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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-510 / 88-1173

STATE OF IOWA,

Plaintiff-Appellee,

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vs.

TOM L. BECKER,

Defendant-Appellant.

STATE OF IOWA,

Plaintiff-Appellee,

vs.

TODD J. BECKER,

Defendant-Appellant.

Appeal from the Iowa District Court for Hamilton County, Louie F. Beisser and Timothy Finn, Judges.

Defendants appeal from a judgment and sentence rendered by the trial court following a consolidated jury trial wherein the defendants were each found guilty on one count of possession with intent to deliver a Schedule I controlled substance and one count of unlawfully possessing with intent to deliver a Schedule II controlled substance. **REVERSED AND REMANDED.**

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Michael E. Houser of Berkland Law Office, Belmond, for defendants-appellants.

Thomas J. Miller, Attorney General, Sarah J. Coats, Assistant Attorney General, and Bridget A. Chamber, Hamilton County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., and Schlegel and Hayden, JJ., but decided en banc.

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HAYDEN, J.

We review the facts leading to the arrest of defendants.

Defendants were stopped for speeding on Interstate Highway 35. The state trooper ordered both defendants to get out of the car and identify themselves. The trooper noticed a knife sheath protruding from beneath Tom's jacket. The trooper removed the knife and patted Tom down for a weapon search. During the pat down a cigarette case was found which contained marijuana cigarettes. The trooper observed Todd attempting to conceal a brown vial. Todd was directed to empty his pockets also. Todd was the driver and Tom was the passenger.

The trooper searched the passenger compartment of the car for weapons and drugs. He opened the glove compartment and found more marijuana cigarettes and a five inch knife. The trooper requested to see the contents of the trunk. Todd opened the trunk and showed him a tool box. Todd refused the trooper's request to search a suitcase. Both men were then arrested. A search warrant was issued to inspect the suitcase. Fifteen pounds of marijuana and four ounces of amphetamines were found in the suitcase. Defendants were charged jointly with one count each of possession with intent to deliver schedule I and II controlled substances in violation of section 204.401(1)(b) of the Iowa Criminal Code.

Before trial, defendants' motion to suppress evidence was denied. Defendants were found guilty on both counts. Defendants' posttrial motions in arrest of judgment and new trials were denied. They were each sentenced to a term of five years and a fine of $1,000. They appeal. We reverse and remand for a new trial.

Defendants' argument on appeal is predicated solely on the alleged illegal search of passenger Tom Becker. There is no separate challenge to search of the driver, Todd Becker; search of the car's passenger compartment and trunk; or of the suitcase, except as they relate to the initial search of Tom Becker. They claim their fourth amendment constitutional rights were violated when stopped and searched.

Our review is de novo. State v. Stevens, 394 N.W.2d 388, 389 (Iowa 1986). When this court is confronted with alleged constitutional violations, we resolve the issue by making our own independent evaluation of the totality of the circumstances. The burden is on the State to show this evidence was obtained lawfully. State v. Hilleshiem, 291 N.W.2d 314, 316 (Iowa 1980).

The fourth amendment to the United States Constitution is as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Defendants were initially stopped for speeding sixty-seven miles per hour in a fifty-five mile per hour speed zone. It is not disputed defendant, Todd Becker, driver of the car, was speeding at the time the state trooper stopped them. The fourth amendment requires reasonable cause to stop a vehicle for investigatory purposes. 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). Once an officer has made a valid stop of an automobile he may order the driver out of the automobile without any further justification. Pennsylvania v. Mims, 434 U.S. 106, 110, 98 S. Ct. 330, 54 L. Ed. 2d 331, 336-37 (1977). The defendants were validly stopped for speeding and it was proper for the trooper to order the driver, Todd Becker, out of the car. The main issue in this case is whether the trooper could order the passenger, Tom Becker, out of the car.

The law which provides the backdrop for considering this issue is well established. The essential purpose of the fourth amendment search and seizure proscription is to impose a standard of reasonableness upon the exercise of discretion by government officials, including law enforcement officials, in order to safeguard the privacy and security of individuals against arbitrary invasions. The first overview courts employ to determine whether a seizure is unreasonable is whether the thing done, in the

sum of its form, scope, nature, incidents and effect, impresses as being fundamentally unfair or unreasonable in the specific situation when the immediate end sought is considered against the private right affected. State v. Hilleshiem, 291 N.W.2d 314, 316 (Iowa 1980).

