IN THE COURT OF APPEALS OF IOWA

No. 7-488 / 06-1611
Filed August 22, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DANIEL JOSEPH SULLIVAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Artis I. Reis (motion to suppress) and Robert A. Hutchison (trial), Judges.

Defendant appeals from his conviction of second-degree burglary. **AFFIRMED.**

William Kutmus, Des Moines, and Catherine Levine, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, John P. Sarcone, County Attorney, Steve Foritano, Assistant County Attorney, and Jim Bryan, Assistant County Attorney Intern, for appellee.

Considered by Sackett, C.J., and Vogel and Miller, JJ.

SACKETT, C.J.

Defendant Daniel Sullivan was charged with the theft of a skid loader, and following a bench trial on a stipulated record, was convicted of theft in the second degree in violation of Iowa Code sections 714.1 and 714.2(2) (2005). Defendant contends the district court erred in overruling his motion to suppress certain evidence discovered in a shed on his father's property. We affirm.

BACKGROUND.

The following facts are basically undisputed. Defendant's father, Donald Sullivan owns real estate in Polk County, Iowa. A home and a storage building are located on the property. The home was equipped with a burglar alarm; the storage building was not. On December 26, 2005, Donald was in Minneapolis and the home was vacant when the burglar alarm went off. A Polk County deputy sheriff responded in accordance with Donald's agreement with his security company. The deputy checked the home and found it secure. The deputy then went to the storage building some seventy-five feet from the house and found vehicles and equipment there. The deputy particularly noticed a skid loader with a grinder sitting on top of it and saw that the number "10" on the loader had been partially painted with white spray paint.

The deputy testified that before he entered the shed, he noted a door was cracked open an inch or two and there was a light on. Donald disputed the deputy's testimony that the door to the shed was ajar but there is no evidence that it was necessary for the deputy to break in to enter.

The deputy testified in entering the shed, he pushed the door open, announced his presence, and after receiving no response, went in and looked

around, noticing the skid loader sitting by the front door. The deputy testified the combination of the spray paint alteration of the loader and the location of the grinder led him to believe the loader might be stolen. From his experience he knew of skid loaders that had been stolen and knew the perpetrator frequently attempts to rid the loader of its VIN number and identifying characteristics. The deputy said he located the VIN number on the skid-loader and wrote it down without moving anything or touching anything on the loader. He subsequently ran the number on the mobile data computer in his car and learned that the skid loader was stolen. He then called other officers who came to the property. The officers did not re-enter the shed but elected to call Donald. They were able to reach one of Donald's other sons who contacted his father. Donald then called the officers, told them defendant had put the loader in the shed and gave them permission to search the shed. Defendant contacted the officers and told them not to enter the property.

Defendant was charged with the theft of the skid loader. He filed a motion to suppress the evidence, contending the deputy unreasonably entered the shed and copied the VIN number, and that he had a legitimate expectation of privacy in the shed. The State contended the entry was lawful because it was made in response to a burglary, that the skid loader was in plain view, and that the officer had a valid consent to search and seize any stolen property. The district court declined to suppress the evidence. Defendant renews his challenge here.

SCOPE OF REVIEW.

In assessing alleged violations of constitutional rights, our standard of review is de novo; we make an independent evaluation of the totality of the

circumstances as shown by the entire record. *State v. Howard*, 509 N.W.2d 764, 767 (Iowa 1993); *State v. Boley*, 456 N.W.2d 674, 677 (Iowa 1990), *cert. denied*, 498 U.S. 924, 111 S. Ct. 305, 112 L. Ed. 2d 258 (1990). We give deference to the district court's fact findings due to its opportunity to assess the credibility of witnesses, but we are not bound by those findings. *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001).

The Fourth Amendment of the United States Constitution protects against unreasonable searches and seizures. U.S. Const. amend. IV; *see also* Iowa Const. art. I, § 8. The constitutional guarantees recognized by the Fourth Amendment have been extended to the states by the Fourteenth Amendment of the federal Constitution. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 1691, 6 L. Ed. 2d 1081, 1090 (1961).

