IN THE COURT OF APPEALS OF IOWA

No. 0-209 / 09-0812
Filed February 9, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JACOB DOUGHERTY,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Kristin L. Hibbs, Judge.

The State appeals a district court order suppressing evidence obtained during a warrantless search. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Leon F. Spies of Mellon & Spies, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Mary E. Tabor (until withdrawal), and then Thomas S. Tauber, Assistant Attorneys General, Scott Wadding, Student Legal Intern, Janet M. Lyness, County Attorney, and Meredith Rich-Chappell, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ. Tabor, J. takes no part.

DOYLE, J.

The defendant, Jacob Dougherty, filed a motion to suppress evidence discovered by the police in a warrantless search of his vehicle and residence. The district court granted the motion, finding the State did not prove Dougherty's consents to the searches were voluntary. Our supreme court granted the State's request for discretionary review. Upon our review of the record, we affirm in part, reverse in part, and remand for further proceedings.

I. Background Facts and Proceedings.

During the early morning hours of July 10, 2008, Iowa City police detectives Paul Batcheller and Matthew Hansen were conducting surveillance of a Tiffin residence as part of a continuing investigation involving Dougherty's brother for possible drug dealing. A car registered to Dougherty was parked in the driveway. A little after 3:00 a.m., the detectives observed a man, later identified as Dougherty, leave the house, load something into the car, and drive away.

The detectives followed the car in their own unmarked patrol car—an all black police-package Crown Victoria bristling with antennae. While following Dougherty, they observed him speeding on Interstate 80 and roll through a stop sign at an off-ramp. The detectives did not stop Dougherty for the traffic violations. Concerned Dougherty might recognize his tail as a police car, Batcheller called Iowa City police detective Zachary Diersen at home and asked him to assist in the rolling surveillance. Diersen, driving his personal car, picked up Dougherty's car as it entered Iowa City and took over the surveillance.

Batcheller and Hansen backed off. Batcheller also contacted dispatch to get a marked patrol car to stop Dougherty for the traffic violations.

Meanwhile, Diersen followed Dougherty until Dougherty stopped and parked outside an Iowa City residence. Diersen parked his car and got out. Dougherty was already out of his car. Diersen, in plain clothes, approached Dougherty, identified himself as a police officer, and showed his badge. Diersen told Dougherty "we had been following him, that we had observed a couple of traffic violations and that we wanted to talk to him for a few minutes." According to Diersen, Dougherty was "real receptive" and "friendly." The other two detectives arrived on the scene and approached Dougherty. Diersen left to go the police station and then proceeded to Tiffin to continue surveillance of the residence.

Batcheller told Dougherty "we had observed some traffic violations and also that [he] was suspecting [Dougherty] was involved in some sort of drug activity." Dougherty admitted to the traffic violations. He told the detectives he was at the Iowa City residence because he wanted to say good-bye to his former girlfriend before leaving for a trip that morning. He stated his mother had committed suicide about a month prior, and he and his brother were scheduled to fly out of Cedar Rapids to Venezuela that morning for her memorial service. He stated they needed to be at the airport by 5:00 or 5:30 a.m. It was after 3:30 a.m. at that point. According to Dougherty, he repeated "many, many times that I needed to make it to Cedar Rapids. I remember trying to make it very clear these were non-refundable tickets and I didn't have another chance to make it to the wake." After some additional small-talk, Batcheller asked Dougherty if they

could search his vehicle. Dougherty said yes, but indicated he thought that he was required to consent because he was on probation. Batcheller clarified that Dougherty was "giving consent to search and was not doing it just because he was required to." Dougherty consented again, and Batcheller searched the vehicle. A small container with a residual amount of marijuana in it was found in the car.

A uniformed Iowa City police officer in a fully marked squad car arrived on the scene at 3:48 a.m. Dougherty told the detectives he had a 6:45 a.m. flight. The detectives asked about Dougherty's brother and engaged in small talk. The detectives told Dougherty "there was a little more to the story" and they "knew about" Dougherty's brother and wanted Dougherty's cooperation. They told Dougherty he was not the focus of the investigation, but he was in the same house as his brother and they didn't know what Dougherty's involvement was. Dougherty replied he knew nothing and kept his life separate from his brother's. Dougherty was then placed under arrest for possession of marijuana and handcuffed. The detectives asked for his cooperation to search the Tiffin house. He was then read his *Miranda* rights.

