IN THE COURT OF APPEALS OF IOWA

No. 9-090 / 08-0452
Filed March 11, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JASON JAMES CHIHAK,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Kellyann M. Lekar (motion to suppress) and Bruce B. Zager (trial), Judges.

Jason Chihak appeals the district court's denial of his motion to suppress evidence and his conviction of possession of a controlled substance (marijuana). **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brook Jacobson, Assistant County Attorney, for appellee.

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

DOYLE, J.

Jason Chihak appeals from his conviction of possession of a controlled substance (marijuana). He contends the district court erred in denying his motion to suppress evidence. Upon our review, we reverse and remand.

***I. Background Facts and Proceedings*.**

During the afternoon of March 23, 2007, Waterloo Police Officers Zubak and Lowrey were on patrol in a police vehicle looking for traffic offenders. At approximately 1:16 p.m., they observed a vehicle circle a block a couple of times near a known drug house. The officers' attention was first drawn to the vehicle because of its loud muffler. They conducted a traffic stop of the vehicle for the loud muffler. Both officers exited the squad car. Officer Zubak approached the driver's side of the vehicle, and Officer Lowrey approached the passenger side. Officer Zubak spoke with the driver, Murley, and inquired about the muffler. He then returned to the squad car to check Murley's driver's license status, which was normal. Upon returning to the vehicle, Officer Zubak asked Murley to step out and come to the back of the vehicle to talk. Murley consented to a search of the vehicle. Meanwhile, Officer Lowrey approached the passenger side of the vehicle and asked the passenger, Chihak, for identification. Officer Lowrey checked for warrants and wants. There were none, so Officer Lowrey stepped to the rear of the vehicle. After Officer Zubak obtained consent from the driver for a search of the vehicle, Officer Lowrey asked Chihak to step out of the vehicle. Once outside the vehicle, Officer Lowrey said, "I'm going to pat you down, make sure you don't have any bombs, guns, knives, or anything that can stick me." Chihak made no verbal response and just stood there and let the officer pat him

down. Officer Lowrey testified he conducted the pat-down for officer safety to make sure Chihak did not have a gun in his pocket or a knife in his pocket or something that could harm Lowrey in some way when he put him to the rear of the vehicle. Officer Zubak was going to search the driver's side of the vehicle, and Officer Lowrey was going to search the passenger side, while Murley and Chihak stood at the rear of the vehicle. During his pat-down of Chihak, Officer Lowrey testified, "I think I had him turn around [so Chihak would be facing away from the officer] and I searched him from the sides, and I got down to his pants when I saw his pocket was open. He had baggy shorts on." Officer Lowrey testified he could see inside the pocket of the shorts without actually having to pat the pockets down, and that he observed a small plastic bag containing a green substance consistent with marijuana. Chihak was placed under arrest and handcuffed. Officer Lowrey then conducted a secondary search and removed the plastic bag from Chihak's pocket. The bag was found to contain 4.2 grams of marijuana.

Chihak was charged with third offense possession of a controlled substance (marijuana), a class "D" felony in violation of Iowa Code section 124.401(5) (2007). Chihak filed a motion to suppress evidence obtained from the officer's pat-down search. The denying the motion, the district court concluded:

> Officer safety is a reasonable concern and search of the persons who are exiting the vehicle for the search in order to assure officer safety while they are searching the vehicle is also reasonable. The pat down search was a minimal intrusion which put the officer in a position for a plain view observation. The baggy nature of the shorts and, therefore, the ability to have a view into a gaping pocket was credibly reported by the officer. Search of the pocket area would have been inevitably made if the officer had not first made the plain view observation. The intrusion for the pat down was

> justified for officer safety and the discovery was inadvertent as the officer's primary concern for officer safety was weapons.

Chihak waived jury trial, and the case proceeded to a bench trial on the stipulated minutes of testimony. Chihak was found guilty of possession of a controlled substance (marijuana) and subject to the enhancement of a class D felony in violation of section 124.401(5). He was sentenced to a term of imprisonment not to exceed five years, along with a suspended fine and various surcharges.

