IN THE SUPREME COURT OF IOWA

No. 16–0563

Filed January 5, 2018

STATE OF IOWA,

Appellee,

vs.

DANIELLE BROWN,

Appellant.

Appeal from the Iowa District Court for Polk County, Mary Pat Gunderson, Judge, and William A. Price, District Associate Judge.

Defendant appeals conviction for possession of marijuana. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Mary K. Conroy, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Richard J. Bennett, Special Counsel (until withdrawal), then Thomas E. Bakke and Kevin Cmelik, Assistant Attorneys General, and John Sarcone, County Attorney, and Stephanie Cox and Joseph Danielson, Assistant County Attorneys, for appellee.

APPEL, Justice.

In this case, we are called upon to determine whether law enforcement officers executing a search warrant may search a purse belonging to a visitor who is present at the premises to be searched but who is not named in the warrant. Under the facts and circumstances of this case, we conclude that the search of the purse belonging to the visitor was unlawful under article I, section 8 of the Iowa Constitution. As a result, the district court in this case erred when it refused to suppress the results of the search in an underlying criminal proceeding against the visitor.

I. Background Facts and Proceedings.

The facts are essentially uncontested. The officers in this case obtained a search warrant for the residence. The search warrant indicated that the police were looking for evidence of the use, sale, and distribution of narcotics, along with firearms and ammunition. The search warrant identified one man, Jeffrey Sickles, as a person to be searched. An attached police affidavit identified a woman—Ileen Sickles, the sister of the man named in the search warrant—who listed the residence as her home address.

The officers involved in the search did not know Danielle Brown and had no facts associating Brown with the residence. In light of this lack of knowledge, it is not surprising that Brown's name does not appear anywhere in the search warrant.

Ten SWAT team officers executed the search warrant. They found Brown and four individuals in a bedroom of the house. The individuals were immediately handcuffed. Brown was handcuffed where the officers found her. The purse in question was next to Brown when she was

handcuffed. Brown along with the others was taken by officers into a living room.

Officer John Scarlet searched the purse. Inside the purse he found a zippered pouch. Upon opening the pouch, the officer found baggies. Upon opening the baggies, the officer found a small amount of marijuana.

After being given *Miranda*[1] warnings, Brown admitted she smoked methamphetamine and marijuana on a regular basis. She was arrested for possession of the marijuana found in her purse.

Prior to trial, Brown filed a motion to suppress the evidence obtained from the search of her purse under both the Fourth Amendment of the United States Constitution[2] and article I, section 8 of the Iowa Constitution.[3] The district court denied the motion. Brown was found guilty of possessing marijuana after a jury trial.

On appeal, Brown asserts the district court erred in denying the motion to suppress. For the reasons stated below, we reverse the ruling of the district court on the motion to suppress and remand the case to the district court.

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[1]*Miranda v. Arizona*, 384 U.S. 436, 444–45, 86 S. Ct. 1602, 1612 (1966).

[2]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.

[3]The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons or things to be seized.

Iowa Const. art. I, § 8.

II. Standard of Review.

Brown asserts the search of her purse violated the Fourth Amendment of the United States Constitution and article I, section 8 of the Iowa Constitution. Our review is de novo. *State v. Fleming*, 790 N.W.2d 560, 563 (Iowa 2010).

III. Discussion.

A. Positions of the Parties.

1. *Brown.* Brown first argues the search was invalid under the Fourth Amendment. She recognizes under United States Supreme Court precedent the general rule is that a valid search warrant authorizing a search includes the right to search a container found on the premises. *See United States v. Ross*, 456 U.S. 798, 820–21, 102 S. Ct. 2157, 2170–71 (1982) (holding legitimate search of vehicle authorizes search of closed containers in vehicle). Yet, Brown makes the general assertion that a search warrant for the premises does not authorize the search of an individual who is not named in the warrant but merely happens to be present on the premises. *See Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S. Ct. 338, 342 (1979).

In addition to her general argument, Brown notes a number of cases emphasize that "special concerns" arise when the items to be searched belong to visitors of the premises, *United States v. Giwa*, 831 F.2d 538, 544 (5th Cir. 1987), as the Fourth Amendment "protects people, not places," *United States v. Micheli*, 487 F.2d 429, 432 (lst Cir. 1973) (*quoting Katz v. United States*, 389 U.S. 347, 351, 88 S. Ct. 507, 511 (1967)). Because of the special concerns arising out of searches involving visitors not named in a search warrant, Brown asserts some federal and state courts have developed specific tests to determine the validity of the search.

The first test, the possession test, requires the container be in the physical possession of the visitor for the search to be outside the warrant. Brown notes the possession test has been criticized as the protections of the Fourth Amendment are "hardly furthered by making [their] applicability hinge upon whether the individual happens to be holding or wearing his personal belongings." *Micheli*, 487 F.2d at 431.

Brown identifies a second test, the relationship test, which focuses on the relationship between the person and the premises being searched. Under the relationship test, for example, the co-owner of a business has a sufficient relationship to the premises such that his briefcase could be searched. *See Micheli*, 487 F.2d at 432.

A third test culled by Brown from the caselaw is a notice test. Under the notice test, police that have actual or perhaps constructive knowledge that the container belongs to a visitor may not search the container. *See, e.g.*, *Waters v. State*, 924 P.2d 437, 439 (Alaska Ct. App. 1996); *State v. Lambert*, 710 P.2d 693, 697–98 (Kan. 1985); *State v. Lohr*, 263 P.3d 1287, 1291–92 (Wash. Ct. App. 2011).

Brown recognizes there are sometimes hybrid tests. For example, in *State v. Jackson*, a Kansas appellate court seemed to combine the notice and relationship tests. 260 P.3d 1240, 1243–44 (Kan. Ct. App. 2011). A search is not valid, according to the *Jackson* court, if the officers have actual or reasonable constructive notice the property is not subject to the warrant with the exception that the search is valid if the visitor has a relationship to the premises and there is a relationship between the visitor and the illegal activities in the warrant. *Id.* at 1244; *see also State v. Wills*, 524 N.W.2d 507, 510 (Minn. Ct. App. 1994); *State v. Light*, 306 P.3d 534, 542 (N.M. Ct. App. 2013).

