IN THE COURT OF APPEALS OF IOWA

No. 2-010 / 11-0243
Filed February 29, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DONNIE RAY ROSE,
Defendant-Appellant.

Appeal from the Iowa District Court for Lee County, William L. Dowell (Motion to Suppress) and Mary Ann Brown (Judgment), Judges.

Donnie Rose appeals from the judgment entered on his convictions for manufacturing more than five grams of methamphetamine, possession of a precursor with the intent to manufacture methamphetamine, and possession of marijuana. He challenges the district court's ruling denying his motion to suppress evidence found in a search of his van. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, and Michael P. Short, County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

I. Background Facts and Proceedings

On May 9, 2010, around noon, Iowa State Trooper Paul Rairden observed a Keokuk Contractors van parked on the shoulder of the road in a remote area near a salvage yard. Rairden stated he patrolled the area frequently and thought it was unusual that the van was parked in the industrial area on a Sunday morning.

Rairden pulled up next to the van and rolled down his window to ask if everything was okay. Rairden testified the driver of the van, Donnie Rose, did not roll down his window, but he indicated everything was fine. When Rairden pulled away, Rose also drove away slowly. As the van left, Rairden noticed a passenger in the van he had not initially seen. Rose drove very slowly down the road and rolled through a stop sign without coming to a complete stop. Rairden also noticed that two of the van's brake lights were out.

Rairden turned on his emergency lights and stopped the van. Rairden testified that as he turned on his lights, he saw the passenger of the van, later identified as Joseph Jones, lean over and reach between the driver and passenger seats, making a downward motion. Rairden testified he saw Jones make these furtive movements twice. Rairden testified this worried him because he feared Jones was hiding a weapon.

Rairden approached the driver's side of the van and asked for Rose's license, registration, and insurance information. Rose produced the requested information, and Rairden asked Rose to come back to his police car. Rose was cooperative. Rairden issued Rose a repair card for the brake lights and a

warning for running the stop sign. Rairden testified that once he had Rose in the police car, he requested backup because he intended to search the van and wanted backup there before he did so due to "the furtive movements of the passenger." Rairden and Rose sat in the patrol car while Rairden completed the paperwork; Jones apparently remained in the passenger seat of the van without raising any further suspicion.

Deputy Chad Donaldson arrived as backup, followed shortly by Keokuk Police Officer John Simmons. Rairden turned Rose over to Donaldson and approached the passenger side of the vehicle. Rairden informed Jones he had observed him making furtive movements and needed to check the area to see what Jones had been doing. Rairden had Jones exit the vehicle and stand back with Officer Simmons. Rairden then searched the center console area in which Jones had been reaching and found a box of pseudoephedrine pills, plastic baggies, and a small bag of what appeared to be marijuana. After completing a limited search, Rairden stopped and called the Lee County Narcotics Task Force to finish the search of the vehicle.

Defendant Rose was subsequently charged with manufacturing methamphetamine, possession of a precursor with the intent to manufacture methamphetamine, and possession of marijuana. Rose filed a motion to suppress, among other things, all evidence seized from the vehicle, asserting the search was unlawful as it was performed without a warrant or Rose's consent. The district court overruled the motion, finding Rairden's search was lawful as a protective search of the center console area in which he saw Jones reaching. Following a jury trial, Rose was convicted of all charges.

Rose now appeals, asserting the district court erred in denying his motion to suppress because Rairden was not justified in conducting a protective search based solely on passenger Jones's furtive movements.

II. Scope of Review

Because Rose challenges the search on constitutional grounds, our review is de novo. *State v. Riley*, 501 N.W.2d 487, 488 (Iowa 1993)

III. Discussion

The Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution provide protections against unreasonable searches and seizures by government officials. Because Rose does not suggest a reason to interpret the two constitutions differently, we interpret the claim under the Iowa Constitution as we do under the United States Constitution. *See State v. Bower*, 725 N.W.2d 435, 441 (Iowa 2006).

"Generally, to be reasonable, a search or seizure must be conducted pursuant to a warrant issued by a judge or magistrate. Unless an exception to the warrant requirement applies, searches conducted without a warrant are per se unreasonable." *State v. Kreps*, 650 N.W.2d 636, 641 (Iowa 2002) (internal citation omitted). One exception to the warrant requirement allows an officer to conduct a limited search of the passenger compartment of a car "if the police officer possesses a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officer to believe that the suspect is dangerous and the suspect may gain immediate control of weapons." *Michigan v. Long*, 463 U.S. 1032, 1049, 103 S. Ct. 3469, 3481, 77 L. Ed. 2d 1201, 1220 (1983). The Supreme Court later

stated the *Long* exception to the warrant requirement applies even when the danger stems from a non-suspect passenger, noting that *Long* "permits an officer to search a vehicle's passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is dangerous and might access the vehicle to gain immediate control of weapons." *Arizona v. Gant*, 556 U.S. 332, 347, 129 S. Ct. 1710, 1721, 173 L. Ed. 2d 485, 498 (2009) (internal quotation marks omitted).

