

IN THE COURT OF APPEALS OF IOWA

No. 2-253 / 11-0520
Filed June 13, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

GARY ALAN RUSSELL,
Defendant-Appellant.

Appeal from the Iowa District Court for Des Moines County, John M. Wright, Judge.

Defendant appeals from the district court denial of his motion to suppress illegal drugs seized from his person, and his subsequent conviction for possession with intent to deliver. **AFFIRMED.**

Scott Schroeder, Burlington, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Lisa Schaeffer and Tyrone Rogers, Assistant County Attorneys, for appellee.

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

DANILSON, J.

Gary Russell appeals from the district court denial of his motion to suppress illegal drugs seized from his person, and his subsequent conviction for possession with intent to deliver, in violation of Iowa Code section 124.401(1)(c)(2). The evidence from Russell's left pocket was suppressed by the district court, but we conclude the evidence was obtained pursuant to a valid consent search. Accordingly, the evidence in the right pocket and watch pocket was not "fruit of the poisonous tree."¹ We affirm denial of the motion to suppress evidence from the right and watch pockets as it was obtained in a valid search incident to a lawful arrest. Accordingly, we also affirm the subsequent conviction.

I. Background Facts and Proceedings.

On January 15, 2010, an off-duty West Burlington police officer, Angela Bonar, believed she witnessed a hand-to-hand drug transaction between Russell and an unidentified man at a local bar. Her companion identified Russell as a known drug dealer. Bonar contacted authorities who sent two Burlington officers to investigate. Officers Dale Wyatt and Laura Larger consulted with Bonar upon their arrival at the bar. Bonar identified Russell as the individual she reported. Wyatt's officer microphone recorded the subsequent events, though the quality of the audio recording lacks clarity.

¹ As aptly stated in *State v. Lane*, 726 N.W.2d 371, 380-381 (Iowa 2007): The phrase 'fruit of the poisonous tree' refers to indirect or secondary evidence obtained as a result of a prior illegality. See *Nardone v. United States*, 308 U.S. 338, 341, 60 S.Ct. 266, 268, 84 L.Ed. 307, 312 (1939) (coining the phrase for the first time). Under the doctrine, the 'fruits' of the prior illegality are excluded if they were an exploitation of that prior illegality. See *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S.Ct. 407, 417, 9 L.Ed. 441, 455 (1963). Thus, the doctrine operates as an extension of the exclusionary rule.

Officer Wyatt asked Russell to step out of the bar. After a brief discussion, Russell consented to a pat-down, which took place out of the view of Wyatt's squad car video camera.

Wyatt felt a soft bulge in Russell's left pants pocket. He asked what was in the pocket. Russell responded, "You can pull it out, money." Wyatt then asked, "Can I check it?" The audio then becomes indecipherable, but it is undisputed that Russell acquiesced. Officer Wyatt believed he had permission to search Russell's entire pocket. Russell now contends he intended to provide limited consent for seizure of the money.

Wyatt removed the bulge and discovered a large quantity of money, though the dollar value was unknown. Without another pat-down, Wyatt re-entered Russell's left pocket and removed a small plastic bag containing white powder. Russell did not object to the re-entry, or withdraw or express a limitation of his consent.

While Wyatt reported that he arrested Russell after the entire pat-down was completed, Russell testified that he was arrested after the search of the left pocket. Locking of the handcuffs is audible on the video immediately after the left pocket search.

Wyatt obtained consent to search Russell's right pocket, where he found another plastic bag containing white powder. The watch pocket contained additional contraband. In all, Officer Wyatt confiscated seven plastic bags and two vials of white powder.

Russell was charged with possession of a controlled substance with intent to deliver on March 1, 2010. He filed a motion to suppress the evidence seized and sought dismissal of the charge against him.

On October 1, 2010, the district court entered a ruling suppressing the controlled substance found in Russell's left pants pocket, finding the officer had limited consent to remove money, but no consent to search the pocket. The court denied the motion to suppress evidence found in the right pocket on the basis of consent and found the search of the watch pocket was supported by probable cause. Russell contends any consent he provided to search the right and watch pockets was not voluntary, and even if there was consent, it was tainted as fruit of the poisonous tree from the unlawful search of the left pocket. Russell filed an application for interlocutory review, which was denied by the Iowa Supreme Court on December 1, 2010. After a bench trial, the court found Russell guilty of possession of a controlled substance with intent to deliver, in violation of section 124.401(1)(c)(2).

