's inherent mobility. See id. (citation omitted); State v. Cain, 400 N.W.2d 582, 585 (Iowa 1987). The subsequent canine search of the vehicle under these circumstances does not violate the Fourth Amendment.

After our de novo review of the record, we conclude the trial court properly denied Penniman's motion to suppress. We have carefully considered all Penniman's claims and find them to be without merit. The decision of the district court is affirmed in its entirety.

AFFIRMED.

Hayden, P.J., and Sackett, J., concur specially.

HAYDEN, P.J. (concurring specially)

Unlike the majority, I do not conclude defendant-appellant voluntarily consented to the search of the black nylon bag.

I do agree with the majority the officer had grounds to seize and search this black bag. I determine, like the majority, the officer had probable cause to take it from the defendant. Because of the exigent circumstances, the officer was justifiably concerned for his safety. I concur with the majority the officer had grounds to search the bag because of the totality of the circumstances of which he was confronted at the time of the stop.

I also concur the officer had probable cause to search defendant's vehicle.

> (T)he automobile exception to the fourth amendment requirement of a search warrant is applicable if probable cause and exigent circumstances exist at the time the automobile is stopped by the police.

State v. Edgington, 487 N.W.2d 675, 677 (Iowa 1992) (citation omitted).

> Probable cause for a vehicle search exists when the facts and circumstances would lead a reasonably prudent person to believe that the vehicle contains contraband. The facts and circumstances upon which a finding of probable cause is based include "the sum total . . . and the synthesis of what the police have heard, what they know, and what they observe as trained officers."

United States v. Strickland, 902 F.2d 937, 943 (11th Cir. 1990) (citations omitted).

For the above reasons and authorities cited I concur with the majority in affirming appellant's conviction.

SACKETT, J. (concurring specially)

I, too, concur specially.

I would affirm the conviction.

The State argued ordering the defendant back in the van was necessary for the officer's safety. The State was not able to explain why the officer was safer with the defendant back in the van where he could not be readily observed and could have weapons than the officer would be if defendant were standing totally visible to the officer along the road the only conclusion. The only conclusion I can reach is the officer would be safer with the defendant clearly visible along the road.