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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,)

Plaintiff-Appellee,) Filed August 26, 1980

vs.)

DAVID PAUL HOLTZ,) 0-207 / 63954

Defendant-Apppellant.)

Appeal from Benton District Court - Robert Ford, Judge.

Defendant appeals his conviction of burglary in the second degree in violation of section 713.3, The Code 1979, challenging the propriety of alleged searches and seizures by police officers, his warrantless arrest, and the sufficiency of the evidence to support his conviction. REVERSED AND REMANDED FOR NEW TRIAL.

Mark H. Rettig of Hines, Pence, Day & Powers, Cedar Rapids, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney general of Iowa; and Douglas H. Staskal, Assistant Attorney General; for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendant appeals his conviction of burglary in the second degree in violation of section 713.3, The Code 1979. He raises a number of issues challenging the propriety of alleged searches and seizures by police officers, his warrantless arrest, and the sufficiency of the evidence to support his conviction. We find defendant's warrantless arrest invalid; consequently, the evidence which was seized incident to that arrest should have been suppressed. We therefore reverse defendant's conviction and remand the case for a new trial.

At 1:40 a.m. on April 6, 1979, a Benton County police officer observed a red and white Ford pickup truck near the Savetamal Medical Clinic in Belle Plaine, Iowa. Defendant and a male companion were in the vehicle. The officer saw defendant try unsuccessfully to open the front door of the clinic. Defendant then got back into the truck which was driven away. The Belle Plaine chief of police saw the vehicle parked near a tavern and later followed it out of town towards Cedar Rapids, noting it was being driven in an erratic manner. After he radioed to authorities that the truck might contain a drunk driver, the police chief returned to Belle Plaine after 3:00 a.m. and discovered a break-in had occurred at the clinic. He again radioed ahead that the vehicle occupants were to be stopped for questioning regarding the break-in.

Two Cedar Rapids policemen overheard the radio broadcast concerning a red and white pickup and the possibility that the driver was drunk. They discovered the vehicle in a motel parking lot. The officers approached the vehicle, asked the occupant to get out, and noticed a container labeled "Parke-Davis 5 ml. Tetanus Toxiod" in the vehicle. After physically examining the container, and asking the occupant some questions, the officers left without further incident. A short time later, the policemen overheard the broadcast concerning the Belle Plaine break-in and the description of the red and white pickup and recognized that the description matched the vehicle they had seen earlier in the parking lot. Consequently, a team of police officers met at the Red Roof Inn at 3:30 a.m. and were told which room defendant and his companion occupied. At approximately 4:30 a.m., two of the officers went upstairs to defendant's room via an outdoor stairway and walkway, the only means of access to the motel rooms on the second floor. One of the officers noticed the drapes in the window of defendant's room were open six to ten inches. Upon looking in, he observed drugs, drug paraphernalia (which he suspected came from the Belle Plaine Clinic) and defendant, among others. The officer knocked on the door, and when asked who it was, responded "Doug"

(defendant's brother) as a ruse to gain entry. After the door was opened, the officers announced their true identity and said they were coming into the room. Without either an arrest or a search warrant, they then arrested defendant for the clinic burglary and seized the drugs and related matter that were laying around the room.

Prior to trial, defendant filed a motion to suppress the evidence seized from the motel room, the testimony regarding the container, and the testimony concerning the officer's observations through the partially opened drapes. Trial court overruled this motion as well as subsequent motions for directed verdict. The jury found defendant guilty of second degree burglary. After trial court overruled defendant's motion for new trial, defendant timely filed this appeal.

I. Scope of Review. Because defendant has raised a constitutional challenge, we review the evidence **de novo.** State v. Olsen, 293 N.W.2d 216, 217 (Iowa 1980).

II. Search Incident to a Warrantless Arrest. Defendant argues that his warrantless arrest was unlawful and that the evidence seized as an incident to his arrest should have been suppressed. We agree with defendant on this point.

It is undisputed that the officers did not have an arrest warrant at the time they arrested defendant. In addition, the record does not indicate that defendant or his companion consented to the officers' entry into the motel room. Under these circumstances, we are compelled by Payton v. New York, ___ U.S. ___, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), to invalidate defendant's arrest. In Payton, the United States Supreme Court held that the Fourth and Fourteenth Amendments prohibit the police "from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest" in the absence of exigent circumstances. Id., 100 S. Ct. at 1374-75, 63 L. Ed. 2d at 644.