Brown does not land on any particular test for Fourth Amendment purposes, but asserts the search in this case fails under any of the above tests. With respect to the possession test, she notes a photograph taken shortly after she was handcuffed and introduced into evidence at the suppression hearing shows the purse located right beside her. She cites a case applying the possession test that found a purse resting against the chair of a visitor was an extension of the visitor's person and could not be searched pursuant to a premises search warrant. *See State v. Worth*, 683 P.2d 622, 624–25 (Wash. Ct. App. 1984).

Turning to the relationship test, Brown notes there was simply no evidence at the suppression hearing establishing that she had a "special relationship" to the premises. *See United States v. Neet*, 504 F. Supp. 1220, 1227–28 (D. Colo. 1981). Brown points out she was not mentioned in the warrant, officers did not know her to have any relationship with the residence, and she was not found in the same area of the house as Jeffrey Sickles, the target of the investigation.

Finally, Brown argues the State cannot support the search based on the notice test. According to Brown, the officer knew or should have known the purse was hers as the police photograph revealed the purse was directly in front of her when she was handcuffed. Further, Officer John Scarlet testified he saw Brown's identification and "stuff" in the purse. It should have been clear the purse did not belong to a man, the target of the warrant. Thus, Brown argues, under the Fourth Amendment, the search of her purse was invalid under *any* of the applicable tests developed by the federal courts.

Brown generally reprises her arguments under article I, section 8 of the Iowa Constitution. She notes preliminarily that we have departed from Federal Fourth Amendment precedent in a number of cases

interpreting the search and seizure provisions of article I, section 8 of the Iowa Constitution. *See, e.g.*, *State v. Gaskins*, 866 N.W.2d 1, 13–14 (Iowa 2015); *State v. Short*, 851 N.W.2d 474, 506 (Iowa 2014); *State v. Ochoa*, 792 N.W.2d 260, 284–91 (Iowa 2010). Brown notes our search and seizure cases under the Iowa Constitution emphasize a "strong emphasis on individual rights," *Short*, 851 N.W.2d at 482, that the Iowa framers placed "considerable value on the sanctity of private property," *Ochoa*, 792 N.W.2d at 274–75, and that our cases show concern about police searches of a person's "private effects," *Gaskins*, 866 N.W.2d at 10.

Brown invites us to adopt a version of the notice test under the Iowa Constitution. For support, she relies upon *Fleming*, where we held a warrant supported by probable cause did not authorize the search of a renter's room. 790 N.W.2d at 568–69. *Fleming*, Brown contends, necessarily rejected the relationship test as the renter had a special relationship to the premises. Brown further notes Fleming did not have physical possession of every item in the room at the time of the search, thus implicitly rejecting the possession test. Brown concludes, therefore, *Fleming* in effect adopted a notice approach to the search of property of third parties not named in a valid warrant.

2. *The State*. The State responds that under the Fourth Amendment, the fact the search warrant indicated drugs and firearms were among the items subject to search is significant. The State in particular draws our attention to *Wyoming v. Houghton*, 526 U.S. 295, 119 S. Ct. 1297 (1999). In *Houghton*, a divided United States Supreme Court upheld a search of a purse found in the back seat of an automobile. *Id.* at 307, 119 S. Ct. at 1304. The majority concluded the driver's possession of a hypodermic needle provided probable cause for a search of the vehicle, including a purse found in the back seat of the car,

which belonged to a passenger. *Id.* at 298, 302, 119 S. Ct. at 1299, 1301. The State argues the United States Supreme Court in *Houghton* essentially adopted a possession test for determining whether an object may be searched. The State asserts that although *Houghton* involved a motor vehicle rather than a premises, the better reasoned cases hold a possession test applies in premises searches. *See State v. Gilstrap*, 332 P.3d 43, 46 (Ariz. 2014); *State v. Leiper*, 761 A.2d 458, 462 (N.H. 2000); *State v. Reid*, 77 P.3d 1134, 1143 (Or. Ct. App. 2003).

According to the State, the possession test, particularly if there is no extension of the test for constructive possession, provides clarity and ease of application. *See, e.g.*, *Gilstrap,* 332 P.3d at 46; *Leiper*, 761 A.2d at 462; *Reid*, 77 P.2d at 1140. The need for clarity, the State presses, is particularly important in cases involving illegal drug trafficking, where multiple persons may be present, many of whom may be armed and dangerous. *See State v. Prior*, 617 N.W.2d 260, 264 (Iowa 2000).

The State then applies its narrowly framed possession test to the facts of this case. The State argues that the record fails to demonstrate Brown had actual, physical possession of her purse when members of the SWAT team first entered the home to secure it before the search began. The State asserts the purse was later found on the bedroom floor after the defendant and others had been handcuffed and removed from the bedroom.

The State concedes a photograph taken before Brown was removed from the room shows her kneeling, hands cuffed behind her back, and the purse on the floor, close to her knees. The State argues the photo was taken after the SWAT officers entered the room and thus does not prove possession of the purse.

The State next argues that even under the relationship test, Brown's Fourth Amendment claim fails. In this case, the State argues, police found Brown in the target residence at 5:45 a.m. smoking methamphetamine. Thus, according to the State, she was not an innocent visitor that might otherwise be protected under the relationship test. *See United States v. Gray*, 814 F.2d 49, 51 (1st Cir. 1987); *People v. Hughes*, 767 P.2d 1201, 1207 (Colo. 1989) (en banc).

The State further suggests Brown is not entitled to relief under the notice test. Although the police did find her identification inside the purse, the State claims the police simply did not have actual notice of Brown's ownership of the purse until after they began the search.

