IN THE COURT OF APPEALS OF IOWA

No. 1-100 / 10-1294
Filed May 11, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

AMANDA MICHELLE SHOEMAKER,
Defendant-Appellant.

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

The defendant sought and was granted discretionary review of the district court's ruling revoking her probation. **AFFIRMED.**

Robert G. Rehkemper of Gourley, Rehkemper & Lindholm, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik and Matt Oetker, Assistant Attorneys General, John P. Sarcone, County Attorney, and Bret Lucas, Assistant County Attorney, for appellee State.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ. Tabor, J., takes no part.

VAITHESWARAN, P.J.

Probationer Amanda Shoemaker raised a constitutional challenge to a home search that resulted in the revocation of her probation. The district court rejected her challenge, and so do we.

I. Background Facts and Proceedings

Amanda Shoemaker pleaded guilty to operating while intoxicated, third offense. She was sentenced to five years in prison, with all but 165 days suspended, and placed on probation. The probation agreement she signed provided she would not "use alcohol or illegal drugs or associate with users and/or sellers" and would "comply with in-home and/or field visits." The agreement further stated her "failure to comply with the above [would] be deemed to be a violation of the terms and conditions of probation, for which [her] probation could be revoked by the Court."

Following execution of the agreement, law enforcement officers in search of a work release escapee learned the escapee was Shoemaker's friend. The officers went to Shoemaker's apartment and, after knocking and receiving no response, stepped inside. As they did so, they saw several empty beer cans on the coffee table in front of the couch on which Shoemaker was lying. One of the officers told Shoemaker he was "going to make sure for [his] safety there wasn't anyone else, including [the fugitive], in the bedroom or bathroom area." He walked through her apartment and found more empty beer cans in her bedroom and bathroom, as well as a partially full case of beer in her refrigerator. Shoemaker admitted she had been drinking the night before.

One of the officers called Shoemaker's probation officer, who told him to take her into custody. The probation officer subsequently recommended revocation of Shoemaker's probation, and the matter proceeded to an evidentiary hearing. At the hearing, Shoemaker's attorney challenged the constitutionality of the home search. Following the hearing, the district court found that Shoemaker violated her probation by drinking alcohol. On the question of the legality of the search, the court stated:

> That in this matter the defendant by signing the Probation Agreement does consent to the home search or home visit. That the officers in making the home visit and hearing a TV on and no one coming to the door correctly opened the door and observed the defendant on a couch. At that point their further entry into the residence was both legal and appropriate pursuant to Paragraph 15 of the Probation Agreement.

The court revoked Shoemaker's probation and imposed her original prison sentence. Shoemaker filed an application for discretionary review, which the Iowa Supreme Court granted. The appeal was subsequently transferred to this court.

II. Analysis

Shoemaker reiterates that the warrantless search of her residence was in violation of her federal and state constitutional right to be free from unreasonable searches and seizures. This violation, in her view, mandated the exclusion, in her probation revocation proceeding, of evidence garnered during the search. As a preliminary matter, we address the State's argument that she did not preserve error.

Error preservation does not turn "on the thoroughness of counsel's research and briefing so long as the nature of the error has been timely brought

to the attention of the district court." *Summy v. City of Des Moines*, 708 N.W.2d 333, 338 (Iowa 2006). The nature of the claimed error—the reasonableness of the warrantless search of her home under the federal and state constitutions—was brought to the court's attention at a time when corrective action could have been taken. Specifically, defense counsel made the following statement:

> Your Honor, just to make sure the record is clear, the Court is finding that the officers' entry, search, and subsequent questioning of Ms. Shoemaker was not in violation of the Fourth Amendment of the United States Constitution or Article 1, Section 8 of the Iowa Constitution and, therefore, the Court can consider that evidence?
> THE COURT: That is correct.

This dialogue was sufficient to preserve error. Accordingly, we proceed to the merits.

Our starting point is *Kain v. State*, 378 N.W.2d 900 (Iowa 1985). There, illegally obtained evidence was excluded in the defendant's criminal trial. *Kain*, 378 N.W.2d at 901. The excluded evidence was later used to revoke Kain's probation. *Id.* Kain appealed, contending the federal exclusionary rule premised on the Fourth Amendment to the United States Constitution and made applicable to the states under the Fourteenth Amendment applied in a probation revocation proceeding. *Id.* The court disagreed, adopting the following reasoning of the Ninth Circuit Court of Appeals:

> "An important aspect of our probation system is the placing of certain restrictions on the probationer . . . . These conditions serve a dual purpose in that they enhance the chance for rehabilitation while simultaneously affording society a measure of protection. Because violation of probation conditions may indicate that the probationer is not ready or is incapable of rehabilitation by integration into society, it is extremely important that *all reliable* evidence shedding light on the probationer's conduct be available during probation revocation proceedings.

> Consequently, to apply the exclusionary rule to probation revocation hearings would tend to frustrate the remedial purposes of the probation system. Not only would extension of the rule impede the court's attempt to assess a probationer's progress or regression, but also it would force probation officers to spend more of their time personally gathering admissible proof concerning those probationers who cannot or will not accept rehabilitation."