On appeal, Chihak does not challenge the legality of the traffic stop, the search of the vehicle based on consent, or the officer's request for Chihak to step out of the vehicle. Rather, Chihak submits that the officer's pat-down search violated his right to be free from unreasonable searches and seizures as guaranteed under the federal and state constitutions.

II. Standard of Review.

We review this constitutional question de novo. *State v. Lane*, 726 N.W.2d 371,377 (Iowa 2007). This review requires "'an independent evaluation of the totality of the circumstances as shown by the entire record.'" *Id*. (citations omitted). We may consider the evidence presented at the suppression hearing and at trial in our review. *State v. Andrews*, 705 N.W.2d 493, 496 (Iowa 2005). We give deference to the district court's factual findings due to its ability to evaluate witness credibility, but we are not bound by its findings. *Lane*, 726 N.W.2d at 377. Error was preserved for our review by the district court's adverse ruling on the motion to suppress. *State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998).

***III. Discussion*.**

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. 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 643, 643-44 (Iowa 1995).

Warrantless searches and seizures are per se unreasonable unless they fall within one of the carefully drawn exceptions to the warrant requirement. *State v. Simmons*, 714 N.W .2d 264, 271 (Iowa 2006). Valid exceptions to the warrant requirement include searches based on (1) consent, (2) plain view, (3) probable cause coupled with exigent circumstances, (4) searches incident to arrest, and (5) those based on the emergency aid exception. *State v. Lewis*, 675 N.W.2d 516, 522 (Iowa 2004). 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*.

It is not contested in this appeal that the officers had a right to stop the vehicle because of the loud muffler. Additionally, Chihak does not contest that the officers had a right to search the vehicle in which Chihak was a passenger based on Murley's consent, nor does Chihak dispute that the officers had the right to order him out of the car to facilitate the lawful consent search of the vehicle. Rather, the crux of the appeal is based on what occurred after the

officer ordered Chihak out of the car. Specifically, we must determine whether Officer Lowrey was justified in performing a pat-down search of Chihak.

As stated above, after Chihak exited the car at the request of Officer Lowrey, the officer stated "I'm going to pat you down, make sure you don't have any bombs, guns, knives or anything that can stick me." The State argues Officer Lowrey had a right to conduct this pat-down search of Chihak prior to searching the car in order to ensure his own safety. Officer Lowrey testified he just wanted to "make sure [Chihak] didn't have a gun in his pocket or a knife in his pocket or something that [Chihak] could harm me in some way when I put him to the rear of the vehicle" while he was assisting in the search of the vehicle. Additionally, he testified "[a]ny time I have anybody to my back it tends to be an officer safety issue." The State argues the pat-down Officer Lowrey performed was justified under the officer safety exception.

The issue here is controlled by the landmark decision of *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), and its progeny. 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; *see also Michigan v. Long*, 463 U.S. 1032, 1047-50, 103 S. Ct. 3469, 3480-81, 77 L. Ed. 2d 1201, 1218-19 (1983); *Ybarra v. Illinois*, 444 U.S. 85, 92-94, 100 S. Ct. 338, 343-44, 62 L. Ed. 2d 238, 246-47 (1979); *Pennsylvania v. Mimms*, 434 U.S. 106, 112, 98 S. Ct. 330, 334, 54 L. Ed. 2d 331, 337-38 (1977).

> The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

Terry, 392 U.S. at 27, 88 S. Ct. at 1883, 20 L. Ed. 2d at 909 (citations omitted). In justifying this particular intrusion upon individuals' constitutionally protected interests 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." *Id*. at 21, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906. The Fourth Amendment requires that at some point the reasonableness of a particular search or seizure can be subjected to the neutral, detached scrutiny of a judge. *Id*. The judge must then evaluate the reasonableness in light of the particular circumstances, and in making that assessment must employ an objective standard: "would the facts available to the officer at the moment of the seizure or search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Id*. at 21-22, 88 S. Ct. at 88, 20 L. Ed. 2d at 906.