The State next turns to attack claims that the police "should have known" the purse belonged to Brown. The State notes that there were other women in the premises, including Ileen Sickles, who police had information might be in possession of a firearm. Sickles, according to the State, was not a "mere visitor" deserving of special protection, and the police could have believed the purse was hers. *See Waters*, 924 P.2d at 440; *People v. McCabe*, 192 Cal. Rptr. 635, 637 (Ct. App. 1983). The State asserts that without notice of actual or constructive possession, the police were free to search the bag. *See State v. Nabarro*, 525 P.2d 573, 577 (Haw. 1974).

The State finally addresses Brown's claim under the Iowa Constitution. The State recognizes we are free to depart from interpretations of federal constitutional law when construing Iowa constitutional provisions. The State argues, however, that the most persuasive approach to searches of possessions of third parties present during the execution of a premises search warrant is the possession test impliedly adopted in *Houghton*, 526 U.S. 295, 119 S. Ct. 1297.

B. Discussion. We begin with a review of Iowa cases involving the rights of third parties when law enforcement obtains a premises search warrant which makes no mention of the third party who is present at the time the warrant is executed.

In *State v. Jamison*, a search warrant was issued for the residence of Terry Rodriguez "and the person and vehicles of any other subjects at the residence after the signing of the search warrant." 482 N.W.2d 409, 411 (Iowa 1992) (emphasis omitted), *abrogated on other grounds by State v. Heminover*, 619 N.W.2d 353, 358, 361 (Iowa 2000), *abrogated on other grounds by State v. Turner*, 630 N.W.2d 601, 602 n.2 (Iowa 2001). Shortly after the search warrant was issued, police observed an individual, Jamison, enter the Rodriguez residence and leave seven minutes later in a vehicle. *Id.* Police followed the vehicle, stopped it, and conducted a search. *Id.* Police found a paper wrapper in the car and a white powdery substance on the vehicle's floorboard. *Id.* The white substance turned out to be cocaine. *Id.* Jamison sought to suppress the evidence obtained in the search on Fourth Amendment grounds. *Id.* The district court denied the motion. *Id.*

We reversed. *Id.* at 414. We noted the state did not show *at the time the warrant was issued* any nexus between Jamison and the criminal activity, the things to be seized, and the place to be searched. *Id.* at 413. We emphasized that "[i]f a warrant calls for the search of multiple places or persons, probable cause must exist as to each location or person sought to be searched under authority of the warrant." *Id.*; *see also State v. Seager*, 341 N.W.2d 420, 427 (Iowa 1983).

We revisited the privacy rights of a third party not named in a premises search warrant in *Fleming*, 790 N.W.2d at 561–62. There, the police obtained a search warrant for the home of Andrew Nearman. *Id.*

at 562. The search warrant, however, made no mention of Joshua Fleming. *Id.* When police executed the warrant, they searched a bedroom in the residence rented by Fleming. *Id.* The officer conducting the search testified he saw insurance policy papers made out to Fleming that listed the Nearman home as his residence. *Id.* A baggy of marijuana was found on the bedroom's closet floor. *Id.* Fleming moved to suppress the evidence found in his bedroom as a violation of the Fourth Amendment and article I, section 8 of the Iowa Constitution. *Id.* at 562–63. The district court in *Fleming* held the scope of the warrant extended to the entire residence, including Fleming's rented room, and Fleming did not have a reasonable expectation of privacy in the residence. *Id.* at 563.

We reversed. *Id.* at 569. We held Fleming had an expectation of privacy in the rented bedroom, and as a result, the state was required to make an independent showing of probable cause as to him. *Id.* at 567. We noted the only person named in the application for the warrant as possessing drugs was Nearman. *Id.* at 568. There was no reason to believe, however, that Nearman had access to Fleming's rented room or had hidden drugs in it. *Id.* at 567. We concluded the warrantless search of Fleming's room violated article I, section 8 of the Iowa Constitution. *Id.*

The thrust of *Jamison* and *Fleming* is that when an individual is not named in a search warrant as a party for whom there is probable cause to search, the search of that individual or his possessions is invalid. Even if the third party has a relationship to the residence, as in *Fleming*, or had a vehicle on the premises, as in *Jamison*, we insisted the third party continues to have an expectation of privacy.

Under *Jamison* and *Fleming*, the failure to have a warrant supported by probable cause specifically naming Jamison and Fleming

was the end of the matter. There are no "tests" to escape the warrant requirement.

The approach of *Jamison* and *Fleming* is consistent with *State v. Cline*, 617 N.W.2d 277 (2000), *abrogated on other grounds by Turner*, 630 N.W.2d at 606 n.2. In *Cline*, we rejected the notion that there is a "good faith" exception to the exclusionary rule in Iowa. *Id.* at 292–93. The police might in good faith believe that property did not belong to a third party not named in the warrant and that the property was subject to search under the search warrant, but if the facts prove otherwise, any evidence obtained pursuant to the warrantless search must be suppressed. Under *Cline*, there are no tests to determine whether the police legitimately searched the property of a person not named in a search warrant. We do not engage in the very difficult reconstruction of events, chopping and dicing to allow a search of property that was not authorized by the magistrate's warrant. Indeed, for those who advocate clarity in the law and who do not believe clarity may be invoked only when it favors law enforcement, the approach of *Jamison*, *Fleming*, and *Cline* is quite attractive. The rule is clear—if a third party is not named in a warrant, that party continues to have expectations of privacy when a search warrant is executed on a residence in which they are present. It vindicates what this court said over a century ago, namely, personal rights enriched in the Iowa Constitution "should be applied in a broad and liberal spirt." *State v. Height*, 117 Iowa 650, 657, 91 N.W. 935, 937 (1902).

