

IN THE COURT OF APPEALS OF IOWA

FILED

382

MAR 29 1970

STATE OF IOWA,

)

Appellee,

)

Filed March 29, 1970

CLERK SUPREME COURT

vs.

)

RICKEY LEE HUTCHINSON,

)

433

Appellant.

)

60258

STATE OF IOWA,

)

Appellee,

)

vs.

)

JESSE DAVID BROWN,

)

437

Appellant.

)

60367

Appeal from Polk District Court - James P. Denato, Ray Hanrahan and Harry Perkins, Judges.

Defendants appeal their convictions of armed robbery, in violation of §§ 711.1 and 711.2, The Code 1975, assigning as error trial court's rulings on their motions to suppress evidence. Defendant-Hutchinson also contends trial court abused its discretion in refusing to permit him to voir dire prospective jurors. Defendant-Brown also contends trial court erred in allowing the prosecutor to read the indictment and plea at the close of the State's evidence rather than at the beginning, as required by § 780.5(1), The Code. REVERSED ON BOTH APPEALS.

Alfredo G. Parrish, of Des Moines, counsel for appellant, Rickey Lee Hutchinson, and appellant, Jesse David Brown.

Richard C. Turner, Attorney General of Iowa, Raymond W. Sullins, Assistant Attorney General, and Dan Johnston, Polk County Attorney, counsel for appellee, State of Iowa.

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

DONIELSON, J.

Rickey Lee Hutchinson, the defendant in No. 433, and Jesse David Brown, the defendant in No. 437, appeal their convictions of armed robbery, in violation of §§ 711.1 and 711.2, The Code 1975. Since the conviction of both men arose out of the same transaction, and since both challenge the trial court's ruling on their motion to suppress evidence on the same grounds, the two appeals will be consolidated for purposes of this opinion. Defendant-Hutchinson also contends that the trial court abused its discretion in refusing to permit him to voir dire prospective jurors concerning their attitudes toward an in-court identification of himself as a participant in the robbery. Defendant-Brown also alleges that the trial court erred in allowing the prosecutor to read the indictment and plea to the jury after the State's evidence rather than before it, as required by § 780.5(1), The Code.

I. Motion to Suppress.

Brown and Hutchinson assert that the trial court erred in overruling their motions to suppress a gun and tape carrying case which were discovered by police officers during a warrantless search of the vehicle in which they were found. In essence, they contend that the evidence was the product of a warrantless search conducted without justification, and in violation of the Fourth, Eighth and Fourteenth Amendments to the United States Constitution.

On July 21, 1976, Sergeant James Trotter, a member of the Des Moines Police Department with nine and one half years experience, was driving an unmarked police vehicle on routine patrol along East 14th Street in Des Moines. At approximately 1:30 p.m., Trotter received a radio dispatch concerning an armed robbery which had just occurred in the relative vicinity at Second and Hull Avenue. In the dispatch, the robbers were described as two black male adults. As a matter of routine procedure, Trotter responded to the call and continued along East 14th Street until he reached Hull, where he turned and proceeded toward the scene of the reported crime in an attempt to locate the robbers.

When Trotter reached North Union and Hull, he observed a black male adult wearing a "muscle shirt" walking toward a 1971 black and green Chevrolet Impala. Trotter then circled the block to observe the man and automobile more closely. When Trotter next observed the man, he (the man) was walking away from the Impala automobile wearing a different shirt and carrying a gasoline can in his hand. At that

time, Trotter observed some movement in the automobile, indicating to him that someone had dropped down in one of the car seats. The man on foot had moved out of Trotter's sight, so Trotter pulled his vehicle forward behind the automobile and proceeded to call for assistance.

Trotter then left his vehicle to investigate the Impala. He had his weapon drawn and he was carrying his walkie-talkie. Trotter approached the vehicle from the rear on the driver's side. Through the left rear door window, Trotter observed one man lying on the back seat and another lying on the front floorboard (later identified as Hutchinson and Brown respectively). Hutchinson was not wearing a shirt, but only trousers. Trotter testified that while he was outside the car, he was able to observe a shirt lying in the back seat of the car which appeared to him to be the same "muscle shirt" that he previously saw being worn by the man carrying the gasoline can.

At the same time that Trotter observed Brown, he observed an open tape carrying case under or next to him. Brown shut the case immediately. Trotter covered the men with his pistol and immediately called for assistance. The total amount of time that elapsed from the initial radio dispatch until Trotter called for assistance was less than 15 minutes.

