IN THE COURT OF APPEALS OF IOWA

No. 7-762 / 07-0336
Filed December 28, 2007

STATE OF IOWA,
Plaintiff-Appellant,

vs.

SHAWN PATRICK SWEENEY,
Defendant-Appellee.

Appeal from the Iowa District Court for Story County, Lawrence Jahn, District Associate Judge.

Following the granting of discretionary review, the State requests reversal of a district court order granting defendant's motion for suppression of evidence. **AFFIRMED.**

Thomas J. Miller, Attorney General, Thomas S. Tauber and Mary Tabor, Assistant Attorneys General, Stephen Holmes, County Attorney, and Bryan Barker, Assistant County Attorney, for appellant.

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

Heard by Sackett, C.J., and Vaitheswaran and Baker, JJ.

BAKER, J.

In this appeal, we are asked to decide whether a police officer's observation of a plastic baggie protruding from the pocket of the passenger of a vehicle, together with (1) the officer's knowledge that the driver's license had been revoked for a drug-related offense, (2) the passenger's refusal to tell the officer what is in the baggie and pushing the baggie back into his pocket, and (3) the officer's knowledge that illegal drugs are commonly carried in plastic baggies, constitutes probable cause to conduct a warrantless search. We hold it does not.

I. Background and Facts

On December 21, 2006, Officer Adrienne Johnson of the Ames Police Department stopped a van because one of its headlights was not working. The driver of the van was Ryan Walton, whose driver's license had been revoked. Shawn Sweeney, who did have a valid license, was the only passenger in the van. Officer Johnson checked Walton's and Sweeney's licenses. After a backup officer arrived, she arrested Walton for driving while his license was revoked, searched him and found no drugs in his possession, and placed him in the back of her patrol car. Officer Johnson asked Walton if Sweeney could drive the van, as an alternative to having it towed, to which Walton agreed.

Officer Johnson approached the passenger side of the van. She asked Sweeney to step out of the van so that she could search the van incident to the arrest of Walton, before releasing it to Sweeney. As Sweeney stepped out of the van, Officer Johnson saw one to two inches of a clear plastic baggie sticking out from the right-hand pocket of his coat. The contents, if any, were not visible.

She had Sweeney put his hands on the roof of the van in pat-down position, and after starting to frisk him, asked him about the baggie. Sweeney responded that he had no idea what was in the baggie, and took his hand off of the van to push the baggie further into his pocket. Officer Johnson told him to take his hand out of his pocket. When he did, she placed his hand back on the van, reached into his pocket, and pulled out the baggie. It contained 2.9 grams of marijuana. Officer Johnson arrested Sweeney for possession of marijuana, handcuffed him, and searched him incident to arrest. In the other pocket of his coat, she found a second bag containing a 224-gram brick of marijuana.

Sweeney was charged by trial information with possession with intent to deliver marijuana in violation of Iowa Code section 124.401(d) (2005) and tax stamp violation under sections 453B.1, 453B.3, and 453B.12. Sweeney filed a motion to suppress the evidence underlying the charges, claiming Officer Johnson had subjected him to a warrantless search without probable cause and exigent circumstances. Following a hearing, the district court sustained Sweeney's motion to suppress. The court determined that, under the facts of the case, the officer did not have good cause to search Sweeney for illegal drugs. The court found the search was illegal and granted Sweeney's motion to suppress any evidence obtained from the search of his person or statements made by him after the commencement of the pat-down. The State filed an application for discretionary review of the district court's suppression ruling. The supreme court granted discretionary review and stayed the proceedings in district court pending disposition of this discretionary review action.

II. Merits

The State asserts that Officer Johnson had probable cause and exigent circumstances justify the search. Because Sweeney claims that the officer subjected him to a warrantless search in violation of his constitutional rights, our review is de novo. *State v. Simmons*, 714 N.W.2d 264, 271 (Iowa 2006).

> This review requires us to make an independent evaluation of the totality of the circumstances as shown by the entire record. We give deference to the factual findings of the district court due to its opportunity to evaluate the credibility of the witnesses, but we are not bound by such findings.

Id. (internal citations and quotations omitted).

