

IN THE COURT OF APPEALS OF IOWA

No. 1-737 / 10-1646
Filed December 7, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DANIEL LEE DIERKS,
Defendant-Appellant.

Appeal from the Iowa District Court for Tama County, Marsha Bergan,
Judge.

Defendant appeals his conviction for operating a motor vehicle while
intoxicated, second offense. **REVERSED AND REMANDED.**

Richard A. Bartolomei of Bartolomei and Lange, P.L.C., Des Moines, for
appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant
Attorney General, and Brent D. Heeren, County Attorney, for appellee.

Considered by Eisenhauer, P.J., and Doyle and Mullins, JJ.

DOYLE, J.

Daniel Dierks appeals his conviction for operating a motor vehicle while intoxicated (OWI), second offense. Dierks argues the district court erred in denying his motion to suppress evidence obtained after a warrantless entry into a business. We reverse and remand for further proceedings.

I. Background Facts and Proceedings.

On Thursday afternoon, February 19, 2009, Joseph Cellucci was driving south on Highway 63 towards Traer. Cellucci noted the erratic driving of a car in front of him. Cellucci called the county sheriff's dispatch and provided the car's location as well as the make, model, and license number. Cellucci continued to follow the car while speaking to dispatch.

Tama County Sheriff's Deputy Quandt lives in Traer. At 5:28 p.m., Quandt received a call from dispatch informing him of the possible drunk driver and informing him of the make, model, and license number. Quandt drove towards the location of the moving car. Utilizing his in-car computer, Quandt ran the license plate number and learned the car was registered to Wendy Dierks of Traer. He then headed towards the Dierks's residence.

Dispatch told Quandt that Cellucci was following Dierks's vehicle and was informing the dispatcher of the car's movements. Cellucci's information, relayed to Quandt, included: Dierks's car crossed the center line, fluctuated in speed, nearly hit a bridge, and pulled into a Sinclair gas station. Cellucci also reported (and Quandt was told) an elderly male got out, went into the gas station, returned shortly with a brown bag, drove into Traer, and entered an alley. Cellucci followed the car into the alley and parked.

Dispatch told Quandt Dierks's car "had pulled in to a downtown alley on the north side of downtown Main Street." Quandt then drove to that location and pulled into the alley. Quandt testified:

A. There was an SUV type vehicle sitting in the alley, male . . . in the driver's seat was talking on the phone. It was obvious that was the reporting party. So I pulled up right next to him and talked to him, just briefly, just a few moments. He . . . pointed to where this garage was that he had reported to the dispatcher . . . pointed to that garage and that direction, said that was the vehicle.

I moved up to where that vehicle was parked [parked behind the vehicle,] and it was clearly the same vehicle that was reported to me by the dispatcher.

. . . .

A. The [garage] door was opened. It's like a two-stall garage on a business in downtown on an alley. The door was [open], the car was parked right in the middle of the garage.

Q. And did you locate anyone in the car? A. I got out. I looked in the vehicle. There was nobody inside the vehicle.

Q. And what did you do when you saw the car stopped and no one inside of the automobile? A. I continued up to the back of this business There is a big storm door that has no windows in it, and then there is a screen door. The storm door was standing wide open and the screen door was just shut, so the only thing that was closed was the screen door. And which I thought was kind of odd, because it was February; it was very, very, very chilly that day, so I thought that was kind of odd.

Q. Did you know at that time whether the business was open or closed? A. I did not. At that point . . . with it being a screen door I could look in and that's when I observed that it was a business. There was a conference room in the back of the business. There [were] a couple of rooms with a hallway running down the middle, some more desks toward the front of the office, business. That's when I clearly identified it as a business. I did not know which business it was, being—coming from the back of the business, I did not know which one it was . . . but I did know it was a business.

. . . .

Q. What did you do then? A. At that time I did knock on the door and just announced hello, and then entered into the business.

Q. And did you see anyone in the business? A. I did not see anybody in the business until I got a few steps in and then I could hear a male subject urinating in the restroom. . . . At that point I just kind of walked toward the bathroom, took a few more

steps in, and just moments later . . . Dierks [came] out of the restroom I explained why I was there, that we got a complaint on his driving, asked—I asked if he just arrived in that vehicle, which was parked in the garage, which he stated he did.

. . . .

Q. And did you have a conversation with him about why he was there or if he could be at that location? A. If we did, it wasn't very lengthy. I think he did identify that it was his business. At one point in time, I can't recall exactly when, it was no lengthy conversation why he was there, no. I did ask him if there was anybody else there and he said no, and he arrived there by himself.

