IN THE COURT OF APPEALS OF IOWA

No. 9-328 / 98-0904
Filed June 23, 1999

STATE OF IOWA,

Plaintiff-Appellee,

vs.

SHELDON CARL SHIVERS,

Defendant-Appellant.

FILED
JUN 23 1999
CLERK SUPREME COURT

Appeal from the Iowa District Court for Webster County, Kurt L. Wilke, Judge.

Defendant appeals from the judgment and sentence entered upon his conviction of possession of cocaine base with intent to deliver and a drug tax stamp violation.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Martha J. Lucey, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, James J. Koll, County Attorney, and Timothy N. Schott, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Mahan and Zimmer, JJ.

MAHAN, J.

Sheldon Carl Shivers appeals the judgment and sentence entered upon his conviction of possession of cocaine base with intent to deliver and a drug tax stamp violation. We affirm.

On November 10, 1997, at approximately 4:30 p.m., Webster County Deputy Sheriff Thomas Hofbauer observed Shivers driving in Fort Dodge. He recognized Shivers and knew there was an outstanding warrant for his arrest. Deputy Hofbauer activated his overhead lights and stopped Shivers at a Holiday service station. Deputy Hofbauer informed Shivers of the reason for the stop and detained him while he received verification of the validity of the warrant from dispatch. Deputy Rodney Strait arrived at the scene shortly after the stop and observed the events that followed.

Deputy Hofbauer received verification of a valid arrest warrant. He then "advised the subject that he was under arrest for that warrant." Shivers was instructed to turn around and place his hands upon the vehicle. Deputy Hofbauer began a pat down search during which Shivers was using derogatory and abusive language. Sometime during the search, Shivers pushed away from the vehicle and took off running. Shivers was pursued by Deputy Strait on foot and Deputy Hofbauer in his vehicle. The chase ended a few blocks away after Deputy Hofbauer accidentally struck Shivers with the vehicle when Shivers attempted to jump over the hood. Shivers lay in the street until an ambulance arrived.

Shivers was taken to the hospital where medical personnel removed Shivers' clothing in order to assess and treat his injuries. At that time, medical personnel discovered a bag containing a green leafy substance in Shivers' pants and another bag of a white powdery substance in Shivers' groin area. These baggies were given to a police officer.[1]

Several minutes later, a paramedic found crack cocaine in the pocket of Shivers' jacket, which had been left in the treatment room while Shivers was being x-rayed. It is unclear whether this search was performed at the request of a police officer.

Shivers remained in the hospital for five days without a guard posted at his door. The hospital agreed to notify the sheriff's department prior to releasing Shivers. Upon his release, Shivers was taken directly from the hospital to the county jail.

Shivers' motion to suppress was denied. He proceeded to a bench trial on the minutes of testimony on the charges of possession of cocaine base with intent to deliver and failure to affix a drug tax stamp. Shivers was convicted of both charges and sentenced to two indeterminate terms of ten years to be served consecutively. Shivers appeals.

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[1] Shivers is not contesting the legality of these "searches" on appeal. The charges relating to these substances were dropped in an agreement made with the State to proceed with a bench trial solely on the minutes of testimony on the two charges relating to the substance found in Shivers' jacket pocket.

I. STANDARD OF REVIEW. Constitutional issues are reviewed de novo, in light of the totality of the circumstances. *State v. Predka*, 555 N.W.2d 202, 204 (Iowa 1996); *State v. Schultzen*, 522 N.W.2d 833, 835-36 (Iowa 1994). We are bound by the findings of fact underlying the district court's ruling on a motion to suppress if supported by substantial evidence. *State v. Frake*, 450 N.W.2d 817, 818 (Iowa 1990).

II. SEARCH OF SHIVERS' JACKET. The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures. U.S. Const. amend. IV; *see also* Iowa Const. art. I, § 8. Evidence obtained in violation of the Fourth Amendment is inadmissible at trial under the exclusionary rule. *State v. Breuer*, 577 N.W.2d 41, 45 (Iowa 1998); *see State v. Ahart*, 324 N.W.2d 317, 318 (Iowa 1982) (citing *Wong Sun v. United States*, 371 U.S. 471, 484-85, 83 S. Ct. 407, 415-16, 9 L. Ed. 2d 441, 453-54 (1963)).

