IN THE COURT OF APPEALS OF IOWA

No. 1-493 / 90-1828

FILED
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CLERK SUPREME COURT

695

STATE OF IOWA,

Plaintiff-Appellant,

vs.

NORMAN WAYNE DAVIS and JACKIE DUANE BEAMAN,

Defendants,

and

DOUGLAS ROBERT THORNTON,

Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Ray Hanrahan and George Bergeson, Judges.

State appeals the district court's suppression order. **REVERSED.**

Bonnie J. Campbell, Attorney General, Bruce Kempkes, Assistant Attorney General, John P. Sarcone, County Attorney, and Joseph P. Weeg and James Ward, Assistant County Attorneys, for appellant.

Jeff Carter of the Tom Whitney Law Office, Des Moines, for appellee.

Heard by Oxberger, C.J., and Schlegel and Habhab, JJ.

SCHLEGEL, J.

At about three in the morning, a deputy sheriff saw a pickup truck with only one headlight. The deputy, Dennis George, followed the truck and saw its driver turn twice without using a turn signal. The truck then stopped in the middle of a residential street while two people disembarked from the passenger side of the vehicle. At that point George got out of his car and approached the truck. Subsequently, another person exited the vehicle from the driver's side.

George ascertained the truck's occupants were Norman Wayne Davis, Jackie Duane Beaman, and Douglas Robert Thornton. After George had made these identifications, and while all three occupants were outside the truck, the deputy looked inside the truck and saw an eight-inch-long shaving kit on the seat. George thought the shaving kit looked out of place and asked about it. Beaman claimed ownership of the kit. When the deputy asked to look inside it, Beaman leaned inside the truck, picked up the kit, opened it, and showed George its contents without relinquishing the kit. The deputy later testified that Beaman "sort of flashed" the contents to him. Beaman said, "See, just shaving stuff". However, what George actually saw was an ammunition clip for an automatic pistol. This caused the deputy to fear the men might have a gun on their persons or in the truck, and thus it also caused him to fear for his safety. George then requested assistance from other officers over his radio.

A pat-down search of the three men revealed no guns on their persons. A few minutes later, after the three men had been placed in patrol cars, the investigating officers searched the truck and the surrounding area, ostensibly for weapons. They found guns and drugs inside the truck's cab; they also found a bag containing methamphetamine and marijuana on the ground under the truck, and another bag containing methamphetamine in the engine compartment.

Davis, Beaman, and Thornton were charged with possession of methamphetamine with intent to deliver and carrying weapons. They moved to suppress the evidence seized from the truck and the ground around it. After a hearing the district court sustained these motions and suppressed the evidence in question. The district court held the search of the truck and its vicinity was not necessary for the safety of the officers and was not justified on any other ground. The district court relied heavily on the fact that the three defendants were already in patrol cars at the time of the search; the court concluded the three men had no access at that point to any guns located in the truck's cab.

The State has now been granted discretionary review to challenge the district court's suppression order. Thornton is the only appellee in this appeal. Our review of a district court's suppression order on allegations of deprivation of a constitutional right is de novo. State v. Vincik, 436 N.W.2d 350, 353 (Iowa 1989). We make an

independent evaluation of the totality of the circumstances on the record as a whole. Id.

I. The State first argues Thornton's suppression motion was not timely filed. Iowa Rule of Criminal Procedure 10(4) provides that motions challenging the seizure of evidence "shall be filed when the grounds therefor reasonably appear but no later than forty days after arraignment." Under rule 10(3), failure by an accused to file a timely motion "shall constitute waiver thereof" unless the district court "for good cause shown" grants relief from such waiver.

Thornton was arraigned on June 26, 1990. He joined Davis's motion to suppress by filing documentation of such on November 16, 1990. The county attorney's office and each attorney for the three defendants agreed to schedule discovery depositions of the State's witnesses on September 24, 1990, and October 23, 1990. The good faith efforts by the separate defense counsel and the prosecutors did not allow for several witnesses to be deposed until October 23, 1990. Thornton has shown good cause, and the suppression issue is not waived.

II. The State next argues the court erred in concluding a fourth amendment violation occurred. The district court found it was reasonable for George to search the defendants for weapons, but unreasonable for him to search the truck. It stated:

> There was no danger to Deputy George or to any of the other deputies after they searched the

> defendants, as at this time the three defendants were placed in the deputies' patrol cars. The State has failed to establish that the search of the pickup was necessary for the safety of the deputies or was a reasonable one.

Contrary to the district court's ruling, the United States Supreme Court has held in Michigan v. Long, 463 U.S. 1032, 1051-52, 103 S. Ct. 3469, 3482, 77 L. Ed. 2d 1201, 1221-22 (1983), that under the fourth amendment a search for a weapon can be reasonable even if the officers have placed their suspects "under control" during an investigative stop of a vehicle. The Court held a stop and frisk is not limited to the person of the defendant:

> [T]he search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "specific articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officers in believing the suspect is dangerous and the suspect may gain immediate control of weapons.

Id. at 1049, 103 S. Ct. at 3480, 77 L. Ed. 2d at 1220 (citing Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 905-06 (1968)).

In the case at hand, defendants were in patrol cars at the time the police searched the truck. The Supreme Court specifically addressed this issue in Long:

> The Michigan Supreme Court appeared to believe that it was not reasonable for the officers to fear that Long could injure them, because he was effectively under their control during the investigative stop and could not get access to any weapons that might have been located in the automobile. This reasoning is mistaken in several respects.

Id. at 1051, 103 S. Ct. at 3482, 77 L. Ed. 2d at 1221

(citation omitted). The Court then set forth the following reasons to justify the search under the circumstances:

> (1) protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger; (2) roadside encounters between police and suspects are especially hazardous; and (3) danger may arise from the possible presence of weapons in the area surrounding a suspect.

State v. Conger, 375 N.W.2d 278, 279 (Iowa App. 1985) (citing Long, 463 U.S. at 1048-49, 103 S. Ct. at 3479-80, 77 L. Ed. 2d at 1219-20). In addition, Iowa appellate courts have applied the Long principles to similar situations. See State v. McGee, 381 N.W.2d 630, 633 (Iowa 1986) (due to reliable tip that accused had gun in his vehicle, armed officers during investigative stop could search passenger compartment after placing him against side of vehicle); Conger, 375 N.W.2d at 279 (officers may search truck's cab for weapons after bullet fell from accused's pocket during investigative stop, even after placing accused in squad car).

We believe the application of the above law to these facts shows the officer's search of the truck was a justified protective search under Long. The discovery of the ammunition clip for an automatic pistol heightened the risk George faced in confronting the three men in the dark. We find the district court erred in its suppression ruling. Deputy George had a reasonable belief based on specific and articulable facts that the suspects may be dangerous and may gain immediate possession of the weapons.

REVERSED.