IN THE COURT OF APPEALS OF IOWA

No. 0-185 / 09-1367
Filed April 21, 2010

IN THE INTEREST OF C.K.,
Minor Child,

STATE OF IOWA,
Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Mark J. Eveloff, District Associate Judge.

The State appeals from the juvenile court ruling on a motion to suppress. **AFFIRMED.**

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, Matthew Wilber, County Attorney, and Dawn Landon, Assistant County Attorney, for appellant.

William McGinn, Council Bluffs, for minor child.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

SACKETT, C.J.

The State sought and received permission to appeal from a juvenile court order adverse to its position. It contends that the court erred in suppressing items taken from a vehicle, contending there was probable cause for the search. The juvenile contends the error now raised was not ruled on by the juvenile court and is not preserved for appellate review. We agree and affirm.

BACKGROUND. The facts are basically without dispute and come from the only witness called, Pottawattamie County Deputy Sheriff Marc Freeman. On June, 27, 2009, the deputy, while on patrol, stopped a Jeep with an expired license plate whose driver failed to yield to another vehicle. There were four young people in the car. They were asked by the deputy for identification, which they presented. The identifications showed none of the four had yet reached twenty-one years of age. C.K.,[1] the young man who is the subject of these proceedings, sat in the backseat of the Jeep with a young woman at his side. C.K. and the young woman had a blanket draped over them. Asked by the deputy to lift the blanket they did so, revealing a thirty-can package of Keystone beer. Questioned about it, C.K. told the deputy that his brother, who had just transferred ownership of the Jeep to him, had inadvertently left the beer in the vehicle. C.K. subsequently changed his story and admitted "the beer belonged to them." The deputy related he ordered the foursome out of the Jeep, explaining he was going to search the Jeep to see if there were other alcoholic beverages in it. The deputy opened the center console, observing a light-colored

[1] The delinquency petition indicates C.K. was born in May of 1992, so he would have turned seventeen the month before the stop.

glass smoking pipe of a kind used for smoking marijuana. It was warm to touch and contained burned residue. Upon questioning, the four passengers each denied they owned the pipe, relating it belonged to Cory's brother. C.K. subsequently admitted the pipe was his. The deputy then handcuffed C.K. and the other young man who had been in the Jeep. The deputy continued to search and found a purse. The girl who owned it gave the deputy consent to search and the officer found another light-colored glass smoking pipe containing burned residue in the purse. While searching in the back of the Jeep the deputy moved a gallon sized Ziploc bag plastic bag and noted it smelled like marijuana. Opening the bag he found what the deputy described as "approximately a half a pound to a pound of marijuana," a purple scale, a CD, numerous boxes, sandwich-size baggies, and clear plastic bags.

After the items were found the deputy put C.K. in the back of the deputy's vehicle and Deputy Freeman asked his back-up officer to read C.K. his Miranda rights. Apparently Freeman did not witness the reading but testified "I was advised at that time that he did waive." The deputy apparently read the other passengers their Miranda rights and got some statements from them. The deputy then talked to C.K. about what he had found, and initially C.K. denied ownership of the marijuana and indicated he did not want anybody to get in trouble and he did not want to talk about it.

The deputy then went to talk again to the other passengers and arrange for someone to tow the Jeep. About ten minutes later the deputy returned to his vehicle and explained to C.K. what he was doing. The deputy testified:

> [a]t that time, I did just kind of mention is there anything you want to talk about, and that [C.K.] was at this time probably going to be charged with it to [C.K.]. And [C.K.] did finally admit that he did have knowledge of the gray Dillard's bag with the large amount of marijuana in it and stated that the reason he had had it was because his father at the time was disabled and it was, basically, their only source of income at the residence that they lived in on Madison Avenue.

PROCEDURE. A delinquency petition was filed two days later, on June 29, 2009, charging C.K. with a violation of Iowa Code section 124.401(1)(d) (2009), possession of marijuana with intent to deliver, and with violation of section 123.47(3)(a)(1), (c).