Dougherty granted the detectives permission to search "his area" of the house and added he had to because he was on probation. The detectives went on to say they just wanted his permission to search his area and the common areas of the house. Dougherty responded he slept in the living room. The detectives engaged in a discussion about who lived in the house and defined the scope of the areas they wanted permission to search. They told Dougherty they wanted permission to search the living room and common areas of the house—

kitchen, hallways, bathrooms, but not his brother's bedroom or his mother's bedroom. Dougherty did not want the detectives rummaging through his recently deceased mother's belongings. Dougherty finally said, "You are welcome to go through my living room." He then asked if he could talk to his former girlfriend. Batcheller replied they were

> on a time frame just like you are. If we can make it work in a short amount of time, we will . . . and we can probably even make arrangements to bring you back here. We have to do our thing first.

Dougherty remarked that "no matter what" he would not be back in a few hours, even if nothing was found. He speculated the paperwork would take five hours. He then agreed to go with the detectives to the Tiffin residence. He was placed in the backseat of the detective's car. It was now 4:00 a.m.

They arrived at the Tiffin residence at 4:19 a.m. The detectives took the handcuffs off Dougherty and had him sign a written consent to search. Just above the signature line, the form stated: "I am giving this written permission to these officers freely and voluntarily, without any threats or promises having been made, and after having been informed that I have the constitutional right to refuse this search and/or seizure." The detectives entered the house with Dougherty, who called out to his brother as they walked in, "It's the police!" Dougherty's brother ran from the living room to his bedroom and shut the door. There was a "haze of smoke" and an "overwhelming odor of burning marijuana" coming from the living room.

The detectives eventually succeeded in getting Dougherty's brother to come out of his room, but he would not consent to a search of the entire house. After obtaining a search warrant, the detectives discovered a "smorgasbord" of

drugs in Dougherty's brother's bedroom and closet. A burnt marijuana joint was observed in the living room. Substantial quantities of cocaine, marijuana, psilocybin mushrooms, and prescription pills were seized, as well as digital scales, about $5000 in cash, and drug-packaging materials.

Dougherty was charged by trial information with four counts of possession of a controlled substance with intent to deliver, three counts of failure to affix a drug stamp, and one count of possession of marijuana. He moved to suppress the evidence found in the searches of his car and home on state and federal constitutional grounds. Following a hearing, the district court entered a ruling granting Dougherty's motion in its entirety.

With respect to the search of Dougherty's car, the court found:

> Defendant's consent to search his car was mere acquiescence in the face of a significant show of authority. Clearly, two minor traffic offenses would not, without more, warrant the appearance of four police officers in three vehicles. The officers did not, at that point, have reasonable suspicion that the Defendant was violating his probation so at that point they were not permitted to search without his voluntary consent. His consent was not voluntary under the circumstances.

The court found Dougherty's subsequent consent to search his residence was also involuntary:

> It was well known that going to his mother's service was very important to the Defendant and that he had only a limited time within which he could make his flight.
>
> Considering the totality of the circumstances, the Court finds that the Defendant's written consent to search limited areas of the residence to which he had access was based on the Defendant's belief in Officer Batcheller's representations that he would be allowed to go to his mother's wake in Venezuela if he cooperated quickly. Based on the context of the consent, the Court finds it was not freely, unequivocally, or intelligently given as required by the Fourth Amendment.

The court finally found that when the "'fruit' of those warrantless searches are deleted from the application for the search warrant, the warrant application fails to establish probable cause to justify issuance of the search warrant."

The State sought discretionary review, which our supreme court granted. On appeal, the State contends the district court erred in finding Dougherty's consents to search his vehicle and residence were involuntary. In the alternative, the State asserts the search of the residence was reasonable under Dougherty's probation agreement, which allowed searches by "any probation officer or law enforcement officer having reasonable grounds to believe contraband is present."

