

DEC 28 1977

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Appellee,	)	Filed December 28, 1977
vs.	)	
GARY HARRY,	)	317
Appellant.	)	60040

Appeal from Clayton District Court - L. John Degnan, Judge.

Defendant appeals his conviction of breaking and entering a violation of § 708.8, The Code, assigning as error district court rulings on motion to suppress and objections to jury instructions. AFFIRMED.

Patrick J. Life, of Life, Davis & Life and Scott K. Campbell, of Oskaloosa, and James Allen, of Dixon, Illinois, counsel for appellant.

Richard C. Turner, Attorney General of Iowa, and Mark S. Beckman, Assistant Attorney General, counsel for appellee.

Heard by Allbee, C. J., Donielson, Snell, Oxberger and Carter, JJ.

DONIELSON, J.

Defendant-Gary Harry appeals his conviction of breaking and entering, a violation of § 708.8, The Code, assigning as error various trial court rulings on his motion to suppress and objections to certain jury instructions. On January 4, 1974, at approximately 1:15 a.m., Delaware County Deputy Sheriff David Benter stopped a truck in Edgewood being driven by the defendant. The vehicle was registered to a Clarence Kiefer, the father of Ronald Kiefer who was a passenger in the vehicle along with Connie Dement. Through the license plate number, Benter was able to identify the truck as belonging to Clarence Kiefer, who was suspected, along with the defendant, of stealing antiques. The vehicle also matched the description and license number received in a police communication from Dubuque and Dixon, Illinois.

After observing the vehicle being driven suspiciously through an alley with its lights turned off, Benter stopped the truck. As he approached, he saw some merchandise in the back which he believed to be antiques. The occupants of the vehicle were then requested to drive the truck to city hall, at which time the vehicle was taken into custody. Although defendant was not arrested at this time, there was conflicting testimony regarding whether he was in police custody at that point.

Shortly after arriving at the police station, Benter was sent to attempt to obtain a search warrant for the vehicle. Apparently, after Benter had left the station, Ronald Kiefer asked Sheriff Elledge whether there was any way to expedite the search without having to wait for Benter to return with a warrant, and Elledge responded that he had a "consent to search" form.

Prior to Kiefer's signing of the consent form, according to testimony given at the suppression hearing, Elledge told both Kiefer and the defendant that they didn't have to sign the form; they could read it and then decide what they wanted to do. After both Kiefer and the defendant read the form, Kiefer stated: "I don't see anything wrong with this at all. I am going to sign it." He then proceeded to sign the form. With the signed form in hand, officers proceeded to search the vehicle, which contained various items connecting Kiefer, Dement, and the defendant with a recent theft. The three individuals were then arrested.

I. Motion to Suppress

Defendant asserts that the trial court erred in overruling his motion to suppress

evidence. He contends that the consent given by Kiefer was involuntary, inasmuch as he was effectively in custody and knew that a search was going to be conducted under color of a search warrant. Defendant relies primarily upon *Bumper v. State of North Carolina*, 391 U.S. 543, 88 S.Ct. 1738, 20 L.Ed.2d 797, 802-803 (1968) for the proposition that the State can't justify the search based upon Kiefer's consent since "a search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out [as it did in the instant case] that the warrant was invalid."

In response, the State initially challenges the standing of the defendant to raise this issue. Although it does not appear that the standing issue was raised below, we must nevertheless consider whether Harry should be allowed to raise possible violations of another person's constitutional rights since the vehicle did not belong to him. See *State v. Dixon*, 241 N.W.2d 21, 23 (Iowa 1976) (supreme court raised standing issue sua sponte).

In *State v. Osborn*, 200 N.W.2d 798, 804 (Iowa 1972), the court stated that in order to qualify as a person aggrieved by an unlawful search and seizure, there must be an invasion of one's "personal right of privacy of person or premises." The court further held:

"Invasion of privacy may be claimed by that person who is charged with an offense of possession; or who has a proprietary or possessory interest in the property seized; or who is legitimately on the premises when the search occurs. Standing proceeds from any of the above." Id.; see *Jones v. United States*, 362 U.S. 257, 261-263 80 S.Ct. 725, 4 L.Ed.2d 697 (1960).

Upon a review of the record, we conclude that defendant was a victim of the search inasmuch as he was legitimately on the premises when the search occurred, and therefore has standing to challenge the search of the vehicle.

