

No. 98-0013. [9-156] STATE v. MUELLER

Appeal from the Iowa District Court for Black Hawk County, Van D. Zimmer, Judge. **REVERSED AND REMANDED FOR NEW TRIAL.** Heard by Sackett, C.J., Vogel, J., and Schlegel, S.J., but decided en banc. Mahan and Zimmer, JJ., take no part. Opinion by Vogel, J. (8 pages \$3.20)

Bryan Mueller, Grant Williamson, Dusty Smith and Jeremiah Gantois rented a house in Waterloo, Iowa owned by James Bauch. Williamson and Gantois, contacted Bauch twice to inform him that some of the other tenants had been causing intentional damage on the property. Bauch, a judge in the First Judicial District, later asked Officer Mike Briggs to meet him at the house to inspect the damage. Upon arrival at the house, Bauch knocked on the door and told Gantois that he needed to come in to inspect the damage. Bauch testified that Gantois either said OK, or simply stepped aside. The two officers followed Bauch into the house. As the officers inspected the damage, one officer noticed a tray in a bedroom which appeared to contain marijuana. At that point, the officer asked each tenant if they would consent to a search for drugs. Two tenants, including Mueller, denied their consent. Briggs then obtained a warrant and seized approximately 121 grams of marijuana in Mueller's bedroom. Mueller now appeals his conviction for failure to affix a drug tax stamp. **OPINION HOLDS: *Motion to suppress.*** Mueller contends the district court erred in denying his motion to suppress. While we agree that the Bauch lawfully entered the premises, the key issue is whether the *officers'* entry and search were valid. It is undisputed that the officers did not ask permission to enter the house or conduct their search, nor did they ask Bauch if he had secured the tenants' consent. Although Gantois did not resist the officers' entry, a consent to a search must be an intentional waiver of a known right and not merely a submission to authority. We agree with the district court that the State did not meet its burden to prove the search was consensual. Moreover, while a landlord may under some circumstances be able to consent to a search of a tenant's home, we do not believe it was proper in this case. Bauch asked the officers to accompany him to gather evidence of criminal mischief so charges could be brought against the alleged perpetrators. We decline to find that an exigency existed as there was simply no emergency or urgent need that justified the warrantless entry. We further do not believe it was reasonable for the officers to believe that Bauch could consent to their entry when the tenants were present and available to consent for themselves. As we find the initial search was unreasonable, all evidence seized in the subsequent search was also tainted. The admission of this evidence amounts to prejudicial error which requires reversal.