II. Scope and Standards of Review.

We review a district court's ruling on a claim the State has violated a defendant's constitutional right to be free from unreasonable searches and seizures de novo. *State v. Ochoa*, ____ N.W.2d ____, ____ (Iowa 2010). In conducting this de novo review, we make an independent evaluation based on the totality of the circumstances as shown by the entire record. *Id.* We give deference to the district court's findings of fact due to its opportunity to assess the credibility of witnesses, but we are not bound by those findings. *State v. Reinders*, 690 N.W.2d 78, 82 (Iowa 2004).

III. Discussion.

A. Consent.

The Fourth Amendment to the United States Constitution, which is made applicable to the states through the Fourteenth Amendment, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, but upon probable cause, supported by Oath

> and affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

"This same fundamental right of privacy is found in article I, section 8 of the Iowa Constitution."[1] *State v. Reinier*, 628 N.W.2d 460, 464 (Iowa 2001). A warrantless search violates the Fourth Amendment unless it falls within a recognized exception. *Reinders*, 690 N.W.2d at 83. "One well-established exception to the warrant requirement is a search conducted by consent." *Reinier*, 628 N.W.2d at 464-65. "A warrantless search conducted by free and voluntary consent does not violate the Fourth Amendment." *Id.* at 465.

The State has the burden to prove the consent was voluntary, which is a question of fact to be determined from the totality of all the circumstances. *State v. Lane*, 726 N.W.2d 371, 378 (Iowa 2007). "Consent is considered to be voluntary when it is given without duress or coercion, either express or implied." *Reinier*, 628 N.W.2d at 465. The question of voluntariness ultimately requires the consideration of many factors, although no one factor is determinative. *Lane*, 726 N.W.2d at 378. Particular attention must be paid to the personal characteristics of the consenter

> "such as age, education, intelligence, sobriety, and experience with the law; and features of the context in which the consent was given, such as the length of detention or questioning, the substance of any discussion between the [consenter] and police preceding the

[1] Our supreme court recently stated "that, while United States Supreme Court cases are entitled to respectful consideration, we will engage in independent analysis of the content of our state search and seizure provisions." *Ochoa*, ___ N.W.2d at ___. When both federal and state constitutional claims are raised, as they are here, "we may, in our discretion, choose to consider either claim first in order to dispose of the case, or we may consider both claims simultaneously." *Id.* (footnote omitted). Because neither the State nor Dougherty has advanced any reason why our state's constitution should be interpreted differently than the federal constitution with respect to the consent issue, we choose to consider both claims simultaneously, as the Iowa Supreme Court has done in the past. *See State v. Wilkes*, 756 N.W.2d 838, 842 n.1 (Iowa 2008).

> consent, whether the [consenter] was free to leave or was subject to restraint, and whether the [consenter's] contemporaneous reaction to the search was consistent with consent."

Id. (quoting *United States v. Va Lerie*, 424 F.3d 694, 709 (8th Cir. 2005)). Other factors include (1) knowledge by the consenter of the right to refuse to consent, (2) whether the police asserted any claim of authority to search prior to obtaining consent, (3) the show of force or other types of coercive action by the police, (4) a threat by police to obtain a search warrant and forcibly execute it when the police lack a sufficient basis to obtain a warrant, and (5) the existence of illegal police action just prior to the time the consent is given. *Reinier*, 628 N.W.2d at 465. With these factors in mind, we turn to the first warrantless search conducted by the police—Dougherty's vehicle.

***1. Vehicle*.** The district court found Dougherty's consent to search his vehicle was not voluntary because it was "mere acquiescence in the face of a significant show of authority." The court reasoned, "Clearly, two minor traffic offenses would not, without more, warrant the appearance of four police officers in three vehicles."

