IN THE COURT OF APPEALS OF IOWA

No. 7-763 / 07-0415
Filed December 12, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RICKY DEAN ANDERSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Cass County, Jeffrey L. Larson, Judge.

Ricky Dean Anderson appeals the judgment and sentence entered following his conviction of second-offense possession of marijuana. **AFFIRMED.**

Patrick Sondag, Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, Thomas Tauber, Assistant Attorney General, and Daniel Feistner, County Attorney, for appellee.

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

ZIMMER, J.

Ricky Dean Anderson appeals the judgment and sentence entered following his conviction of second-offense possession of marijuana in violation of Iowa Code section 124.401(5) (2005). Anderson alleges the district court erred in overruling his motion to suppress evidence because police officers were not justified in conducting a protective search for weapons and did not have independent grounds for arresting and searching him incident to arrest.[1] Although we find the initial protective search was improper, we conclude the defendant's illegal resistance to the pat-down search gave police independent grounds to arrest Anderson and search him incident to the arrest. We affirm.

I. Background Facts and Proceedings.

On June 11, 2006, around 2:00 a.m., Atlantic Police Officer Joshua McLaren was on routine patrol, accompanied by Reserve Officer Brandon Krause and an intern, Donald McLaren. Officer McLaren noticed a passenger in a pickup truck was not wearing a seatbelt, and he stopped the truck.

Officer McLaren approached the truck and recognized all three of the occupants on sight. He detected an odor of alcohol coming from within the truck, which was being driven by Gary Buboltz. The two passengers were Cynthia Buboltz and Anderson. Neither passenger was wearing their seatbelt.

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[1] Anderson asserts his rights under the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Iowa Constitution were violated. Our supreme court has generally interpreted Article I, Section 8 to have the same scope and purpose as the Fourth Amendment. *State v. Legg*, 633 N.W.2d 763, 765 (Iowa 2001). Because Anderson has offered no reason to distinguish the state constitutional guarantee from the federal provision as it has been interpreted by the United States Supreme Court with respect to the issue before us, our discussion of the Fourth Amendment applies equally to the state constitutional claim.

Officer McLaren obtained identification from all of the truck's occupants and returned to his patrol car to confirm the validity of their licenses and to check for warrants. As Officer McLaren sat in his patrol car, he saw the occupants of the truck moving their heads and upper torsos as though "reaching and grabbing" for something. Around this time, Officer Shawna Becker arrived on the scene.[2] Officer McLaren confirmed there were no outstanding warrants for anyone in the pickup.[3]

Officer McLaren returned to the truck and asked Gary Buboltz to step out of the vehicle. Officer McLaren determined that Buboltz and his passengers had been drinking. He then had Buboltz perform a series of field sobriety tests. After approximately ten minutes of testing, he determined that Buboltz was not intoxicated. During this time, Officer McLaren did not notice anything that caused him concern for his safety. After concluding that Buboltz was not under the influence, Officer McLaren asked Buboltz if he could search the pickup for open beer or anything else illegal. Buboltz consented to the search of his truck.

Before searching the truck, Officer McLaren asked Cynthia Buboltz and Anderson to exit the vehicle. All three occupants were then patted down without their consent. Reserve Officer Krause patted down Gary Buboltz, Officer Becker patted down Cynthia Buboltz, and Officer McLaren patted down Anderson.

As Officer McLaren began to pat Anderson down, he felt a small, hard, metallic object in the left front pocket of Anderson's jeans. Officer McLaren

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[2] The record indicates that Deputy Darby McLaren was also at or near the scene.

[3] While the records check was in progress, Deputy McLaren referred to the defendant as "Rocket" and joked that his apparent nickname was short for "Rocket Scientist."

asked if the object was a lighter, and Anderson said it was not. Officer McLaren asked Anderson what the object was, but Anderson refused to identify the object and he put his hands in his pockets. Officer McLaren told him to take his hands out of his pockets and Anderson refused. Anderson asked if he was under arrest. Officer McLaren told him he was not under arrest, but continued to tell him to take his hands out of his pockets. Anderson did not comply with Officer McLaren's requests.