The application of *Cline* to searches involving persons not specifically named in a warrant was explored in *Prior*, 617 N.W.2d 260. In that case, the warrant purported to authorize a search of "all persons" who might be found at a location where it was suspected drug activity

was occurring. *Id.* at 262. When police arrived at the premises to execute the warrant, no one was present, but during the search Prior entered the apartment. *Id.* He was then searched based on the "all persons" language in the warrant. *Id.* The district court found no probable cause to search Prior, but upheld the search based on good-faith reliance on the validity of the "all persons" warrant. *Id.*

We reversed. *Id.* at 268. We emphasized the warrant "must describe the place or person to be searched with particularity." *Id.* at 263. While some jurisdictions find "all persons" searches unconstitutional per se, we recognized "all persons" searches might be valid in cases where the facts give rise to the inference that all persons on the premises would necessarily be involved in illegal activity. *Id.* at 263–64. Finding the search was unlawful, we then proceeded to determine whether the state could rely upon a good-faith exception to the exclusionary rule to allow admission of evidence uncovered in the unconstitutional search. *Id.* at 268. We concluded under *Cline*, the good-faith exception was not available under article I, section 8 of the Iowa Constitution. *Id.*

The principle derived from *Jamison* and *Fleming* that a search of the possessions of a third party at a residence is unconstitutional when the warrant does not support probable cause to search that particular person has appeal. It avoids the tangled mess of attempting to apply unworkable tests based on relationship or notice. *See Micheli*, 487 F.2d at 434 (Campbell, J., concurring) (noting "[s]ince the nature and quantum of 'relationship' cannot readily be defined, officers and courts may be bedeviled with uncertainty"); *Reid*, 77 P.3d at 1139 ("Practical application of the 'actual notice' test is problematic."). On the other hand, it also avoids the vices of a bright-line rule as being arbitrary,

inflexible, and sweeping too broadly on the liberties of visitors not named in the warrant and with respect to whom probable cause to search has not been established. *Micheli*, 487 F.2d at 431 (revealing many personal effects are vulnerable to search under possession test, simply by being put down or hung on a rack); *Childers v. State*, 281 S.E.2d 349, 351–52 (Ga. Ct. App. 1981) (holding visitor who placed purse on table retains constitutional protection as no indication she abdicated control of or responsibility for purse); *Reid*, 77 P.3d at 1140 (noting problem with possession test is potential arbitrariness and inflexibility); *Commonwealth v. Platou*, 312 A.2d 29, 33 (Pa. 1973) (noting a warrant could not possibly contemplate search of unknown visitor), *overruled by Commonwealth v. Reese*, 549 A.2d 909, 910 (Pa. 1988). Given the lack of precision of the three tests, it is not surprising that in this case, the State plausibly argues that it wins under any test, while Brown also plausibly argues that she wins under any test.

In considering rejection of any of the three tests in favor of a purer and simpler approach under *Jamison* and *Fleming*, nothing would prevent the police from searching the purse of a third party on another theory independent of the search warrant. *See United States v. Young*, 909 F.2d 442, 446 (11th Cir. 1990) (holding search of purse carried by woman who was not named in warrant was not supported by warrant, but was supported based on exigent circumstances and probable cause where woman left rear door of premises with bulging purse and headed towards the woods as police arrived to execute warrant); *United States v. Johnson*, 475 F.2d 977, 983 (D.C. Cir. 1973) (Bazelon, C.J., concurring in part and dissenting in part) (rejecting search pursuant to warrant of nonresident but urging remand to district court for determination of whether police had probable cause to arrest when purse was searched);

Nabarro, 525 P.2d at 577 ("[I]f the police, while executing a warrant to search premises, obtain probable cause to believe that a visitor present on the premises is committing an offense, such as the illegal possession of drugs, they may arrest that visitor and conduct a proper search incident to arrest of his person and the belonging in his possession.").

Indeed, that is precisely what the district court did in this case. No doubt realizing the problematic nature of basing a search of Brown's purse on a warrant that did not establish probable cause to search her belongings, the district court held the search of the purse was valid not because of the search warrant, but on the independent theory that after police arrived, secured the premises, and surveyed the surroundings, they had probable cause to engage in a warrantless search of Brown's purse. Under the district court's order, the search of Brown's purse was not based upon the original warrant, but on facts developed by police at the scene.[4]

On appeal, however, the State does not defend the search on the basis of the theory employed by the district court order. This was no doubt a wise decision because probable cause with respect to Brown was only established by the unlawful search of her purse. Instead of relying on grounds independent of the warrant, the State asks this court to do what the district court declined to do, namely, notwithstanding *Jamison*,

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[4]If officers have legitimate concerns for safety, a *Terry*-type search might have been conducted. *See Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884–85 (1968). However, at the time of the search, Brown was handcuffed and was in the next room under police supervision. Any claim that the search of the purse was supported by *Terry* is thus problematic. *See Arizona v. Gant*, 556 U.S. 332, 344, 129 S. Ct. 1710, 1719 (2009); *State v. Coleman*, 890 N.W.2d 284, 301 (Iowa 2017). In any event, the State does not advance the *Terry*-type exception to the warrant requirement in this appeal.

Fleming, and *Cline*, provide the State with an avenue to escape the warrant requirement. It cannot be done.

In any event, the State cannot succeed in any of its warrant-evading tests. For one thing, the *Jamison* and *Fleming* cases plainly reject a relationship test. Indeed, in *Fleming*, there was a clear and undisputed relationship between the defendant and the residence being searched. 790 N.W.2d at 562. He lived there. *Id.* *Fleming* was not one of those difficult cases where someone was using a shower in the residence subject to search and the court is asked to determine whether the facts are sufficient to show the third party was not "a mere visitor." Fleming was incontestably not a mere visitor under the applicable caselaw employing the relationship test. *See id.* Yet, notwithstanding the direct and undisputed relationship between Fleming and the residence subject to the search under the duly issued warrant, we declared the search of his room invalid because there was no warrant issued based on probable cause. *Id.* at 568–69. Clearly, under our applicable caselaw, the search of Brown's purse in this case cannot be supported based on a relationship test.

