IN THE COURT OF APPEALS OF IOWA

No. 0-775 / 99-1674
Filed February 28, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT JOSEPH FOXHOVEN,
Defendant-Appellant.

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Appeal from the Iowa District Court for Polk County, Artis Reis, Judge.

Robert Foxhoven appeals from his convictions and sentences for possession of crack cocaine with intent to deliver in violation of Iowa Code section 124.401(1)(c)(3) (1997) and failure to possess a tax stamp in violation of sections 453B.3 and 453B.12. **REVERSED AND REMANDED.**

Scott Bandstra, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Denise A. Timmins, Assistant Attorney General, and John P. Sarcone, County Attorney, and Daniel Voogt, and Stephanie Cox, Assistant County Attorneys, for appellee.

Heard by Streit, P.J., and Hecht and Vaitheswaran, JJ.

VAITHESWARAN, J.

A jury convicted Robert Foxhoven of possession of a controlled substance (crack cocaine) with intent to deliver and failure to possess a tax stamp. On appeal, Foxhoven contends: (1) evidence obtained following a warrantless search of his residence should have been suppressed; (2) there was insufficient evidence to show cocaine base is sold by dosage unit, an essential element for a tax stamp conviction; and (3) the district court erred in overruling his objections to jury instructions pertaining to dosage units. We reverse and remand.

I. Background Facts and Proceedings

Des Moines police officers Robert Clark, Jeffrey Vaughn, and Holly Glenn, in search of a woman wanted on an outstanding arrest warrant, went to Foxhoven's home. They knew Foxhoven was a crack user and his home was a crack house and an apparent shelter for wanted persons.

Foxhoven met the officers outside his home. The officers asked him whether they could go inside and check for the wanted woman. Foxhoven informed them the wanted woman was not there and they could not go in. Officer Clark asked why. Foxhoven responded he had "dope laid up in the house." Upon hearing this, the officers immediately proceeded into the home without a warrant, taking Foxhoven with them and securing him inside.

Officer Clark headed to the dimly lit second floor while the other two officers remained on the first level with Foxhoven and one of the home's other occupants. As Clark reached the landing, he startled a woman who was stuffing something into her bra. Clark handcuffed her. He then saw a man in an adjacent room, called for back-up assistance, and proceeded to handcuff him. In

the course of checking the area for weapons, Officer Clark noticed plastic baggies, often used to package crack, strewn on the floor.

When Officer Glenn arrived on the landing, she spotted an above-the-ankle snow boot at the top of the stairs. She shone her flashlight on the boot and discerned a baggie in the heel containing several rocks of crack cocaine. Trial testimony revealed the baggie contained fourteen rocks of crack cocaine totaling 2.79 grams.

The State charged Foxhoven with conspiracy to deliver a controlled substance, possession of a controlled substance with intent to deliver, and failure to possess a tax stamp. *See* Iowa Code §§ 124.401(1)(c)(3); 453B.3, 453B.12 (1997). Foxhoven moved to suppress the evidence seized during the search of his residence. The district court denied the motion and the case proceeded to trial. The jury convicted Foxhoven of the possession with intent to deliver and tax stamp charges and the district court sentenced him to ten and five year prison terms, respectively, to be served concurrently. This appeal followed.

II. Suppression Ruling

Foxhoven contends the officers' search of his home violated his constitutional right to be free from unreasonable searches and seizures guaranteed by the United States and Iowa Constitutions. U.S. Const. amend. IV; Iowa Const. art 1, § 8. We review this claim de novo in light of the totality of the circumstances. *State v. Jackson*, 542 N.W.2d 842, 844 (Iowa 1996).

Warrantless searches and seizures are per se unreasonable unless they fall within a recognized exception to the warrant requirement such as consent, exigent circumstances, or plain view. *State v. Breuer*, 577 N.W.2d 41, 44 (Iowa

1998). The parties agree Foxhoven did not consent to the entry into his home. Instead, they focus on the applicability of the exigent circumstances and plain view exceptions. We must determine (1) whether the warrantless entry into Foxhoven's home was supported by exigent circumstances and (2) if it was, whether drugs found in the boot were in plain view.

A. Exigent Circumstances. The officers testified Foxhoven's admission that there were drugs in the home created an exigency justifying a warrantless entry. We agree the exigent circumstances exception may justify a warrantless search and seizure to prevent destruction of evidence. *Johnson v. United States*, 333 U.S. 10, 68 S. Ct. 367, 369, 92 L. Ed. 436, 439 (1948); *State v. Jackson*, 210 N.W.2d 537, 540 (Iowa 1973). However, the mere suspicion that drugs might be present cannot justify a warrantless search under this exception. *See State v. Ahern*, 227 N.W.2d 164, 167-8 (Iowa 1975); *cf. State v. Canas*, 597 N.W.2d 488, 493 (Iowa 1999) (holding suspicion that drugs present in motel room did not justify warrantless entry under emergency aid exception to warrant requirement).[1] Instead, courts have generally required a showing of an objectively reasonable belief by officers that occupants inside a home are aware of the officers' presence and may therefore destroy evidence. *United States v. Tovar-Rico*, 61 F. 3d 1529, 1535 (11th Cir. 1995); *United States v. Buchanan,* 904 F.2d 349, 354 (6th Cir. 1990). Absent specific evidence that others are present in the house, a warrantless entry to prevent destruction of evidence has generally been held

