IN THE COURT OF APPEALS OF IOWA

No. 9-490 / 89-408

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IN THE INTEREST OF M.D.C., Minor Child,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, Stephen C. Clarke, Juvenile Referee.

A juvenile appeals from an adjudication of delinquency and a resulting dispositional order. **AFFIRMED.**

Scott Lemke of Pieters & Pieters, Waterloo, for appellant.

Thomas J. Miller, Attorney General, Gordon E. Allen, Deputy Attorney General, and Kathrine S. Miller-Todd, Assistant Attorney General, for appellee.

Considered by Oxberger, C.J., and Donielson and Hayden, JJ.

OXBERGER, C.J.

A juvenile appeals from an adjudication of delinquency and a resulting dispositional order. He challenges the sufficiency of the evidence to prove that he had committed burglary in the first degree. He also contends much of the evidence should have been suppressed because it resulted from an improper stop of the car in which he was riding, from an improper warrantless search of that car, or from an unduly suggestive "show-up" identification procedure. Finally, he contends his trial attorney rendered ineffective assistance by failing to request that the least restrictive available disposition be used. We affirm the decision of the juvenile court.

Our review of a juvenile court order finding a juvenile delinquent is de novo. In re J.D.S., 436 N.W.2d 342, 343 (Iowa 1989). We give weight to the fact findings of the juvenile court, especially when considering the credibility of the witnesses, but are not bound by them. Iowa R. App. 14(f)(7); In re J.D.S., 436 N.W.2d at 343.

M.D.C. was arrested for burglary in the first degree. He was later adjudicated to be delinquent due to the commission of that offense. He has appealed from the resulting dispositional order.

I. Investigatory Stop

M.D.C. contends there was no probable cause to stop the vehicle in which he was found. He argues the evidence resulting from the stop should have been suppressed.

Mere suspicion or curiosity is not sufficient to justify the stop for investigatory purposes. State v. Donnell, 239 N.W.2d 575, 577 (Iowa 1976). Circumstances for an investigatory stop exist where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experiences that criminal activity may be afoot. Id.

The crucial question is whether there was articulable objective facts available to Officer O'Connor to justify the stop.

At approximately 2:10 a.m., the police were notified of a burglary in a residential neighborhood. The patrol cars arrived at the scene at approximately 2:15 a.m. Several vehicles parked approximately half a block from the victim's house and on the same side of the street were checked for occupants. One of the patrol cars used bright spotlights to illuminate the parked vehicles to determine if they were occupied. All of the vehicles initially appeared to be empty. However approximately three minutes after the patrol car left the scene, the vehicle closest to the victim's house pulled slowly away and drove slowly through the residential area. After observing this another patrol car followed the vehicle. The vehicle turned down a couple of dead-end streets which indicated unfamiliarity with the neighborhood. No other vehicles were seen moving in the area. The initial report contained a description that the

suspect was a black male. While following the vehicle the description of the suspect changed from being a black male to being either a white or black male or female wearing some type of body suit. The officer stopped this vehicle after observing its suspicious nature and concluding that its occupants must have previously been lying down. We hold such circumstances would lead a reasonable person to believe criminal activity was involved and thus justify the stop. The test in Donnell has been satisfied.

II. Warrantless Search

M.D.C. also contends the physical evidence taken from the car was obtained as a result of an unreasonable warrantless search of the vehicle. He argues that evidence therefore should have been suppressed.

The State claims the plain view doctrine applies here. The burden is on the State to prove the plain view doctrine's applicability. State v. Oliver, 341 N.W.2d 744, 745 (Iowa 1983). "Three prerequisites must be satisfied for a plain view seizure. The intrusion into the otherwise protected area must be justified, the discovery of the object must be inadvertent, and its incriminating nature must be immediately apparent." Id at 746.

We find the three prerequisites of the plain view doctrine satisfied in this case. As previously noted the stop of the vehicle in this case was reasonable and lawful. We find that exigent circumstances were present because of

the vehicle's inherent mobility. See State v. Cain, 400 N.W.2d 582, 585 (Iowa 1987). We believe the intrusion was justified. Officer Frost noticed M.D.C. lying in the back seat of the vehicle. M.D.C. appeared to be sleeping. When Officer Frost shined his flashlight beam on M.D.C. he moved, sat up, and leaned forward toward the driver's side of the vehicle. Officer Frost then observed a driver's license laying on the rear seat where M.D.C. had been stretched out. The officer observed from the picture on the driver's license that it was the license neither of M.D.C. nor of the driver of the vehicle, who later was discovered to be Joy Remley. We also believe the discovery of the driver's license was inadvertent. The officer was not searching for a driver's license.

The third requisite, that the incriminating nature of the driver's license be immediately apparent, was also shown. "The necessary probability exists when there is probable cause to associate the property with criminal activity." Oliver, 341 N.W.2d at 746 (citing Texas v. Brown, 460 U.S. 730, 738, 103 S. Ct. 1535, 1542, 75, L. Ed. 2d 502, 513 (1983)). The Officer immediately observed that the driver's license did not belong to either occupant. We find this establishes the necessary probability that the license was associated with criminal activity. We conclude that all elements of the plain view doctrine were established. We further find the seizure of the flashlight

and knife were justified under the plain view doctrine. Both items, in plain view with the aid of the officer's flashlight, were retrieved from the floorboard behind the passengers seat of the vehicle. Therefore the juvenile court did not err in refusing to suppress evidence obtained as a result of the search of the vehicle.

