

IN THE COURT OF APPEALS OF IOWA

No. 2-955 / 10-1103
Filed January 9, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRIAN LEE FRY,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Douglas C. McDonald (motion to suppress), and Christine Dalton (trial and sentencing), District Associate Judges.

A defendant appeals his conviction for possession of marijuana.

AFFIRMED.

Timothy J. Tupper, Davenport, for appellant.

Thomas J. Miller, Attorney General, Julia S. Kim, Assistant Attorney General, Michael J. Walton, County Attorney, and Will Ripley, Assistant County Attorney, for appellee.

Considered by Potterfield, P.J., Tabor, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

MILLER, S.J.

Brian Lee Fry was charged with possession of marijuana, in violation of Iowa Code section 124.401(5) (2009), and possession of drug paraphernalia, in violation of Iowa Code section 124.414(2). He filed a motion to suppress evidence seized from his person. The district court overruled the motion. Fry waived his right to jury trial, and the charges were tried to the court without a jury. Fry appeals his resulting conviction for possession of marijuana.¹

On appeal Fry presents the following issue:

The District Court Erred in Denying Defendant's Motion to Suppress Where Law Enforcement Expanded the Scope of its Investigation without Reasonable Suspicion of Criminal Activity.

In support of this claim of error Fry cites *State v. Pals*, 805 N.W.2d 767, 776-77 (Iowa 2011). *Pals* discussed, but for lack of error preservation declined to address or resolve, the question of the "Legality of Expansion of Seizure for Investigation Unrelated to Purposes of Stop." See 805 N.W.2d at 775-78. The State contends Fry did not preserve error on the issue he attempts to present on appeal.

Fry's motion sought suppression of a baggie of marijuana and a "pot pipe" seized from his person. His motion contended that (1) the "police did not

¹ In the "Statement of the Case" in his brief Fry states that, "This is an appeal by the defendant subsequent to his *conviction* . . . on the *charge* of possession of a controlled substance The Defendant appeals the denial of the motion to suppress and his subsequent *conviction*." (Emphasis added.) Nothing in the record before us on appeal discloses entry of a judgment of conviction on the charge of possession of drug paraphernalia. Further, assuming that Fry was convicted on that charge, the record contains no indication that Fry sought discretionary review of, or purported to appeal from, such a conviction. We conclude that any conviction for possession of drug paraphernalia is not before us in this appeal.

observe Defendant commit any violations of law nor [have] any reasonable grounds to conduct [a] *search* of Defendant's person," (2) "there was no probable cause to justify the police to *search* Defendant's person," and (3) "at no time did law enforcement obtain consent by Defendant to *search* nor were there any lawful grounds for *searching* Defendant." (Emphasis added.)

At the commencement of the suppression hearing the court inquired of Fry's counsel whether the claim(s) were that (1) "there's no probable cause to justify the *search* of the Defendant," and (2) "it was not a consent to *search*." (Emphasis added.) Counsel responded in the affirmative.

At the conclusion of the hearing the district court requested that Fry specifically identify what the police officer did wrong. Fry's counsel stated that (1) "the officer was not telling the truth about the suspicious activity," (2) "the police report is silent about" the action of Fry and a companion of Fry's, and (3) Fry had been "treated differently than other people," resulting in "a lack of due process."

For two reasons we agree with the State that error was not preserved on the issue Fry attempts to present on appeal. First, the issue presented on appeal, whether a police officer impermissibly expanded the scope of an initial *seizure* of Fry's person, is not raised, either expressly or by necessary or reasonable implication, by Fry's written motion raising issues concerning a *search* of his person or by counsel's identification of issues at the time of the suppression hearing.

Second, and more importantly, assuming without so deciding that the written motion or counsel's statements at the hearing can be viewed as raising the issue Fry now attempts to present on appeal, nothing in the district court's on-the-record ruling at the conclusion of the suppression hearing discusses or addresses such an issue. "[I]ssues must be presented to and passed upon by the district court before they can be raised and decided on appeal." *State v. Manna*, 534 N.W.2d 642, 644 (Iowa 1995). As the issue in question was not passed upon by the district court, we have nothing to review. *Id.*

We affirm Fry's conviction for possession of marijuana.

AFFIRMED.