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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	189
vs.	)	
WENDELL CARL HARRINGTON,	)	8-354 87-1175
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Polk County (No. 35027), Theodore H. Miller and Jerrold W. Jordan, Judges.

Defendant appeals from his convictions, following a jury trial, for three counts of second-degree burglary. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Raymond E. Rogers, Acting Chief Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Ann E. Brenden, Assistant Attorney General; and Joseph Weeg, Assistant Polk County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson and Habhab, JJ.

HABHAB, J. 181

The defendant was convicted of three counts of second-degree burglary. He appeals, urging several grounds for reversal. For reasons hereafter set forth, we affirm in part, reverse in part, and remand.

I.

On March 27, 1987, the Des Moines Police arrested and questioned a burglary suspect, Kevin Brown, who informed them that defendant here was active in burglaries and that he had items to sell which were similar to items taken in burglaries. Brown also revealed that he had been with the defendant and knew of defendant's activity in burglaries. On the same day, the police searched the defendant's residence and arrested his housemate on a charge of exercising control over stolen property. Police officers then placed the defendant under surveillance.

Des Moines Police Officer James Harkin testified that at 7:00 p.m. on March 27, 1987, he observed the defendant leave 1364 East 17th Court in Des Moines and drive away in a 1978 Datsun. The officer followed the defendant and watched him park the car in the 1400 block of East 12th Street. The defendant left the car on foot, walked to Cleveland Street, and then continued walking on East 9th Street. After losing sight of the defendant for approximately twenty-five minutes, the officer subsequently observed the defendant walk out between two houses and back

onto East 12th Street. When the officer last saw the defendant walking on East 9th Street, the defendant's hands were empty; when the officer again saw the defendant on East 12th Street, the defendant was carrying a pillowcase with items inside it.

At this point, the officer stopped the defendant and searched the pillowcase. The items in the pillowcase were later identified as items stolen from two burglaries in the immediate vicinity on the day of the arrest.

After defendant was arrested for an unrelated burglary a few days later, he was charged and tried for three counts of burglary in the second degree. The jury found him guilty as charged, and he has appealed from the resulting convictions.

II.

The defendant contends the district court should have suppressed the evidence resulting from the stop and search described above, which he claims was illegal and in violation of his fourth amendment rights. The defendant further contends that the police had no reasonable cause to stop him.

The fourth amendment requires a showing of reasonable cause to justify a stop for investigatory purposes. United States v. Brignoni-Ponce, 422 U.S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975); Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968); State v.

Lamp, 322 N.W.2d 48, 51 (Iowa 1982). "When a stop is challenged on the basis that reasonable cause did not exist, the State must show that the stopping officer had 'specific and articulable cause to support a reasonable belief that criminal activity may have occurred.'" State v. Lamp, 322 N.W.2d at 51 (quoting State v. Aschenbrenner, 289 N.W.2d 618, 619 (Iowa 1980)).

When reviewing issues that deal with constitutional rights, our review is de novo. State v. Lamp, 322 N.W.2d at 50. In determining whether the trial court's denial of the defendant's motion to suppress was proper, this court may consider trial testimony as well as evidence adduced at the evidentiary hearing on the motion. State v. Donnell, 239 N.W.2d 575, 577-78 (Iowa 1976). Inquiry into whether reasonable cause for the investigatory stop existed does not end with an officer's subjective rationale. "The test is not the policeman's subjective theory, but whether the record discloses articulable facts were available to the officer to justify the stop." Id. at 578; see also State v. Stevens, 394 N.W.2d 388, 391 (Iowa 1986), cert. denied 479 U.S. 1057, 107 S. Ct. 935, 93 L. Ed. 2d 986 (1987); State v. Peck, 229 N.W.2d 680, 686 (Iowa App. 1982).

The State points to the following as grounds for the stop: (1) the suspicious circumstances of defendant disappearing between houses without a pillowcase and his reappearance minutes later carrying a pillowcase filled

with things; (2) the fact that several burglaries had occurred in the area where defendant was seen, at the rate of four to five per evening; (3) the fact that when defendant left his car on foot he "looked around about himself" in a manner drawing the officers' suspicions; (4) the fact that defendant lived with a person who had been arrested that same day for selling stolen property and who had been connected to the sale of burgled items; and (5) the fact that defendant had been identified by a fellow burglar, without promise of favor, as being "very active" in burglaries in that area, and as having items to sell similar to the burgled items.

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow crime to occur or a criminal to escape. . . . . A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

State v. Stevens, 394 N.W.2d at 391 (quoting Adams v. Williams, 407 U.S. 143, 145-46, 92 S. Ct. 1921, 1923, 32 L. Ed. 2d 612, 616-17 (1972)). "Circumstances for an investigatory stop exist 'where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot . . . .'" State v. Donnell, 239 N.W.2d at 577 (quoting Terry v. Ohio, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884, 20 L. Ed. 2d 889, 911 (1968)).

The facts pointed to by the State as grounds for the stop provide ample support for the officers' belief that the defendant was involved in criminal activity. These facts are supported by our review of the record. Accordingly, we find that this stop was justified by reasonable suspicion and the district court's denial of the defendant's suppression motion was proper.

III.

Defendant next contends that he was entitled to have the jury instructed on the lesser offense of criminal trespass, claiming it is included within the crime of second-degree burglary. The trial court denied this request. We agree with the trial court.

