IN THE COURT OF APPEALS OF IOWA

No. 2-016 / 11-0429
Filed February 29, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SCOTT DWAYNE BANKS,
Defendant-Appellant.

Appeal from the Iowa District Court for Buena Vista County, Charles K. Borth, District Associate Judge.

Defendant appeals the denial of his motion to suppress. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, David Patton, County Attorney, and John M. Stevens and James M. McHugh, Assistant County Attorneys, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

BOWER, J.

Defendant, Scott Banks, appeals from his conviction of possession of a controlled substance, second offense, in violation of Iowa Code section 124.401(5) (2009), a serious misdemeanor. He contends the district court erred in denying his motion to suppress. We affirm.

I. BACKGROUND AND PROCEEDINGS. On May 11, 2010, Officers Flikeid and Younie, of the Storm Lake Police Department, were dispatched to 119 East Railroad, in Storm Lake, on the report of a dog on a roof. When the officers arrived they observed a dog and determined the only access to the roof was through the adjacent apartment building at 117 East Railroad. The officers proceeded into the building and up the stairs to the second floor to a door which led to the common landing for apartments 2 and 3. As the officers were walking up the stairs they detected the odor of burnt marijuana, which became stronger. When the officers reached the top of the stairs, they knocked on the landing door and observed, through the broken-out window, the defendant, Scott Banks, exit apartment 3. As Banks approached the landing door and officers, the odor of marijuana became more intense.

The officers asked Banks to open the landing door and Banks complied. The officers advised Banks they had received a call about a dog on the roof next door. Banks stated the dog was on the roof, but had been brought inside. As the officers were speaking with Banks, an unknown individual shut and locked the door to apartment 3 behind Banks. They then advised Banks they could smell

marijuana. The officers could also hear someone inside of apartment 3 moving around who refused to open the apartment door upon the officers' requests.

Melissa Patten, resident of apartment 2, opened her door to find out what was going on in the hallway. The officers advised Patten they smelled marijuana, which they believed to be coming from Banks's apartment. Patten stated the smell was not coming from her apartment and the officers agreed.

Banks was handcuffed and patted down to ensure he did not have any weapons. During the pat-down Officer Younie felt something in Banks's right front pants pocket that felt and sounded like a plastic bag with a soft substance inside. Because of Younie's past experience in narcotics investigations, he reached inside Banks's pocket and located a clear plastic baggie containing what appeared to be marijuana. Banks was advised he was under arrest, placed in the patrol car, and transported to jail.

A trial information and minutes of testimony were filed on June 1, 2010, charging Banks with possession of a controlled substance, second offense. Banks filed a motion to suppress, which came on for hearing on October 25, 2010. Officers Flikeid and Younie testified as did Patten. The court denied Banks's motion to suppress on December 1, 2010, concluding Officer Younie had authority to conduct a weapons pat-down, and did not exceed the scope of the protective weapons search when he removed the baggie from Banks's pocket. The court found the marijuana was properly discovered pursuant to the plain-feel exception to the warrant requirement.

On February 28, 2011, a bench trial on the minutes of testimony, which included the police reports, was held. The court found Banks guilty of possession of a controlled substance, second offense, and sentenced Banks, pursuant to the State's sentencing recommendation, to forty-eight hours in jail with credit for time served, a fine of $315.00, the D.A.R.E and law enforcement initiative surcharges, court costs, and court-appointed attorney fees. Banks appeals contending the district court erred in denying his motion to suppress evidence.

II. SCOPE OF REVIEW. Because Banks argues the district court should have granted his motion to suppress pursuant to the federal and state constitution, our review is de novo. *State v. Pals*, 805 N.W.2d 767, 771 (Iowa 2011). We make "an independent evaluation of the totality of the circumstances as shown by the entire record." *State v. Kinkead*, 570 N.W.2d 97, 99 (Iowa 1997). We are not bound by the district court's conclusions, but we may give deference to its credibility findings. *State v.Harriman*, 737 N.W.2d 318, 319 (Iowa Ct. App. 2007). In addition, we consider the evidence presented at the suppression hearing, as well as the evidence at trial, which in this case included the police reports attached to the minutes of testimony. *State v. Andrews*, 705 N.W.2d 493, 496 (Iowa 2005).

III. MOTION TO SUPPRESS. The Fourth Amendment of the United States Constitution and article I, section 8 of the Iowa Constitution protect citizens from unreasonable searches and seizures. Generally for a search or seizure to be reasonable, it must be made pursuant to a warrant. *Kinkead*, 570

N.W.2d at 100. However there are exceptions to the warrant requirement, and one such exception was established in *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1884, 20 L. Ed. 2d 889, 906 (1968). Under *Terry*, an officer may stop an individual or vehicle based on a reasonable suspicion a criminal act has or is occurring. *Id*. This reasonable suspicion must be based on specific, articulable facts. *Id*. The facts must be judged on an objective basis: "[W]ould the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." *Id*.

In addition, if, while investigating the suspicious behavior, officers believe the person is armed and dangerous, they may conduct a pat-down search to determine if the person is carrying a weapon. *Id*. at 24, 88 S. Ct. at 1881, 20 L. Ed. 2d at 908. This search is limited, and is not to be used to discover evidence of a crime. *Minnesota v. Dickerson*, 508 U.S. 366, 373, 113 S. Ct. 2130, 2136, 124 L. Ed. 2d 334, 344 (1993). "If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed." *Id*. However, if, during a lawful pat-down, an officers feels an object "whose contour and mass makes its identity immediately apparent," the officer may seize that item just as they would under the plain-view exception. *Id*. at 375–76, 113 S. Ct. at 2137, 124 L. Ed. 2d at 346. This rule has become known as the "plain feel" exception. *Harriman*, 737 N.W.2d at 319.

