

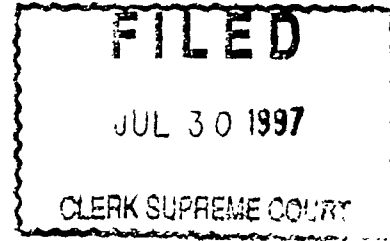
IN THE COURT OF APPEALS OF IOWA

No. 7-301 / 96-1158

STATE OF IOWA,
Appellee,

vs.

SHEILA DIANNE SWAIN,
Appellant.



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Appeal from the Iowa District Court for Humboldt County, Joel E. Swanson,
Judge.

Defendant appeals the judgment and sentence entered upon her conviction of possession with intent to deliver a controlled substance in violation of Iowa Code section 124.401(1)(c) (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, and Kurt J. Stoebe, County Attorney, for appellee.

Considered by Cady, P.J., and Streit and Vogel, JJ.

VOGEL, J.

Sheila Swain appeals the judgment and sentence entered upon her conviction of possession with intent to deliver a controlled substance in violation of Iowa Code section 124.401(1)(c) (1995). She argues the district court erred in denying her motion to suppress evidence from a search that was not supported by probable cause, exigent circumstances, or otherwise constitutional.

Scope of review. This appeal concerns the constitutional right to be free from unreasonable searches and seizures; we accordingly review the district court's suppression ruling de novo. *State v. Myer*, 441 N.W.2d 762, 763 (Iowa 1989).

Background facts. In the early morning hours of July 2, 1995, Iowa State Patrol troopers Loveland and Fellin were watching traffic on Highway 3 near Humboldt. They both observed a vehicle pass by them with an apparent equipment violation (the license plate light was not illuminated) and believed the driver was not wearing a seat belt. The troopers followed the car and noticed it crossed the center line of the highway. They stopped the car.

Sheila Swain was the driver and sole occupant of the car. Loveland approached the car and noticed Swain was then wearing a seat belt. He informed her of why she was stopped and learned she was on her way to a motorcycle rally. Loveland obtained her license and returned to his vehicle to write a memorandum for driving left of the center line and for an equipment violation. Upon his return to Swain's car Loveland asked if she was carrying any contraband. Swain replied she

was not. Swain testified Loveland asked her, "Do you mind if we search?" Swain again replied she did not have anything in her car but stated she did not mind if he looked in it.

At this point trooper Fellin was also at Swain's car, on the passenger side. Loveland asked her to unlock the passenger-side door and exit the car. Loveland and Swain walked back between her car and the patrol car. Fellin executed a search. After two to three minutes, Swain told Loveland she did not want Fellin to look in her car anymore. Loveland repeated back to her, "[Y]ou don't want us to search your vehicle anymore?" and she replied, "No, I don't." He then told her to stand in front of the patrol car and returned to her car to inform Fellin. When Loveland told Fellin that Swain wanted the search to stop, Fellin replied that it was too late. Fellin had found a device used for smoking crack cocaine, a small digital scale, crack cocaine and methamphetamine. These items were found inside a purse and a small bag.

Among other things, Swain was charged with possession with intent to deliver. Prior to trial she filed a motion to suppress the evidence seized from her car alleging the search was unconstitutional. At the hearing on the motion Swain testified that when she was asked if the troopers could look in her car, she replied they could look in her car but not in her personal belongings. She further testified she told Loveland three times she did not want her bags searched before he slowly moved to tell Fellin of this. The court denied the motion.

The court found Swain guilty of possession with intent.

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Motion to suppress/constitutionality of search. Swain argues the search was unconstitutional because she withdrew her consent to it and there was no probable cause or exigent circumstances to justify a nonconsensual search. She also contends the search exceeded the consent she gave before her revocation.

The officers had reason to stop Swain's vehicle because of the apparent equipment violation. *State v. Godfrey*, 491 N.W.2d 173, 174-75 (Iowa App. 1992). The question then becomes whether Swain consented to the search of her car. "[T]he constitutional guarantee prohibiting unreasonable searches and seizures may be waived by consent." *State v. Gates*, 150 N.W.2d 617, 618 (Iowa 1967). The State has the burden to establish the voluntariness of consent by a preponderance of the evidence. *State v. Erickson*, 362 N.W.2d 528, 530 (Iowa 1985).

There was conflicting testimony between Swain and Trooper Loveland regarding the extent and scope of the consent given by Swain. Loveland testified Swain did not put any limits on the search when she gave her consent to the officers. Conversely, Swain testified she did consent to the search of her car, but she told Loveland she did not want Trooper Fellin to look in her "personal things." The district court resolved this conflict in favor of Loveland based on a credibility finding. The *Baych* court is instructive in this vein:

Whether consent has been given freely and intelligently in a particular case is a factual matter to be determined in the first instance by the trial court, and when the evidence is factually in conflict, the appellate court will accept the finding below if supported by substantial evidence.

Id. at 583. *See State v. Shepard*, 124 N.W.2d 712, 715 (Iowa 1963) (“The question of whether consent was in fact given is a factual matter to be determined by the trial court and where the evidence is conflicting this court will accept the finding of the trial court unless it is clearly unreasonable.”).

We find there was substantial evidence Swain consented to a search of her vehicle without limitation. Further, we find Trooper Fellin found Swain’s drugs and paraphernalia before he was notified of Swain’s revocation of consent. Fellin testified he spotted a glass tube sticking out of a bag within five seconds of beginning the search of Swain’s car. Thus, some of the evidence was in Fellin’s plain view. While a defendant may revoke consent, an attempt to do so after evidence has been found is ineffective. *State v. Anderson*, 517 N.W.2d 208, 213 (Iowa 1994). Additionally, a consent revocation does not “retroactively . . . render unreasonable that search conduct prior to the time of revocation.” *State v. Myer*, 441 N.W.2d 762, 765 (Iowa 1989) Accordingly, we find the trial court’s finding was reasonable.

Having carefully considered all arguments on appeal, we affirm the district court’s decision to overrule Swain’s motion to suppress; we therefore uphold Swain’s conviction.

AFFIRMED.