



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
)
Plaintiff-Appellee,)
)
vs.)
)
JAMES DEAN TRANGSRUD,)
)
Defendant-Appellant.)

Filed February 26, 1986

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5-624
84-1825

Appeal from the Iowa District Court for Black Hawk County (No. 07X001114) - Peter Van Metre, James L. Beeghly, Judges.

Defendant appeals from judgment and sentence for burglary, second degree, in violation of Iowa Code sections 713.1 and 713.5 (1983). He asserts the trial court erred: (1) in overruling defendant's motion to suppress evidence obtained as a result of an allegedly illegal investigatory stop of defendant by police; and (2) in overruling defendant's motion to suppress evidence seized in the warrantless search of defendant's temporary residence. **AFFIRMED.**

Charles L. Harrington, Chief Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Joseph P. Weeg, Assistant Attorney General, and James Metcalf, Assistant County Attorney, for plaintiff-appellee.

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

Defendant, James Trangsrud, was charged by trial information with second-degree burglary; the case was tried to the court.

Evidence presented established that a convenience store in Cedar Falls was burglarized during the late evening of July 2, 1984 or the early morning of July 3. The manager testified at trial that five bags of empty pop and beer cans and two empty 16-gallon kegs were taken from the shed. The manager received a tip, which he conveyed to the Cedar Falls police, that someone had been seen carrying sacks of cans similar to those stolen from him into a certain room, unit number 16, in a certain motel in Cedar Falls. Acting on this information, the police obtained an arrest warrant for one Van Cleve. When they arrived on the scene of the motel, they observed Van Cleve and defendant placing paper sacks full of beer cans into a vehicle.

One of the police officers arrested Van Cleve. The other officer approached Trangsrud who indicated the cans came from a party in apartment number 16. The officer advised defendant of his Miranda rights and motioned for him to come over from the automobile to the corner of the building. The officer proceeded to question Trangsrud about the incident, telling him what information had been relayed to police concerning the involvement of apartment number 16. Defendant then admitted his involvement in the burglary.

The officers then approached Donna Funk, tenant of the apartment and obtained her permission to search the premises. She later testified she consented under duress because the officers made threatening statements to her. The officers found two empty beer kegs and three or four large plastic bags full of beer cans in the apartment.

L.

Prior to trial, Trangsrud moved to suppress the evidence obtained from his interrogation and the search of his automobile. He claims that the trial court erred in overruling his motion since he was illegally seized in violation of the fourth amendment. We disagree.

The fourth amendment's protection against unreasonable intrusions on a person's liberty is triggered when an officer seizes an individual. United States v. Mendenhall, 446, U.S. 544, 552, 100 S.Ct. 1870, 1876, 64 L.Ed.2d 497, 507 (1980); Terry v. Ohio, 392 U.S. 1, 16, 88 S.Ct. 1868, 1877, 20 L.Ed.2d 889, 903 (1968). "Not all personal intercourse between policemen and citizens involves 'seizures' of persons." Terry, 392 U.S. at 19, n. 16, 88 S.Ct. at 1879 n. 16, 20 L.Ed.2d at 905 n. 16. For fourth amendment purposes a seizure occurs "only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen. Id. In State v. Harlan, 301 N.W.2d 717, 719-20 (Iowa 1981) the Iowa Supreme Court set forth guidelines as to when a person's liberty has been restrained by "physical force or show of authority:"

If an officer takes hold of a suspect, a seizure has occurred. [Citing Terry.] A seizure might occur if there was "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance might be compelled." [Citing Mendenhall.] The use of sirens, flashing lights or other signals to pull a moving vehicle to the side of the road might also constitute a show of authority that is a seizure. [Authority.] One commentator suggests that a seizure occurs "if the officer engaged in conduct which a reasonable man would view as threatening or offensive even if coming from another private person." [Authority.]

Applying these principles to the present case, we conclude that there was no seizure.

Initially, we note that when officers observed the defendant he was in a parking area open to the public. Transgrud had no reasonable expectation

that he would be free from observation. See State v. Beatty, 305 N.W.2d 496, 497 (Iowa 1981). In approaching the defendant, the officers were not violating any constitutionally protected right. Further, circumstances surrounding the subsequent questioning of defendant do not reflect any restraint of liberty as contemplated by Harlan. Transgrud was never physically seized; there were no sirens, flashing lights or display of weapons. Defendant was never handcuffed nor formally arrested prior to his admission of involvement in the burglary. As defendant indicates, he was given a Miranda warning at the time. However, this fact alone does not lead us to conclude that a reasonable person would have believed he was not free to leave.

Considering the totality of the circumstances, we find the defendant did not "submit to physical force or show of authority" and his fourth amendment rights were not triggered.

II.

Transgrud also argues that the trial court erred in admitting evidence seized in the warrantless search of Donna Funk's apartment, defendant's temporary residence. He claims that the alleged consent of Donna Funk was obtained by coercive threats and hence not voluntarily given. In considering this issue, we make an independent evaluation of the totality of the circumstances. State v. Hatter, 342 N.W.2d 851, 854 (Iowa 1983). The state has the burden of proof to establish by a preponderance of the evidence that consent to enter was voluntarily given. Id. "This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." Bumper v. North Carolina, 391 U.S. 543, 548-49, 88 S.Ct. 1788, 1792, 10 L.Ed.2d 797, 802 (1968).

In reviewing the record, we find that this burden has been met. Testimony of the officers involved indicate that Funk was told of the investigation and that stolen items were in her apartment. She admitted the items were in the

apartment and consented to the search. Funk also signed a written waiver allowing the search. One officer indicated that she signed the consent "freely of her own free will." Additionally, in a written statement Funk indicated that she freely signed the consent form.

At the suppression hearing, Funk asserted that the police officers threatened to arrest her, take her child away, and "come back with a warrant anyway." However, these claims were viewed by the trial court as "inherently improbable." In recognition of the trial court's ability to observe the witness and make a credibility determination, we defer to this finding. See Hatter, 342 N.W.2d at 854.

Based on the record as a whole, we concluded that the totality of the circumstances indicates Funk's consent was freely and voluntarily given. Evidence obtained from the search of her apartment was properly admitted at trial.

Finding no error, we affirm the conviction.

AFFIRMED.