Officer McLaren then took hold of Anderson's left hand and told him to put his hands on the truck. At that point, Anderson "kind of spun away and took about two steps" away from the officer. Several officers grabbed Anderson and "a short struggle" ensued before officers took Anderson to the ground and handcuffed him. Anderson's chin was cut as a result of the fall to the ground, and an ambulance was called to the scene. While waiting for the ambulance, the officers searched Anderson. The officers located a metal marijuana pipe, rolling papers, and a plastic bag containing 1.10 grams of marijuana in his left front jeans pocket.

On July 6, 2006, the State filed a trial information, with minutes of testimony attached, formally charging Anderson with second-offense possession of a controlled substance. Anderson pled not guilty and filed a motion to suppress all evidence seized from him on June 11. He argued that the initial pat down was improper because Officer McLaren had no reason to believe that Anderson was armed and dangerous. The State filed a resistance to the motion arguing that Officer McLaren patted Anderson down for officer safety, and that the search of Anderson was incident to a lawful arrest.

A suppression hearing was held, and the court heard testimony from Officer McLaren and viewed a DVD recording of the traffic stop taken from the police car. Following the hearing, the court overruled Anderson's motion to suppress, finding that the initial pat down was reasonable. Anderson filed a motion to reconsider and/or for expanded findings, which the district court denied. Anderson subsequently waived jury trial and was found guilty of second-offense possession of a controlled substance after a stipulated trial on the minutes of testimony. He was sentenced on February 26, 2007.

Anderson appeals.

II. Scope and Standards of Review.

Anderson challenges the district court's denial of his motion to suppress, which implicates his constitutional rights; as a result our review is de novo. *State v. Otto*, 566 N.W.2d 509, 510 (Iowa 1997). We 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). In reviewing the district court's ruling on a motion to suppress, we consider both the evidence presented during the suppression hearing and that introduced at trial. *State v. Andrews*, 705 N.W.2d 493, 496 (Iowa 2006). Because this case was tried to the court on the minutes of testimony, they are included in the record. *See id.*

III. Discussion.

The Fourth Amendment to the United States Constitution protects people from unreasonable searches and seizures by government officials. *State v. Kinkead*, 570 N.W.2d 97, 100 (Iowa 1997). Warrantless searches and seizures are presumptively unreasonable, and the State bears the burden of proving a

warrantless search falls within one of the exceptions to the warrant requirement of the Fourth Amendment. *State v. Kreps*, 650 N.W.2d 636, 641 (Iowa 2002). One of the well-established exceptions to the warrant requirement is the *Terry* stop, which allows an officer to stop an individual for investigatory purposes based on a reasonable suspicion that a criminal act has occurred or is occurring. *Id.*; *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968).

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous . . . he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Terry, 392 U.S. at 30, 88 S. Ct. at 1884-1885, 20 L. Ed. 2d at 911. The officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion." *Id.* at 21, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906.

Anderson alleges the district court erred in finding that Officer McLaren had reasonable grounds to pat him down for weapons. In concluding the initial pat down was reasonable, the court noted that because a search of the vehicle was to take place at approximately 2:00 a.m. and because there were three occupants in the vehicle, "it was prudent to do a pat-down of all three, including [Anderson]." For the reasons which follow, we conclude the initial pat down was improper.

Officer McLaren pulled the truck over on a well-lit public roadway to investigate an apparent seatbelt violation. The officer was acquainted with all

three occupants of the vehicle, and he observed nothing unusual in the pickup bed or inside the cab. Officer McLaren was accompanied by a reserve officer and an intern, and was joined by two other officers shortly after he stopped the truck. Officer McLaren indicated he observed the occupants of the truck make some suspicious movements "like reaching and grabbing," while he was checking the occupants' licenses in his patrol car. However, when he returned to the truck he observed nothing that alarmed him, and he did not conduct a pat-down search for his safety.

Officer McLaren then proceeded to conduct field sobriety tests on the driver, which lasted for approximately ten minutes. During this time, Officer McLaren did not feel threatened by the driver or the truck's other occupants. After concluding Gary Buboltz was not intoxicated, Officer McLaren asked for and received permission to search his vehicle. At that point, the defendant and the Buboltzes were frisked. Officer McLaren testified he routinely conducts pat-down searches for his own safety when "there's a consent search of a vehicle and somebody steps out." However, he was unable to point to anything specific about the occupants of the truck indicating that they may be armed and dangerous.[4] *Id.* The record in this case does not support the conclusion that he had a reasonable belief that the defendant might be armed and dangerous. Therefore, we conclude the district court erred in finding the initial pat-down search was reasonable. This conclusion, however, does not end our inquiry in this case.