A search and seizure without a valid warrant is per se unreasonable unless it comes within a recognized exception such as search incident to arrest. *State v. Pickett*, 573 N.W.2d 245, 247 (Iowa 1997); *State v. Manna*, 534 N.W.2d 642, 644 (Iowa 1995).

Evidence obtained illegally does not, however, "become sacred and inaccessible." *State v. Seager*, 571 N.W.2d 204, 210 (Iowa 1997) (citing *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392, 40 S. Ct. 182, 183, 64 L. Ed. 319, 321 (1920)). If the evidence "ultimately or inevitably would have been discovered by

lawful means," the exclusionary rule serves no purpose and does not apply. *Seager*, 571 N.W.2d at 211 (citing *Nix v. Williams*, 467 U.S. 431, 444, 104 S. Ct. 2501, 2509, 81 L. Ed. 2d 377, 387-88 (1984)).

A. Search Incident to Arrest. A search incident to arrest involves two questions, that is, whether the arrest was valid and, if so, whether the search was reasonable both as to the area covered and the time within which it was made. *State v. Derifield*, 467 N.W.2d 297, 299 (Iowa App. 1991) (citing *State v. Shane*, 255 N.W.2d 324, 326 (Iowa 1977)). If the officer is legally permitted and objectively authorized to make the arrest, he is, for that reason alone, also authorized to make the search. *State v. Doran*, 563 N.W.2d 620, 623 (Iowa 1997); *see also State v. Meyer*, 543 N.W.2d 876, 878 (Iowa 1996) (citing *United States v. Robinson*, 414 U.S. 218, 235, 94 S. Ct. 467, 477, 38 L. Ed. 2d 427, 440-41 (1973), and *Chimel v. California*, 395 U.S. 752, 762-63, 89 S. Ct. 2034, 2040, 23 L. Ed. 2d 685, 694 (1969)).

An arrest requires "an assertion of authority and purpose to arrest followed by submission of the arrestee." *State v. Rains*, 574 N.W.2d 904, 910 (Iowa 1998); *State v. Johnson-Hugi*, 484 N.W.2d 599, 601 (Iowa 1992) (quoting *California v. Hodari D.*, 499 U.S. 621, 626, 111 S. Ct. 1547, 1551, 113 L. Ed. 2d 690, 698 (1991)). Whether a defendant was "arrested" is determined on a case-by-case basis. *Rains*, 574 N.W.2d at 910; *State v. Dennison*, 571 N.W.2d 492, 495 (Iowa 1997).

In the case at bar, we find Shivers was under arrest at the time of the search. Deputy Hofbauer clearly made an assertion of authority when he turned on his

overhead lights, followed Shivers into the gas station parking lot, and detained Shivers while waiting for verification of the arrest warrant. *See State v. Harlan*, 301 N.W.2d 717, 720 (Iowa 1981) (using lights to stop a vehicle might constitute a show of authority); *c.f. State v. Pickett*, 573 N.W.2d 245, 247 (Iowa 1997) (no show of authority where officer did not stop defendant's vehicle and did not detain defendant).

Deputy Hofbauer explicitly stated his purpose to arrest Shivers on the outstanding arrest warrant. *See Rains*, 574 N.W.2d at 910 (no explicit statements regarding arrest made by officers required consideration of other surrounding circumstances to determine if defendant had been "arrested"); *State v. Breitbach*, 488 N.W.2d 444, 447 (Iowa 1992) (officers told defendant they had a warrant for his arrest and that he would have to come with them).

Shivers submitted to authority when he obeyed the deputy's command to turn around for a pat down search. Shivers was restrained or recaptured after being struck by Deputy Hofbauer's vehicle. Consequently, Shivers was "arrested" for purposes of a search incident to arrest at the time of the search at the hospital. *See* Iowa Code § 804.5; *State v. Schmitt*, 290 N.W.2d 24, 28 (Iowa 1980).

In the case at bar, we also find the search of Shivers' jacket was reasonable in time and scope. A reasonable delay in effectuating a seizure and search of an arrestee's clothing while the arrestee remains in lawful police custody does not remove it from the "search incident to arrest" exception to the search warrant requirement. *United States v. Edwards*, 415 U.S. 800, 805, 94 S. Ct. 1234, 1238,

39 L. Ed. 2d 771, 776-77 (1974) (clothing taken and examined the following day not unreasonable when no substitute clothing was available for the arrestee on the night of the arrest); *see State v. Harrington*, 284 N.W.2d 244, 247 (Iowa 1979) (clothing taken the morning after the arrest was not unreasonable); *State v. Kramer*, 231 N.W.2d 874, 878 (Iowa 1975) (clothing taken within two or three hours following the arrest was not unreasonable). Shivers escaped before Deputy Hofbauer could conduct a pat down search. He was subsequently seriously injured and transported to the hospital under lawful police custody. Under these circumstances, it was not unreasonable for the police to delay the search for a short time after Shivers' arrest to permit him to receive medical attention for his injuries.

