IN THE COURT OF APPEALS OF IOWA

No. 7-207 / 06-1117
Filed June 13, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

WENDI JO SMITH,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Kellyann M. Lekar, Judge.

The State appeals a district court ruling granting Wendi Jo Smith's motion to suppress evidence. **AFFIRMED.**

Thomas J. Miller, Attorney General, Jean C. Pettinger and Mary Tabor, Assistant Attorney General, and, Thomas J. Ferguson, County Attorney, and Mary A. Schlicher, Assistant County Attorney, for appellant.

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant Appellate Defender, for appellee.

Considered by Zimmer, P.J., and Miller and Baker, JJ.

MILLER, J.

The State appeals a district court ruling granting Wendi Jo Smith's motion to suppress evidence obtained as a result of a consent search of a vehicle in which she was a passenger. We affirm.

The record reveals the following facts. On March 21, 2006, at approximately 9:30 p.m. Officer Albert Bovy of the Waterloo Police Department observed a vehicle traveling with no license plates and no tail lights. Officer Bovy stopped the vehicle due to these defects. Bovy asked the driver to step out of the vehicle so he could show him the defective equipment and talk to him. The driver was later identified as Christopher Montgomery. Bovy then asked Montgomery, who, although title had not yet officially been transferred was the owner/purchaser of the vehicle, for consent to search his person and the vehicle. Officer Bovy testified he made the request to search because he "ask[s] a lot of people once I have them step out of the vehicle, to search the vehicle" just as a "procedure." He had no other reason, such as suspicion of criminal activity, to search the vehicle. Montgomery consented to a search of the car.

The defendant, Wendi Jo Smith, was the passenger in the car Bovy stopped. After Bovy obtained consent to search the car from Montgomery, he asked Smith to step out of the car. She did so and moved to the rear of the car. Officer Bovy proceeded to search the vehicle. During the search he observed a purse on the front passenger seat. Bovy proceeded to search the purse and inside found a baby sock containing Smith's identification, social security card, and a glass pipe used for smoking methamphetamine. Bovy advised Smith what

he had found and she admitted the item was hers and that she used it to smoke methamphetamine.

The State charged Smith, by trial information, with possession of a controlled substance (methamphetamine), in violation of Iowa Code section 124.401(5) (2005). Smith filed a motion to suppress the evidence obtained during the consent search of her purse, as well as any resulting incriminating statements she made. Following hearing the district court granted Smith's suppression motion. In granting the motion, the court found

> The issue in *State v. Grant,* 614 N.W. 2d 848 (Iowa Ct. App. 2000), concerned the search of a jacket pocket belonging to the guest of a house being searched by the consent of the owner of the house. The *Grant* court found that consent could not extend to the personal items of the guest. Likewise, this court finds that the driver's consent to search the vehicle did not extend to the purse of the passenger in this circumstance where it should have been clear to the officer that the purse belonged to the passenger and not to the driver and was clearly identifiable as a purse.

The State filed an application for discretionary review of the district court's ruling. On August 31, 2006, our supreme court granted the State's application.

Because Smith's motion to suppress was based on alleged constitutional violations, our review of the district court's ruling on her motion is de novo. *State v. Carter*, 696 N.W.2d 31, 36 (Iowa 2005); *State v. McConnelee*, 690 N.W.2d 27, 30 (Iowa 2004). We independently evaluate the totality of the circumstances found in the record. *State v. Reinders*, 690 N.W.2d 78, 82 (Iowa 2004).

The Fourth Amendment to the United States Constitution guarantees a person's right to be free from unreasonable search and seizure.[1] Evidence obtained in violation of this provision 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). Searches and seizures are unconstitutional if they are unreasonable and reasonableness depends on the facts of the particular case. *State v. Naujoks*, 637 N.W.2d 101, 107 (Iowa 2001). Warrantless searches are per se unreasonable unless they fall within one of the carefully drawn exceptions to the warrant requirement. *Id.* One such valid exception is consent searches. *Id.* The State has the burden of proving by a preponderance of the evidence that a warrantless search falls within one of the exceptions to the warrant requirement. *Id.* at 107-08.

On appeal, the State contends the search of Smith's purse was permissible based on the consent given by Montgomery as the owner/driver of the vehicle. Smith concedes the equipment defects were sufficient to justify the initial stop of the vehicle, and that Montgomery had the authority to consent to a search of the vehicle, including the passenger compartment. However, she contends it was not reasonable for Officer Bovy to believe such consent authorized him to search her purse that was sitting on the passenger seat.

It is clear from the record that this search was based solely upon the consent of the driver. Officer Bovy testified he had no other articulable

[1]The rights guaranteed by the Fourth Amendment apply to the states through the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 1694, 6 L. Ed. 2d 1081, 1090 (1961).

suspicions or reasonable cause to justify a search of the car in this case. Thus, cases based upon probable cause and exigent circumstances are not helpful to our analysis.