Warrantless searches and seizures are per se unreasonable unless the State proves by a preponderance of the evidence that a recognized exception to the warrant requirement applies. *See Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514, 19 L. Ed. 2d 576, 585 (1967); *State v. Vincik*, 436 N.W.2d 350, 353 (Iowa 1989); *State v. Folkens*, 281 N.W.2d 1, 3 (Iowa 1979). The exceptions include searches based on consent, plain view, exigent circumstances, and searches incident to arrest. *Howard*, 509 N.W.2d at 767.

EXPECTATION OF PRIVACY.

Defendant contends he had an expectation of privacy in the shed. To claim the protection of the Fourth Amendment one need show an expectation of privacy in the invaded place. *Minnesota v. Carter*, 525 U.S. 83, 89, 119 S. Ct. 469, 473, 142 L. Ed. 2d 373, 379-80 (1998).

It is undisputed that the property was owned by Donald and defendant had no ownership interest in the real estate or buildings. Donald testified however that while defendant did not live on the premises, he had items in Donald's home as well as the shed, and defendant had a key to the shed.

Donald consented to the search of the shed and clearly he had authority to consent. Where an overnight guest has a legitimate expectation of privacy in his or her host's home, that expectation does not vitiate the homeowner's ability to consent to a search of his or her home. *See, e.g., Minnesota v. Olson*, 495 U.S. 91, 99-100, 110 S. Ct. 1684, 1689, 109 L. Ed. 2d 85, 94-95 (1990); *State v. Grant*, 614 N.W.2d 848, 852-853 (Iowa Ct. App. 2000). Furthermore, even if officers were mistaken in their belief that Donald had authority to consent to the search of the shed, the officers reasonably relied upon his consent and the search was lawful. *See Illinois v. Rodriguez*, 497 U.S. 177, 188-89, 110 S. Ct. 2793, 2801, 111 L. Ed. 2d 148, 161 (1990). The officers' belief was reasonable as the property was titled in Donald's name and it was his home. *Id*.

We distinguish *Georgia v. Randolph*, 547 U.S. 103, 113-21, 126 S. Ct. 1515, 1522-1528, 164 L. Ed. 2d 208, 221-27 (2006) where the court found a warrantless search of a home was unreasonable where a co-tenant consented to the search but the defendant present at the home refused consent. Any privacy interest defendant may claim in the shed is not such an interest as would allow his objection to the search to trump Donald's permission. Defendant held no interest in the real estate. Donald, as owner of the real estate and the resident of the property, had superior control, consequently his consent to search was sufficient. *See id.*

ENTRY TO THE SHED.

Defendant contends the deputy unreasonably entered the shed. We disagree. The alarm went off and the deputy entered the real estate in response to the direction from the alarm company. The triggering of the alarm suggested an unauthorized entry to Donald's home and the presence of an unauthorized person or persons on his property. There was probable cause to believe a theft or other unauthorized or illegal activity was taking place on Donald's property. When probable cause exists to believe illegal activity is in progress officers are presented with exigent circumstances justifying their warrantless entry. It would defy reason to suppose that officers had to secure a warrant before investigating, leaving the wrongdoers to complete their crime unmolested. *See United States v. Brown*, 449 F.3d 741, 748 (6th Cir. 2006); *see also United States v. Singer*, 687 F.2d 1135, 1144 (8th Cir. 1982).

COPYING VIN NUMBERS.

Defendant contends the deputy acted unreasonably in copying the VIN number from the skid loader. We disagree. Merely inspecting the skid loader that was in plain view without moving or touching the item and recording the VIN number was neither a search nor a seizure. *See Arizona v. Hicks* 480 U.S. 321, 324-25, 107 S. Ct. 1149, 1152, 94 L. Ed. 2d 347, 353-54 (1987). The district court is affirmed.

AFFIRMED.