Sweeney claims that Officer Johnson's warrantless search was in violation of his rights under the Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution, both of which protect "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." "[O]ur analysis applies equally to both the state and federal grounds." *State v. Carter*, 696 N.W.2d 31, 37 (Iowa 2005). Unless a recognized exception to the warrant requirement exists, such as probable cause coupled with exigent circumstances, searches and seizures conducted without a warrant are per se unreasonable. *Simmons*, 714 N.W.2d at 271-72. "An initially unconstitutional search is not validated by reason of its success." *State v. Moriarty*, 566 N.W.2d 866, 868 (Iowa 1997) (citing *State v. Swartz*, 244 N.W.2d 553, 555 (Iowa 1976)).

It is not contested that Officer Johnson had a right to stop the van, to search the van incident to Walton's arrest, and to order Sweeney out of the van

in order to search the vehicle. The crux of the appeal is based on what occurred after Officer Johnson ordered Sweeney out of the van. Sweeney claims that, when the officer turned her attention to him with the intent to pat him down for weapons, his constitutional rights were violated because she had no basis in fact to justify a pat-down, she did not have probable cause to reach into Sweeney's pocket, and no exigent circumstances existed to justify the search.

The State acknowledges that Officer Johnson did not have a legal basis to pat Sweeney down for weapons. *See Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968) (holding that in order to justify a pat-down, the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion"). The sole question before this court, therefore, is whether seeing a baggie protruding from Sweeney's coat pocket, under the facts and circumstances known to the officer, was sufficient to warrant a person of reasonable prudence to believe that the baggie contained contraband. We agree with the district court that probable cause did not exist for this warrantless search.

"[W]hen there is probable cause for the search, and exigent circumstances require that the search be conducted immediately," officers may conduct a warrantless search. *Carter*, 696 N.W.2d at 37. Evidence from a warrantless search "is inadmissible unless the State proves by a preponderance of the evidence that [the] exception applies." *Id.* "In making this determination, we must assess a police officer's conduct based on an objective standard." *State v. Nitcher*, 720 N.W.2d 547, 554 (Iowa 2006).

The State argues that Officer Johnson had probable cause to conduct a warrantless search of Sweeney because (1) she knew Walton's license had been revoked for a drug-related offense, (2) she saw a plastic baggie protruding from Sweeney's coat pocket, (3) when she asked about the baggie, Sweeney claimed to have no idea what it was and then pushed it back in his pocket, from which she could reasonably believe that Sweeney was lying about the baggie, and (4) she knew that illegal drugs are commonly carried in plastic baggies. We hold that an officer's observation of an inch or two of a plastic baggie protruding from an individual's pocket, under the facts and circumstances known to Officer Johnson, was insufficient to warrant a person of reasonable prudence to believe that the baggie contained contraband, and therefore does not constitute probable cause to conduct a warrantless search.

"In the context of evidentiary searches, 'probable cause' exists when a reasonably prudent person would believe that evidence of a crime will be discovered in the place to be searched." *Moriarty*, 566 N.W.2d at 868. The State relies on *State v. Carter*, where, "considering the totality of the circumstances," the court found the State had proven by a preponderance of the evidence that officers had probable cause to search a vehicle. 696 N.W.2d at 37. In *Carter*, the officer had observed "two inches of a baggie sticking out of the ashtray of the center console." *Id.* The existence of the baggie alone, however, was not the only basis for the search. When the officer signaled the vehicle to stop, the driver began digging around the area of the center console while driving, crossed three lanes of traffic, and struck a curb. *Carter*, 696 N.W.2d at 37. When the

vehicle stopped, the driver quickly exited the vehicle and appeared nervous. *Id.* at 37-38. The court held the sum total of the facts together with the officer's "experience and knowledge would lead a reasonable person to believe that evidence of a crime would be discovered under the ashtray." *Id.* at 38. The court further noted that, "[o]ther courts have found that a plastic baggie is a commonly used container for narcotics and *when seen in an unusual setting* can tip the scales in favor of probable cause for a search." *Id.* (emphasis added). For example, in *People v. Hilt*, 698 N.E.2d 233, 236 (Ill. 1998), the court held an officer's observation of a torn and knotted baggie in plain view inside a vehicle, combined with the officer's knowledge of drug packaging, provided the officer with probable cause to conduct a warrantless search of the car.