The show of force made by the police at the time the consent is sought is a factor to be taken into account in the voluntariness analysis. *See Lane*, 726 N.W.2d at 379-80. However, that factor itself is not determinative of the outcome. *See id.* at 378. The court in *Lane* accordingly determined the defendant's consent to search her home was voluntary despite the number of officers present when she consented. *Id.* at 379-80. Similarly, in *United States v. Barnum*, the Eighth Circuit Court of Appeals found "the mere presence of 'two to three officers being armed with holstered firearms,' in the absence of evidence

of threats or intimidation, does not negate a defendant's consent." 564 F.3d 964, 970 (8th Cir. 2009) (quoting *Va Lerie*, 424 F.3d at 710).

Here, although multiple officers were present at the scene, there is no evidence of threats or intimidation preceding Dougherty's consent to search his car. The request to search was made by only one of the detectives.[2] *See Lane*, 726 N.W.2d at 380 (finding show of force was minimal even though four officers were present at the consenter's house because only one was involved in asking for consent to search). All three detectives were in plain clothes and were driving unmarked cars. It appears the uniformed police officer, who was driving a marked squad car, arrived during or after the search. There was no use of sirens or flashing lights, no brandishing of weapons, and no forced stop. *See Wilkes*, 756 N.W.2d at 844 (finding similar factors relevant in determining defendant was not seized). Dougherty was not subject to any restraint and was free to leave.[3] We accordingly find this case distinguishable from those that have found the show of force exhibited by the police to be coercive. *See, e.g.*, *State v. Ahern*, 227 N.W.2d 164, 166 (Iowa 1975) (finding officer's show of force coercive where the officer entered the apartment "by knocking on the door three times (within a

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[2] Detective Diersen testified he left "pretty much right after" Batcheller and Hansen arrived. Hansen testified that he was not present when Batcheller asked Dougherty for consent because he had stepped away for a minute to get something out of his car.

[3] As has been oft-repeated by our supreme court in determining whether an individual has been seized, law enforcement officers

> "do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen. . . . The person approached . . . need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. . . ."

State v. Smith, 683 N.W.2d 542, 546-47 (Iowa 2004) (quoting *Florida v. Royer*, 460 U.S. 491, 497-98, 103 S. Ct. 1319, 1324, 75 L. Ed. 2d 229, 236 (1983)).

span of less than thirty seconds) and, without identifying himself, kicking in the door").

This is also not a case where a defendant passively cooperated with an officer's demand to search. *See, e.g.*, *State v. Lathum*, 380 N.W.2d 743, 745 (Iowa Ct. App. 1985) (finding suspect's tacit cooperation with officers could not be equated with voluntary consent). Our supreme court has recognized the State's burden to show consent was voluntarily given "'cannot be discharged by showing *no more than acquiescence* to a claim of lawful authority.'" *Ochoa*, ____ N.W.2d at ____ (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548-49, 88 S. Ct. 1788, 1792, 20 L. Ed. 2d 797, 802-03 (1968) (emphasis added)); *see also State v. Horton*, 625 N.W.2d 362, 364 (Iowa 2001) (holding defendant did not voluntarily consent by emptying her pockets in response to an officer's demand for her to do so). Dougherty did not merely acquiesce to a show of authority. Under all the circumstances, we find he voluntarily consented to the search.

First, the record does not show the detectives ever made a false claim that they had authority to search Dougherty's vehicle without his consent. *Cf. Bumper*, 391 U.S. at 548-49, 88 S. Ct. at 1791-92, 20 L. Ed. 2d at 801-02 (finding consent was not voluntary when official claimed he possessed a search warrant when the warrant was invalid or did not exist); *Ochoa*, ____ N.W.2d at ____ ("A search conducted in reliance upon an officer's claim of lawful authority cannot be justified on the basis of consent if the claim of authority turns out to be invalid."). After Batcheller asked Dougherty for consent to search his car, Dougherty agreed but stated he thought he had to consent because he was on probation. Batcheller clarified with Dougherty that "he was giving consent to search and was

not doing it just because he was required to." Dougherty again consented to the search.