We now turn to the actual-possession test, the approach advocated by the State. As noted by an often cited federal case, the actual-possession test rests on an unrealistic assumption about human behavior, namely, that a visitor to the premises has no expectation of privacy in "wallets, purses, cases, or overcoats, which are often set down upon chairs or counters, hung on racks, or checked for convenient storage." *Micheli*, 487 F.2d at 431; *see also Nabarro*, 525 P.2d at 576 (noting possession test ignores substantial interest the visitor has in possession, no matter where located); *Platou*, 312 A.2d at 34 (holding personal belongings brought by visitor retain constitutional protection

until owner meaningfully abandons them). A holding of this court that a visitor loses all reasonable expectations of privacy when visiting a premises by hanging a coat on a rack or placing a purse on a chair or on the floor, simply does not comport with reality. A visitor who placed her purse on a sofa would be shocked to learn that her host, let alone government agents, was free to rummage around the purse looking for interesting or entertaining items while the visitor was in the other room. *Micheli*, 487 F.2d at 431 ("The rudest of government intrusions into someone's private domain may occur by way of a search of a personal belonging which had been entrusted to a nearby hook or shelf.").

It has been argued that a strict actual-physical-possession rule has the benefit of "clarity." We are not so sure. In this case, the purse is right next to Brown. Does she have actual possession? She is not clutching it with her hands, but her hands are handcuffed. Is that, nonetheless, actual possession? Is the test really one of physical proximity?

In any event, a rule allowing the admission of evidence whenever authorities find drugs also has undeniable "clarity," but would be plainly unconstitutionally overbroad. Even the United States Supreme Court has recognized that mere clarity in a rule is an insufficient basis to adopt it if the rule trenches on legitimate expectations of privacy protected by the Fourth Amendment. As noted by Justice Stewart, "The privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law." *Mincey v. Arizona*, 437 U.S. 385, 393, 98 S. Ct. 2408, 2414 (1978).

Plainly, a rule based on actual possession—which would require a visitor who seeks to maintain privacy to clutch a purse, physically hang on to a coat, or shoulder a computer bag during the entire course of a

social visit to another person's home—is completely unrealistic and cuts well to the bone of legitimate expectations of privacy and denies security to papers and effects. Such a rule cannot possibly pass constitutional muster under article I, section 8 of the Iowa Constitution. In order to avoid unconstitutionally, any test based on possession must, at a minimum, also include within its scope property that is not in the actual possession of the unnamed person but is constructively possessed by the person. *See, e.g.*, *Childers*, 281 S.E.2d at 350–52 (holding visitor retained constitutional protection for purse placed on table in trailer); *Lambert*, 710 P.2d at 697–98 (suppressing evidence from search of purse sitting on table near defendant).

Our court has recently considered the doctrine of constructive possession in a number of cases in which the question was whether a jury could find a defendant who did not actually possess contraband could nonetheless be convicted on a theory of constructive possession. *See, e.g.*, *State v. Reed*, 875 N.W.2d 693, 706–08 (Iowa 2016); *State v. Thomas*, 847 N.W.2d 438, 447 (Iowa 2014); *State v. Kern*, 831 N.W.2d 149, 162 (Iowa 2013); *State v. Dewitt*, 811 N.W.2d 460, 477 (Iowa 2012). Our court has been sharply divided on the scope of constructive possession in these cases. In our most recent cases, a minority of the court has argued we have adopted an overly expansive approach to the constructive-possession concept. *See Reed*, 875 N.W.2d at 711 (Hecht, J., concurring specially); *Thomas*, 847 N.W.2d at 448 (Hecht, J., dissenting).

What is crystal clear, however, is at a minimum the same expansive approach to constructive possession found in our recent caselaw upholding the convictions of criminal defendants must be applied in the context of search and seizure law. Indeed, it would be

unprincipled in the extreme to fashion an expansive conception of constructive possession for purposes of upholding criminal convictions, but then apply a narrow view of constructive possession for the purpose of defeating search and seizure rights asserted by a suspect. Further, such an approach would be inconsistent with our robust protection of individual rights under the Iowa Constitution.

If we were to apply the constructive-possession doctrine of our recent cases, it is clear the motion to suppress should have been granted. The SWAT team stormed the residence, secured it in short order, and immediately handcuffed the persons in the bedroom. It was a shock-and-awe scenario where the occupants were immediately secured. This is not the kind of situation where persons present in the bedroom could rationally plan to hide contraband in the visitor's purse or pass the purse around because of the presence of the SWAT team. After the occupants of the bedroom were secure, the purse was located right next to the kneeling Brown, who was handcuffed from behind. The close proximity of the purse under the circumstances was sufficient to establish possession. *See People v. Lujan*, 484 P.2d 1238, 1240, 1242 (Colo. 1971) (en banc) (suppressing the search of a guest's purse, even though the guest did not have physical possession of the purse); *Childers*, 281 S.E.2d at 351–52 (suppressing results of search of purse located in close proximity to guest under a warrant for the premises); *Nabarro*, 525 P.2d at 577 (holding search of purse which was in guest's "immediate vicinity," on the floor near her, was not supported by the warrant on the premises); *Lambert*, 710 P.2d at 698 (holding purse lying on kitchen table next to defendant not searchable under a premises warrant not describing defendant). Applying the standards of our constructive-possession doctrine applicable in determining whether a

defendant had possession of a controlled substance, Brown was in constructive, if not actual possession, of the purse.

Finally, we consider the possibility the State might prevail if we embraced a notice test. *See McCabe*, 192 Cal. Rptr. at 637 (noting police may not search property or possessions of a person they actually know is a nonresident); *Nabarro*, 525 P.2d at 576 ("[W]ithout notice of some sort of the ownership of a belonging, the police are entitled to assume that all objects within premises lawfully subject to search under a warrant are part of those premises for purpose of executing the warrant."); *Thomas v. State*, 818 S.W.2d 350, 360–61 (Tenn. Crim. App. 1991) (finding search of purse officers knew or should have known belonged to nonresident unlawful). The State's argument has even less merit under the notice test than under a possession test with a constructive-possession element. There is no question the State was on at least constructive notice that the purse belonged to Brown in light of the proximity of the purse to the handcuffed Brown. The search warrant in this case established probable cause only with respect to Jeffrey Sickles, and the police were on notice that it was unlikely the purse belonged to Sickles. *See Lambert*, 710 P.2d at 697–98. Further, when the purse was opened, officers discovered Brown's ID and other identifying items in the bag. Although the record is not clear, one can infer these identifying items were discovered prior to the more intensive process of opening a container within the purse, discovering baggies within the container, and opening the baggies to discover traces of marijuana.