Shortly after Trotter made the call, an officer arrived and Trotter directed him to pursue the man on foot carrying the gas can. Officer Irwin arrived immediately thereafter and he removed Brown from the front floorboard while Trotter removed Hutchinson from the rear seat. Both suspects were immediately searched, handcuffed, and placed in separate police vehicles. At this time, Trotter advised Irwin of Brown's activity with regard to the tape carrying case.

Acting on the information given him by Trotter, Irwin reached inside the car where he observed a small amount of change on the floorboard around the tape case. He then opened the case, observed that it contained money, and immediately closed it again. Irwin then observed that the automobile glove box had papers sticking out of the upper left hand corner and nylon or silk material coming out of the lower left hand corner. Irwin proceeded to open the unlocked glove box. He observed the barrel of a small pistol and immediately closed the glove box.

Hutchinson and Brown were taken to the police station where they were advised of their constitutional rights and formally placed under arrest. However, during the hearing on defendants' motions to suppress, Trotter testified that as far as he was

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concerned, both men were "under arrest" at the scene where they were taken into police custody inasmuch as they were detained and not permitted to leave.

In their motions to suppress, both of which were overruled by the trial court, defendants argued that the search conducted in this case was constitutionally impermissible because it was warrantless and did not fall within any of the recognized exceptions to the warrant requirement of the Fourth Amendment. The State contended that the search of the automobile was clearly justified as either a search incident to a lawful arrest or as a search conducted under exigent circumstances.

Since defendants assert that the search and seizure violated their constitutional rights, our review is *de novo*, i.e., we independently evaluate the circumstances in totality. *State v. Iowa* District Court in and for Johnson County, 247 N.W.2d 241, 245 (Iowa 1976); *Bettuo v. Pelton*, 260 N.W.2d 423, 425 (Iowa 1977). Because the search and seizure were made without a warrant, the burden is upon the State to demonstrate that the police action was lawful and fell within one of the exceptions to the warrant requirement of the Fourth Amendment. *State v. King*, 191 N.W.2d 650, 654 (Iowa 1971). This burden must be met by a preponderance of the evidence since defendants have invoked the protection of the federal constitution, *United States v. O'Looney*, 544 F.2d 385, 388 (9 Cir.), cert. denied, 429 U.S. 1023, 97 S.Ct. 642, 50 L.Ed.2d 625 (1976), citing *United States v. Matlock*, 415 U.S. 164, 177-178 & n. 14, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974), although we recognize that Iowa apparently demands a showing by clear and convincing evidence. *State v. Smith*, 178 N.W.2d 329, 333 (Iowa 1970).

The law is settled that the Fourth Amendment does not prohibit all searches and seizures, but only those which are unreasonable. Warrantless searches are *per se* unreasonable, subject only to a few specifically established and well delineated exceptions. *State v. King*, 191 N.W.2d 650, 654 (Iowa 1971); *Coolidge v. New Hampshire*, 403 U.S. 443, 452-454, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). These exceptions were enumerated by the court in *State v. Shane*, 255 N.W.2d 324, 326 (Iowa 1977):

"There are three exceptions to this rule generally recognized by the courts. No warrant is necessary when the search and seizure, within prescribed limits, are incident to a lawful arrest; the warrant requirement may be waived by an informed and voluntary consent; and, third, existence of exigent circumstances may relieve an officer from the obligation to obtain a warrant if it is impracticable to do so." [quoting from *State v. Jackson*, 210 N.W.2d 537, 539 (Iowa 1973)].

Consequently, our inquiry must focus upon whether the warrantless search conducted in the instant case fell within one of these three exceptions. However, as an initial matter, defendants urge that Trotter's initial presence at the Impala automobile was not justifiable as an "investigatory stop" as recognized in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1969, 20 L.Ed.2d 889 (1968) and *State v. Cooley*, 229 N.W.2d 755, 760 (Iowa 1975). The State argues that there is no need to justify Trotter's initial presence because the automobile was already stopped and Trotter was merely making a "plain view" observation from a point at which he was entitled to be, i.e., a sidewalk next to a public thoroughfare. See *State v. Donnell*, 239 N.W.2d 575, 577 (Iowa 1976); *State v. Dixon*, 241 N.W.2d 21, 24 (Iowa 1976). The State's argument has merit. In *State v. Kramer*, 231 N.W.2d 874, 879 (Iowa 1975), the court held that there is no intrusion in the constitutional sense where one observes that which occurs openly in a public place and which is fully disclosed to visual observation. See *State v. Raymond*, 258 Iowa 1339, 1347, 142 N.W.2d 444 (1966); *State v. Davis*, 228 N.W.2d 67, 72 (Iowa 1975).