III. Pretrial Identification

M.D.C. contends that a pretrial "show-up" identification procedure, in which the burglary victim stated that M.D.C. had similar characteristics to the intruder she saw, was unnecessarily suggestive. He therefore argues the juvenile court should have suppressed the victim's trial testimony that he resembled the intruder.

In State v. Salazar, 213 N.W.2d 490, 493 (Iowa 1973), the Iowa Supreme Court noted that a one-to-one confrontation is inherently suggestive and held that "on-the-scene identification procedures, held shortly after the crime, are not violative of due process unless the confrontation is unnecessarily suggestive." Salazar, 213 N.W.2d at 493-94; see also State v. Jackson, 387 N.W.2d 623, 631 (Iowa App. 1986). Additionally, the presence of police officers nor the handcuffing of the defendant is sufficient to support a claim of suggestiveness. Salazar, 213 N.W.2d at 493-94.

M.D.C. asserts that the show-up identification procedure in this case was far more suggestive than in a mere face to face confrontation. We disagree. In this case the juvenile

was handcuffed and placed in a street intersection with the illumination coming from the headlights of the police cars. The victim was unable to identify the juvenile until the lights were turned off. Although the victim could not positively identify the juvenile as her assailant because she had not seen the person's face, she did indicate that he was the same height and size of the perpetrator. She further noted that he was wearing black sweat pants with gold lettering down the side similar to what she saw her assailant wearing while in her living room. The prompt on-the-scene identification in this case "promotes fairness by assuring reliability." Jackson, 387 N.W.2d at 632 (citing Salazar, 213 N.W.2d at 495). We hold that M.D.C. was not denied any constitutional rights by the show-up identification procedure employed in this case.

IV. Sufficiency of the Evidence

M.D.C. challenges the sufficiency of the evidence to identify him as the intruder. He argues the State's evidence failed to negate the possibility that the burglary was committed by the car's driver or by a third person while he simply slept in the back seat. In support of the involvement of a hypothetical third person, he notes that while some of the stolen property was found in the car where he was lying, many of the stolen items (including the bulkiest) were never found in spite of an intensive search. He argues that the disappearance of these items requires the

positing of a third person who carried them off; he also argues the State failed to negate the possibility that this third person was the only intruder, and that the third person (before disappearing) simply dumped a few of the items in the car where he slept.

Due process requires that the standard of proof in delinquency proceeding be beyond a reasonable doubt. In re Thompson, 241 N.W.2d 2, 4 (Iowa 1976). If in our de novo review admissible evidence satisfies the reasonable doubt standard, we need not reverse. In re Wheeler, 229 N.W.2d 241, 243-44 (Iowa 1975) Evidence is sufficient when there is substantial evidence from which a rational fact finder could determine defendant is guilty of the crime beyond a reasonable doubt. State v. Mitchell, 371 N.W.2d 432, 432 (Iowa App. 1985).

The State has here carried its burden of proof in showing beyond a reasonable doubt that M.D.C. committed the alleged offense. The victim was awakened by the presence of one or two intruders in the early morning hours of July 27, 1988. She saw someone standing near the VCR and identified the clothing as that similar to a body suit with bright stripes down the legs. Due to the dim light in the living room she never saw the persons face and was unable to determine the sex of the assailant. Later at the show-up, the victim stated that the juvenile had the same figure, same stature, and same body suit type pants with the stripes

as the person she had seen in her living room. The police officers later found the victim's driver's license, money and library card in the vehicle. The juvenile court found M.D.C. met the description of the perpetrator, and his explanations and defenses were not credible.

We agree with the juvenile court that M.D.C.'s intoxication defense is not credible considering all the evidence. We believe the evidence was sufficient to convince a rational trier of fact that M.D.C. committed the burglary.

V. Ineffective Assistance of Counsel

Finally, M.D.C. contends that his trial attorney rendered ineffective assistance by failing to request that the least restrictive available disposition be used. He argues that prejudice resulted because the juvenile court in fact did not use the least restrictive available disposition in spite of a statutory mandate.

Our ultimate concern in claims of ineffective assistance is with the "fundamental fairness of the proceeding whose result is being challenged." State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987) (quoting Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. Risdal, 404 N.W.2d at 131. The burden is on the defendant to prove

by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted.

Iowa Code Section 232.52 provides that "the court shall enter the least restrictive dispositional order appropriate in view of the seriousness of the delinquent act. . . ." At the dispositional hearing, the Department of Juvenile Court Services provided a case permanency plan that recommended M.D.C.'s continued placement at the State Training School for Boys at Eldora. The plan revealed a history of delinquent behavior by M.D.C. The plan noted "that his charges have gotten more serious. . . ." The plan further indicated that placement opportunities for M.D.C. outside of the State Training School were very limited. At the hearing M.D.C.'s attorney presented no alternative placement recommendations.

Upon our review of the record we find no basis for an ineffective assistance of counsel claim. We find M.D.C. was not prejudiced by continuing his placement at the State Training School. We affirm the juvenile court in all respects.

AFFIRMED.