

IN THE COURT OF APPEALS OF IOWA

No. 3-216 / 12-1075
Filed April 24, 2013

STATE OF IOWA,
Plaintiff-Appellant,

vs.

TONY BOUNYALATH,
Defendant-Appellee.

Appeal from the Iowa District Court for Adair County, David L. Christensen, Judge.

The State of Iowa appeals from the district court's ruling on defendant's motion to suppress. **REVERSED.**

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, and Michael L. Maynes, County Attorney, for appellant.

Mark C. Smith, State Appellate Defender, David Arthur Adams, Assistant State Appellate Defender, and Matthew Shimanovksy, Student Legal Intern.

Heard by Vogel, P.J., and Vaitheswaran and Bower, JJ.

BOWER, J.

The State of Iowa appeals from the district court's ruling suppressing all evidence obtained during a search of defendant Tony Bounyalath's vehicle. The State argues the district court erred in failing to find the search was permissible. Because we find the search was lawful, we reverse.

I. Background Proceedings

On December 1, 2011, State Trooper Justin Simmons began following a Chevrolet Tahoe he observed exceeding the speed limit along Interstate 80 in western Iowa. The Tahoe was driven by Tony Bounyalath. Simmons made a number of observations including that the Tahoe had different front and rear California license plates. The Tahoe exited the highway as Simmons attempted to run a check of the license plate number. Simmons followed the Tahoe into a gas station parking lot and parked his vehicle some distance from Bounyalath, who parked immediately adjacent to the front entrance. Bounyalath was observed entering the gas station. Simmons followed a distance behind and walked past the Tahoe on his way into the gas station. In the rear compartment of the vehicle he observed a pillow, blanket, a number of unopened air fresheners, and energy drinks.

Simmons entered the gas station but was unable to locate Bounyalath. After entering the restroom and overhearing a man talking in one of the stalls, Simmons decided to wait inside the gas station so that he could speak with Bounyalath. During his wait Simmons decided to call Trooper Ryan Zenor to request a free air sniff by a drug dog. Zenor arrived on the scene shortly

thereafter, and after conducting a visual inspection of the Tahoe and determining that a free air sniff would be appropriate, Zenor deployed his dog Ranger. Working around the outside of the car, Ranger gave a positive indication for narcotics near the rear bumper of the Tahoe. Zenor informed Simmons and another Trooper who had subsequently arrived on the scene.

Bounyalath eventually exited the restroom and was greeted by Simmons. Agreeing to answer some questions, Bounyalath described the purpose of his trip and explained the status of the plates on his vehicle. Simmons noted that Bounyalath appeared nervous during the conversation. Bounyalath then agreed to show Simmons the registration for his vehicle. While attempting to retrieve it from the glove box, Bounyalath was informed by Zenor that Ranger had given a positive indication for narcotics in the vehicle. The troopers testified that Bounyalath's knees buckled and his body visibly reacted to the information. After initially denying any knowledge as to why Ranger might detect the scent of narcotics coming from the vehicle, Bounyalath admitted that someone had smoked marijuana in the vehicle some time earlier.

Simmons accompanied Bounyalath back into the gas station so that Simmons could inspect the registration. After the troopers informed Bounyalath that the dog's indication gave them probable cause to search the vehicle, Bounyalath gave the troopers permission to search the vehicle, indicating they could, "Tear it up." Bounyalath also voluntarily submitted to a pat down after an empty gun container was found in the vehicle. No weapon was recovered.

Minutes later an additional trooper arrived on the scene and suggested, in an effort to reduce congestion near the front door of the gas station, that the parties move the vehicle to a Department of Transportation (DOT) garage one block away. Bounyalath agreed. The vehicle was moved and the search continued. During the search, one of the troopers noticed an irregularity with the rear hatch and, removing a plastic panel, discovered seventeen packages of marijuana. A small quantity of marijuana was also discovered under the front cup holder.

On January 3, 2012, Bounyalath was charged with possession of marijuana with intent to deliver, in violation of Iowa Code section 124.401(1)(d) (2011), failure to affix a drug tax stamp, in violation of Iowa Code sections 453B.3 and 453B.12, and prohibited acts, in violation of Iowa Code section 124.402.

On March 6, 2012, Bounyalath filed a motion to suppress the evidence discovered during the search. Following a hearing on April 18, 2012, the district court granted the motion in a two paragraph ruling. The State filed an application for discretionary review on June 6, 2012, which was granted by our supreme court on July 25, 2012.

