IN THE COURT OF APPEALS OF IOWA

No. 1-188 / 10-0334
Filed April 27, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRENT ALLEN BARKHAUSEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, James D. Coil, District Associate Judge.

Brent Barkhausen appeals from the judgment and sentence entered on his conviction for possession of marijuana, third offense. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda Hines, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Shana Guthrie and Brian Williams, Assistant County Attorneys, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ. Tabor, J., takes no part.

DANILSON, J.

Brent Barkhausen appeals from the judgment and sentence entered on his conviction following a bench trial for possession of marijuana, third offense, in violation of Iowa Code section 124.401(5) (2009). Barkhausen contends the district court erred in denying his motion to suppress because (1) it was unreasonable for the law enforcement officer to believe a third party had authority to consent to entry into his residence and (2) the consent was not voluntary. Upon our review, we find the circumstances faced by the officer in this case would not have caused a reasonable person to doubt the third party's authority to allow him to accompany a child protection worker into Barkhausen's home for purposes of an Iowa Department of Human Services (DHS) home visit. As such, the officer was lawfully inside Barkhausen's home when he observed drug evidence in plain view. We further find error was not preserved on the voluntary consent issue that is raised for the first time on appeal. We affirm Barkhausan's conviction and sentence.

I. Background Facts and Proceedings.

On May 8, 2009, DHS child protection worker Stacy DeBerg called the Waterloo Police Department and requested an officer meet her at the home Brent Barkhausen owned with his fiancée, Tonya, for an unannounced home visit. DeBerg was investigating a report that a child living in Barkhausen's home had made statements that his parents were smoking methamphetamine and marijuana in his presence.

Waterloo Police Officer Matt Miller responded to the home in uniform, where DeBerg was waiting. They went together to the front door and knocked.

Jolene, Tonya's mother, answered the door. DeBerg explained who they were, Jolene opened the door and let them in (the front door opens into the living room), and Jolene called to Tonya and Barkhausen who were taking a nap in the bedroom. DeBerg and Officer Miller "were walking in the door" when Tonya and Barkhausen joined them in the living room. DeBerg and Officer Miller introduced themselves.

Tonya asked DeBerg to sit down with her and Brent in the living room to conduct the DHS interview. Officer Miller stood "about five feet" inside the doorway in the living room. After several minutes, he observed "what appeared to be a marijuana bong near the end table by the chair, and . . . a small silver marijuana grinder on the end table" in the living room right next to the armchair upon which Barkhausen was sitting.

During the investigation, DeBerg stepped outside for a few minutes to answer a phone call. Officer Miller complied with Barkhausen's request that he go outside with DeBerg. The interview resumed when they reentered the home. At some point during the interview, Tonya gave DeBerg a tour of the home. Officer Miller accompanied DeBerg on at least part of the tour.

When DeBerg completed the interview, Officer Miller asked the couple about the marijuana bong and grinder. Although Barkhausen had admitted to smoking marijuana earlier in the interview, he denied the drug paraphernalia was his and said he was holding the items for a friend. Officer Miller seized the evidence before he and DeBerg left the home. They had been at the home for approximately one hour. Officer Miller returned on May 18, 2009, to arrest Barkhausen.

The State charged Barkhausen by trial information with possession of marijuana, third offense. Barkhausen filed a motion to suppress his statements about smoking marijuana and the evidence seized from his home. After an evidentiary hearing, the district court overruled the motion in regard to statements made by Barkhausen that he was smoking marijuana, finding "he was not in custody at any time" and "he was not being questioned by law enforcement at that time, but rather DHS worker Ms. DeBerg." The court also denied the motion in regard to the physical evidence seized by Officer Miller, concluding he was invited into the house by "[Jolene] who was present and he assumed she had authority to invite him in" and that he saw "these items in plain view."

Barkhausen waived jury trial, and the court found him guilty of possession of marijuana, third offense. The court imposed a suspended, two-year prison sentence and ordered supervised probation for a period of one to two years.

II. Scope and Standard of Review.

Barkhausen appeals the district court's denial of his motion to suppress. We review this constitutional question de novo in light of the totality of the circumstances. *State v. Fleming*, 790 N.W.2d 560, 563 (Iowa 2010). "[W]e give deference to the factual findings of the district court due to its opportunity to evaluate the credibility of the witnesses, but are not bound by such findings." *State v. Lane*, 726 N.W.2d 371, 377 (Iowa 2007). In reviewing a motion to suppress ruling, the entire record must be considered including the evidence presented at the suppression hearing and at trial. *State v. Simmons*, 714 N.W.2d 264, 271 (Iowa 2006); *State v. Jackson*, 542 N.W.2d 842, 844 (Iowa 1996).