The State attempts to distinguish Payton by noting its emphasis on the sanctity of and privacy interests in one's personal home or dwelling, whereas defendant was arrested in a motel room. Thus, the State argues, defendant has a lesser privacy interest to be protected because, for example, motel rooms are frequently entered by motel employees for cleaning and other purposes. We are not persuaded by this assertion. Nor are we required to determine with precision the locations in which a person may be arrested without a warrant. Although motel rooms may be inherently less private domains than private homes, the Fourth Amendment protects people, not property. Katz v. United States, 389 U.S. 347, 351, 88 S. Ct. 507, 510, 19 L. Ed. 2d 576, 581 (1967). In this case, defendant and his companion contracted with the motel to rent

a room in which they could reasonably expect to be entitled to at least some degree of privacy. We thus hold that, under Payton, the police may not make a warrantless and nonconsensual entry into a suspect's motel room in order to make a routine felony arrest in the absence of exigent circumstances.

The State next argues that defendant's warrantless arrest was justified due to exigent circumstances. Guidelines to aid in determining when such circumstances exist are found in State v. Mayes, 286 N.W.2d 387, 389 (Iowa 1979):

> (1) a grave offense is involved; (2) the suspect is reasonably believed to be armed; (3) there is probable cause to believe the suspect committed the crime; (4) there is strong reason to believe he is on the premises; (5) there is a strong likelihood of escape if not apprehended; and (6) the entry, though not consented to, is peaceable.

Not all six criteria must be established to show exigent circumstances, but they are important in making the determination. State v. Jones, 274 N.W.2d 273, 276 (Iowa 1979). The State argues that probable cause to arrest did not exist until moments before the arrest (i.e. when the officer looked through the motel room window and saw the drugs), thus, it would be unreasonable to require the officers to get a warrant at that point. During the time required to get a warrant, the State also argues, there is a chance that the evidence could have been destroyed. In fact, one of the occupants of the room was seen injecting something into his body.

We are not persuaded that exigent circumstances were present. There was no cause reasonably to believe defendant was armed and there was no indication of any imminent escape on defendant's part. Other than the single attempt by one of the room's occupants to inject something into his body, the record shows no attempt to hide or destroy evidence. As for the State's fear of the evidence being destroyed, "a mere speculative claim . . . that the contraband 'might' have been removed if it had not been seized without a valid warrant, is just as plainly an insufficient basis upon which to justify the search as arising out of an 'emergency' or from 'exigent circumstances.' " Merrick v. State, 338 So. 2d 77, 78 (Fla. Dist. Ct. App. 1976). Most significant, however, is the fact that the officers were at the motel for an hour before they finally decided to arrest defendant. This one-hour delay belies the State's assertion of exigent or compelling circumstances necessitating a warrantless entry and arrest. It also provided sufficient time for the officers to make a determination of probable cause to arrest and to obtain an arrest warrant. As a result, the evidence seized as an incident to that arrest should have been suppressed. Trial court's failure to do so was prejudicial error.

Although our disposition of the previous issue requires reversal, defendant raises other issues which could recur on retrial. In the interest of judicial economy, we will address those that are relevant.

III. Testimony Regarding the Tetanus Toxoid Container. Defendant asserts trial court should have suppressed testimony regarding the officers' observations of the container discovered by the officers within the vehicle in which defendant was an occupant. He claims trial court erroneously concluded that the officers' actions did not constitute an investigatory stop, a search, or a seizure. The State argues that the initial observation of the container was made as a result of the officers' lawful, non-coercive approach of a stopped vehicle and defendant's subsequent voluntary exit from the vehicle.

We reject the State's argument that no "seizure" took place. The record indicates that the officers approached the vehicle to investigate suspicious circumstances regarding the operation of the red and white pickup. The officers showed their authority by approaching the vehicle and "ha[ving] the driver get out of the vehicle . . . ." We conclude that the officers' actions were a clear demonstration of authority sufficient to cause defendant to be restrained. Thus, as urged by defendant, "a Terry 'seizure' of the defendant did take place." As a result, trial court should have applied the principles of Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

However, defendant's "seizure" did not violate the Fourth Amendment if it was made on the basis of "specific and articulable cause to support a reasonable belief that criminal activity may have occurred." State v. Aschenbrenner, 289 N.W.2d 618, 619 (Iowa 1980). In this case, the specific and articulable facts are that the officers approached a stopped vehicle while investigating a crime based on a broadcast description of the vehicle involved, its occupants, and the nature of the crime, drunken driving. Further, the officers themselves previously saw the vehicle in a parking lot and observed that it was being operated in an "erratic manner" and that it appeared the driver was having difficulty steering it. We find that the officers were justified in concluding criminal activity may have occurred.

We must next determine whether the scope of the investigatory intrusion is reasonably related to the purpose of the initial intrusion. State v. Hilleshiem, 291 N.W.2d 314, 317 (Iowa 1980); Carpenter v. Sigler, 419 F.2d 169, 171 (8th Cir. 1969). We conclude that it was. The officers' request of the defendant to exit from the vehicle was justified by the information possessed by the officers through the police broadcast

and their own observation. The officers initiated the investigation due to their suspicion that the driver was intoxicated. Both saw the container and one testified he could read the label from the outside of the vehicle. The label clearly indicated that the container housed a type of pharmaceutical. Given these facts, the observations were reasonably related to the purpose of the investigation and, thus, within the limits of the circumstances which initially justified the interference with defendant's freedom. Trial court therefore properly admitted testimony regarding the officers' observations of the container.

