IN THE COURT OF APPEALS OF IOWA

No. 9-640 / 08-1841
Filed October 7, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DANIEL DALE PETRIE,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Carla T. Schemmel (motion to suppress) and Leo Oxberger (trial), Judges.

Defendant appeals his conviction for possession of a controlled substance with intent to deliver, second or subsequent offense. **AFFIRMED.**

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

Daniel D. Petrie, Newton, appellant pro se.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, John P. Sarcone, County Attorney, and Stephanie Cox, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Mansfield, J., and Schechtman, S.J.*

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

SCHECHTMAN, S.J.

I. Background Facts & Proceedings

On May 6, 2008, deputy Frank Courtney of the Polk County Sheriff's Department was on routine patrol in northeast Des Moines. Directly ahead of him, in the westbound lane, was a black Ford conversion van. At a four-way-stop intersection on Northeast 54th Avenue, the van stopped, then turned left, southbound, without engaging its turn signal. Deputy Courtney followed. The van trended across the fog line onto the right shoulder three times and traveled across the center line into the northbound lane on two occasions. Courtney suspected an intoxicated operator, but delayed a stop for a safe location off the highway.

The deputy noticed the driver reaching towards the center console, "kind of reaching down . . . his shoulders moving with two hands." The officer ignited his emergency lights short of an intersection. The van continued on, then turned into a Casey's convenience store stopping by a gas pump. The driver, Daniel Petrie, while smoking a cigarette, exited the vehicle. Courtney directed him to move the van away from the pumps. The van was moved away from the pump area. Petrie opened his door, again preparing to exit. The officer blocked the door with his body, then, when it appeared appropriate, instructed Petrie to step out of the van. He told his passenger to keep his hands in sight. Petrie was patted down and placed in the back seat of the patrol car.

The deputy returned to the passenger side of the van to talk to the front-seat passenger, Jack Kingery. He glanced towards the console area for a

weapon or knife. Deputy Courtney spotted a briefcase that was ajar about one and one-half to two inches. It was leaning against the console, partially upright. He connected the briefcase with the item the driver was reaching down for prior to signaling the van to stop. The briefcase was obtained and fully opened. Its contents included two bags of white powder, syringes, and scales. The narcotic officer was notified. The white powder was confirmed as methamphetamine.

Petrie was charged with possession of a controlled substance (methamphetamine) with intent to deliver, failure to affix a drug tax stamp, and possession of a controlled substance (marijuana). He also was charged as a habitual offender.

Petrie filed a motion to suppress. The stop was not contested. Petrie contended the officer's search violated the Fourth Amendment prohibition against an unreasonable search and seizure. At the suppression hearing, the deputy testified the reaching down movement made him concerned about the presence of a weapon and for his safety; that the search was conducted to assure that the passenger did not have access to a weapon while he was questioning the driver in his patrol car. Kingery testified that the windows of the van were tinted dark black making it difficult to see through them, and Petrie dropped his cell phone, at one time, while driving. Kingery attested that the briefcase was latched and closed.

The district court denied Petrie's motion to suppress. The court found Kingery's testimony was not fully reliable, due to discrepancies, including denying any traffic violations by Petrie prior to the stop. The court concluded, "The

Deputy was justified, based upon his belief that a weapon could still be in the vehicle with the passenger and based upon the Defendant's furtive movements while he was operating the vehicle, in conducting the search."

The case proceeded to trial before the court based on the minutes of testimony. The briefcase contained 14.7 grams of methamphetamine. Petrie's checkbook and some drug notes were found in the briefcase. The court found Petrie guilty of possession of a controlled substance (methamphetamine) with intent to deliver, in violation of Iowa Code section 124.401(1)(b)(7) (2007). The other counts were dismissed. Petrie was a second or subsequent offender within the meaning of section 124.411. He was sentenced to a term of imprisonment not to exceed thirty-five years. Petrie now appeals the district court's ruling on his motion to suppress.

II. Standard of Review

We review de novo constitutional claims arising from a motion to suppress. *State v. Feregrino*, 756 N.W.2d 700, 703 (Iowa 2008). Our review is de novo in light of the totality of the circumstances. *State v. McConnelee*, 690 N.W.2d 27, 30 (Iowa 2004). While we are not bound by the district court's factual determinations, we may give deference to the court's credibility findings. *State v. Lovig*, 675 N.W.2d 557, 562 (Iowa 2004).

III. Merits

Under the Fourth Amendment, a search conducted without a search warrant is per se unreasonable unless the circumstances come within an exception to the warrant requirement. *State v. Christopher*, 757 N.W.2d 247, 249

(Iowa 2008). The applicability of an exception must be proven by a preponderance of the evidence by the State. *State v. Naujoks*, 637 N.W.2d 101, 107 (Iowa 2001). If evidence is obtained in violation of the Fourth Amendment, it is inadmissible. *State v. Lloyd*, 701 N.W.2d 678, 680 (Iowa 2005).