C.K. filed a motion on July 6, 2009, seeking to suppress all evidence obtained by members of the Pottawattamie County Sheriff's Office from his automobile on June 27, 2009. The motion contended that the stop and search of the automobile was made (1) without a reasonable suspicion of criminal activity, (2) without probable cause, and (3) without a warrant. The motion further contended that any statements of C.K.: (1) were the fruits of a custodial interrogation occurring as the result of the arrest of the child; (2) were obtained without first securing a knowing, voluntary, and intelligent waiver of C.K.'s right to counsel, his right against compulsory self-incrimination, and without parental consent and presence; and (3) were obtained without a warrant or probable cause to believe the child committed a criminal offense. C.K. sought the suppression of all evidence and any statements obtained by the State in violation of the Fourth, Sixth and Fourteenth Amendments to the United States Constitution. The State filed no written resistance to C.K.'s motion. On July 16, 2009, a hearing was set for August 10, 2009.

On August 10, 2009, the matter came before the juvenile court on the delinquency petition. The juvenile court noted it was also the time for a hearing on the child's motion to suppress, and the State agreed. No further statements were made by either party before the State called its first witness Deputy Freeman. At the close of the deputy's testimony and cross-examination the court asked the State if it had anything further, and the assistant county attorney responded "not in the form of a witness." C.K.'s attorney was given the opportunity to speak for C.K. He argued that the fact the occupants of the backseat had their feet elevated did not raise a reasonable suspicion. The State responded that the officer had the right to ask them to raise the blanket and at that point everything spiraled from there for the occupants of the vehicle. There is nothing to indicate that the attorneys for either side made further argument, any statement of the issues, or supplied the juvenile court with a brief or a cite to any authority relevant to the suppression motion.

The juvenile court entered a written ruling on the motion to suppress on August 25, 2009. The court said that after hearing the deputy's testimony it found that C.K. was handcuffed and detained then asked for consent to search his vehicle and this was prior to C.K. being advised of his Miranda rights. The court further found C.K. was never given the opportunity to talk to a parent prior to being questioned while detained by the deputy. The court then went on to find:

> any item discovered through a search of the vehicle after C.K. was detained, and any statements C.K. made after he was detained, without being given the opportunity to talk to a parent, are not admissible . . . the child's motion to suppress the search and

> statement of the child is sustained in regard to any items discovered from a search of the vehicle after C.K. was detained, and any statements made by C.K. after he was detained.

There were no post-ruling motions filed and there are no further findings by the juvenile court.

The State filed an application for discretionary review with the supreme court on September 9, 2009. No resistance was filed to the State's application. The supreme court, after considering the matter, granted the State's application and stayed matters in juvenile court pending the resolution of this appeal.

ISSUE ON APPEAL. The State's brief advances that in its application for discretionary review, it had relied on a statement of Deputy Freeman and challenged the juvenile court's fact findings. It went on to say:

> [T]he State now limits its argument on appeal to the purely legal issue raised in its application: whether any Fourth Amendment violation occurred when Deputy Freeman continued his search of the Jeep for alcohol, illegal drugs, and drug paraphernalia upon finding the cold beer hidden underneath the blanket and the warm pipe located in the center counsel.

The State complains that as a result of the suppression ruling it cannot offer into evidence the second pipe, the half pound of marijuana, the weighing scale, and numerous plastic sandwich bags.

SCOPE OF REVIEW. We review de novo the ultimate conclusion a court reaches on a motion to suppress based on the Fourth Amendment. *See State v. Heminover*, 619 N.W.2d 353, 358 (Iowa 2000). A district court's fact-findings on such a motion are binding on the appellate courts if those findings are supported by substantial evidence. *See id.* However, here the State does not contest the

factual findings of the juvenile court[2] so we assume the juvenile court's findings are so supported.

