IN THE COURT OF APPEALS OF IOWA

No. 8-877 / 08-0146
Filed December 31, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

NATHANIEL JAMES MELTON,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Casey D. Jones (motion to suppress) and Angeline M. Wilson (trial), District Associate Judges.

Nathaniel James Melton appeals his conviction, following a stipulated trial to the court, for possession of marijuana. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and E. Frank Rivera, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Harold Denton, County Attorney, and Jason Beslar, Assistant County Attorney, for appellee.

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

MILLER, J.

Nathaniel James Melton appeals his conviction, following a stipulated trial to the court, for possession of marijuana.[1] He contends the district court erred in denying his motion to suppress. We affirm.

At 1:23 a.m. on May 13, 2007, Marion Police Sergeant Robert Elam was dispatched to an address on Vasey Avenue in Marion based on reports of a loud party. The residence has been the subject of similar previous reports, and Elam himself had been there on at least two previous occasions based on complaints of loud parties and underage drinking. When Sergeant Elam went to the door and knocked he heard someone inside alert others to the presence of "cops" and heard a window opening. Another officer at the scene was alerted, went around the back of the house, and apprehended one person in the backyard attempting to leave the party undetected. Upon discovery of people running from the party, Elam radioed other officers in the area to be on the lookout for persons fleeing the party and gave the direction of the fleeing individuals.

Officer Jason Schamberger received the radioed information from Elam while at the station and headed toward the area of the party. Schamberger saw one person walking on the sidewalk approximately one and one-half blocks from the address where the party had been reported. The individual was later

[1] Melton was also convicted of public intoxication. He states in his appellate brief that he is appealing from "the final judgment and sentence" and "every adverse order, decision, and ruling." However, public intoxication is a simple misdemeanor and thus not subject to direct appeal. *See* Iowa Code §§ 123.46(2) and 814.6(1)(a) (2007). Furthermore, Melton has not sought discretionary review of this conviction under Iowa Rule of Appellate Procedure 6.201. Accordingly, we deal only with Melton's conviction for possession of marijuana in this appeal.

identified as the defendant Melton. Officer Schamberger pulled his squad car to the curb and parked without activating his lights or siren. He encountered Melton on the sidewalk and asked him where he was coming from but did not draw his gun or issue any orders to Melton at that time. Melton replied he was walking to a friend's home but could not tell Schamberger the friend's address. At that point Officer Schamberger observed that Melton was out of breath and sweating. He also noticed the smell of alcoholic beverage coming from Melton as he responded to his questions and he thought Melton appeared too young to drink.

Schamberger then decided to pat Melton down for weapons, for what he later described as officer safety purposes. He asked Melton if he was carrying any weapons and Melton said no. When Schamberger patted Melton down he found a pocketknife. Officer Schamberger then asked Melton a few more questions in what Schamberger described as a "relaxed" interaction. He then asked Melton if he had anything illegal on him and requested permission to search him. Melton consented and the officer found a small baggie of marijuana in Melton's front pocket. Melton was placed under arrest.

The State charged Melton, by trial information, with possession of marijuana, in violation of Iowa Code section 124.401(5) (2007), and public intoxication in violation of section 123.46. Melton filed a motion to suppress alleging Officer Schamberger's seizure and subsequent search of Melton's person was in violation of both the federal and state constitutions, and thus any

evidence obtained from the illegal search must be suppressed.[2] Following a hearing on the motion the district court concluded that Officer Schamberger's cursory, superficial pat-down of Melton did not amount to a seizure and that Schamberger did not have sufficient cause to conduct a protective pat-down search of Melton for officer safety pursuant to *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889 906 (1968). Under *Terry* an officer has authority to conduct a reasonable search for weapons for the officer's own protection where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual. *Terry,* 392 U.S. at 27, 88 S. Ct. at 1883, 20 L. Ed. 2d at 909. The district court here concluded that Schamberger did not articulate why he believed Melton may have had a weapon or why he was in fear of his safety. Thus, the court concluded the initial pat-down search was illegal. Again, the only thing seized during this search was a pocketknife.

However, the district court went on to conclude that even though the pat-down search was invalid, under the totality of the circumstances the subsequent consent to search was voluntarily given. Therefore, the court concluded that because that search during which the marijuana was found was voluntary and consensual, Schamberger did not violate Melton's constitutional rights and denied the motion to suppress the drug evidence.

Melton appeals, contending the district court erred in denying his motion to suppress. More specifically, he argues that "[b]ecause there was no independent

[2] Although Melton never specifically states what "evidence" should be suppressed we presume he is referring to the marijuana, as that is the only evidence found on his person that led to a conviction.

reason to search [Melton], the intrusion of a pat-down search was not reasonable and the fruits therefrom should have been suppressed."

Melton claims only that his person was illegally seized and the initial pat-down search of his person was improper. He argues that any evidence seized thereafter must be suppressed as fruit of the poisonous tree. We believe that Melton's reasoning is flawed.

As a general proposition, "[t]he fruit of the poisonous tree doctrine bars evidence found in subsequent searches only when the evidence was found by virtue of the first illegality." *State v. Bergmann*, 633 N.W.2d 328, 333 (Iowa 2001) (citing *Wong Son v. United States*, 371 U.S. 471, 487-88, 83 S. Ct. 407, 417, 9 L. Ed. 2d 441, 455 (1963)). In *Bergmann* our supreme court held that even if an initial pat-down search were illegal, marijuana discovered as a result of a subsequent search based on probable cause and exigent circumstances was not subject to suppression as fruit of the poisonous tree because there was no link between the pat-down and the subsequent search. *Id.* at 333, 338. The only incriminating evidence seized from Melton was marijuana found not during the pat-down search, but instead found during a later search to which Melton consented. Melton does not question the nature or character of that consent, or claim that it was involuntary.

We recognize that, as pointed out by the State, our supreme court's plurality opinion in *State v. Lane*, 726 N.W.2d 371 (Iowa 2007), makes clear that consent itself can be the fruit of a prior illegality and thus involuntary. *See id.* at

381. However, as also pointed out by the State, Melton makes no claim that his consent was the product of an illegal seizure.

The district court found that Melton's consent to the search of his person that resulted in discovery of the marijuana was voluntarily given. Melton makes no claim that his consent to that search was not voluntary, makes no argument in support of such a claim, and cites no authority in support of such a claim. We therefore deem waived any such claim. *See* Iowa R. App. P. 6.14(1)(*c*) ("Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue."); *see also Hollingsworth v. Schminkey*, 553 N.W.2d 591, 596 (Iowa 1996) ("When a party, in an appellate brief, fails to state, argue, or cite to authority in support of an issue, the issue may be deemed waived.").

In summary, the district court found that Melton voluntarily consented to the search of his person that resulted in discovery of the marijuana, and on appeal Melton does not challenge that finding. We therefore affirm the court's denial of Melton's motion to suppress and affirm his conviction for possession of marijuana.

AFFIMRED.