Second, we find Dougherty's personal characteristics weigh in favor of finding his consent was voluntary. *See Lane*, 726 N.W.2d at 378 (finding consenter's personal characteristics, including the fact she was an adult mother with an eighth grade reading level who was sober and familiar with the officer, showed she voluntarily consented). Dougherty was a twenty-one-year-old high school graduate. He was not under the influence of alcohol or drugs while speaking to the detectives. As a probationer, Dougherty had some familiarity with the criminal justice system and law enforcement.

Finally, the context of the search indicates Dougherty's consent was voluntary. Dougherty was described as "real receptive" and "friendly" when Diersen, the off-duty detective, first made contact with him. Diersen talked to Dougherty for a couple of minutes before Batcheller and Hansen arrived. Those detectives then engaged Dougherty in casual conversation for three to four more minutes before asking for his consent. Dougherty readily agreed to the search after explaining the car had been out of his possession for about a month. The short period of time within which Dougherty's consent was obtained, combined with his cooperative behavior, indicates his will was not overborne by the officers.

Considering the totality of the circumstances as detailed above, we conclude the State established the consent to search the vehicle was voluntary. The district court's ruling granting Dougherty's motion to suppress the evidence seized in that search is therefore reversed. We must next decide whether Dougherty's subsequent consent to search his residence was voluntary.

2. Residence. This issue presents a closer question. As we stated previously, "Consent is considered to be voluntary when it is given without duress or coercion, either express or implied." *Reinier*, 628 N.W.2d 460, 465 (Iowa 2001). When there is an allegation of coercion, the State must show there has been no undue pressure, threats, or improper inducements. *State v. Holland*, 389 N.W.2d 375, 381 (Iowa 1986).

"In examining the presence of coercive tactics to determine the voluntariness of the consent to search . . . it is important to take subtle police actions into account as well as direct actions." *Reinier*, 628 N.W.2d at 468. The form of coercion that bears on the voluntariness of consent, whether direct or implied, is of no consequence. *Id.* The obtaining of consent from a person in custody is inherently suspect, though that fact alone will not preclude a finding of voluntariness. *United States v. Griffin*, 530 F.2d 739, 742 (7th Cir. 1976). Trickery, fraud, or misrepresentation on the part of the police also "naturally undermines the voluntariness of any consent." *Id*. at 743. "All of these considerations emphasize the fact that in determining the voluntariness of a consent, the 'psychological atmosphere' in which it is obtained is of critical importance." *Id.*

We think the psychological atmosphere in which Dougherty's consent was obtained was coercive. After the marijuana was discovered in Dougherty's car, he was handcuffed, placed under arrest, and read his *Miranda* rights. *See Ahern*, 227 N.W.2d at 166 (stating while an individual under arrest may validly consent to a search, "the psychological impact of an arrest immediately preceding a consent to search may not be ignored"). The detectives continued

their discussion with him and requested for consent to search the house in Tiffin. Hansen testified they told Dougherty that

> he wasn't the focus of our investigation but actually his brother was, and we wanted to go [to their house] to make sure there was nothing illegal as far as what his brother may have had or have, and we wanted to make sure he didn't have any additional marijuana or paraphernalia related to what we found in his car.

Batcheller made similar statements to Dougherty. He testified that he told Dougherty "if, as it turned out, all we're dealing with is a simple possession or something like that, I would try to make arrangements to turn himself in, I would work with him the best I possibly could." In response to Dougherty's request to see his former girlfriend, Batcheller also told him they were

> on a time frame just like you are. If we can make it work in a short amount of time, we will . . . and we can probably even make arrangements to bring you back here. We have to do our thing first.

The foregoing comments "bear upon the voluntariness of the consent because they are limitations on the nature of the crime under investigation and the objects sought by the search." *Reinier*, 628 N.W.2d at 469. Such comments "tend to minimize the seriousness of possessing drugs for personal use or casual sales, and subtly create a false belief that no adverse consequences will result from a search." *Id.* The court in *Reinier* found similar comments by police[4] constituted "a subtle form of deception with no reasonable basis" that rendered the consent involuntary. *Id.* We think the same can be said here. By telling Dougherty the narcotics investigation was focused on his brother and suggesting he could be released in time to make his flight, the officers improperly minimized

[4] The officers in *Reinier* told the defendant prior to obtaining her consent to search her house "that they were not looking for small quantities of drugs but 'meth labs' and 'major dealers.'" 628 N.W.2d at 469.

the seriousness of the situation and subtly created a false belief that no adverse consequences would result from the search.