III. Merits.

A. Consent to Enter. Barkhausen argues Officer Miller's entry into his home violated the search and seizure clauses of the Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution. He contends it was unreasonable for Officer Miller to believe "a third party [Jolene] had authority to consent" to his entry into Barkhausen's home, and the "drug evidence seized as a result of this unlawful entry should therefore be suppressed." The State argues "the circumstances faced by Officer Miller would not have caused a reasonable person to doubt Jolene's authority to invite him, and DeBerg, inside." Therefore, the State asserts, Officer Miller "was lawfully inside Barkhausen's home when he observed drug evidence in plain view."

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. The language of the Fourth Amendment and article I, section 8 of the Iowa Constitution are substantially identical. Although our supreme court has generally interpreted the scope and purpose of the state clause as consistent with that of the federal clause, *see State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998), the court reserves the right to "apply the principles differently under the state constitution compared to its federal counterpart," *State v. Ochoa*, 792 N.W.2d 260, 267 (Iowa 2010), and "engage in independent

analysis of the content of our state search and seizure provisions." *King v. State*, ___ N.W.2d ___, ___ (Iowa 2011).

The essential purpose of the Fourth Amendment "is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents in order 'to safeguard the privacy and security of individuals against arbitrary invasion . . . .'" *Delaware v. Prouse*, 440 U.S. 648, 653-54, 99 S. Ct. 1391, 1396, 59 L. Ed. 2d 660, 667 (1979). Evidence obtained in violation of this safeguard is inadmissible in a prosecution, no matter how relevant or probative the evidence may be. *State v. Manna*, 534 N.W.2d 642, 643-44 (Iowa 1995).

In examining the lawfulness of Officer Miller's actions, we balance Barkhausen's interest in Fourth Amendment guarantees against the State's legitimate interests, which include "realistic standards of law enforcement." *State v. Naujoks*, 637 N.W.2d 101, 107 (Iowa 2001). We look to see "[w]hether the thing done [by the officer], in the sum of its form, scope, nature, incidents and effect, [appears] fundamentally unfair or unreasonable in the specific situation when the immediate end sought is considered against the private right affected." *State v. Legg*, 633 N.W.2d 763, 765 (Iowa 2001).

Generally, a warrantless invasion of a protected area is per se unreasonable unless the State establishes one of the few, carefully-drawn, and well-recognized exceptions to the warrant requirement. *State v. Freeman*, 705 N.W.2d 293, 297 (Iowa 2005); *Naujoks*, 637 N.W.2d at 107. Those exceptions include consent, plain view, probable cause coupled with exigent circumstances, searches incident to arrest, and emergency aid. *Naujoks*, 637 N.W.2d at 107.

The State contends two of these exceptions apply, and argues Officer Miller was lawfully in the home because Jolene consented to his entry, and the drug evidence was his plain view as he stood just inside the entry of the home.

"For the plain view exception to apply, police must be rightfully in the place that allows them to make the observation." *State v. Kubit*, 627 N.W.2d 914, 918 (Iowa 2001), *abrogated on other grounds by State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001). The sole issue raised on appeal is whether Officer Miller's entry in Barkhausen's home was lawful. *See State v. McGrane*, 733 N.W.2d 671, 680 (Iowa 2007).

This question turns to whether Officer Miller had consent to enter. A warrantless search or seizure may be justified by proof of voluntary consent from a third party who possesses "common authority over or sufficient relationship to the premises or effects to be inspected." *United States v. Matlock*, 415 U.S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974); *State v. Cadotte*, 542 N.W.2d 834, 836 (Iowa 1996) (noting third party can consent if "a common right of access or control of property to be searched" is shared), *abrogated on other grounds by State v. Turner*, 630 N.W.2d 601 (Iowa 2001).

> Determining whether a party's consent to a search is valid, however, is not driven solely by whether the party has actual authority to consent to the search. Law enforcement officers may also rely on the apparent authority of the consenting party. For officers to rely on a claim of apparent authority, they must "reasonably (though erroneously) believe that the person who has consented to their" search had authority to do so.

State v. Grant, 614 N.W.2d 848, 854 (Iowa Ct. App. 2000) (quoting *Illinois v. Rodriguez*, 497 U.S. 177, 186, 110 S. Ct. 2793, 2800, 111 L. Ed. 2d 148, 160 (1990)).

The State points out that Officer Miller was not requesting consent to search, but rather, consent to enter. As observed by our supreme court, "if consent to *search* may be given by such a person, that person may surely give consent to *enter*." *Cadotte*, 542 N.W.2d at 836 (emphasis added); *State v. Peterson*, 261 Iowa 669, 673, 155 N.W.2d 412, 414 (1968) ("It must be remembered that the request here was for admission only, not for a right to search. This is a vital distinction."). "The burden is on the State to show, by a preponderance of the evidence, that consent to enter was voluntarily given." *State v. Hatter*, 342 N.W.2d 851, 854 (Iowa 1983); *State v. Folkens*, 281 N.W.2d 1, 3 (Iowa 1979). The United States Supreme Court has concluded that "[t]his burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Bumper v. North Carolina*, 391 U.S. 543, 548-49, 88 S. Ct. 1788, 1792, 20 L. Ed. 2d 797, 802 (1968).

