IN THE COURT OF APPEALS OF IOWA

No. 9-369 / 08-0335
Filed August 6, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARK ROBERT BIRKHOLZ,
Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Paul W. Riffel, Judge.

Mark Robert Birkholz appeals his conviction for possession with intent to deliver a controlled substance (methamphetamine). He claims the district court erred in denying his motion to suppress evidence. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Paul L. Martin, County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MILLER, S.J.

Mark Robert Birkholz appeals his conviction for possession with intent to deliver a controlled substance (methamphetamine). He claims the district court erred in denying his motion to suppress evidence. We affirm.

The record reveals the following facts. On June 26, 2007, Deputy Matt Klunder of the Cerro Gordo Sheriff's Department and Officer Toby Schissel of the Mason City Police Department were working together for the North Central Iowa Drug Task Force. They went to an apartment complex at 540 East State Street in Mason City to look for Nancy Bolding because they had information she had been living in Apartment 7 in that complex. Officers had been there on previous occasions to look for Bolding because she had an outstanding arrest warrant for probation violations. The defendant Birkholz lived with Bolding. Officers had also received information that Birkholz and Bolding were dealing drugs from their apartment. Schissel and Klunder arrived at the apartment complex around 3:30 p.m. in an unmarked car and dressed in plain clothes. The door to the apartment building in question has a security lock and thus anyone wishing to enter either has to have a key or has to be buzzed in by an occupant of one of the apartments.

As the officers were conducting their surveillance, they observed a person later identified as Kevin Hejlik approach the building and ring a buzzer in an attempt to enter the building. The officers walked up behind Hejlik and also rang a buzzer for an apartment other than Apartment 7. When the entry door "buzzed" open all three men entered the apartment building.

The officers followed Hejlik up the stairs to the second floor of the building to Bolding's apartment. They observed the door of her apartment open and saw Hejlik standing in the doorway talking to Birkholz. Klunder and Schissel walked past the door and did not see anyone else in the apartment at that time. Hejlik then entered the apartment and closed the door behind him. The officers returned to the doorway of Apartment 7, stood about a foot away, and attempted to listen to the conversations inside. Deputy Klunder heard two men talking and assumed it was Hejlik and Birkholz. One seemed to be talking on a cell phone and Klunder heard him making statements such as "I need more money," "They're mad at me," and "I need to come get more money. I can come get the rest." Klunder interpreted these statements to mean that one of the men needed more money to buy more drugs. He also heard a female voice in the apartment and assumed it was Bolding's, and heard what sounded like the rustling of plastic baggies. One of the men inside said he would "go get the rest of the money and come back," and at that point the door to the apartment opened.

As the door opened the officers saw Birkholz and Hejlik standing inside the door. They also observed Bolding somewhere behind the men towards the rear of the apartment. The officers displayed their badges, and Deputy Klunder had drawn his weapon and ordered Birkholz and Hejlik to show their hands. As they showed their hands Klunder noticed that Birkholz had a handful of baggies containing a white substance and ordered him to drop them on the floor. Later testing showed the white substance was methamphetamine. Hejlik and Birkholz were placed under arrest and the officers entered the apartment to arrest Bolding

pursuant to the outstanding warrant for her arrest. Birkholz was searched incident to arrest and a substance believed to be methamphetamine was seized from his person. Officers later obtained a search warrant for the apartment and additional property was seized during the execution of that warrant.

The State charged Birkholz, by trial information, with possession of methamphetamine with intent to deliver, in violation of Iowa Code sections 124.401(1) (2007) and 124.401(1)(c), and possession of marijuana, second offense. He filed a motion to suppress, asserting the officers' warrantless entry into his apartment building, warrantless loitering outside his apartment door, and warrantless entry into his apartment violated his rights under the Fourth Amendment to the United States Constitution and article 1, section 8 of the Iowa Constitution. More specifically, he contended the officers' actions were unconstitutional because their entry into the apartment building was under false pretense and subterfuge or ruse, and he had a legitimate expectation of privacy in the apartment building, the common hallway area, and the apartment. Following a hearing the district court entered a written ruling denying the suppression motion, concluding in part that "under the circumstances herein the officers' presence in the common hallway was lawful."