C. Costs of Dismissed Charge. Brown was also charged with a simple misdemeanor of possession of drug paraphernalia. The State moved to dismiss this charge at the defendant's cost. This charge was dismissed, and the district court ordered Brown to pay court costs on the

dismissed charge in the sentencing order for the possession of a controlled substance charge. Brown argues this was an illegal sentence.

The State agrees with Brown that an assessment of court costs for the dismissed simple misdemeanor charge would be an illegal sentence. *See State v. Petrie*, 478 N.W.2d 620, 622 (Iowa 1991) ("[T]he provisions of Iowa Code section 815.13 and section 910.2 clearly require, where the plea agreement is silent regarding the payment of fees and costs, that only such fees and costs attributable to the charge on which a criminal defendant is convicted should be recoverable under a restitution plan."). We vacate this portion of Brown's sentence as well as Brown's conviction for possession of a controlled substance.

IV. Conclusion.

For the above reasons, the ruling of the district court is reversed and the case is remanded to the district court.

REVERSED AND REMANDED.

All justices concur except Waterman, Mansfield, and Zager, JJ., who dissent.

WATERMAN, **Justice (dissenting).**

I respectfully dissent and would affirm the district court judgment. The police entered the home of a drug dealer, Jeffrey Sickles, with a valid search warrant to look for methamphetamine and marijuana as well as handguns. The warrant entitled the officers to search the house and any containers or things found inside capable of concealing narcotics or weapons. *See United States v. Ross*, 456 U.S. 798, 820–21, 102 S. Ct. 2157, 2170–71 (1982) ("A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found . . . . Thus, a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found."). But a premises search warrant does not authorize the search of a *person* not named in the warrant who merely happens to be at the searched premises at the time of the warrant's execution. *See Ybarra v. Illinois*, 444 U.S. 85, 92–94, 100 S. Ct. 338, 342–43 (1979). Courts are divided whether a visitor's personal effects such as a purse are beyond the scope of the warrant. It depends on the facts of the case, and the majority opinion's discussion of the facts is incomplete.

The majority fails to mention that Danielle Brown was smoking methamphetamine in the bedroom at 5:45 a.m. with another woman, Ileen Sickles (who was named in the warrant application as possibly armed) and three men when the police entered. No one was wearing or holding the purse. Neither woman admitted or denied the purse on the floor was hers. As far as the officers knew, the purse could have belonged to Ileen, Jeff's sister. The occupants were led to another room before an officer opened the purse and found the marijuana and Brown's

identification. Facts matter. Brown was not an innocent passerby in the wrong place at the wrong time. She was at the Sickles' house to smoke methamphetamine. The police were there looking for methamphetamine and weapons. Ample authority and common sense support the validity of this search.

We prefer warrants and should not give a cramped interpretation of the scope of a premises search warrant issued under judicial authority. *Cf. State v. Angel*, 893 N.W.2d 904, 911 (Iowa 2017) ("There is a preference for warrants and we construe them in a commonsense manner, resolving doubtful cases in favor of their validity." (quoting *State v. Sykes*, 412 N.W.2d 578, 581 (Iowa 1987))). After today's decision, will Iowa's male drug dealers place their stash in a woman's purse to impede a search? Will the police then need to obtain a second warrant to search a purse found on the floor in a house they already had a warrant to search? The majority errs by effectively requiring a redundant warrant. A neutral magistrate had already found probable cause to search the Sickles home and any containers there that could hide drugs or weapons.

The majority fails to acknowledge that Brown has the burden of proving the search of her purse fell outside the scope of the warrant.[5] Indeed, in *State v. Walker*, the Oregon Supreme Court specifically held

[5]*See State v. Farber*, 314 N.W.2d 365, 367 (Iowa 1982) (noting burden of proof is on defendant challenging the execution of search warrant); *see also State v. Gogg*, 561 N.W.2d 360, 364 (Iowa 1997) (Defendant challenging veracity of search warrant application "bear[s] burden of establishing an intentional or reckless misrepresentation" by affiant.); *State v. Garrett*, 183 N.W.2d 652, 656 (Iowa 1971) (holding defendant carries burden of proof to show search warrant was invalidly issued or evidence illegally obtained with the warrant). By contrast, the State has the burden of proof on the validity of a warrantless consent search. *State v. Jackson*, 878 N.W.2d 422, 438 (Iowa 2016) (noting the State had "the burden of proving [the] warrantless search was reasonable").

that the defendant claiming the search of her purse was outside the scope of a premises search warrant bore the burden of proving the unlawfulness of the search. 258 P.3d 1228, 1236 (Or. 2011) (en banc) (citing 6 Wayne R. LaFave, *Search & Seizure* § 11.2(b), at 42–43 (4th ed. 2004)). The *Walker* court upheld the search on that basis without deciding what test to apply to the search of the personal effects of a defendant who claimed to be a mere guest or casual visitor when police executed the search warrant. *Id.* at 1237–38. Federal courts and a majority of state courts place the burden of proof on the defendant moving to suppress evidence obtained through a search warrant.[6] Brown did not meet her burden.

The majority decision rests on inapposite Iowa decisions. First, the majority relies on a readily distinguishable case Brown never cited. *See State v. Jamison*, 482 N.W.2d 409 (Iowa 1992), *abrogated on other grounds by State v. Heminover*, 619 N.W.2d 353, 357 (Iowa 2000), *abrogated on other grounds by State v. Turner*, 630 N.W.2d 601, 606 n.2 (Iowa 2001). *Jamison* involved the search of a visitor's car conducted blocks away from the premises identified in the search warrant. *Id.* at 411. By contrast, here police searched a purse found on the floor inside the home identified in the premises search warrant, without knowing whether it belonged to Brown or the other woman in the room, Ileen Sickles, who was named in the warrant application. In any event,

[6] *United States v. Higgins*, 282 F.3d 1261, 1269 (10th Cir. 2002) ("[T]he burden is on the defendant to prove that the challenged search was illegal under the Fourth Amendment . . . ." (quoting *United States v. Gordon*, 168 F.3d 1222, 1225 (10th Cir. 1999)); *United States v. Crawford*, 220 F. Supp. 3d 931, 937 (W.D. Ark. 2016) ("Ms. Crawford has the initial burden to show that the search exceeded the scope of the warrant . . . ."); *Lebedun v. Commonwealth*, 501 S.E.2d 427, 433–34 (Va. Ct. App. 1998) (collecting cases and adopting this "well-reasoned rule applied by the federal courts and the majority of our sister states").