In fact, Dougherty testified he agreed to a limited search of the residence only because

> [i]t was made overwhelming clear to me, even if my brother went to jail, I would be able to go to a wake. That meant a lot to me. They made it very clear that like even if anything came out of it that I was going to be back on a plane. No one says you are going to have a car ride back to your car if they don't intend to help you out, you know. It was made overwhelming clear to me that my cooperation would result in me becoming free.

The district court credited that testimony in finding, "It was well known that going to his mother's service was very important to the Defendant and that he had only a limited time within which he could make his flight." Giving due deference to this implied credibility finding, we agree with the court that Dougherty's consent was not voluntary because of the subtle coercion employed by the officers in this case. *See Reinier*, 628 N.W.2d at 469. *But see United States v. Kolodziej*, 706 F.2d 590, 593 ("Raised expectations and hopes for leniency do not amount to coercion or improper inducement.").

We reach this conclusion though there is other evidence that tends to support finding Dougherty's consent was voluntary, such as his signing of the written consent form and an officer's statement to him that he could possibly go to jail that night. *See Reinier*, 628 N.W.2d at 469 (reaching similar conclusion). However, that statement and the execution of the written consent form followed the coercive tactics detailed above, which also included a nineteen-minute car ride in the back of a squad car to the house in Tiffin during which Dougherty remained handcuffed. Upon examining the totality of the circumstances, we

agree with the district court that Dougherty did not voluntarily consent to the search of his residence.[5] Our inquiry does not end here, however, as the State asserts Dougherty's probation agreement provided an alternative ground for the officers' search of the residence.

B. Reasonable Suspicion.

As a condition of his probation for a prior felony drug conviction, Dougherty signed an agreement that stated:

> I understand and agree that my person, property, place of residence, vehicle and personal effects may be searched at any time, with or without a search warrant or warrant of arrest, by any probation officer or law enforcement officer having reasonable grounds to believe contraband is present.

The State argues this agreement gave the detectives authority to conduct a warrantless search of the residence in Tiffin. Dougherty does not challenge the constitutionality of the probation-agreement search under either the federal or state constitution.[6] *See United States v. Knights*, 534 U.S. 112, 121, 122 S. Ct.

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[5] We need not and do not reach the State's argument under the fruit-of-the-poisonous-tree doctrine because we conclude the consent was not voluntary under the totality of the circumstances. *See Reinier*, 628 N.W.2d at 468 n.3 (noting that because the "consent was not voluntary under the totality of the circumstances, it is unnecessary for us to additionally consider whether there was a break in the illegal entry and the subsequent consent); *see also Lane*, 726 N.W.2d at 378 (stating "'evidence obtained by the purported consent should be held admissible only if it is determined that the consent was *both* voluntary and not an exploitation of the prior illegality'" (citation omitted)).

[6] Our supreme court recently decided *State v. Ochoa*, ____ N.W.2d ____, ____ (Iowa 2010), in which it considered "the extent to which persons on parole are entitled to constitutional protections against unreasonable searches and seizures under the Iowa Constitution." The court found that although warrantless, suspicionless searches of parolees are permissible under the federal constitution, *see Samson v. California*, 547 U.S. 843, 857, 126 S. Ct. 2193, 2202, 165 L. Ed. 2d 250, 261-62 (2006), they are not permissible under the Iowa Constitution. *Ochoa*, ____ N.W.2d at ____ ("We conclude that a parolee may not be subjected to broad, warrantless searches by a general law enforcement officer without any particularized suspicion or limitations to the scope of the search."). The court stated its decision left open the question of whether "individualized suspicion amounting to less than probable cause may be sufficient in some contexts to support a focused search." *Id.* We have no occasion to consider that question in this

587, 593, 151 L. Ed. 2d 497, 506 (2001) (stating when a law enforcement officer "has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable"). Instead, he asserts the detectives did not have reasonable suspicion for the search. We agree.

