IN THE COURT OF APPEALS OF IOWA

No. 6-422 / 05-1020
Filed August 9, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PATRICK ALLEN DOUGLAS,
Defendant-Appellant.

Appeal from the Iowa District Court for Wapello County, James Q. Blomgren (suppression) and E. Richard Meadows, Jr. (sentencing), Judges.

A defendant appeals following conviction and sentence for the crimes of possession of cocaine with intent to deliver and failure to affix a tax stamp, asserting the district court erred in denying his motion to suppress evidence, and that the court considered impermissible factors when imposing sentence. **CONVICTIONS AND SENTENCES VACATED, REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Greta Truman, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard Bennett, Assistant Attorney General, Mark Tremmel, County Attorney, and Ed Harvey, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Zimmer and Vaitheswaran, JJ.

ZIMMER, J.

Patrick Douglas appeals following conviction and sentence for possession of cocaine with intent to deliver, in violation of Iowa Code section 124.401(1)(c)(2)(b) (2003), and failure to affix a tax stamp, in violation of sections 453B.3 and 453B.12. Because we conclude the evidence seized from Douglas's apartment should have been suppressed, we reverse Douglas's convictions and sentences and remand for further proceedings.

I. Background Facts and Proceedings.

Douglas rented an apartment in Ottumwa, Iowa, located at 812½ East Main Street, above the Mug Shot Lounge. The apartment, which was the only premises above the bar, was accessed by an enclosed stairway located on the outside of the building. A solid exterior door with a keyed entry knob, deadbolt, and doorbell was located at the base of the stairway. At the top of the stairway another door lead directly into Douglas's apartment.[1]

On April 25, 2004, Officer Noah Aljets was informed by dispatch that an anonymous caller had reported Douglas and an unidentified woman were selling cocaine out of 812½ East Main Street, and that drug activity was currently occurring at the apartment. Realizing he did not have probable cause to perform a search of the premises, Officer Aljets decided to follow a procedure known as a "knock and talk." The purpose of this procedure is to speak with residents of a dwelling about the reported illegal activity, then attempt to obtain their consent to search the premises.

[1] The record does not indicate whether the upstairs door also had a lock.

Officer Aljets and Officer Cody McCoy proceeded to the building housing the Mug Shot Lounge and Douglas's apartment. Officer McCoy secured the rear of the building, while Officer Aljets opened the exterior stairway door and proceeded up the stairway towards the closed apartment door. Officer Aljets did not knock on the exterior door or attempt to use the doorbell.

When Officer Aljets reached the top of the stairs, he heard three men talking inside the apartment. He knocked on the door, and a voice from inside the apartment stated, "Come on in." Officer Aljets hesitated, then began to enter the apartment. As he was entering the same unidentified person said, "Come on in, Phil." Officer Aljets then completed his entry, without identifying himself as a police officer. Once inside he observed Douglas and two other men sitting at a table. On the table was a mirror covered in a white substance and a razor blade.

Officer Aljets advised Officer McCoy to come up to the apartment. The officers secured the table's contents and, after obtaining identification from all three men, arrested Douglas on an outstanding warrant. Police also obtained a warrant to search the premises. Upon executing the search warrant and searching Douglas incident to his arrest, officers seized approximately nineteen grams of cocaine, drug paraphernalia, and a large amount of cash.

Douglas was charged with possession of cocaine with intent to deliver and a tax stamp violation. Douglas moved to suppress the evidence seized in his apartment. At the hearing on the motion, the State conceded Douglas had a legitimate expectation of privacy in the stairway. The district court concluded the "extremely minimal" intrusion by police, which was outweighed by the State's

"interest in its ability to gather information," was not unreasonable. Accordingly, the court denied the motion.

The matter proceeded to trial. A jury found Douglas guilty of the possession with intent to deliver and tax stamp violations, and the district court imposed judgment and sentence. Douglas appeals. He contends the court erred in denying his motion to suppress and in relying on unproven offenses when imposing sentence.

II. Scope and Standards of Review.

We conduct a de novo review of the district court's denial of Douglas's motion to suppress. *State v. Freeman*, 705 N.W.2d 293, 297 (Iowa 2005). We must "'make an independent evaluation of the totality of the circumstances as shown by the entire record.'" *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001) (citation omitted). We consider both the evidence presented during the suppression hearing and that introduced at trial. *State v. Jackson*, 542 N.W.2d 842, 844 (Iowa 1996). We give weight to the factual findings of the district court, due to its opportunity to evaluate the credibility of the witnesses. *Turner,* 630 N.W.2d at 606. We are not, however, bound by those findings. *Id*.

III. Discussion.

Douglas contends Officer Aljets's entry into his apartment violated the search and seizure clauses of the Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution. Because the language of those clauses is substantially identical, we have consistently interpreted the scope and purpose of the state clause as consistent with that of the federal clause, and thus rely on federal interpretations of the Fourth

Amendment. *State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998). 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. *State v. Ahart*, 324 N.W.2d 317, 318 (Iowa 1982).