. . . .

Q. And was there any discussion about whether or not it was open? A. After I got in and walked down the hall, it was just the lights in the back of the business were on. There [were] no lights on in the front of the business. I didn't ask. It was pretty obvious after I got inside that it was closed. There was nobody else there.

. . . .

A. I know the back room was lit and I believe the hallway was illuminated by the back lights. If there was a hall light in the hallway specifically lit, I don't know.

Q. . . . [Y]ou told me that your entire encounter in the hallway with [Dierks] was approximately five to ten seconds; correct?

A. Approximately, just my brief encounter, yes.

Q. And you determined in five to ten seconds that he was intoxicated; correct? A. Yes.

Q. But he wasn't in a public place, was he? A. No.

Dierks agreed to accompany Quandt outside. Quandt administered a field sobriety test, which Dierks failed. After Dierks refused a preliminary breath test, he was arrested and transported to the sheriff's office. Quandt invoked implied consent, and Dierks was charged with OWI, third offense.

In April 2009, Dierks filed a motion to suppress alleging a violation of his United States and Iowa constitutional rights to be free from unreasonable search and seizure. After hearing, the district court denied the motion. Dierks was tried on the minutes of testimony and found guilty of OWI, second offense.

Dierks appeals, seeking suppression of the evidence gathered after Quandt entered the business. Dierks first argues that he had a legitimate expectation of privacy in the business. The State asserts Dierks did not show he had a legitimate expectation of privacy in the business at the time of Quandt's entry. Dierks also argues Quandt did not have probable cause to arrest, nor were there exigent circumstances to justify the warrantless entry into Dierks's business premises to seize Dierks. The State asserts Quandt had probable cause to arrest Dierks for OWI, he was in hot pursuit of Dierks, and delay to obtain a warrant risked the destruction of evidence of Dierks's intoxication. Considering the unique facts of this case, we conclude Dierks had a legitimate expectation of privacy that was unreasonably invaded by Quandt's warrantless search and seizure.

II. Scope of Review.

We review Dierks's claimed violation of constitutional rights "de novo in light of the totality of the circumstances." *State v. Lovig*, 675 N.W.2d 557, 562 (Iowa 2004).

III. Merits.

We utilize a two-part test in analyzing whether Quandt's warrantless entry was unreasonable and a constitutional violation. *See id.*

We first determine whether the person challenging the warrantless search has a legitimate expectation of privacy in the premises searched. This expectation of privacy must be shown to exist both subjectively and objectively. If this expectation exists, we proceed to the second step which requires us to determine whether the State has unreasonably invaded that protected interest.

Id. at 562-63 (internal quotations and citations omitted).

A. Legitimate Expectation of Privacy.

The determination of whether Dierks “has a legitimate expectation of privacy concerning a specific area is made on a case-by-case basis, considering the unique facts of each situation.” See *id.* at 563 (quoting *State v. Legg*, 633 N.W.2d 763, 767 (Iowa 2001)). In resolving this issue, we do not ask “whether the individual has chosen to conceal some private activity but whether the government’s intrusion infringes upon the personal and societal values protected by” the constitution. *Id.* (quoting *State v. Breuer*, 577 N.W.2d 41, 46 (Iowa 1998)).

“Although each case is unique,” we have differentiated business activity in a home. See *id.* (stating a guest in a home does not have a legitimate expectation of privacy if the guest is “on the premises merely to conduct a business transaction”). Additionally, “the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.” *Katz v. United States*, 389 U.S. 347, 351, 88 S. Ct. 507, 511, 19 L. Ed. 2d 576, 582 (1967).

Courts have also concluded that “[a]n open gate invites entry.” *United States v. Tolar*, 268 F.3d 530, 532 (7th Cir. 2001) (holding no constitutional violation when police entered an open business to ask the owner’s permission to conduct a search). In *United States v. Sandoval-Vasquez*, 435 F.3d 739, 742-44 (7th Cir. 2006), the officers in that case entered an open business around 4:30 p.m. by walking through the garage and a pedestrian entrance. The court noted the fact the business “may have been in the process of closing” did not make the entry unconstitutional, and distinguished an earlier case in which the officers

unconstitutionally entered “a business they knew was closed.” *Id.* at 743. We find these cases to be distinguishable from the case at hand.