The trooper testified the reason he has the occupants of vehicles he stops get out of the vehicle is to: (1) identify the occupants of the vehicle to determine whether there are any outstanding warrants for their arrest; (2) see if any beer cans, drug paraphernalia or other instrumentalities of criminal conduct fall out; and, in some instances; (3) conduct a search for weapons. He has done this for over ten years when the occupants of the vehicle are between the ages of eighteen and forty; there are two or more occupants in the vehicle; the occupants are dressed casually or in leather jackets; the occupants have long hair; or facial hair. He also testified his determination is based upon what he "feels is right" and upon "gut instinct."

We observe, at the time the trooper required the passenger, Tom Becker, out of the car, he was not under arrest and there was no reason for the trooper to suspect Tom had committed any offenses. Therefore, this was not a search incident to arrest of passenger Tom Becker.

The trooper's trial testimony reveals when he pulled defendant's vehicle over he did not observe anything about

the vehicle or its occupants that made him suspect they were dangerous or posed a threat to his safety.

A Terry search involves a four-pronged test prior to a limited search without probable cause to arrest. This test is: (1) unusual conduct; (2) reasonable suspicion of criminal activity; (3) suspicion that person stopped is armed and dangerous; and (4) fears not dispelled after reasonable inquiry. United States v. Hairston, 439 F. Supp. 515, 517 (N.D. Ill. 1977).

The fourth prong of the Terry analysis requires the trooper to make reasonable inquiry toward dispelling his fears prior to conducting a search for weapons. Since he had no fear the occupants of the vehicle were armed, he had no reason to ask such questions. The record establishes no such questions were asked.

The trooper detected no odor of alcohol, did not smell the odor of marijuana or any other controlled substance, and observed nothing in the interior of the vehicle which suggested criminal activity.

The State has not shown any unusual conduct was ever observed by the trooper. The State has also failed to prove there were any specific and articulable facts, known to the trooper at the time of the stop, from which he could draw a reasonable inference the occupants of the vehicle were armed and presented a danger to himself or any bystanders or were engaged in any criminal activity before ordering Tom Becker from the car.

Our supreme court in the case of State v. Eis, 348 N.W.2d 224, 226 (Iowa 1984), determined the status of a driver and passengers of an automobile. We recite the holding in that case:

> No principled basis exists for distinguishing between the privacy rights of passengers and drivers in a moving vehicle. When the vehicle is stopped they are equally seized; their freedom of movement is equally affected. We therefore hold that occupants of motor vehicles, whether drivers or passengers, ordinarily have a legitimate expectation of privacy which is invaded when the vehicle is stopped by the government. This holding presupposes the occupant's rightful presence in the vehicle. Otherwise the privacy expectation is not legitimate.

Id.

In Eis, the Iowa Supreme Court also held the passenger of the automobile had a legitimate expectation of privacy that was invaded by the stop in that case. Id. at 227. The State argues, if a vehicle is lawfully stopped and both occupants equally seized, it would only be a "de minimis additional intrusion to require the passenger to also exit the vehicle when stopped. Our U.S. Supreme Court, in addressing a stop and search of an individual, stated: "[i]t is simply fantastic to urge that such a procedure performed in public by a policeman while the citizens stands helpless, perhaps facing a wall with hands raised, is a 'petty indignity.' It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly." Terry v. Ohio, 20 L. Ed. 2d at 903.

The State cites us to other state jurisdictions that have expanded Mims to include police officers ordering passengers out of a vehicle that has been legally stopped. See People v. McLaurin, 508 N.Y.S.2d 429, 120 A.D.2d 270 (1986), and People v. Meglosa, 753 P.2d 221, 225 (Colo. 1988). These cases are legitimized upon the apparent concern for the immediate safety of the police officer.

Our supreme court has not ruled law enforcement officers may order passengers out of a legally-stopped vehicle for a search of their person as a matter of course. We decline to do so on the underlying facts of this case. We hold there needs more than an officer's "sense of what is right" or "gut instinct" to order a passenger out of a legally-stopped vehicle. We cannot say in this case it was harmless error to order passenger Tom Becker out of the car driven by Todd Becker.

The items seized from passenger Tom Becker are suppressed and shall not be used as evidence upon retrial of this case. We reverse and remand for a new trial.

REVERSED AND REMANDED.

All judges concur except Donielson and Habhab, JJ., who dissent.