II. Standard of Review

We review the district court's decision to suppress the evidence *de novo*. *State v. Pals*, 805 N.W.2d 767, 771 (Iowa 2011). Accordingly, we give the entire record an independent evaluation of the totality of the circumstances. *Id.* In so doing, we will give deference to credibility assessments made by the district court, though we will not be bound by them. *Id.*

III. Discussion

In the present matter, we are confronted with two questions. First, was the dog sniff legal and did it provide probable cause to search the vehicle, and second, was the later search conducted at the DOT facility legal under the Iowa and United States Constitution?

The law surrounding dog sniffs is long-standing and well-settled.¹ As understood under the Fourth Amendment, a dog sniff is not a search. *State v. Bergmann*, 633 N.W.2d 328, 334 (Iowa 2001). Our supreme court has held that the Fourth Amendment does not protect the area around a car. *Id.* at 335. Concern with the use of a dog sniff has primarily centered not on the sniff itself but on the period of time a vehicle may be detained while the sniff is conducted. *Id.*; *State v. Aderholdt*, 545 N.W.2d 559, 563–64 (Iowa 1996).

The present matter presents an unusual circumstance. Most often, we have been presented cases where a driver is stopped by police and the dog sniff occurs during the stop. This is not such a case. Bounyalath was not stopped by police. The sniff occurred while Bounyalath was in the gas station restroom. There are no concerns in this case that Bounyalath was unduly detained so that the sniff could be conducted. We see no legal basis for objecting to the dog sniff.

Once properly conducted, a dog sniff indicating the presence of narcotics provides law enforcement with probable cause to search the vehicle. *Bergmann*, 633 N.W.2d at 338. Our supreme court has long recognized an exception to the

¹ Our supreme court has declared that “our interpretation of the search and seizure clause under the Iowa Constitution conforms to the Search and Seizure Clause under the Federal Constitution.” *State v. Vance*, 790 N.W.2d 775, 791 (Iowa 2010).

warrant requirement for automobiles. *Vance*, 790 N.W.2d at 791. The automobile exception reflects an understanding that the inherent mobility of a motor vehicle creates an exigency excusing strict adherence to the warrant requirement. *State v. Olsen*, 293 N.W.2d 216, 218 (Iowa 1980). It also reflects a general sense that the nature of automobiles within our state diminishes the reasonable expectation of privacy within. *Id.*

The dog gave a positive indication for the presence of narcotics when sniffing Bounyalath's vehicle. This gave police probable cause to search the vehicle, and under the automobile exception, they were justified in doing so immediately without a warrant. The more pressing question, however, is whether police were justified in continuing to search after the car was moved to the nearby DOT garage.

Cases dealing with a search conducted or continued after the vehicle has been removed from the location of the initial encounter primarily focus upon situations where a vehicle has been impounded and moved to a police station. This is not such a case. We believe, however, that the concerns are similar.

As we have already explained, a warrantless search of an automobile is permissible so long as there is an exigency and probable cause. In the usual case, the inherent mobility of the vehicle creates the exigency. Our supreme court has held that the exigency does not disappear simply because the vehicle is removed "to a police station or other place of impoundment." *State v. Allensworth*, 748 N.W.2d 789, 763 (Iowa 2008). This "inherent exigency" standard has been recognized in our state. See, e.g., *State v. Cain*, 400 N.W.2d

582, 585 (Iowa 1987) (“[T]he exigency requirement is always satisfied by a vehicle’s inherent mobility.”). To illustrate the outermost boundaries of this doctrine, in *State v. Holderness*, 301 N.W.2d 733, 737 (Iowa 1981), a warrantless search was upheld when the vehicle was impounded at a police station and the defendant had already been arrested. *Holderness* makes clear that, so long as probable cause existed “at the time officers initially encountered defendant’s vehicle, the automobile could still be searched after it was removed . . . provided only that probable cause still existed.” 301 N.W.2d at 737. The State must show only probable cause to support the continued search.

Bounyalath argues that probable cause became stale in this case because the troopers searched the vehicle, found nothing, moved it to a new location, and successfully searched the vehicle again. He contends the failure to find narcotics during the initial search effectively disproved the indication by Ranger thereby removing probable cause. We disagree. There is no evidence in the record that the troopers conducted a complete search of the vehicle before moving it to the DOT garage. Instead, all evidence indicates the initial search was brief and incomplete. Troopers then removed the vehicle to the DOT garage so that the search could be continued, not repeated. Nothing in the intervening time undermined the reliability of the dog sniff. Probable cause existed at the gas station parking lot and remained during the continued search minutes later at the DOT garage. Because probable cause existed during the continued search, the

evidence located was legally seized and should not have been suppressed.²

Accordingly, we reverse the ruling by the district court.

REVERSED.

² Because we have determined that probable cause existed justifying a warrantless search of the vehicle, we do not reach the issue of consent.