However, even if we would not accept the State's argument, Trotter's initial presence at the automobile was justifiable as an investigatory stop. In *State v. Cooley*, supra, at 760, the court held that a police officer may, in appropriate circumstances and in an appropriate manner, approach a person for purposes of investigating possible criminal behavior, even though there is not sufficient probable cause to make an arrest. Circumstances for an investigatory stop exist "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity is afoot." *State v. Donnell*, supra, at 577. In order for the State to establish that the officer had reasonable grounds to conduct an investigatory stop of a motor vehicle when the grounds are questioned, the State must show that the officer possessed specific and articulable objective facts which would cause him to reasonably believe that criminal activity is afoot. *State v. Reese*, 259 N.W.2d 793, 795 (Iowa 1977).

In the instant case, Trotter had received a radio dispatch concerning an armed robbery which had just occurred in the relative vicinity. The dispatch described the robbers as two black male adults. On the same street as and within blocks of the robbery, only minutes after it occurred, Trotter observed the parked Impala automobile and a black male adult approach it and then leave it wearing a different shirt and carrying a gasoline can. Trotter observed furtive movements in the car, indicating to him that someone was ducking down in one of the seats. Under this set of facts, we

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conclude that Trotter was possessed of sufficient specific and articulable objective facts to warrant further investigation. Consequently, we uphold the validity of Trotter's initial presence as an investigatory stop.

Next, we must consider whether the warrantless search of the interior of the automobile fell within one of the exceptions to the warrant requirement. Initially, the State contends that the search was made incident to a lawful arrest. However, we must determine when the arrest of the defendants actually occurred. The State seems to argue that Brown and Hutchinson were under arrest when they were detained, taken into custody, handcuffed, and placed in separate patrol cars.

An arrest occurs when there is an actual or constructive seizure or detention of the person, performed with the intention to effect arrest and so understood by the person detained, *Hicks v. United States*, 382 F.2d 158, 161 (D.C. Cir. 1967), or when an individual's liberty of movement has been effectively restricted by police officers. *Reed v. United States*, 401 F.2d 756, 761 (8 Cir. 1968), cert. denied, 394 U.S. 1021, 39 S.Ct. 1637, 23 L.Ed.2d 48 (1969). The thought processes of the police and the defendant, to the extent they can be discerned, are relevant considerations, but the test is not what the defendant thought, but what a reasonable person, innocent of any crime, would have thought had he been in the defendant's shoes. *Hicks v. United States*, supra, at 161; *Coates v. United States*, 413 F.2d 371, 373-374 (D.C. Cir. 1969).

An arrest to be effective does not require formal words of arrest or stationhouse bookkeeping. *Reed v. United States*, supra, at 761. Consequently, despite the fact that no formal arrest was made in the instant case until defendants were taken to the police station, we conclude that they were effectively "under arrest" when placed in patrol cars. However, assuming *arguendo* that the arrest did not occur until formally made at the station several minutes later, that fact, in and of itself, does not vitiate the validity of the search if made at a time when probable cause to arrest existed. The fact that a search occurs a few minutes before arrest does not *per se* invalidate that search. *State v. Harvey*, 242 N.W.2d 330, 339 (Iowa 1976); *State v. Johnson*, 232 N.W.2d 477, 479 (Iowa 1975). The propriety of a search conducted incident to an arrest is unaffected by the fact that it immediately preceded rather than followed the formal arrest, *State v. Harvey*, supra, at 339; *United States v. Burnett*, 526 F.2d 911, 913 (5 Cir.), cert. denied, 425 U.S. 977, 96 S.Ct. 2179, 48 L.Ed.2d 801 (1976); *United States v.*

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Skinner, 412 F.2d 93, 103 (8 Cir.), cert. denied, 386 U.S. 967, 90 S.Ct. 448, 24 L.Ed.2d 433 (1969), if, at the time of the search, there was probable cause to arrest. United States v. Brown, 463 F.2d 949, 950 (D.C. Cir. 1972); United States v. Branch, 545 F.2d 177, 183 (D.C. Cir. 1976).