We conclude the district court did not err in denying Shivers' motion to suppress on this basis.

B. Inevitable Discovery. Impermissibly obtained evidence which would have inevitably been discovered is still admissible. "When the State can establish by a preponderance of the evidence that a specific piece of evidence ultimately or inevitably would have been discovered by lawful means, the exclusionary rule does not apply and the evidence should be admitted." *State v. Vincik*, 436 N.W.2d 350, 354 (Iowa 1989) (citing *Nix*, 467 U.S. at 444, 104 S. Ct. at 2509, 81 L. Ed. 2d at 387).

We find the State proved the crack cocaine discovered in Shivers' jacket pocket would have inevitably been discovered during the booking procedure. The hospital notified the sheriff's department before releasing Shivers. He was transported

directly from the hospital to the jail. Barbara Jean Thompson, a correctional officer at the Webster County jail, testified booking procedures at the jail involve a pat down search of arrestees, a search of the outer clothing of the arrestees including jackets and jacket pockets, and removal of arrestees' clothing before they are taken to the general population. We conclude the district court did not err in denying Shivers' motion to suppress on this alternative basis.

Shivers and the State briefed the issue of whether the paramedic's search of Shivers' jacket was a "private search." Because we have resolved this case on other issues, we need not discuss the "private search" issue.

For these reasons, we affirm the judgment and sentence entered upon Shivers' conviction of possession of cocaine base with intent to deliver and a drug tax stamp violation.

AFFIRMED.

No. 98-0904. [9-328] STATE v. SHIVERS

Appeal from the Iowa District Court for Webster County, Kurt L. Wilke, Judge. **AFFIRMED.** Considered by Sackett, C.J., and Mahan and Zimmer, JJ. Opinion by Mahan, J. (8 pages $3.20)

Shivers was pulled over by a deputy who recognized him and knew there was an outstanding warrant for his arrest. A second deputy arrived on the scene. The first deputy received verification of a valid arrest warrant. He told Shivers he was under arrest and began a pat down search. Shivers attempted to run away. He was pursued by the first deputy in his vehicle and the other deputy on foot. The chase ended a few blocks away after the first deputy accidentally struck Shivers with the vehicle when Shivers attempted to jump over the hood. At the hospital, medical personnel found drugs on Shivers' person as they removed his clothing in order to assess and treat his injuries. Several minutes later, a paramedic found crack cocaine in the pocket of Shivers' jacket, which had been left in the treatment room while Shivers was being x-rayed. The hospital agreed to notify the sheriff's department prior to releasing Shivers. Upon his release, Shivers was taken directly from the hospital to the county jail. The district court denied his motion to suppress the crack cocaine found in his jacket pocket and convicted him of possession with intent to deliver and drug tax stamp violation charges. **OPINION HOLDS: I.** ***Search Incident to Arrest.*** In the case at bar, we find Shivers was under arrest at the time of the search. Deputy Hofbauer made an assertion of authority and explicitly stated his purpose to arrest Shivers on the outstanding arrest warrant. Shivers submitted to authority and was restrained or recaptured after being struck by Deputy Hofbauer's vehicle. Consequently, Shivers was "arrested" for purposes of a search incident to arrest at the time of the search at the hospital. Under the circumstances, it was not unreasonable for the police to delay the search for a short time after Shivers' arrest to permit him to receive medical attention for his injuries. We conclude the district court did not err in denying Shivers' motion to suppress on this basis. **II.** ***Inevitable Discovery.*** We find the State proved the crack cocaine discovered in Shivers' jacket pocket would have inevitably been discovered during the booking procedure. Shivers was transported directly from the hospital to the jail where the booking procedures involve a pat down search of arrestees, a search of the outer clothing of the arrestees including jackets and jacket pockets, and removal of arrestees' clothing before they are taken to the general population. We conclude the district court did not err in denying Shivers' motion to suppress on this alternative basis.