[1] Many federal circuit courts agree. *See United States v. Howard*, 106 F.3d 70, 74 (5th Cir. 1997); *United States v. Driver*, 776 F.2d 807, 811 (9th Cir. 1985); *United States v. Moreno*, 701 F.2d 815, 818 (9th Cir. 1983); *United States v. Korman*, 614 F.2d 541, 550 (6th Cir. 1980).

unreasonable. *See Vale v. Louisiana*, 399 U.S. 30, 34, 90 S. Ct. 1969, 1972, Ed. 2d 409, 411 (1970); *United States v. Perez*, 700 F. 2d 1232, 1237 (8th Cir. 1983).[2]

Officers Vaughn and Glenn conceded they had no reason to believe there was anyone in the home to destroy the drugs.[3] Indeed, the only person they knew to be an occupant of the house was outside with them. Nevertheless, they insisted drugs could have been destroyed had they not entered immediately.[4] Officer Vaughn's testimony is instructive:

> Q: Your testimony is you had not seen anyone else in the Foxhoven residence; is that correct? A: That's correct.
> Q: If we're to believe your statement that Mr. Foxhoven said that there is dope laid out inside, he was not concealing that from you, is he? A: No.
> Q: Wouldn't you agree with me, officer, that you could have held Mr. Foxhoven at that time and got a warrant issued to look through the house? A: No.

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[2] *Accord State v. Lewis*, 231 F.3d 238, 242 (6th Cir. 2000); *United States v. Lynch*, 934 F.2d 1226, 1232 (11th Cir. 1991); *United States v. Veillette*, 778 F.2d 899, 902-903 (1st Cir. 1985); *United States v. Elkins*, 95 F. Supp. 796, 817 (W.D. Tenn. 2000); *United States v. Price*, 441 F. Supp. 814, 187 (E.D. Ark. 1977); *cf. United States v. Parris*, 17 F.3d 227, 229 (8th Cir.), *cert. denied*, 511 U.S. 1077, 114 S. Ct. 1662, 128 :L. Ed. 2d 378 (1994) (upholding warrantless entry into home where informant learned at last minute transaction would take place with defendant in neighboring home rather then home officers had obtained a warrant to search); *United States v. Kulcsar*, 586 F.2d 1283, 1287 (8th Cir. 1978) (upholding warrantless entry into drug supplier's home where officers saw defendant look out window, then duck down, officers presence was visible, and informant was on the way); *State v. Davis*, 383 N.W.2d 524, 383 (Iowa 1986) (holding occupants could have been alerted to arrest of former occupant, justifying warrantless entry into home to secure premises and await warrant.)

[3] Officer Clark was not asked whether he saw anyone in the house or had reason to believe anyone was inside.

[4] The State does not argue the entry was justified to search for the wanted person. Therefore, we need not consider this issue. *See Steagland v. United States*, 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d. 38 (1981) (absent consent or exigent circumstances, warrantless entry into third party's home to apprehend wanted person unconstitutional); *State v. Luloff,* 325 N.W.2d 103, 105 (Iowa 1982)(same).

> Q: Why is that? A: Because if there was somebody inside, eventually they would have come out during the time that it would have taken us to get a warrant.
> Q: If they would have come out, you could have held them too, correct? A: Correct.
> Q: If people are walking out, they probably can't tell the people upstairs or wherever in the Foxhoven residence that you're there; isn't that correct? A: That's correct.

This testimony highlights the tenuousness of the officers' exigency claim. Because the officers had no evidence there were occupants inside the house at the time they entered, their belief that drugs might be destroyed was unreasonable.

We reach this conclusion notwithstanding the officers' knowledge that Foxhoven was a crack user, lived in a crack house, and had previously welcomed wanted persons to his home. The fact the officers had this information well in advance of their warrantless entry suggests they had time to apply for a search warrant. *See Illinois v. McArthur,* No. 99-1132, slip op. at 3 (U.S. Feb. 20, 2001) (upholding officers' decision to restrain defendant outside premises until warrant was obtained to search for suspected marijuana); *United States v. Patino*, 830 F.2d 1413, 1417 (7th Cir. 1987). Additionally, the fact the officers did not search Foxhoven's home or arrest him on previous occasions despite their knowledge of his illegal conduct renders suspect their present claim of exigency. *See United States v. Timberlake*, 896 F.2d 592, 597 (C.A.D.C. 1990). We conclude the officers' warrantless entry into the home occupied by Foxhoven was not justified under the exigent circumstances exception to the warrant requirement and, accordingly, was illegal.

B. Plain View. Foxhoven next contends the drugs found in the boot were not in plain view, rendering the warrantless seizure unreasonable. The plain

view doctrine requires proof of the following elements: 1) the initial entry affording the plain view must be valid; 2) the item seized must be in plain view; and 3) the incriminating character of the item must be "immediately apparent." *See Horton v. California*, 496 U.S. 128, 136-137, 110 S. Ct. 2301, 2308, 110 L. Ed. 2d 112 (1990); *U.S. v. Weinbender*, 109 F.3d 1327, 1330 (8th Cir. 1997); *State v. Vincik*, 436 N.W.2d 350, 354 (Iowa 1989) (restating second and third element as singular requirement of "inadvertent discovery"). In light of our conclusion that the initial entry was unlawful, the drug seizure cannot be justified under the plain view doctrine. Accordingly, the officers' seizure of the drugs was unconstitutional.

We find it unnecessary to address Foxhoven's remaining arguments. We reverse and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.