In order to establish reasonable suspicion, which is something less than probable cause, the State must show by a preponderance of the evidence that the officer had "specific and articulable facts, which taken together with rational inferences from those facts, to reasonably believe criminal activity may have occurred." *State v. Tague*, 676 N.W.2d 197, 204 (Iowa 2004). "Mere suspicion, curiosity, or hunch of criminal activity is not enough." *Id.* Whether reasonable suspicion exists must be determined objectively and in light of the totality of the circumstances confronting the officer. *Id.*

The State argues the "nexus between marijuana found in the defendant's vehicle and the Tiffin residence gave officers reasonable suspicion to believe that contraband would be discovered in the dwelling." We do not agree. Under certain circumstances in the probable-cause search warrant context, it is reasonable to infer drug-related evidence will be found on a defendant's property. *See State v. Padavich*, 536 N.W.2d 743, 748 (Iowa 1995) (upholding warrant relying, in part, on fact drugs and drug use by defendant were observed at location to be searched). However, warrants that have been upheld in the

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case, as Dougherty has not presented the issue to us for our review. It is noted Dougherty's brief was filed about one year prior to the filing of the *Ochoa* decision.

absence of such direct evidence were based upon applications indicating more than mere drug possession or use by the owner or possessor of the property to be searched.

For example, in *State v. Godbersen*, 493 N.W.2d 852, 855 (Iowa 1992), evidence that a person possessed a large quantity of drugs when apprehended led to a reasonable inference the person was involved in drug trafficking and evidence of trafficking would be found at the person's home. *See also State v. Groff*, 323 N.W.2d 204, 212 (Iowa 1982) (finding large quantity of marijuana discovered in field provided nexus to search near-by residence). Here, in contrast, the only thing the detectives discovered in Dougherty's car was a small container with a residual amount of marijuana in it. There was no evidence connecting Dougherty's suspected drug use to the residence in Tiffin, other than the fact the detectives observed him drive from Tiffin to the residence in Iowa City where he stopped. The mere fact Dougherty, or someone else who used his car, may have smoked marijuana (a portable, concealable, and disposable drug) does not give rise to a reasonable suspicion that drugs and related items would be found in the residence. *See State v. Stoermer*, No. 04-1154 (Iowa Ct. App. Oct. 12, 2005) (Mahan, J., concurring specially) ("Pipe in car equals drugs in the house! I don't think so and do not believe the other factors in this case create a nexus.").

The State is correct that a defendant's criminal history or reputation may be considered in making a probable cause determination. *See Padavich*, 536 N.W.2d at 748. Although the detectives were aware Dougherty was on probation before they searched the residence, there is no evidence they were aware of

what he was on probation for. The State is also correct that a suspect's association with a *known* drug dealer is a relevant consideration. *See State v. Bergmann*, 633 N.W.2d 328, 333 (Iowa 2001). But here, the detectives only suspected Dougherty's brother was a drug dealer.

We recognize reasonable suspicion "'is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.'" *State v. Kreps*, 650 N.W.2d 636, 642 (Iowa 2002) (citation omitted). However, all that was present in this case was "[m]ere suspicion, curiosity, or hunch of criminal activity." *Tague*, 676 N.W.2d at 204. That is not enough to give rise to a reasonable suspicion drugs were present at the residence in Tiffin. *Id.* We accordingly reject the State's argument that the detectives' warrantless search of the residence was permitted by the probation agreement.

IV. Conclusion.

Under our de novo review of the totality of the circumstances, we conclude that although Dougherty voluntarily consented to the search of his vehicle, he did not voluntarily consent to the search of the residence. We therefore reverse the district court's ruling granting Dougherty's motion to suppress evidence discovered during the vehicle search, but affirm its ruling granting Dougherty's motion to suppress evidence discovered during the residence search. The case is remanded for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.