The determination of whether a crime is an included offense involves a legal test and a factual test. State v. Morgan, 322 N.W.2d 68, 69 (Iowa 1982). To pass the legal or element prong of our test for lesser-included offenses, the lesser offense must be composed solely of some but not all elements of the greater offense. The lesser offense necessarily is included in the greater offense if it is impossible to commit the greater offense without also committing the lesser. State v. Mount, 422 N.W.2d 497 (Iowa 1988); State v. Aswegan, 331 N.W.2d 93, 97 (Iowa 1983). The factual test asks whether "there is a factual basis in the record for submitting the included offense to the jury." State v. Millspaugh, 257 N.W.2d 513, 516 (Iowa 1977).

Both the State and defendant agree that the legal test is met. The burglary charges against the defendant were all brought under the "break and/or enter" statutory definition. As such, criminal trespass meets the legal test as a lesser-included offense here. State v. Wales, 325 N.W.2d 87, 89 (Iowa 1982); State v. Sangster, 299 N.W.2d 661, 664 (Iowa 1980).

With regard to the factual test, however, we do not find, nor does the defendant point to, a factual basis in the record for submitting criminal trespass. As our supreme court in State v. Morgan, 322 N.W.2d 68, 70 (Iowa 1982), stated:

> . . . The principle that a not guilty plea controverts all elements is not strictly applied when courts come to applying the factual test of included offenses. In the included offense setting the courts apply a principle that when the major offense consist of elements A, B, & C, the lesser offense consists of elements B & C, and the record does not contain substantial evidence from some quarter controverting element A, the State's case stands or falls on the major offense. As stated with particular reference to robbery in 4 Wharton's Criminal Procedure § 545, at 30-31 (12th ed. C. Torcia 1976), "If the evidence, in a prosecution for robbery or assault with intent to rob warrants a conviction on the offense charged, but there is no evidence apart from the robbery evidence which would warrant a conviction for assault and battery, or the evidence indicates that if the defendant is guilty at all he is guilty of only the greater offense, an instruction on the lesser offense need not be given.

Under Morgan, for the lesser-included offense to be submitted, "the record [must] contain substantial evidence from some quarter controverting" an element that

distinguishes the greater offense (burglary) from the lesser (trespass). Id. at 69-70. The distinguishing element here involves the intent requirement. As our supreme court in State v. Sangster, 299 N.W.2d 661, 664 (Iowa 1980), states:

> Although the intent elements differ, the intent for criminal trespass is a constituent of the intent element in burglary. The trespass offense merely requires an intent to commit a public offense whereas the burglary offense requires an intent to commit a particular kind of public offense, 'a felony assault or theft.' [Iowa Code] Section 713.1.

In the case before us the defendant does not contest the issue of felonious intent. The fighting issue is whether the defendant was sufficiently connected to the burglaries. This case then is clearly a contest to determine whether the defendant committed the alleged burglaries or whether he did not.

The defendant argues that the jury might find a failure of proof on the felonious intent issue but find that the defendant intended to commit a nonfelonious theft. However, the court in Morgan rejected this argument. Morgan, 322 N.W.2d at 69. The court stated it is not a question whether the jury could find the defendant guilty of the lesser offense, the issue is does the record contain substantial evidence controverting the distinguishing element. Id. at 69 & 70. It is clear to us that the controverted evidence on the intent element goes to conviction on the burglary charge while absence or lack of

proof regarding intent goes to acquittal on the burglary charge.

In this case there was no evidence nor dispute concerning whether defendant committed a felony theft or a nonfelony theft. As such, the trial court did not err when it denied defendant's request for a lesser offense instruction. We believe in keeping with State v. Mount, 422 N.W.2d 497, 501 (Iowa 1988), that "a reasonable person viewing the evidence could only conclude that the major offense of second-degree burglary, or no offense, has been committed."

IV.

Finally, defendant contends the district court erred by ordering him to make restitution to the victims of additional burglaries for which he was not charged or convicted. He argues the restitution order was erroneous for two reasons: (1) he had made no in-court admission of any of these other burglaries, and (2) his out-of-court admissions of certain burglaries were involuntary because they were made in return for a promise of immunity.

The State asserts that defendant's in-court statement that the presentence report was correct constituted an admission of certain burglaries and justified the restitution order as to those burglaries. However, the State agrees with defendant that his out-of-court statements admitting certain other burglaries were made in

return for a promise of immunity and therefore cannot support a restitution order. The State asks that the restitution order be modified to exclude restitution for the burglaries admitted in the out-of-court statements.

Our supreme court has consistently held that statements obtained as a result of promissory leniency are involuntary and inadmissible. State v. Rhiner, 352 N.W.2d 258, 263-64 (Iowa 1984); State v. Kase, 344 N.W.2d 223, 225-26 (Iowa 1984); State v. Hrbek, 336 N.W.2d 431, 436 (Iowa 1983); State v. Hodges, 326 N.W.2d 345, 349 (Iowa 1982); State v. Hilpipre, 242 N.W.2d 306, 310-12 (Iowa 1976); State v. Ware, 205 N.W.2d 700, 703 (Iowa 1973); State v. Mullin, 249 Iowa 10, 18, 85 N.W.2d 598, 602-03 (1957). The restitution order should be revised so as not to require defendant to make restitution for crimes the admissions to which were obtained in response to a promise of leniency.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.