However, we also conclude that the trial court correctly overruled the motion to suppress. In a case involving fundamental constitutional rights, such as searches and seizures, we are obligated to make an independent evaluation of the totality of the evidence. *State v. Iowa District Court in and for Johnson County*, 247 N.W.2d 241, 245 (Iowa 1976); *State v. Snethen*, 245 N.W.2d 308, 311 (Iowa 1976).

According to Sheriff Elledge's testimony at the suppression hearing, no pressure was exerted in an attempt to get Kiefer to sign the consent form. Elledge stated that

when the form was signed, he understood and intended that the search would be made pursuant to the consent, whether a search warrant was issued or not.

The State argues that the fact that the search was not conducted until after Benter returned with the warrant is coincidental and does not transform the search from one made pursuant to consent into one made under color of a warrant. The State claims, and reasonably so, that the delay was attributable to the fact that the officers were in the process of finishing hot coffee before going outside into the cold to conduct the search. However, before they were finished, Benter returned to city hall with the warrant.

Although defendant cites *Bumper v. State of North Carolina*, *supra*, as support for his position, his reliance upon that case is misplaced. Bumper holds that consent is involuntary only if given after the official conducting the search asserts that he possesses a warrant and that the search is made in reliance thereupon. Such is not the case here. First, Kiefer himself asked if there was any possible way to hasten the search. Secondly, the consent form was signed before Benter returned with the warrant, and there is no evidence that anyone asserted that a valid warrant already existed prior to his return. Thirdly, there is no evidence that Elledge or anyone else exerted any pressure on Kiefer to sign the form. On the contrary, Elledge stated that he told Kiefer and Harry to read the form and then decide what to do.

There is nothing in the record to support any contention that the officers asserted that they possessed a warrant before Kiefer gave his consent. Consequently, Bumper is inapposite to the instant factual situation. Since we conclude that the search was made pursuant to the consent form, we hold that the trial court properly overruled the motion to suppress.

II. Jury Instructions

A. Harry argues that the court erred by instructing with regard to "entering" a dwelling house instead of "breaking and entering," as enumerated in the amended county attorney's information. However, defendant did not preserve the error in the lower court and consequently waived it.

During the September 23, 1976 conference regarding jury instructions, defendant failed to raise the specific error now asserted on appeal. *State v. Overstreet*, 243 N.W.2d 880, 885 (Iowa 1976); *State v. Lyles*, 225 N.W.2d 124, 127 (Iowa 1975).

Although at that conference, defense counsel expressed a desire to "... come back to ..." this instruction at a later time, his subsequent objection to it did not serve to specifically raise the issue assigned as error here.

Later during that same conference, with defense counsel present, the county attorney raised the precise issue that defendant now raises. but after a discussion off the record, he withdrew his objection and defense counsel made no further objections to the instructions. In *State v. Youngbear*, 203 N.W.2d 274, 278 (Iowa 1972), the court stated:

"It is sound law and logic that a party may not sit by and permit the court to commit inadvertent error without protest, and then complain for the first time in his motion for a new trial or in the appellate court." (citations omitted)

Since defense counsel made no further objection, he is deemed to have waived any error which may have been committed. Further, we do not believe that this issue was specifically raised in either the motion in arrest of judgment or the motion for new trial. See rule 196, Rules of Civil Procedure, and § 780.35, The Code. Consequently, defendant has once again failed to preserve error and may not raise the issue for the first time on appeal. *State v. Overstreet*, supra; *State v. Lyles*, supra.

B. Defendant also objects to another instruction on the ground that it violates his constitutional right not to incriminate himself. United States Constitution, Amendments V and XIV. Essentially, Harry claims that this instruction unfairly requires him to explain his possession of the stolen goods and in effect, shifts the burden of proof to him, thereby violating his privilege against self-incrimination.

Initially, we hold serious doubts whether defendant properly preserved this specific error since he only objected to the instruction on the ground that it violated the due process clause of the Fourteenth Amendment to the United States Constitution. *State v. Overstreet*, supra; *State v. Smith*, 228 N.W.2d 111, 112 (Iowa 1975). Notwithstanding this preservation question, we conclude that the giving of this instruction did not constitute reversible error. An instruction in substantially identical form was approved by the supreme court in *State v. Morrison*, 183 N.W.2d 696, 697-698 (Iowa 1971), and that case is dispositive here as well. Finding no error, we affirm the district court.

AFFIRMED.