In the context of this case, Douglas's contention gives rise to a two-part inquiry. *Breuer*, 577 N.W.2d at 44. We must first determine, based on the unique facts of this case, whether Douglas had a legitimate expectation of privacy in the stairway. *See State v. Simmons*, 714 N.W.2d 264, 272 (Iowa 2006). If such an expectation exists, we must then determine whether the State unreasonably invaded his protected interest. *See Breuer*, 577 N.W.2d at 45. Because the State concedes Douglas had a reasonable expectation of privacy in the stairway, we limit our inquiry to whether Officer Aljets's invasion of that right was reasonable.

In examining the lawfulness of the officer's actions, we balance Douglas'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) (citation omitted). 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) (citation omitted).

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. *Id*. The State does not contend Officer Aljets's entry into the stairway was justified by any of these exceptions. Rather, it relies on the case of *State v. Breuer*, 577 N.W.2d 41 (Iowa 1998).[2]

In *Breuer*, an officer was investigating a reckless driving complaint involving a black S-10 pickup truck. *Id*. at 43. The complainant advised that the owner and driver of the vehicle might live in a particular area. *Id*. After proceeding to the area the officer observed a vehicle matching the description of the suspect vehicle parked in front of a large house that had been divided into two apartments. *Id*. Upon checking the vehicle's license plates, the officer learned the vehicle was registered to the defendant. *Id*. Although he did not know the defendant, the officer did have information the defendant possibly lived in the building's upstairs apartment. *Id*.

The building had a porch with two doors. *Id*. The left door, which led to the defendant's upstairs apartment, opened onto a private stairway. *Id*. When the officer approached, the wooden entry door at the bottom of the defendant's stairway was open but the exterior screen door was closed. *Id*. The officer rang

[2] The district court also relied in *Breuer* in rejecting Douglas's motion to suppress.

the doorbell located at the stairway entrance. *Id*. Receiving no response, the officer opened the unlocked screen door, proceeded up the stairs, and knocked on the closed apartment door. *Id*. When the defendant opened the door, the officer detected a strong odor of burning marijuana. *Id*. After informing the defendant he was there regarding a driving complaint, and receiving the defendant's consent to enter the apartment, the officer observed what appeared to be marijuana. *Id*. In response to police questioning, the defendant stated that he had "just smoked a joint," and produced drugs and drug paraphernalia. *Id*.

After being charged with possession of marijuana, the defendant moved to suppress the evidence seized from his apartment. The *Breuer* court agreed that the defendant had a legitimate expectation of privacy in the stairway, but concluded the officer's invasion was not unreasonable under the circumstances. *Id*. at 48-49. The facts in *Breuer* are similar to those currently before us in several respects. However, having reviewed *Breuer* and subsequent Fourth Amendment case law, we conclude *Breuer* is distinguishable, and that under the particular facts of this case, Officer Aljets's entry into the stairway constituted an unreasonable invasion of a protected privacy interest.

The officer in *Breuer* was confronted with an open wooden exterior door behind a closed screen door. The interior of the stairway was visible, and there is no indication the screen door had any visible locks. In addition, the officer rang the doorbell before entering. In contrast, Officer Aljets was confronted with a closed, solid exterior door that bore two visible locks as well as the doorbell, and he made no attempt to ring the doorbell, knock on the door, or orally summon the occupants of the apartment to the door before entering the stairway. Although

the situation in *Breuer* could be reasonably construed as an implied invitation to enter, we see no basis to distinguish the situation in this case from any other instance when an officer encounters a closed, exterior door to a private residence. Moreover, contrary to the State's contention, we believe Officer Aljets's failure to knock on the door, ring the doorbell,[3] or otherwise summon the apartment's residents is a significant factor for our consideration. *See Breuer,* 577 N.W.2d at 49 (citing with approval cases that held an officer conducting a legitimate investigation, who received no response to an attempt to summon residents from the front door, may enter certain areas in an attempt to contact the residents); *see also State v. Lewis*, 675 N.W.2d 516, 527 (Iowa 2004) (citing to *Breuer* as support for the proposition that, if the officer in *Lewis* had attempted to contact the defendant at his front door and received no response, then the officer's invasion into the defendant's backyard might have been reasonable); *but see id*. at 527-28 (Cady, J., dissenting).

The State seeks to minimize the failure to knock on the door or ring the doorbell, noting that "'[t]he reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative "less intrusive" means.'" *Breuer*, 577 N.W.2d at 49 (citations omitted). However, the State ignores the fundamental difference between the less intrusive means available in *Breuer*, and those available here. The *Breuer* court found it would be

[3] The State points to evidence that, at or about the time of the suppression hearing, the doorbell did not work, and that Officer Aljets did not recall seeing a doorbell. We place little weight on this evidence. The condition of the doorbell several months after the arrest is of limited assistance in determining its condition at the time of Officer Aljets's entry, and neither fact explains or justifies Officer Aljets's failure to knock on the door or otherwise attempt to summon the apartment's residents.

impractical under the circumstances to require the officer to employ other less intrusive means, because that would have required the officer "to leave a residence, even though the officer has reason to believe a person who may have important information relating to an investigation is inside the residence, simply because the officer receives no response at an outside door." *Id*. Here, in contrast, the alternate means required only that Officer Aljets take the minimal step of knocking on the door or ringing the doorbell.