Consequently, regardless of when the arrest actually occurred, the search is only valid if it was undertaken at a time when probable cause to arrest existed. In State v. Shane, supra, at 326, the court held that a valid arrest may be made without a warrant when an officer has probable cause to believe a crime has been committed and that defendant committed it. See § 755.4, The Code. Probable cause consists of circumstances which would lead a reasonable person to believe defendant committed the crime. State v. Evans, 193 N.W.2d 515, 517 (Iowa 1972); State v. King, supra, at 654. In Evans, the court quoted the following from Draper v. United States, 358 U.S. 307, 313, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959):

"In dealing with probable cause, * * * as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. * * * Probable cause exists where 'the facts and circumstances within their [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.' * * *" See State v. Morris, 227 N.W.2d 150, 152 (Iowa 1975).

Sergeant Trotter had the following information at the time he and Officer Irwin placed defendants in police custody. Trotter had received a radio dispatch regarding an armed robbery which had just occurred. The dispatch gave the location of the robbery and described the robbers as two black male adults. Trotter was in the immediate vicinity of the robbery at a time immediately following the robbery. A few blocks from the robbery site, Trotter observed the Impala automobile and a black male adult wearing a "muscle shirt" walking toward the automobile. When Trotter next observed the man, he was walking away from the vehicle wearing a different shirt and carrying a gasoline can in his hand.

At this time, Trotter observed movement in the vehicle, indicating to him that someone had dropped down in one of the car seats. Trotter approached the vehicle and, through the back door window, he was able to observe one man (Hutchinson) lying on the back seat and another (Brown) lying on the front floorboard. At the same time that

Trotter first saw Brown, he saw Brown shut a tape carrying case which was under or next to him. Hutchinson was not wearing a shirt, but only trousers. Trotter testified that while he was outside the car, he was able to observe a shirt lying in the back seat of the car which appeared to him to be the same "muscle shirt" that he previously saw being worn by the man carrying the gasoline can. When assistance arrived, both suspects were immediately removed from the vehicle, searched, handcuffed, and placed in separate vehicles.

Against this factual scenario, we are constrained to conclude that the police officers in this case did not have probable cause to arrest the defendants. The State's reliance upon *State v. Simmons*, 195 N.W.2d 723, 724-726 (Iowa 1972) to justify this search as one made incident to a valid arrest is misplaced. In *Simmons*, where a warrantless search was upheld prior to arrest because exigent circumstances and probable cause were found to exist, police officers were called to the scene of an armed robbery and learned that four black juveniles, one of whom was wearing a dark raincoat, had committed the crime. Earlier that evening, these same officers had been summoned to another location to investigate an armed robbery, where they learned that two black males had committed the robbery. One of the robbers had an Afro type haircut, weighed 130-140 pounds, and was 5'6" - 5'7" in height. Police officers stopped a vehicle with four occupants in the relative vicinity of both crimes. Officers observed that both rear-seat passengers wore dark coats. They also observed furtive movements by the rear-seat occupants, which suggested that someone was attempting to shove something under the front seat.

Simmons differs from the instant case because there police officers had much more information upon which to base their warrantless search than did Trotter and Irwin to make a warrantless arrest and search. The officers in *Simmons* had a description of the race, sex, clothing, hairstyle, height, weight and relative age of the robbers, all of which they were able to verify when they stopped the vehicle in which the suspects were riding. Other than race and sex, the officers in our case had none of this same information when they placed defendants in custody.

In the other cases relied upon by the State, *State v. Donnell*, supra, and *State v. Dixon*, supra, the seizures of evidence from vehicles were upheld as being made from within "plain view" during the course of a valid investigatory stop. However, there is no

contention in the instant case that the search or seizure was made pursuant to a "plain view" observation by police officers.

Our research has not led us to a single case in which probable cause to arrest has been found to exist where officers possessed so little concrete information as they did here. If, in the radio dispatch, there had been a more detailed description of the physical characteristics of the robbers with respect to height, weight, hair color or style, or other special identifying features, or if there had been a description of the clothing the suspects were wearing, or if there had been a description of the automobile in which they were riding or its license number, we would experience much less difficulty in finding probable cause to arrest. Further, if the robbery had occurred at 1:30 a.m. instead of 1:30 p.m., our task might be made somewhat easier. However, none of this information was available to officers in the instant case. In fact, the radio dispatch here described only two men while the actual stop and subsequent arrest centered around the activities of three.