Jamison did not even mention—much less select—any test for determining whether a visitor's personal effects can be searched *inside* the location identified in the warrant.

Nor is *State v. Fleming*, 790 N.W.2d 560 (Iowa 2010), on point. Police obtained a warrant to search Andrew Nearman and his residence. *Id.* at 562. Joshua Fleming rented a bedroom from Nearman for $375 a month, and Fleming had exclusive possession of that room. *Id.* at 567. Fleming and Nearman were not related, and there was "no indication [Fleming] gave Nearman access to his private bedroom." *Id.* When the police executed the search warrant, they searched the entire house and found marijuana in several rooms, including Fleming's. *Id.* at 562. Fleming was charged and convicted of possession. *Id.* at 562–63. Our decision made no mention of the various tests for determining when a premises search warrant allows police to search a mere visitor's personal effects. Rather, we held Fleming had a reasonable expectation of privacy in his rented bedroom and that the warrant to search Nearman's residence did not allow the police to search Fleming's private room. *Id.* at 562. *Fleming* is distinguishable. Brown does not claim she rented the bedroom in the Sickles' house where she and four others were smoking methamphetamine when the police entered; as a mere party guest, Brown had no expectation of privacy in that room comparable to a tenant's.

Next the majority knocks down a straw man argument by citing our precedent rejecting a good-faith exception to the exclusionary rule. *State v. Cline*, 617 N.W.2d 277, 293 (2000), *abrogated on other grounds by Turner*, 630 N.W.2d at 606 n.2; *State v. Prior*, 617 N.W.2d 260, 268 (2000) (applying *Cline*). The fighting issue here is the scope of the premises search warrant, not the remedy for a constitutional violation.

In *Prior*, we declined to hold "all persons" warrants were unconstitutional per se; rather, we adopted a fact-based test including whether "persons with no connection to criminal activity may be present." 617 N.W.2d at 267. Brown does not fit that description.

The majority cites no case holding that police executing a search warrant cannot search unclaimed personal effects found on the floor merely because a visitor caught using drugs there is not named in the warrant. Courts uphold searches under these circumstances. This case is much like *United States v. Gray*, 814 F.2d 49 (1st Cir. 1987). In *Gray,* the United States Court of Appeals for the First Circuit upheld the search of a defendant's jacket pursuant to a premises search warrant. The police discovered Robert Gray lying on the floor fully clothed "in a private residence, outside of which a drug deal had just 'gone down,' at the unusual hour of 3:45 a.m." *Id.* at 50–51. During their search of the house, the police inspected a jacket—"which had been draped over the back of a chair in the outer room"—without knowing the jacket belonged to Gray. *Id.* at 50. In a pocket of the jacket, the police found a small plastic bag containing a white substance that looked like cocaine. *Id.* The police asked Gray if the jacket belonged to him, and Gray replied that it did; police then arrested him. *Id.* Gray, who was not identified in the search warrant and was not previously known to the police, challenged the search of his jacket as "beyond the proper scope of the warrant-backed search." *Id.* In upholding the search of the jacket, the First Circuit noted that "[t]he defendant was not, say, a casual afternoon visitor to the premises" and concluded that Gray "could warrantably have been believed to be harboring contraband . . . [g]iven the entire array of facts and the plausible inferences therefrom." *Id.* at 51. Significantly, the court explained that

> *[e]ven if the searchers believed that the jacket belonged to defendant*, the circumstances then extant would unquestionably have served to bring the case within the *Micheli* rule, [which enables searches of personal effects of individuals not identified in the warrant when there is a relationship between the person and the place].

Id. at 51–52 (emphasis added); *see also United States v. Micheli*, 487 F.2d 429, 431 (1st Cir. 1973).

I would uphold the search of Brown's purse based on *Gray*'s reasoning. Brown and the others were smoking methamphetamine "at the unusual hour" of 5:45 a.m. when police entered the residence pursuant to a warrant to search for drugs and weapons. Brown was participating in an illegal activity directly related to the sale of methamphetamine, which was the reason for searching the house. "[T]he entire array of facts and the plausible inferences therefrom" support a search of Brown's purse for contraband specifically identified in the premises search warrant. *Gray*, 814 F.2d at 51; *see also State v. Couillard*, 641 N.W.2d 298, 301 (Minn. Ct. App. 2002) (upholding search of backpack found "near the couch in the living room where a tray of marijuana was openly displayed on the coffee table" because "police could reasonably suspect that the backpack contained marijuana or related items described in the warrant").

Other courts likewise rely on a visitor's perceived connection to the activity targeted by the warrant to uphold a search of his or her personal effects. *See United States v. Neet*, 504 F. Supp. 1220, 1228 (D. Colo. 1981) (upholding search of briefcase of defendant who entered the house when a suspect was believed "to be picking up cocaine for delivery" and who implicated himself in "efforts to destroy cocaine when the officers entered the house" while suppressing evidence from search of purse of another person because police had no "indication of [her] involvement in

any narcotics transaction"); *People v. Hughes*, 767 P.2d 1201, 1207 (Colo. 1989) (en banc) (upholding search of film canister removed from defendant's pocket based on determination he "was connected to the premises and the purpose of the search warrant because he fit the description of the apartment occupant's drug supplier" for the cocaine deal in question); *Bonds v. State*, 372 S.E.2d 448, 450, 452 (Ga. Ct. App. 1988) (holding defendant's "status as a visitor does not remove her purse [found inches away] from examination, because there were indicators that she was not an innocent visitor but rather a person involved in the type of criminal activity underlying the warrant"); *cf. State v. Leiper*, 761 A.2d 458, 460 (N.H. 2000) (upholding search of knapsack when police purposefully executed a search warrant during a party, saw drugs and drug paraphernalia in plain view, and removed the defendant from the apartment—and his position near the knapsack—due to defendant's disruptive behavior).