IV. Testimony Regarding Officer's Observations Through the Partially-Opened Drapes. Defendant also alleges that trial court should have suppressed testimony of a police officer regarding his observations of the contents and interior of the motel room occupied by defendant. Defendant contends that the officer's actions constituted a planned warrantless search undertaken for the officer's convenience in the absence of exigent circumstances or other justification for failure to obtain a valid search warrant.

We agree with defendant's assertion that the officer's view through the partially opened drape could not be justified under the "plain view" doctrine enunciated in Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). However, Coolidge applies only to post-intrusion seizures of evidence. State v. Davis, 228 N.W.2d 67, 70 (Iowa 1975).

In this case, we must determine whether the viewing activities of the officer constituted an illegal search, an issue the court was not required to reach in Davis. 228 N.W.2d at 73. We believe the answer rests on existence of a reasonable expectation of privacy. Rakas v. Illinois, 439 U.S. 128, 143, 99 S. Ct. 421, 430-31, 58 L. Ed. 2d 387, 401, n. 12 (1978). "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection [citing cases]. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. [citing cases]" Katz, 389 U.S. at 351-52, 88 S. Ct. at 511, 19 L. Ed. 2d at 582.

Applying these principles to the facts, we conclude the officer's observations did not constitute a search protected by the Fourth Amendment. The record reveals that the room faced the common exterior walkway of the motel, over which defendant had no control. Motel occupants, visitors, and employees, among others, could walk past the defendant's room, any one of whom could have looked through the open drapes. Further, the officer was lawfully on the walkway and took no extraordinary measures to enhance

his ability to observe. Under these circumstances, we find defendant had no reasonable expectation of privacy. Trial court property overruled defendant's motion to suppress the officer's testimony.

V. Sufficiency of the Evidence. Defendant alleges trial court erred in overruling his motions for directed verdict and for new trial on the grounds that there was insufficient evidence to sustain the verdict. Due to our decision in this case, any retrial of defendant will necessarily involve the jury's consideration of evidence different from that in the original trial, we thus will not address these issues.

Judgment of trial court is reversed and the case is remanded for new trial.

REVERSED AND REMANDED FOR NEW TRIAL.

All judges concur except Donielson, J., who dissents.

I dissent from the majority's holding exigent circumstances were not present to justify the warrantless arrest of defendant. Applying the six guidelines for determining exigent circumstances, originally adopted by the supreme court in State v. Johnson, 232 N.W.2d 477, 480 (Iowa 1975), to this case clearly indicates exigent circumstances existed. The offense of burglary of which defendant was accused is a serious felony offense, § 713.3, The Code 1979. After viewing in through the motel room's window, the police had probable cause to arrest. They also had strong reason to believe defendant was in the room. The entry by the police was peaceable. It is important to note that each of the Johnson factors need not be found to conclude exigent circumstances exist; each case turns on its own particular facts. State v. Jones, 274 N.W.2d 273, 276 (Iowa 1979).

Moreover, the other facts and circumstances of the arrest militate in favor of a finding of exigent circumstances. Immediately prior to the arrest, the Cedar Rapids police were facing a situation in which individuals in a vehicle bearing Texas license plates were suspected of being involved in a burglary in a small town approximately thirty miles to the west. Police located the suspects not in a home, but in a motel room, which I believe provides a person with less of an expectation of privacy than a home. The suspects had been stopped once before and could reasonably be suspected of being on the alert for further police surveillance. The time was 4:30 a.m., yet the suspects were still awake. One suspect was seen attempting to inject something into his arm, thereby indicating the risk of destruction of the evidence. Thus, the police were confronted with suspects, who could reasonably be expected to be wary and ready to escape at the slightest indication of a police presence. Considering the public nature of a motel and its parking lot, the police would have considerable concern regarding safely arresting the suspects as the other motel occupants began to awake and leave their rooms. The aggregation of these circumstances leads reasonably and inexorably to only one conclusion: exigent circumstances existed to justify the warrantless arrest. See State v. Mayer, 286 N.W.2d 387, 389-90 (Iowa 1979); Jones, 274 N.W.2d at 275-76.

The majority castigates the police's failure to make a determination of probable cause and to obtain an arrest warrant within the one-hour period they spent outside the motel room. Yet until they determined for themselves probable cause existed they reasonably would not seek an arrest warrant. There is no evidence in the record

indicating the police could have obtained the reasons for finding probable cause any sooner than they did. Once they had determined for themselves probable cause existed, the exigent circumstances justified their proceeding without a warrant to secure an arrest safely and effectively.

I would hold the trial court did not err in finding the warrantless entry and arrest was justified by the presence of exigent circumstances.