The United States Supreme Court recognized an exception in *Michigan v. Long*, 463 U.S. 1032, 1049, 103 S. Ct. 3469, 3480-81, 77 L. Ed. 2d 1201, 1219-20 (1983), as follows:

> Our past cases indicate then that protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger, that roadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding a suspect. These principles compel our conclusion that the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.

The court should consider "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.* at 1050, 103 S. Ct. at 3481, 77 L. Ed. 2d at 1220.

Petrie first disputes whether he made any furtive movements that would engender the application of *Long*. He states "the 'furtive movement' made by the defendant occurred *before* the defendant was aware of the police officer's presence." Deputy Courtney was in his patrol car directly following Petrie when Petrie reached down into the console area of his vehicle. Petrie may have detected the presence of the patrol car behind him when he made what was

admittedly a "furtive movement." The officer had been following him for a considerable distance. Violators of the law pay particular heed to the presence of patrol vehicles and consciously maintain a visual search for law enforcement.

Petrie next asserts that furtive movements by a driver are not enough to trigger the warrant exception set forth in *Long*. He asserts there must be additional suspicious circumstances, citing *State v. Riley*, 501 N.W.2d 487, 490 (Iowa 1993).

It is unclear whether the holding in *Riley* requires more than furtive movements. Similar to the present case, the defendant made movements that led an officer to conclude the defendant was putting or retrieving something from under the front seat of a vehicle. *See Riley*, 501 N.W.2d at 489. The Iowa Supreme Court stated, "The question, then, is whether Trooper Smith's concern for his safety upon seeing Riley's furtive movements, thus warranting the search under the front seat, was justified under the circumstances. We believe it was." *Id.* at 490.

The court further stated:

> Here, Smith testified that he saw Riley reaching down under the front seat. Smith was immediately alarmed by these furtive movements. A reasonable interpretation of these movements was that Riley was hiding or retrieving a gun, thus understandably causing Smith to be concerned for his safety.
>
> Additionally, Smith searched only under the front seat, where he suspected a weapon may be: he limited his search to "what was minimally necessary to learn whether [the suspect was] armed . . . ." Furthermore, by removing Riley from the car and immediately reaching only under the front seat, "it is clear that the intrusion was 'strictly circumscribed by the exigencies which justifi[ed] its initiation.'"

Id. (citations omitted).

The court noted some jurisdictions have held furtive movements alone were sufficient to give rise to a specific and articulable suspicion permitting the search of the passenger compartment of a vehicle, while other jurisdictions require additional suspicious circumstances before a warrantless search of a vehicle is justified. *Id.* The court found Riley had failed to provide identification as requested by the officer and concluded "under either line of authority the search did not violate the Fourth Amendment." *Id.*

We believe the search of the console area in Petrie's vehicle in this case was justified by the deputy's observance of Petrie reaching down to the center console area. It was limited to that area. The deputy was rightfully concerned that Petrie had been reaching for a weapon. If additional suspicious circumstances are necessary, we note that Petrie did not immediately stop when the deputy activated his lights, Petrie acted as though he was going to purchase gas while smoking a cigarette, and he attempted to vacate his car as the deputy approached. These circumstances lend credence to a conclusion that Petrie was nervous when stopped. Nervousness is one factor to consider in determining whether an officer has reasonable suspicion that weapons are present. *See State v. Bergmann*, 633 N.W.2d 328, 333 (Iowa 2001).

The court is aware that Petrie was secured in the patrol car when the search occurred. But danger may emanate from a passenger as surely as it may from the driver. The United States Supreme Court has suggested that the *Long* exception applies whenever an officer reasonably believes he or she is in danger, even if the danger stems from a passenger rather than a suspect.

Arizona v. Gant, ___ U.S. ___,.___, 129 S. Ct. 1710, 1721, 173 L. Ed. 2d 485, 498 (2009) (stating *Long*, 463 U.S. at 1049, 103 S. Ct. at 3481, 77 L. Ed. 2d at 1220, permits an officer to search a vehicle's passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is "dangerous" and might access the vehicle to "gain immediate control of weapons" (citing *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 905-06 (1968))).

Petrie raises an additional argument that, even assuming a furtive movement and the presence of additional suspicious circumstances, "the scope of that search was exceeded in searching and opening the briefcase found in the car." A search under the exception in *Long* should be "limited to those areas in which a weapon may be placed or hidden." *Long*, 463 U.S. at 1049, 103 S. Ct. at 3481, 77 L. Ed. 2d at 1220.

The district court did not find Kingery's testimony that the briefcase was latched to be credible. We give deference to the court's credibility findings. *Lovig*, 675 N.W.2d at 562. We determine the deputy did not exceed the permissible bounds of the search by looking inside the unlatched briefcase. The briefcase was lying in the console area of the van, the identical area the deputy had observed Petrie bending his body towards and extending his hands into. The deputy was justified in securing and looking inside the briefcase to determine the presence of a weapon, for his safety and the safety of others.

We conclude the district court properly denied Petrie's motion to suppress. We affirm Petrie's conviction for possession of a controlled substance with intent to deliver.

AFFIRMED.