In *State v. Gilstrap*, the Arizona Supreme Court recently reviewed the various tests and adopted the physical-possession test. 332 P.3d 43, 44–46 (Ariz. 2014). The *Gilstrap* court concluded, "[T]he possession test's simplicity, precision, and the guidance it offers to police and courts make it superior to the relationship and actual-notice tests." *Id.* at 46. Many other courts agree. *See Commonwealth v. Petty*, 157 A.3d 953, 958 (Pa. Super. Ct. 2017) ("[M]yriad jurisdictions agree with this Commonwealth's application of the possession test . . . because of the test's simplicity, precision, and the guidance it offers to police and courts."); *State v. Andrews*, 549 N.W.2d 210, 218 (Wis. 1996) (concluding that the possession test "is the most practical and easiest to apply for both the police executing a search and a judge subsequently reviewing the

propriety of the search"). I would adopt the physical-possession test for the same reasons.

"We generally 'prefer the clarity of bright-line rules in time-sensitive interactions between citizens and law enforcement.' " *State v. Storm*, 898 N.W.2d 140, 156 (Iowa 2017) (quoting *State v. Hellstern*, 856 N.W.2d 355, 364 (Iowa 2014)). Such clarity and ease of application is especially important during chaotic police raids on a drug den. *See id.* (noting easy-to-apply, "[b]right-line rules are 'especially beneficial' when officers 'have to make . . . quick decisions as to what the law requires where the stakes are high, involving public safety on one side of the ledger and individual rights on the other' " (quoting *Welch v. Iowa Dep't of Transp.*, 801 N.W.2d 590, 601 (Iowa 2011))). Police executing a premises search warrant in a drug raid do not have an affirmative duty to determine what possessions belong to whom. *Carman v. State*, 602 P.2d 1255, 1262 (Alaska 1979) (officers did not have a "duty to solicit" a claim of ownership before searching a purse that could have contained a gun, which was listed in the search warrant); *State v. Kurtz*, 612 P.2d 749, 751 (Or. Ct. App. 1980) (officers did not "have a duty of inquiry" when officers knew guests were present but did not have actual knowledge as to who owned the item that was searched).

The other tests are more problematic. Courts adjudicating the scope of premises search warrants have expressed skepticism about the reliability of an occupant's claim or denial of ownership of items containing incriminating evidence. The Pennsylvania Supreme Court, in adopting the physical-possession test over the notice test, aptly warned that

> [i]t would not be reasonable to require police officers executing a warrant to ask individuals located on the premises whether they own various items of personal

> property nor[] would it be reasonable to expect an appropriate response were they required to do so.

Commonwealth v. Reese, 549 A.2d 909, 911 (Pa. 1988). I share that skepticism. Someone who knows his or her purse or backpack contains narcotics would be motivated to say it belongs to someone else if that response meant police could not search it. Conversely,

> visitors to the premises could frustrate the efforts of police by placing contraband among their unworn personal effects or by announcing ownership of various articles of clothing and containers in order to place those items beyond the scope of the warrant.

Id. Other state supreme courts agree

> the []notice test is much more susceptible to abuse . . . [because] a visitor could simply assert ownership to immunize property from search or, conversely, police could make a point of never being put on notice so that they could assume all items were searchable.

Andrews, 549 N.W.2d at 217; *see also Leiper*, 761 A.2d at 461–62 (agreeing with *Andrews*). "We cannot sanction any rule that through fraud and gamesmanship erects barriers to the effective and legitimate execution of search warrants." *Reese*, 549 A.2d at 911. Yet that is what our court has done today.

In my view, the search of Brown's purse was constitutional. *See, e.g.*, *United States v. Teller*, 397 F.2d 494, 497 (7th Cir. 1968) (concluding "that it would be contrary to the facts to hold that a search of a purse lying upon a bed, where it was placed by its owner, constitutes a search of the person of that owner"); *Gilstrap*, 332 P.3d at 44, 47 (upholding search of purse police found in bathroom where a woman not identified in the warrant was showering). The police could constitutionally search purses found on the floor because a purse could hold drugs and firearms, the items described in the search warrant. *See*

Ross, 456 U.S. at 820–21, 102 S. Ct. at 2170–71; *see also United States v. Johnson*, 475 F.2d 977, 978 (D.C. Cir. 1973) (upholding search of purse found on coffee table in front of the couch where the defendant was sitting); *United States v. Riccitelli*, 259 F. Supp. 665, 666 (D. Conn. 1966) (upholding search of pocketbook found on kitchen table pursuant to premises search warrant that authorized police to seize "records, papers, writing, slips, [and] cash monies"); *State v. Richards*, 487 So. 2d 98, 99 (Fla. Dist. Ct. App. 1986) (upholding search of defendant's purse that was not in her immediate possession and "was an article in the residence capable of containing the items sought and described in the warrant").

Brown never argued our cases allowing proof of *constructive* possession to support convictions on drug offenses apply to determine whether a visitor's personal effects are beyond the scope of a premises search warrant. The majority compares apples to oranges to make that leap, without citing any case equating those disparate concepts. The State has the burden to prove constructive possession beyond a reasonable doubt to convict a defendant of possession. *See, e.g.*, *State v. Reed*, 875 N.W.2d 693, 705–06 (Iowa 2016). As noted, Brown has the burden to prove the purse on the floor was outside the scope of this valid premises search warrant. She failed to do so.

Finally, it is important to note that nothing in today's decision limits the legal authority of officers executing search warrants to protect themselves and others and safeguard evidence by securing the scene and searching persons there for weapons. *See* Iowa Code § 808.7 (2017).

For all these reasons, I would affirm Brown's conviction.

Mansfield and Zager, JJ., join this dissent.