Birkholz waived his right to a jury trial and stipulated to a trial on the minutes of evidence. The court found him guilty of possession of methamphetamine with intent to deliver and sentenced him to prison for an indeterminate term of no more than ten years. Birkholz appeals, claiming the district court erred in denying his motion to suppress. He argues that the police

officers' warrantless entry into his apartment building, warrantless loitering outside his apartment door, and warrantless entry into his apartment violated his rights under both the federal and state constitutions.[1]

Birkholz's challenge to the district court's ruling on his motion to suppress implicates the Fourth Amendment to the United States Constitution[2] and article 1, section 8 of the Iowa Constitution. *State v. Otto*, 566 N.W.2d 509, 510 (Iowa 1997). We review constitutional issues de novo. *State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998). In doing so, we make an independent evaluation of the totality of the circumstances as shown by the entire record. *Id*. Error was preserved here by the district court's adverse ruling on Birkholz's motion to suppress. *Id*. Because the search and seizure provisions of article I, section 8 of the Iowa Constitution and the Fourth Amendment contain identical language, the two provisions are generally "'deemed to be identical in scope, import, and purpose.'" *State v. Bishop*, 387 N.W.2d 554, 557 (Iowa 1986) (quoting *State v. Groff*, 323 N.W.2d 204, 207 (Iowa 1982)). Therefore, while our discussion focuses on the Fourth Amendment, it is equally applicable to the similar provision in the Iowa Constitution.

The Fourth Amendment to the United States Constitution "protects persons from unreasonable intrusions by the government upon a person's

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[1] These are the issues presented to and passed upon by the district court. To the extent Birkholz's brief may read as raising issues that were not raised and adjudicated in the district court, we find such issues were not properly preserved and thus need not be addressed here. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

[2] The rights guaranteed in the Fourth Amendment apply to the states through the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655-81 S. Ct. 1684, 1694, 6 L. Ed. 2d 1081, 1090 (1961).

legitimate expectation of privacy." *State v. Lewis*, 675 N.W.2d 516, 522 (Iowa 2004). 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 642, 643-44 (Iowa 1995). We have stated:

> The essential purpose of the proscriptions of the Fourth Amendment "is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents in order 'to safeguard the privacy and security of individuals against arbitrary invasion. . . .'"

State v. Loyd, 530 N.W.2d 708, 711 (Iowa 1995) (quoting *Delaware v. Prouse*, 440 U.S. 648, 653-54, 99 S. Ct. 1391, 1396, 59 L. Ed. 2d 660, 667 (1979)); *see also State v. Anderson*, 479 N.W.2d 330, 332 (Iowa Ct. App.1991) ("The key principle of the Fourth Amendment is reasonableness and a balancing of competing interests."). The Fourth Amendment does not protect against all government searches. *Breuer*, 577 N.W.2d at 45. "Rather, the law is well established in Iowa that the Fourth Amendment protects only against unreasonable government intrusion upon a person's legitimate expectation of privacy." *Id.*

> We have established a two-step approach in analyzing the constitutionality of a search under the Fourth Amendment. First, the person challenging the search must show that he or she had a legitimate expectation of privacy in the area searched.
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> If we conclude that a person has a legitimate expectation of privacy with respect to a certain area, we must then decide whether the search was unreasonable; in other words, we consider whether the State unreasonably invaded that protected interest.

Id. (citations omitted). Thus, we must first determine whether Birkholz had a reasonable expectation of privacy with respect to the common hallway of his apartment building. We conclude it has already been established by various

courts that there exists no expectation of privacy in such hallway, even when it is within a locked or secured building.