The State suggests Officer Aljets reasonably believed it was unnecessary to knock on the street-level door to the apartment on this occasion because on several prior occasions, during an unspecified six-month period of time, Officer Aljets had found the door unlocked. On those occasions, after he was dispatched to the building to investigate suspicious activity complaints, Officer Aljets opened the door to ascertain if anyone was using the private stairwell to hide from police. For a number of reasons, we cannot agree this knowledge dispensed with the need to at least attempt to summon the apartment's occupants from the street-level door.

First, we note the State has not tied Officer Aljets's prior experience to a period of time when Douglas rented the apartment.[4] In addition, on those prior

[4] Officer Aljets did not specify when this six-month period occurred, other than to state it occurred at some point prior to Douglas's April 25, 2004 arrest. By the time Officer Aljets made this statement at the September 1, 2004 suppression hearing, he had served as a police officer for approximately two years. However, Douglas had lived at 812½ East Main Street for only six months, or possibly up to one year, prior to his arrest. Thus, it is entirely possible that, on the occasions Officer Aljets found the street-level door unlocked, someone else occupied the apartment. Similarly, Officer McCoy testified that, since 1998, he had found the street-level door unlocked on a number of occasions. However, there is no evidence Officer Aljets was aware of Officer McCoy's experience, nor is there any evidence tying Officer McCoy's experience to the period of time when Douglas occupied the apartment.

occasions Officer Aljets found the door unlocked, his investigation was not directed at the occupant of the upstairs apartment, and his intrusion was restricted to looking into the stairway to observe that it was empty. We cannot conclude these limited facts gave rise to a reasonable belief that the current occupant of the apartment consented to general public entry into the stairway. Moreover, even if we were to conclude Officer Aljets's knowledge was a factor that militated in favor of a finding of reasonableness, other factors, including the common-sense presumptions that accompany a closed exterior door with a keyed entry knob, deadbolt, and doorbell, lead us to conclude that Officer Aljets's entry into the stairwell was not reasonable.

We recognize that no individual has a right to be free of inquiries by law enforcement. *Id*. at 48-49. Nor do we mean to suggest an officer must always attempt to summon residents from the main entrance door before proceeding into a protected area. Each case must necessarily be decided on its own merits. However, the rights protected by the Fourth Amendment are substantial. *See Welsh v. Wisconsin*, 66 U.S. 740, 748-49, 104 S. Ct. 2091, 2096-97, 80 L. Ed. 2d 732, 742 (1984). In balancing those rights against the State's legitimate interests in pursuing police investigation, we must conclude, under the particular circumstances of this case, that the State failed to prove Officer Aljets's entry into the stairway was reasonable.

The State suggests that, even if Officer Aljets's entry into the stairway was unreasonable, Douglas nevertheless consented to the officer's entry into the apartment. Even if we assume Officer Aljets entered the apartment by consent, the evidence obtained by virtue of entry into the apartment must be suppressed

unless the State demonstrates a break between the initial illegal entry into the stairway and the subsequently obtained evidence by demonstrating the taint from the illegal entry had been purged or attenuated. *State v. Reiner*, 628 N.W.2d 460, 468 n.3 (Iowa 2001). Any subsequently-obtained consent will not be sufficient to support admission of the evidence if it is merely an exploitation of the prior illegality. *See* 3 Wayne R. LaFave, *Search and Seizure* § 8.2(d), at 656 (3rd ed. 1996). Here, where the violation immediately preceded the alleged consent to enter, and no intervening circumstances are present that would break the chain between the illegal entry into the stairway and the allegedly consensual entry into the apartment, the State has not shown the taint from the illegal entry has been purged. *See Brown v. Illinois*, 422 U.S. 590, 603-04, 95 S. Ct. 2254, 2261-62, 45 L. Ed. 2d 416, 427 (1975) (setting forth considerations relevant to determining whether evidence is tainted by preceding illegal action).

IV. Conclusion.

After a consideration of the totality of the circumstances of this case, we conclude the State failed to prove Officer Aljets's warrantless entry into the stairwell and apartment was reasonable in light of the competing privacy interest involved. The evidence seized as a result of that entry should have been suppressed. Because we conclude the motion to suppress should have been granted, we do not address Douglas's sentencing claim. We vacate his convictions and sentences, reverse the district court's suppression ruling, and remand this matter for further proceedings not inconsistent with this opinion.

CONVICTIONS AND SENTENCES VACATED, REVERSED AND REMANDED.