The Iowa Supreme Court recognized this exception in *Riley*, where it noted, "specific and articulable suspicion does *not* mean that the officer must be 'absolutely certain that the individual is armed'; rather, the issue is whether a 'reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.'" 501 N.W.2d at 489 (quoting *Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883, 20 L. Ed. 2d 889, 909 (1968)). We must determine whether Rairden's concern for his safety was justified under the circumstances, warranting the search of Rose's car.[1] *See id.* at 490.

Our supreme court has recognized that other jurisdictions are split on the issue of whether furtive movements alone are sufficient to justify a protective search: some jurisdictions hold "furtive movements alone are enough to give an

[1] We note that *Riley* involved a protective search conducted immediately or shortly after the furtive movements were observed. 501 N.W.2d at 488. On appeal, Rose did not challenge the search of his van on the basis that the traffic stop had been completed or that the passage of time with Jones sitting alone in the van made the officer's need for self-protection less compelling. *See State v. Pals*, 805 N.W.2d 767, 775–77 (Iowa 2011) (declining to decide whether reasonable suspicion of criminal activity is required to legally expand a seizure to matters outside the scope of a traffic stop); *State v. Smith*, 683 N.W.2d 542, 546 (Iowa 2004) (declining to decide whether the Fourth Amendment requires that police have reasonable suspicion to seize a passenger once an initial, lawful stop based on a traffic violation has been completed).

officer a specific and articulable suspicion to conduct a protective weapons search of the passenger compartment of a vehicle," while other jurisdictions "require furtive movements to be accompanied by additional suspicious circumstances to justify a warrantless search of a vehicle during a stop for a minor traffic violation." *Id.* The supreme court in *Riley* did not decide which line of cases it chose to follow, finding additional suspicious circumstances existed and concluding that "under either line of authority the search did not violate the Fourth Amendment." *Id.*

Rose asserts the district court erred in denying his motion to suppress because Rairden was not justified in conducting a protective search based solely on passenger Jones's furtive movements. Rose asserts no additional suspicious circumstances were present in his case and asks this court to follow the line of cases holding furtive movements alone, absent additional suspicious circumstances, do not justify a protective search of the vehicle. The State asserts that this court need not decide whether furtive movements alone support a protective search because additional suspicious circumstances in this case accompanied the furtive movements, justifying the search. We agree with the State.

In *Riley*, a trooper approached a vehicle driven by an individual who was not wearing his seatbelt. *Id.* at 487. The trooper asked the passenger, Riley, for identification, but Riley reported he did not have identification with him. *Id.* The trooper and the driver walked to the back of the driver's car, and the trooper issued the driver a citation for not wearing a seatbelt. *Id.* The trooper told the driver he could return to the car and stepped to the passenger side of the car to

talk to Riley. *Id.* As he did so, the trooper saw passenger Riley make movements that led the trooper to believe Riley had placed something under the front seat. *Id.* at 488. The trooper testified he was concerned Riley may have been hiding a gun and feared for his safety because of Riley's furtive movements. *Id.* The trooper had Riley step out of the car and conducted a protective search of the area of the car in which he had seen Riley reaching. *Id.* He found a loaded gun. *Id.* A subsequent search of Riley's person revealed two bags of marijuana. *Id.*

Riley filed a motion to suppress the gun and marijuana evidence, asserting his Fourth Amendment rights had been violated because there was no probable cause for the search. *Id.* The supreme court concluded the "circumstances were sufficient to give [the trooper] an articulable suspicion that Riley may be hiding or retrieving a weapon and to therefore allow a search under the front seat of the car." *Id.* at 490. In reaching this conclusion, the supreme court determined furtive movements as well as additional suspicious circumstances were present, noting only one additional circumstance, "Riley's failure to provide identification upon request by [the trooper]."

Just as in *Riley*, in the present case Rairden "testified that he saw [the passenger] reaching down . . . [and] was immediately alarmed by these furtive movements." *Id.* "A reasonable interpretation of these movements was that [the passenger] was hiding or retrieving a gun, thus understandably causing [the trooper] to be concerned for his safety." *Id.* Further, as in *Riley*, Rairden searched only the center console area in which he saw Jones reaching, where

he suspected a weapon might be. *See id.* (noting the officer limited his search to what was minimally necessary to learn whether the passenger was armed).

Finally, we find that, as in *Riley*, additional suspicious circumstances were present in this case. *Riley* suggests that additional suspicious circumstances do not need to be especially incriminating or threatening when viewed in isolation—the supreme court found the mere fact that the passenger did not have identification was sufficient to constitute additional suspicious circumstances. *Id.* We conclude the additional circumstances in this case were at least as suspicious as those presented in *Riley.* In the present case, Rairden discovered the van parked in a remote, unusual place at an unusual time, on a Sunday. The driver of the van declined to roll down his window to converse with Rairden when Rairden stopped to ask if he was alright. Further, Rairden testified when he initially pulled up to the van, he did not see a passenger, raising the possibility the passenger may have been hiding.

Accordingly, we conclude Jones's furtive movements were accompanied by additional suspicious circumstances, giving Rairden a specific and articulable suspicion to justify a limited protective weapons search of the area in which he saw Jones reaching.

AFFIRMED.