It is well established that law enforcement officers may rely on consent as the basis for a warrantless search, but they have no more authority than that granted by the scope of the consent. *See Florida v. Jimeno,* 500 U.S. 248, 251-52, 111 S. Ct. 1801, 1803-04, 114 L. Ed. 2d 297, 302-03 (1991). The scope of the consent is measured by objective reasonableness: "what would the typical reasonable person have understood by the exchange between the officer and the suspect?". *United States v. Hephner,* 260 F. Supp. 2d 763, 773 (N.D. Iowa 2003) (quoting *Jimeno,* 500 U.S. at 251, 111 S. Ct. at 1803-04, 114 L. Ed. 2d at 302-03). In *Hephner* the federal court concluded it was not reasonable for the officer to believe the driver's consent to search the vehicle authorized a search of the locked toolbox belonging to the passenger. *Id.*

A finding of *actual authority* by a joint occupant to consent to a search depends on whether there was joint access or control so that it would be reasonable to recognize that a co-occupant had the right to permit inspection. *United States v. Matlock,* 415 U.S. 164, 171 n.7, 94 S. Ct. 988, 993 n.7, 39 L. Ed. 2d 242, 250 n.7 (1974). Under the *apparent authority* doctrine, a search will be valid as long as the facts available to the officer at the time of the search would warrant a reasonable person of caution to believe that someone with authority over the items or containers to be searched consented to the search. *Illinois v.*

Rodriguez, 497 U.S. 177, 188, 110 S. Ct. 2793, 2801, 111 L. Ed. 2d 148, 161 (1990); *Hephner,* 260 F. Supp. 2d at 775.

We conclude under the specific facts and circumstances here that it was not reasonable for Officer Bovy to believe the consent given by Montgomery to search the vehicle authorized a search of the purse. The purse was found by Bovy sitting on the front passenger seat where Smith, the only female in the vehicle, had been sitting immediately before he asked her to exit the vehicle. Thus, all of the facts available to Bovy at the time of the search supported a conclusion that Smith had placed the purse on the seat as she got out of the vehicle and it belonged to her, not Montgomery. We agree with the district court that "it should have been clear to the officer that the purse belonged to the passenger and not the driver." Accordingly, we conclude it was unreasonable for Bovy to believe the purse belonged to anyone other than Smith or that anyone other than she had actual or apparent authority to consent to a search of the purse.

Assuming Officer Bovy in fact did not know to whom the purse belonged when he conducted the search, as he testified at the suppression hearing, then he should have made a further inquiry into the situation. "[I]f the surrounding circumstances raise reasonable doubts as to the authority of the consenting party, officers have an *obligation to make further inquiries* into the precise nature of the situation." *State v. Grant,* 614 N.W.2d 848, 854 (Iowa Ct. App. 2000) (citing *Rodriguez,* 497 U.S. at 188-89, 110 S. Ct. at 2801, 111 L. Ed. 2d at 161); *see United States v. Salinas-Cano,* 959 F.2d 861, 864 (10th Cir. 1992) ("The

[government's] burden cannot be met if agents, faced with an ambiguous situation, nevertheless proceed without making further inquiry."); *United States v. Whitfield,* 939 F.2d 1071, 1075 (D.C. Cir. 1991) (same). Without such further inquiry, the search is unlawful. *Rodriguez,* 497 U.S. at 189, 110 S. Ct. at 2801, 111 L. Ed. 2d at 161; *Grant,* 614 N.W.2d at 854.

Thus, even if we assume the existence of ambiguity concerning ownership of the purse, Officer Bovy was required to make further inquiry and it was unreasonable and unlawful for him to search the purse without that further inquiry. *Grant,* 614 N.W.2d at 854-55.

The State further argues that Smith impliedly consented to the search of her purse because she left the purse in the car, she did not ask to retrieve it when the officer began to search the car, and she did not object to the search. The State also contends that Smith's consent to a search of her person justifies the search of her purse because a search of her person is more intrusive than a search of her purse.

It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal. *Metz v. Amoco Oil Co.,* 581 N.W.2d 597, 600 (Iowa 1998); *Benavides v. J.C. Penney Life Ins. Co*., 539 N.W.2d 352, 356 (Iowa 1995). It is well settled that a post-trial motion is essential to preservation of error when a trial court fails to resolve an issue, claim, defense, or legal theory properly submitted to it for adjudication. *Meier v. Senecaut,* 641 N.W.2d 532, 540 (Iowa 2002); *Manna,* 534

N.W.2d at 644-45; *State Farm Mut. Auto. Ins. Co. v. Pflibsen,* 350 N.W.2d 202, 206 (Iowa 1984).

Assuming, without so deciding, that the State presented these issues to the district court, it is clear the court did not rule on them and the State made no request for such a ruling. Therefore, there is nothing for us to review. The State did not properly preserve for our review these additional issues. *See State v. Schiernbeck*, 203 N.W.2d 546, 547 (Iowa 1973) (holding nothing was preserved for review and reviewing court would not pass on merits of motions to dismiss where defendant proceeded to trial without requesting ruling on his motions and did not call matter to district court's attention until after trial).

Based on our de novo review, and for all the reasons set forth above, we conclude it was unreasonable for Officer Bovy to believe that the consent given by the driver to search the vehicle authorized a search of the purse. Under the facts and circumstances available at the time of the search, even if there existed some ambiguity as to ownership of the purse, Bovy should have made further inquiry into the scope of the authority of the consenting party. The district court was correct in granting Smith’s motion to suppress.

AFFIRMED.