At the evidentiary hearing on Barkhausen's motion to suppress, the district court heard testimony from Officer Miller, DeBerg, and Tonya. It is undisputed Tonya's mother, Jolene, answered the door. As far as Officer Miller and DeBerg knew, Jolene was the only adult present, but they soon learned Barkhausen and Tonya "were in the back bedroom napping." Two children were also home. Apparently, Jolene was supervising the children. Tonya testified that on that day, May 8, 2009, Jolene was not living with the family (although the evidence in the record shows she later moved in with the family), but rather, that she was "just visiting."

According to Officer Miller, Jolene "invited" them in. DeBerg stated Jolene "let us in." Tonya testified she and Barkhausen appeared from the bedroom "pretty much as they were walking in the door."

As the district court observed, "[Officer Miller] was invited into the house by [Tonya's] mother, although she wasn't a resident. Obviously she was somebody who was present and he assumed she had authority to invite him in." We agree.

Officer Miller was not visiting the home for purposes of a criminal investigation; rather, he was accompanying DeBerg on a DHS interview. A woman at the home answered the door and invited him inside. *See, e.g.*, *Reinier*, 628 N.W.2d at 467 (observing "[t]he act of opening a door in response to a knock could under certain circumstances constitute consent); *United States v. Griffin*, 530 F.2d 739, 743 (7th Cir. 1976) (leaving door open and stepping back was invitation for officers to enter); *United States v. Turbyfill*, 525 F.2d 57, 59 (8th Cir. 1975) (opening door and stepping back constitutes implied invitation to enter). Further, within seconds of Officer Miller's entry, Barkhausen and Tonya appeared from the bedroom and did not object to his presence. *See Peterson*, 261 Iowa at 673, 155 N.W.2d at 414 ("In any event, when the officer asked to come in, no one including defendant voiced any objections to his entry."). Tonya asked DeBerg to sit down, and Officer Miller remained standing just inside the doorway.

Upon our review, we find the circumstances faced by Officer Miller would not have caused a reasonable person to doubt Jolene's authority to allow him and DeBerg to enter the Barkhausen home. *See Delaware*, 440 U.S. at 653-54,

99 S. Ct. at 1396, 59 L. Ed. 2d at 667 (noting officers must exercise discretion within a standard of reasonableness). Specifically, we do not find the existence of "surrounding circumstances" that would have given Officer Miller "an obligation to make further inquiries into the precise nature of the situation." *Grant*, 614 N.W.2d at 854.

B. Voluntary Consent. Barkhausen further argues Officer Miller's entry was unlawful because Jolene "did not voluntarily consent." The State responds that Barkhausen did not preserve this alleged error for our review. We agree.

"Our preservation rule requires that issues must be presented to and passed upon by the district court before they can be raised and decided on appeal." *Manna*, 534 N.W.2d at 644 (concluding error was not preserved on an issue raised in a motion to suppress that was not considered by the trial court); *but see State v. Lovig*, 675 N.W.2d 557, 562 (Iowa 2004) (noting court's adverse ruling on motion to suppress preserved error for appellate review). In Barkhausen's motion to suppress and the evidentiary hearing on the motion, defense counsel presented only one argument to support suppression of the drug evidence—that third party Jolene did not have authority to consent to Officer Miller's entry. *See State v. Eames*, 565 N.W.2d 323, 326 (Iowa 1997) (noting that issues are preserved for appeal when they are presented to and passed upon by the district court). The court denied his motion, addressing only that issue. *See Manna*, 534 N.W.2d at 644. We conclude the only issue preserved for our review is that which was raised and considered before the district court. *See id.*; *Eames*, 565 N.W.2d at 326. Error was not preserved on the "voluntary consent" issue that is raised for the first time on appeal.

Even if the issue was preserved and no consent was vocalized, we conclude the State has met its burden of proof by showing that Jolene opened the door in response to a knock and let the officer into the residence with apparent authority to do so, without any objection voiced by the residents. Further, Jolene, who opened the door, did not testify at the suppression hearing and the trial evidence consisted of the minutes of testimony as stipulated by the parties. Without her testimony and in light of these facts, we are unable to conclude she opened the door due to "acquiescence to a claim of lawful authority." *Bumper*, 391 U.S. at 548-49, 88 S. Ct. at 1792, 20 L. Ed. 2d at 802.

IV. Conclusion.

Upon our review, we find the circumstances faced by Officer Miller would not have caused a reasonable person to doubt Jolene's authority to allow him and DeBerg to enter Barkhausen's home. As such, Officer Miller was lawfully inside Barkhausen's home when he observed drug evidence in plain view.

AFFIRMED.