Id. at 902 (quoting *United States v. Winsett*, 518 F.2d 51, 54–55 (9th Cir. 1975)).

The court next considered whether, irrespective of the federal exclusionary rule, "exclusion is required under article I, section 8 of the Iowa constitution." *Id.* The court concluded exclusion of the evidence was not required under the state constitution for two reasons, first, because its "interpretation of article I, section 8 has quite consistently tracked with prevailing federal interpretations of the fourteenth amendment in deciding similar issues," and second, because a prior Iowa opinion, according to the court, adopted a constitutional balancing test "independently of any controlling federal precedent." *Id.* at 902–03 (citing *State v. Swartz*, 278 N.W.2d 22, 23–25 (Iowa 1979)).

In sum, *Kain* unequivocally answered no to the question posed here: whether the federal and state constitutions' search and seizure provisions require exclusion of evidence in probation revocation proceedings. *Kain*'s analysis of the issue under the federal constitution is dispositive of Shoemaker's federal constitutional argument. *Kain*'s analysis of the state constitution requires further discussion because a recent Iowa Supreme Court opinion has cast doubt on at least a portion of that analysis.

In *State v. Ochoa*, 792 N.W.2d 260, 266 (Iowa 2010), the Iowa Supreme Court rejected the "lockstep" approach to interpretation of state constitutional provisions that the court adopted in prior opinions, including *Kain*. The court

stated, "[W]e now hold 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*, 792 N.W.2d at 267; *see also State v. Cline*, 617 N.W.2d 277, 285 (Iowa 2000), *abrogated on other grounds by State v. Turner*, 630 N.W.2d 601, 606 n.2 (Iowa 2001). To the extent *Kain*'s refusal to extend the state exclusionary rule to probation revocation proceedings was based on "prevailing federal interpretations of the fourteenth amendment in deciding similar issues," 378 N.W.2d at 902, we conclude the *Kain* holding has been called into question by *Ochoa*.

There remains the second basis for *Kain*'s holding under the state constitution. As noted, the court characterized this basis as a constitutional balancing test that was adopted "independently of any controlling federal precedent." *Id.* at 902–03. This rationale arguably remains viable after *Ochoa*. We say "arguably" because the court's characterization of the balancing test as "independent[ ] of any controlling federal precedent" is at odds with the language of the opinion the court cited—*Swartz*, 278 N.W.2d at 23–25.

In *Swartz*, the court had to decide whether the exclusionary rule applied to a sentencing proceeding. *Id.* at 23. The court held:

> Upon balancing the divergent policy considerations discussed, we conclude that evidence should not per se be inadmissible in a sentencing hearing solely upon the basis that, if tendered at trial, it would be subject to exclusion on constitutional grounds. We therefore decline to extend the exclusionary rule to those proceedings, absent some showing that the evidence in question was gathered in violation of the defendant's constitutional rights and for the express purpose of influencing the sentencing court.

Id. at 26. Notably, the *Swartz* court did not state that its holding was grounded in article I, section 8 of the Iowa Constitution. This calls into question the assertion in *Kain* that there was a state constitutional basis for the holding in *Swartz*. But, even if we were to read a state constitutional basis into *Swartz*, we believe the court there employed a "lockstep" rather than an "independent" analysis of the state constitution. Specifically, the court canvassed several federal opinions, including four United States Supreme Court decisions that, in its view, indicated "a trend toward a restrictive application of the exclusionary rule" in similar contexts. *Id.* at 24–26. The court relied on this federal precedent in declining to adopt a per se rule of inadmissibility in sentencing proceedings.

We believe *Swartz* simply stands for the proposition that the federal exclusionary rule grounded in the Fourth Amendment to the United States Constitution does not apply in a sentencing proceeding under the circumstances of that case. *Swartz* says nothing about whether the state exclusionary rule applies to such a proceeding, and it does not articulate an independent basis under the state constitution for declining to extend the state exclusionary rule to sentencing proceedings. For these reasons, we believe the second basis for *Kain*'s holding under the state constitution is also in doubt.

That said, *Kain* has not been overruled and the second basis has not explicitly been called into question.[1] For that reason, we believe *Kain*'s holding

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[1] We observe, however, that in *Cline*, our supreme court parted ways with the United States Supreme Court and declined to adopt a good faith exception to the exclusionary rule under the Iowa Constitution. 617 N.W.2d at 293. Much of the court's reasoning in *Cline* concerned its disagreement with the Supreme Court's limitations on the purpose and use of the exclusionary rule. *Id.* at 288–92. We think the reasoning of *Cline* could be extended to this case. But it is not our place to do so, as *Cline* did not expressly overrule, abrogate, or otherwise disapprove of its holding in *Kain*.

under the state constitution, to the extent it is based on an independent constitutional balancing test, is controlling. Relying on that holding, we conclude the exclusionary rule grounded in article I, section 8 of Iowa's constitution did not apply to Shoemaker's probation revocation proceeding. *See Kain*, 378 N.W.2d at 902–03. Accordingly, the district court acted appropriately in considering the evidence of alcohol usage gained by the officers following their entry into Shoemaker's home. We affirm the revocation of Shoemaker's probation.

AFFIRMED.