In this case Banks maintains the police violated his rights in three ways: (1) the officers had no justification for stopping and detaining him in the landing

area, (2) the officers had no justification to conduct a pat-down, and (3) the officers exceeded the permissible scope of the pat-down.

A. *Terry* Stop. First, Banks contends the police did not have any justification to seize him when they placed him in handcuffs on the landing area of his apartment building. He concedes the officers testified they smelled burnt marijuana coming from the apartment he just exited, but maintains this alone is not enough to warrant placing him in handcuffs since there were no facts from which the officers could conclude he possessed marijuana or was engaged in other criminal activity.

From our review of all the evidence in this case, we find the police had an individualized suspicion Banks was engaged in criminal activity. The officers testified the odor of marijuana got stronger as they ascended the stairs to the second floor. Once Banks opened the landing door, the odor again became stronger. In addition, Officer Younie wrote in his police report the smell of marijuana was stronger around Banks himself.[1] Someone inside Banks's apartment shut and locked the apartment door behind Banks as he conversed with the officers, and the person refused to open the door upon the officers' request. There were only two apartments on the floor, and when Patten, the resident of the other apartment, opened her door to determine what was going on, the officers testified they were able to determine the smell of marijuana was

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[1] Banks maintains in his reply brief that we should consider only the evidence presented at the suppression hearing, and not the evidence admitted at trial, which included the police reports attached to the minutes of testimony. As stated earlier, in determining whether Banks's constitutional rights were violated, we consider all evidence, whether it was presented at the suppression hearing, or presented at the stipulated trial on the minutes of testimony. *State v. Andrews*, 705 N.W.2d 493, 496 (Iowa 2005).

not coming from her apartment. We find this evidence provided the police with a reasonable suspicion Banks was engaged in criminal activity which justified placing Banks in handcuffs to detain him under *Terry*.

B. *Terry* Pat-down. Even if his seizure was justified, Banks claims the officers did not have specific, articulable facts from which to conclude he was in possession of a weapon so as to justify the pat-down. In this case Officer Flikeid testified that he was aware of past incidents where Banks was using a weapon. However, Officer Flikeid could not recall any specific instance where he located a weapon on Banks. Officer Younie testified that in his experience weapons go hand in hand with drug use, and because they had detected the odor of marijuana, he felt it was necessary to check Banks for weapons for their safety. In addition, someone still inside Banks's apartment had just shut and locked the door behind Banks, and could be heard moving around the apartment refusing to open the door. We find the evidence sufficient to justify the officer's belief that a pat-down was necessary to ensure their safety during their preliminary investigation.

C. Scope of Pat-down. Finally, Banks claims that even if the pat-down was justified, Officer Younie exceeded the permissible scope of the pat-down by going into his pocket and seizing the baggie containing marijuana, where the identity of the item within the pocket was not immediately apparent. Banks contends Officer Younie did not know the baggie he felt contained marijuana until it was removed from his pocket. Therefore, Banks asserts the seizure of the item exceeded the scope of the search authorized by *Terry*.

In order to justify the seizure of an item detected during a *Terry* pat-down, the officer must have probable cause to believe the item is contraband. *Dickerson*, 508 U.S. at 376, 113 S. Ct. at 2137, 124 L. Ed. 2d at 346. Probable cause does not mean absolute certainty, but is a "flexible, common-sense standard" that requires "that the facts available to the officer would 'warrant a man of reasonable caution in the belief' that certain items may be contraband." *Texas v. Brown*, 460 U.S. 730, 742, 103 S. Ct. 1535, 1543, 75 L. Ed. 2d 502, 514 (1983) (internal citation omitted).

At the suppression hearing, Officer Younie testified he felt the crunch or crinkle of plastic in Banks's front pants pocket. Based on his experience he knew marijuana is routinely packaged in plastic baggies. He smelled the odor of burnt marijuana, and therefore, he opined the item in Banks's pocket was packaged marijuana. Officer Younie acknowledged that it was possible the baggie may have contained something other than marijuana, but as stated above, absolute certainty is not required. In addition, in his police report Officer Younie stated that he felt something in the pocket during the pat-down and that it felt like a plastic bag with a soft substance inside. We believe this evidence provided Officer Younie with probable cause to believe the item he felt in Banks's pocket was contraband, justifying his seizure of the item during the *Terry* pat-down.

AFFIRMED.

Eisenhauer, C.J., concurs; Danilson, J., dissents.

DANILSON, J. (dissenting)

I respectfully dissent. I do not think the *Terry* pat-down was supported by "particular facts" the officer could point to or from which he could reasonably infer that Banks was armed and dangerous. *See Sibron v. New York*, 392 U.S. 40, 64, 88 S. Ct. 1889, 1903, 20 L. Ed. 2d 917, 935 (1968) ("In the case of the self-protective search for weapons, [the officer] must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous."). Officer Younie, who performed the pat-down on Banks, explained that the reason for the pat-down was because "we smelled marijuana." He stated, "Many times weapons go hand in hand with drugs, drug use." I do not believe this record provides particular facts to support a reasonable belief that Banks was armed. Moreover, even if the pat-down was sufficiently supported, the pat-down can only support a warrantless seizure of contraband if the officer "feels an object whose contour or mass makes its identity immediately apparent." *Minnesota v. Dickerson*, 508 U.S. 366, 375, 113 S. Ct. 2130, 2137, 124 L. Ed. 2d 334, 346 (1993). Here, Officer Younie acknowledged that due to the smell of marijuana, he presumed the object was marijuana, but "[i]t could have been something else." I would reverse.