The information known to Quandt at the time he arrived at and entered Dierks’s business was that the business was located on the main street business area of Traer. Quandt found the garage door of the garage attached to the business building open, as well as the business’s rear alleyway door, an unmarked solid steel security door, open. The attached screen door was closed. The time was 5:42 to 5:43 p.m. on a Thursday, a time of day when a main-street business is likely closed or in the process of closing.

Quandt entered Dierks’s business premises through the rear alleyway door. The record contains no evidence whatsoever that the public was invited, or even allowed, to enter through this door. There were “no signs, nothing” that said anything about a public entrance through the garage to the business. Moreover, there is no evidence in the record Dierks entered an area of the business premises open to the general public. In fact, Quandt admitted that when he encountered Dierks in the hallway, it was not a public place.

Under the record presented, we conclude the door was a private, not a public, entrance to the business. It makes no difference that the security door was open; the screen door to the private entrance was closed. There was no “open gate” inviting entry. *See Tolar*, 268 F.3d at 532; *see also Sandoval-Vasquez*, 435 F.3d at 742-44. Based on these specific facts and circumstances, we conclude Dierks had a legitimate expectation of privacy in the area of his business premises where he was confronted by Quandt.

B. Exigent Circumstances.

Having concluded Dierks had a legitimate expectation of privacy, Quandt's warrantless search was per se unreasonable and prohibited, unless Quandt acted reasonably under one of the recognized exceptions to the warrant requirement. *Lovig*, 675 N.W.2d at 565-66. The only exception arguably applicable in this case is the probable cause coupled with exigent circumstances exception. *See generally id.* Setting aside whether or not Quandt had probable cause to arrest Dierks for operating while intoxicated, there were no exigent circumstances to establish an exception to the warrant requirement. Although he was attempting to intercept the Dierks's car, Quandt was never in hot pursuit of Dierks. There was no chase. He first encountered the car only after it had been parked in the garage.

The absence of hot pursuit requires us to carefully examine the claim of destruction of evidence. *Id.* at 566. There was no evidence Dierks knew Quandt was looking for him. There was no evidence Quandt suspected Dierks was engaged in any purposeful activity within the business premises that would destroy the integrity of any future chemical tests. Dierks's opportunity to flee by vehicle was denied, as Quandt blocked Dierks's car in the garage with his patrol car. There was no evidence concerning any efforts by police to seek a warrant or to determine the amount of time it would take to secure a warrant. Like the situation presented in *Lovig*, the facts here do not support a finding of exigent circumstances. *See id.* at 566-67. We therefore do not believe Quandt was entitled to enter through the rear door without a warrant or consent.

Considering all of the circumstances, we find the State did not support a warrantless entry into Dierks's business premises. *See id.* Although the crime of OWI is a serious matter, we are unable to find exigent circumstances under the record in this case. Exigent circumstances did not exist merely because Dierks's blood alcohol level might have dissipated while the police obtained a warrant. *Id.* at 567. With no exigent circumstances, Quandt's search and seizure violated Dierks's constitutional protections. Accordingly, we reverse the district court's order denying Dierks's motion to suppress and remand for further proceedings.

REVERSED AND REMANDED.

Mullins, J., concurs; Eisenhauer, P.J., dissents.

EISENHAUER, P.J. (dissenting)

I respectfully dissent. The evidence does not show Dierks had a legitimate expectation of privacy in the business at the time of Quandt's entry. See *United States v. Tolar*, 268 F.3d 530, 532 (7th Cir. 2001) (upholding police entry into an open business).

At the time Quandt entered the business building, he knew the business was located on the main street business area of Traer, the garage door of the garage attached to the business building was open, and the back door to the business building itself was open, with only the screen door closed, suggesting someone had just entered the business. At 5:42 to 5:43 p.m. Thursday, it was a time of day when a business might be open or in the process of closing. Quandt observed no sign, barrier, or other indication the public was not permitted to enter the back entrance to the business building. Therefore, nothing asserted an expectation of privacy to anyone approaching the business from the public back alley.

Under these specific facts and circumstances, I am unable to conclude Quandt violated Dierks's reasonable/legitimate expectation of privacy. Quandt entered a business building where the business's lights were on in the room by the open back door. The business itself was in plain view to anyone looking through the screen door of the open back door of this business building. Quandt entered during a time of day when it is ambiguous whether the business was open or closed and he did not determine the business was, in fact, closed until after his entry. See *Thompson v. City of Lawrence*, 58 F.3d 1511, 1516 (10th Cir. 1995) (warrantless entry upheld where office was open to the public and

there was no evidence that customers needed permission to enter the business).

Accordingly, I would affirm the decision of the district court.