DONIELSON, J. (dissenting)

I respectfully dissent. "The touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'" Pennsylvania v. Mimms, 434 U.S. 106, 109, 98 S. Ct. 330, 332, 54 L. Ed. 2d 331, 335 (1977). "Reasonableness" depends on a balance between the public interest and an individual's right to personal security free from arbitrary interference by law officers. Id. at 109, 98 S. Ct. at 332, 54 L. Ed. 2d at 336.

In recognizing the inherent danger to officers from individuals seated in an automobile, the United States Supreme Court held the safety of officers is a sufficiently legitimate and weighty justification to warrant the routine practice of ordering drivers out of their stopped vehicles. Id. at 110, 98 S. Ct. at 333, 54 L. Ed. 2d at 336. In Mimms, the Court found such an order to be a "de minimis" intrusion upon a driver's fourth amendment interests. Id. at 111, 98 S. Ct. at 333, 54 L. Ed. 2d at 337, and it concluded "[w]hat is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety." Id.

The courts are not in agreement as to whether the Mimms reasoning also applies to a passenger in a stopped vehicle. W. LaFave, Search and Seizure § 5.2(h) (2d ed.

1987). Several courts, however, have recognized the logical extension of the Mimms analysis to passengers in automobiles. See People v. Melgosa, 753 P.2d 221, 225 (Colo. 1988) ("In light of the particular hazards confronting a police officer in roadside encounters involving drivers and passengers of automobiles, Fourth Amendment rules permit a police officer to order a driver or passenger out of the vehicle during an investigatory stop."); State v. Ferrise, 269 N.W.2d 888, 890 (Minn. 1978) ("While the Mimms case involved only the right to order a driver to get out of the car, the Mimms analysis would also seem to justify a policy of ordering passengers out. The same concern of the officers for their own safety applies, and the intrusion on the rights of the passengers occasioned by being required to get out of the car is no greater than the intrusion on the rights of the driver."); People v. Robinson, 74 N.Y.2d 773, 775, 543 N.E.2d 733, 733-34, 545 N.Y.S.2d 90, 90-91 (N.Y. 1989) ("Inasmuch as the risks in these police/civilian vehicle encounters are the same whether the occupant is a driver or a passenger 'police may order persons out of an automobile during a stop for a traffic violation.'")' Commonwealth v. Elliott, 376 Pa. Super. 536, 547-48, 546 A.2d 654, 660 (1988) ("Indeed the safety of the officer, which is the proffered justification for ordering the driver out of the vehicle, applies with equal force to the passenger of a vehicle stopped for a traffic violation.").

Some of the circumstances in the above-cited cases may have been sufficient to constitute separate articulable and tenable reasons for ordering a passenger out of an auto. However, in each case the courts specifically cited Mimms and concluded passengers could be ordered from stopped vehicles as a matter of course, absent any specific fears of an individual passenger.

I would find the rationale adopted by the Supreme Court in Mimms to be no less applicable in a case involving the removal of a passenger from a vehicle. I fail to discern any appreciable difference between a driver and passenger in the degree of risk each poses to the safety of a police officer. Ordering a driver from a vehicle does nothing to ensure an officer's safety if a passenger is allowed to remain in the vehicle.

Any infringement upon a passenger's personal security by being ordered out of an auto is certainly "not a 'serious intrusion upon the sanctity of the person.'"[1] Mimms, 434 U.S. at 111, 98 S. Ct. at 333, 54 L. Ed. 2d at 337. The United States Supreme Court has recognized "it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." Id. at 110, 98 S. Ct. at 333, 54 L. Ed. 2d at 336, citing Terry

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1. Extending Mimms to apply to this case would involve nothing more than the removal of a passenger from a vehicle. The issue of whether a passenger may then be subsequently physically searched or frisked would be contingent upon separate Terry-type findings. See Mimms, 434 U.S. at 110 n.5, 98 S. Ct. at 333 n.5, 54 L. Ed. 2d at 336 n.5.

v. Ohio, 392 U.S. 1, 23, 88 S. Ct. 1868, 1881, 20 L. Ed. 2d 889, 907 (1968). I cannot imagine that the minor inconvenience which results from requiring an automobile passenger to leave a car can prevail when balanced against the legitimate concerns for an officer's safety.

I would hold that when a vehicle has been lawfully detained for a traffic violation, an officer may order a passenger out of the vehicle solely to minimize the risk an officer confronts each time he approaches a person seated in a stopped automobile. An officer should not be required to set forth separate individualized reasons with regard to a specific passenger to justify such an order.

Habhab, J., joins this dissent.