In *State v. Anderson,* 517 N.W.2d 208, 212 (Iowa 1994), *overruled on other grounds by State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006), two officers gained entry into a locked apartment building by randomly pushing apartment buzzers until an occupant let them into the building. Although our supreme court determined this means of entry was in effect a ruse, it nevertheless concluded that once an occupant let the officers into the apartment building their presence in the hallways and stairwells of the apartment building was lawful "until such time as someone with authority requested them to leave" and upheld the district court's denial of the defendant's motion to suppress. *Anderson*, 517 N.W.2d at 212.

In *United States v. Eisler*, 567 F.2d 814, 816 (8th Cir. 1977), an officer entered a secured apartment complex by going in right behind a tenant who had opened the door. The officer saw the defendant Eisler enter and leave an apartment and overheard conversations that occurred between Eisler and the tenant of the apartment, co-defendant Hoff, both in the hallway and within the apartment. *Eisler*, 567 F.2d at 816. On appeal the defendants claimed the officer's testimony concerning the officer's observations and the overheard conversations should be suppressed. *Id.* The Court of Appeals for the Eighth Circuit held that the essential inquiry was whether the defendants had a reasonable expectation of privacy in the hallway of the apartment building. *Id.* The Court held they did not. *Id.* "The locks on the doors to the entrances of the

apartment complex were to provide security to the occupants, not privacy in common hallways." *Id*.

> An expectation of privacy necessarily implies an expectation that one will be free of *any* intrusion, not merely unwarranted intrusions. The common hallways of Hoff's apartment building were available for the use of residents and their guests, the landlord and his agents, and others having legitimate reasons to be on the premises. That [the officer] was a technical trespasser in a *common* hallway is of no consequence since appellants had no reasonable expectation that conversations taking place there would be free from intrusion.

Id. (emphasis in original); *see also United States v. Nohara,* 3 F.3d 1239, 1242 (9th Cir. 1993) ("[W]e join the First, Second, and Eighth Circuits" and hold that an "apartment dweller has no reasonable expectation of privacy in the common areas of the [high security, high rise apartment] building whether the officer trespasses or not."); *State v. Luschen*, 614 F.2d 1164, 1173 (8th Cir. 1980) (holding there was no expectation of privacy in halls and common areas of secured building where the officer had obtained security key from the building manager without a warrant).

The well established rationale of these cases applies equally here. The two officers gained access to the building by being buzzed in by one of the tenants. Although they may have gained access by a "ruse" resulting in some occupant granting them entry into the common area, once there the officers' presence in the common hallway of the apartment building was lawful. *See Anderson*, 517 N.W.2d at 212. They then stood lawfully in this common hallway outside of Birkholz's apartment where Birkholz had no reasonable expectation of privacy, *see Eisler*, 567 F.2d at 816, and overheard conversations going on in the

apartment. Accordingly, we conclude the officers did not violate Birkholz's constitutional rights by lawfully standing in, and observing and listening to events from, a common hallway of an apartment building. As Birkholz had no reasonable expectation that conversations which could be heard in the common hallway would be free from intrusion, expecting privacy in such areas cannot be considered reasonable. *See United States v. Acosta,* 965 F.2d 1248, 1252-53 (3rd Cir. 1992) (noting its prior holding that "[e]xpecting privacy in a building staircase accessible to other tenants and the general public cannot be considered reasonable.").

To the extent Birkholz also challenges the officers' entry into the apartment, we conclude that based on the evidence in the record the officers properly entered the apartment to lawfully arrest Bolding. When Hejlik and Birkholz opened the apartment door, Deputies Klunder and Schissel were present immediately outside the door and observed Bolding in the rear of the apartment. The officers had an outstanding warrant for Bolding's arrest for probation violations. Thus, having observed her there they legally entered the apartment to execute that warrant. Accordingly, we need not decide the merits of Birkholtz's claim on appeal that the conversation the officers overheard was not sufficient to form a reasonable probability that a crime was taking place and thus did not provide sufficient cause for them to enter the apartment, as the officers lawfully entered the apartment to arrest Bolding pursuant to the outstanding warrant.

Based on our de novo review, and for the reasons set forth above, we conclude the district court was correct in denying Birkholz's motion to suppress and we affirm his conviction.

AFFIRMED.