We find the facts in this case to be distinguishable from those in *Carter.* A baggie in an individual's pocket is not necessarily an unusual setting. Individuals have baggies (generically known as sandwich bags) in their pockets to carry a variety of legitimate items, e.g., single doses of medication, litter, snacks, or even a sandwich. Further, unlike the driver in *Carter*, there was nothing in Sweeney's behavior to justify a belief that he possessed drugs.

We also find that Officer Johnson's knowledge that the van driver's license had been revoked for a drug-related offense insufficient to justify the warrantless search. The State argues that the officer's knowledge that Walton's license had been revoked was an important factor giving rise to probable cause, yet cites no case authority where knowledge of the companion's criminal background, under circumstances similar to this case, was found to support probable cause.

"[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S. Ct. 338, 342, 62 L. Ed. 2d 238, 245 (1979) (citation omitted). A search or seizure based on probable cause must be based on probable cause with respect to that particular person. *Id.* "*Ybarra*, however, does not hold that companionship is irrelevant to the determination of probable cause or reasonable suspicion." *U.S. v. Silva*, 957 F.2d 157, 160 (5th Cir. 1992).

While "'a suspect's companionship with or propinquity to an individual independently suspected of criminal activity is a factor to be considered in assessing the reasonableness of a seizure,'" something more is required. *State v. Kreps*, 650 N.W.2d 636, 647 (Iowa 2002) (quoting with approval *Silva*, 957 F.2d at 161). For example, a suspect's fleeing from officers who had ordered him to stop, a suspect's refusal to comply with an officer's orders, and a companion's appearing to be under the influence coupled with other suspicious behavior, have lead courts to find "the 'more' that is required" for probable cause. *U.S. v. Valle Cruz*, 452 F.3d 698, 703 (8th Cir. 2006); *see also Silva*, 957 F.2d at 161; *U.S. v. Bell*, 762 F.2d 495, 501 (6th Cir. 1985).

In this case, before the questioning regarding the baggie, there was nothing to lead Officer Johnson to believe criminal activity was afoot. Officer Johnson testified that both occupants were cooperative. It was only the existence of the baggie that aroused the officer's suspicion. The baggie in Sweeney's pocket, his refusal to say what was in it, and Officer Johnson's

assertion that illegal drugs are commonly carried in plastic baggies, do not constitute the "more" required to give rise to probable cause to search.

Perhaps most telling is the testimony of Officer Johnson herself:

Q. You had suspicion that it was drugs?
Johnson: Yes.
Q. You didn't have probable cause?
Johnson: Correct.

While the officer's subjective belief is not controlling, we are unable to conclude that Officer Johnson possessed a reasonable belief that evidence of a crime would be discovered in Sweeney's pocket. *See Moriarty*, 566 N.W.2d at 868. At the time Officer Johnson put her hand in Sweeney's pocket, she lacked probable cause to conduct the warrantless search.

The State also argues that exigent circumstances existed to search Sweeney's pocket, as it was probable Sweeney would destroy or conceal the contents of the baggie if Officer Johnson did not search him immediately. *See Nitcher*, 720 N.W.2d at 555 (noting exigent circumstances include "the probability that, unless taken on the spot, evidence will be concealed or destroyed"). "If we find a basis for probable cause, we will then determine whether exigent circumstances existed to justify the warrantless entry." *State v. Naujoks*, 637 N.W.2d 101, 108 (Iowa 2001). Because we find no probable cause, we need not consider the existence of exigent circumstances on appeal.

III. Conclusion

Because the officer lacked probable cause, the search of Sweeney violated his constitutional right to be free from unreasonable searches. Accordingly, we affirm the district court's order granting Sweeney's motion to suppress the

evidence obtained from the search of his person or statements made by him after the commencement of the pat-down. Our holding that there was no probable cause effectively disposes of the other issues raised on appeal.

AFFIRMED.