PRESERVATION OF ERROR. The State contends the issue it raises here has been preserved for appellate review. It recognizes the issue was not specifically addressed by the juvenile court, but argues that C.K.'s suppression motion never alleged a lack of a valid consent to search; rather, it alleged a lack of probable cause to search. The State goes on to relate that it resisted lack-of-probable-cause allegation. It advances it produced evidence that included Deputy Freeman's testimony of events that supported probable cause to search the Jeep for additional contraband and the deputy's written report where he noted he had probable cause to search the Jeep for more beer or drugs after discovering the beer under the blanket and the warm pipe in the console of the Jeep. The State goes on to say:

> This ruling necessarily rejected the State's position that Deputy Freeman had probable cause to continue his search after finding those two items. Such circumstances establish the State preserved error on the issue for this court's review.

C.K. contends that the issue the State raises on appeal was not addressed by the juvenile court and the State made no filing after it was entered asking the court to reconsider or rule on the issue. A warrantless search, such

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[2] The State's brief notes:

> Although the State in its application for discretionary review relied upon Deputy Freeman's report in challenging one of the juvenile court's fact-findings, the State now limits its argument on appeal to the purely legal issue raised in its application: whether any Fourth Amendment violation occurred when Deputy Freeman continued his search of the Jeep for alcohol, illegal drugs, and drug paraphernalia upon finding the cold beer hidden underneath the blanket and the warm pipe located in the center console.

as the one in this case, is per se unreasonable unless it falls within a recognized exception. *State v. Cline*, 617 N.W.2d 277, 282 (Iowa 2000). The State has the burden to prove by a preponderance of the evidence that the search falls within an exception. *See id.* Despite having this burden, the State made no effort to direct the juvenile court to the position it now takes on appeal, yet now contends we should reverse on an issue the juvenile court did not address. We agree with C.K. that the issue the State now raises was not addressed by the juvenile court.

Our error preservation rule requires that issues must be presented to and passed upon by the court from which appeal is taken before they can be raised and decided on appeal. *See Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998). Error preservation is based on principles of fairness. *State v. Paredes*, 775 N.W.2d 554, 572 (Iowa 2009) It would be fundamentally unfair to fault the juvenile court for failing to rule correctly on an issue it was never given the opportunity to consider. *DeVoss v. State*, 648 N.W.2d 56, 60 (Iowa 2002)). Furthermore, it is unfair to allow a party to choose to remain silent in the juvenile court in the face of error, taking a chance on a favorable outcome, and subsequently to assert error on appeal if the outcome in the trial court is unfavorable. *See id.* (citing 5 Am. Jur. 2d *Appellate Review* § 690, at 360-61 (1995)). Because error preservation is based on fairness, all parties should be bound by the rule. *See id*.

The juvenile court based its decision to suppress the child's statements and items of the search on Iowa Code section 232.47(6).[3] In its reply brief the State argues the suppression of C.K.'s statements and the items found in the search was not correct under this section. It is well-established that an issue cannot properly be asserted for the first time in a reply brief. *State v. Walker*, 574 N.W.2d 280, 288 (Iowa 1998); *Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 642 (Iowa 1996). We do not address this claim.

AFFIRMED.

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[3] Iowa Code section 232.47(6) in part provides:

> 6. Statements or other evidence derived directly or indirectly from statements which a child makes to a law enforcement officer while in custody without presence of counsel may be admitted into evidence at an adjudicatory hearing over the child's objection only after the court determines whether the child has voluntarily waived the right to remain silent. In making its determination the court may consider any factors it finds relevant and shall consider the following factors:
>
> a. Opportunity for the child to consult with a parent, guardian, custodian, lawyer or other adult.
>
> b. The age of the child.
>
> c. The child's level of education.
>
> d. The child's level of intelligence.
>
> e. Whether the child was advised of the child's constitutional rights.
>
> f. Length of time the child was held in shelter care or detention before making the statement in question.
>
> g. The nature of the questioning which elicited the statement.
>
> h. Whether physical punishment such as deprivation of food or sleep was used upon the child during the shelter care, detention, or questioning.