Officer Lowrey testified he was going to conduct the pat-down search of Chihak to ensure his safety. However, he also testified that Chihak was cooperative (the driver was also cooperative), gave him his ID, made no movements and was not moving around, was not threatening, and that Chihak was not a danger to him when he asked him to step out of the car. This testimony demonstrates that Officer Lowrey did not have the requisite "reasonable belief" that Chihak was armed and presently dangerous to justify the

initiation of a pat-down search. Furthermore, not only is there no testimony from the officer that he had any belief that Chihak was armed or dangerous, we cannot find that the facts available to the officer at the time of the search would have warranted a person of reasonable caution to believe that he was.

Certainly such determinations must be made by officers and courts on a case-by-case basis, taking into consideration all of the surrounding circumstances. We are mindful of the importance of an officer's safety during even routine traffic stops; however, none of the circumstances which might lead a reasonable person to believe Chihak was armed and presently dangerous can be found in the present record. There is no evidence in the record of any furtive movements or nervous behavior by Chihak (or the driver), as was found in part to justify such a "reasonable belief" in *Maryland v. Wilson*, 519 U.S. 408, 410-11, 117 S. Ct. 882, 884, 137 L .Ed. 2d 41, 45 (1997). Nor is there any evidence in the record to indicate this stop took place late at night in a high crime district, other factors the Supreme Court has taken into consideration in finding an officer's actions reasonable for officer safety reasons. *See Adams v. Williams*, 407 U.S. 143, 144, 92 S. Ct. 1921, 1922, 32 L. Ed. 2d 612, 616 (1972).

We conclude there are no specific and articulable facts in the record which, taken together with rational inferences from those facts, justified Officer Lowrey in subjecting Chihak to a pat-down search. *See Terry*, 392 U.S. at 21, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906. The State has failed to meet its burden to prove circumstances existed which would support a reasonable belief Chihak was armed and presently dangerous, thus allowing Officer Lowrey to conduct a

pat-down search. Thus, Officer Lowrey did not have the right to conduct a pat-down search.

The State further argues that even if Officer Lowrey was not justified in performing the pat-down search, Chihak's appeal should be denied because the marijuana was discovered in plain view. Plain view is an exception to the warrant requirement of the Fourth Amendment. *See Lewis*, 675 N.W.2d at 522 (Iowa 2004) (citations omitted). The plain view exception applies when the following conditions are present: (1) the item seized is in plain view, (2) the incriminating character of the item seized was immediately apparent, and (3) the police were rightfully in the place that allows them to observe the item. *State v. McGrane*, 733 N.W.2d 671, 680 (Iowa 2000) (citing *Horton v. California*, 496 U.S. 128, 136, 110 S. Ct. 2301, 2308, 110 L. Ed. 2d 112, 123 (1990)). Arguably, the first two conditions are present here. The third is not. Officer Lowrey saw the bag of marijuana only *after* he began the impermissible pat-down search. In other words, it was the impermissible pat-down that placed the officer in the position to observe the bag of marijuana in Chihak's pants pocket. Under the circumstances presented, Officer Lowrey was not rightfully in a place that allowed him to observe the item. There is no testimony that he observed the bag of marijuana before he began the search. The plain view exception does not apply in this case.

IV. Conclusion.

For all the reasons stated above, we conclude the trial court erred in denying Chihak's motion to suppress. The officer was not justified in conducting a pat-down search immediately following Chihak's removal from the vehicle as

he could not, at that point in the encounter, point to any specific and articulable facts which would warrant a reasonable person confronted with the same surrounding circumstances to believe Chihak was armed and presently dangerous. Chihak had not done anything suspicious during the traffic stop, and neither did the driver. It was only after Officer Lowrey began his pat-down search of Chihak that he observed the marijuana. The plain view exception does not apply to the circumstances presented in this case. Therefore, the discovery of the marijuana came about through a violation of Chihak's fourth Amendment right to be free from unreasonable search and seizure and should have been inadmissible and suppressed. We therefore must reverse and remand to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.