[4] It is apparent from the overall record that the generalized movements which McLaren observed when he was checking the licenses of the occupants of the pickup were not why the officer frisked the defendant.

The State agrees Officer McLaren did not have constitutionally sufficient reasons to permit his initial pat-down search. However, the State argues that Anderson's illegal resistance to the pat down gave Officer McLaren valid, independent grounds to arrest Anderson and search him. For the reasons which follow, we agree. Our supreme court has stated "[e]ven though an initial arrest is unlawful, a defendant has no right to resist the arrest. If the defendant does so, probable cause exists for a second arrest for resisting. A search incident to the second arrest is lawful." *State v. Dawdy*, 533 N.W.2d 551, 555 (Iowa 1995) (citing *United States v. Bailey*, 691 F.2d 1009, 1016-18 (11th Cir. 1982)). In *Dawdy*, the court held "that a defendant's response to even an invalid arrest or *Terry* stop may constitute grounds for arrest." *Id*. In determining whether probable cause existed for the second arrest, the test used is an objective one. *Id*.

Anderson does not claim that the principles in *Dawdy* do not encompass an illegal pat-down, as well as resistance to an improper arrest. However, Anderson argues that his actions did not constitute interference with official acts and did not provide valid grounds for his arrest. He contends he "used no force whatever against Officer McLaren," "made no attempt to run away or flee the area," and merely "passively sought to terminate the search." Upon careful review of the record, we reach a different conclusion. At the suppression hearing, Officer McLaren testified that after he took hold of Anderson's arm and instructed him to place his hands on the truck, Anderson "kind of spun away and took about two steps" away from the officer. As reported in the minutes of testimony, Officers McLaren, Becker, and Krause all saw Anderson's actions as

an attempt to flee. Officer Darby McLaren, who had arrived on the scene as a backup officer, stated that after Anderson was instructed to put his hands on the truck, "Anderson then swung around obviously not listening to the directions. I am unaware if he was trying to escape by running or if he getting ready to fight." The testimony presented at the suppression hearing, as well as the evidence contained in the minutes of testimony, which are uncontroverted, indicate that "a short struggle" took place after Officer McLaren told Anderson to place his hands on the truck. Based on the foregoing evidence, we conclude a reasonable police officer could have viewed Anderson's actions as interference with official acts, which provided probable cause for arrest. *See id.* ("The struggle that ensued when the state trooper attempted to handcuff Dawdy, though quickly suppressed, would provide a reasonable police officer with probable cause for an arrest under Iowa law.").

If Anderson had not resisted Officer McLaren's request to place his hands on the truck, and if he had allowed the pat-down search to be conducted without resistance, we would have no grounds on which to affirm the district court's ruling denying Anderson's motion to suppress evidence. This is because the initial pat-down search was improper. However, because Anderson's resistance provided an independent ground for his arrest, we believe the subsequent search of his person was valid as a search incident to arrest. *See State v. Canada,* 212 N.W.2d 430, 434 (Iowa 1973) (stating a warrantless search incident to valid arrest, if properly limited, is reasonable and an arresting officer may search the person arrested in order to remove any weapons the arrestee might seek to use in order to resist arrest or effect escape and to prevent concealment or

destruction of evidence). Strong policy reasons underlie the rule that a defendant may be arrested as a result of resisting police misconduct. As noted in *Dawdy*, a "contrary rule would virtually immunize a defendant from prosecution for all crimes he might commit that have a sufficient causal connection to the police misconduct." 533 N.W.2d at 555 (quoting *Bailey*, 691 F.2d at 1017).

IV. Conclusion.

We conclude that the police did not have reasonable grounds to pat the defendant down for weapons; however, the defendant's illegal resistance to the pat-down search provided officers with independent grounds to arrest and search him incident to arrest. Accordingly, we affirm the district court's ruling denying Anderson's motion to suppress.

AFFIRMED.