On the basis of the information contained in the radio dispatch, the proximity in time and place to the robbery, and the other suspicious activity, Trotter was most certainly justified in approaching these men in the vehicle for purposes of investigation. However, there is a great deal of difference between the level of information an officer must possess to make an investigatory stop and the level necessary to furnish probable cause to arrest. Although we conclude that the former was met here, we are unable to say that the latter was. Consequently, we must reverse. We need not consider the State's other argument that the search was made under "exigent circumstances" because our inquiry would again focus upon whether officers had probable cause for believing that the automobile contained contraband which was being illegally transported. *Carroll v. United States*, 267 U.S. 132, 149, 45 S.Ct. 280, 69 L.Ed. 543 (1925); *State v. King*, supra. Under the facts of this case, we conclude that officers had neither probable cause to arrest nor probable cause to search. A contrary conclusion would, in our view, constitute a serious erosion of the protection of the Fourth Amendment. Such an erosion we refuse to sanction here. Although our resolution of this issue may render consideration of the other issues unnecessary, we will address them in case the State chooses to retry the defendants.

II. Voir Dire Examination

Defendant-Hutchinson contends that the trial court abused its discretion in refusing to permit him to voir dire prospective jurors concerning their attitudes toward an in-court identification of himself as a participant in the robbery. The scope and form of the examination of prospective jurors on voir dire is largely within the sound discretion of the trial court, and an appellate court will interfere only where abuse is clearly shown. *State v. Menke*, 227 N.W.2d 184, 187 (Iowa 1975); see *Anderson v. City of Council Bluffs*, 195 N.W.2d 373, 377 (Iowa 1972). We find no such abuse here.

III. Compliance with § 780.5(1), The Code.

Defendant-Brown asserts that the trial court abused its discretion in allowing the prosecutor to read the indictment and plea to the jury after the State's evidence rather than before it, as required by § 780.5(1), The Code. The supreme court has held that the failure of the prosecutor to read the indictment prior to the presentation of the State's evidence is a mere irregularity which is waived by the defendant's failure to object to the omission prior to the introduction of evidence, *State v. Norton*, 67 Iowa 641, 642, 25 N.W. 842 (1885), and that such reading is not prejudicial to the defendant. *State v. Dawson*, 245 Iowa 747, 748-749, 63 N.W.2d 917 (1954). Although Brown invites us to abandon the position taken in these two cases, this court declines to do so. Defendant waived any error by failing to make a proper objection prior to the introduction of evidence.

On the basis of our holding in Division I, we reverse on both appeals.

REVERSED ON BOTH APPEALS.

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

OXBERGER, J. (dissenting)

I dissent since I find in the facts recited by the majority as the information available to Officers Trotter and Irwin when they placed defendants in police custody sufficient probable cause to justify the warrantless limited search of the vehicle which occurred.

I believe that there is probable cause to detain and investigate when police officers arrive in the vicinity of an armed robbery within moments following the crime and observe people matching the general description of the robbers lying on the floorboards of an automobile who, upon the officer's identification of himself, move quickly to close a tape deck box which lies among scattered coins. The officers in opening the tape box observed a quantity of money inside and noted also the door to the glove compartment appears to be stuffed closed with papers and nylon still hanging out. Opening the unlocked glove compartment and observing a gun appears to me no more than routine and standard police practice fully within the reasonableness standard which is the ultimate test of all search and seizure cases. *State v. Shane*, 255 N.W.2d 324, 327 (Iowa 1977).

It appears to me the actions of the defendants themselves invited the closer police scrutiny which now they claim is an unconstitutional intrusion. The limited "search" of the tape box and glove compartment were directly related to the defendant's actions just prior to their arrest. See *Shane*, supra at 328. Further, the police were not required to secure proof sufficient to establish guilt in order to establish probable cause to search. *Draper v. United States*, 258 U.S. 307, 311 (1959) rejected just such an argument. I believe Trotter and Irwin would have been derelict in their duties, as the Draper court stated regarding the police officer's conduct examined there, had they not pursued the obvious indicia strongly suggesting the defendants' involvement in the moments-earlier armed robbery.

I would affirm the trial court on the basis of probable cause to arrest and search and rule the defendants' motions to suppress were properly denied.