II. Standard of Review.

We conduct a de novo review of a district court's ruling on suppression issues arising from alleged constitutional violations. *State v. Lowe*, ___ N.W.2d ___, 2012 WL 163027, at *4 (Iowa Jan. 20, 2012). We make an independent evaluation of the totality of the circumstances as shown by the entire record. *Id.* We give deference to the district court's fact findings due to its opportunity to assess the credibility of witnesses, but we are not bound by those findings. *Id.*

III. Discussion.

The Fourth Amendment to the United States Constitution 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, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. The language of the Fourth Amendment and article I, section 8 of the Iowa Constitution are substantially identical. Because Russell makes no argument that the federal and state constitutions should be interpreted or applied differently, our discussion applies to both constitutional claims. See *Lowe*, 2012 WL 163027, at *4.

The essential purpose of the Fourth Amendment “is to impose a standard of ‘reasonableness’ upon the exercise of discretion by government officials, including law enforcement agents, in order ‘to safeguard the privacy and security of individuals against arbitrary invasions’” *Delaware v. Prouse*, 440 U.S. 648, 653–54 (1979) (quoting *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 312 (1978)). Evidence obtained in violation of this safeguard is inadmissible in a prosecution, no matter how relevant or probative the evidence may be. *State v. Manna*, 534 N.W.2d 642, 643–44 (Iowa 1995).

Generally, a warrantless invasion of a protected area is per se unreasonable unless it falls within a recognized exception to the warrant requirement. *Lowe*, 2012 WL 163027, at *6. A voluntary consent search is one of those exceptions. *Id.* at *10. However, consent to search may be limited in scope. *State v. McConnelee*, 690 N.W.2d 27, 30 (Iowa 2004).

We derive the scope of an individual’s consent by considering what a “typical reasonable person [would] have understood by the exchange between

the officer and the suspect.” *Id.* at 30-31 (quoting *Florida v. Jimeno*, 500 U.S. 248, 251(1991)). This determination is based on the totality of the circumstances and includes not only the language authorizing consent, but also any gestures and other nonverbal conduct displayed. *Id.* at 30. At any time before the search is completed, the person who initially gave consent may limit, withdraw, or revoke the same. *State v. Sanford*, 474 N.W.2d 573, 575 (Iowa 1991). But to do so, he or she “must clearly inform the appropriate official that the initial consent has been limited, withdrawn or revoked.” *Id.*

Though Officer Wyatt had reasonable and individualized suspicion to justify a *Terry* stop and pat-down search to determine if Russell was carrying a weapon, the permissible scope of that search was limited. *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993). Wyatt did not feel any object that was immediately identifiable as a weapon or other contraband. Thus, search of the left pocket could only be upheld based on consent.

A. Consent—Left Pocket.

After initiating a pat-down, Wyatt felt a soft bulge in Russell’s left pants pocket. Wyatt asked what was in the pocket. Russell responded, “You can pull it out, money.” Wyatt then asked, “Can I check it?” The audio recording of Russell’s response is indecipherable; however, it is not disputed that Russell acquiesced. Russell’s first statement was specific to removal of money. However, Russell does not allege that in response to the officer’s second request to “check it” he limited his permission to removal of the bulge or the money.

Our supreme court has observed that “[e]ven though the defendant’s failure to object to the scope of the officer’s search is an indication the search

was within the initial consent, the natural reluctance of a citizen to interfere with an officer is an equally likely explanation for the defendant's silence." *McConnelee*, 690 N.W.2d at 32. But here, Russell has not suggested that he remained silent for that reason.

We conclude a reasonable person would construe the officer's second request, "Can I check it?" to reference the pocket, not the money. The officer's initial inquiry was also about the contents of Russell's pocket. See *Id.* at 31-32 (in response to officer's inquiry about a leafy substance on a car stereo, defendant's permission to "check it" authorized officer to examine the leafy substance only, not the whole car). Unlike *McConnelee*, Officer Wyatt's inquiries were focused on the broader search area—the left pocket—not specific to a suspicious item within it. Russell's revelation that the bulge was money does not limit the consent Russell subsequently provided.

Moreover, it is undisputed that Russell consented to the officer taking money out of the pocket. Officer Wyatt re-entered the left pocket to confirm he had removed all of the money. Russell did not object to the re-entry, or give any indication he was withdrawing consent. Thus, evidence from the left pocket was validly obtained and admissible.

B. Search Incident to Arrest—Right and Watch Pockets.

Search incident to a lawful arrest is another well-recognized exception to the warrant requirement. *State v. Naujoks*, 637 N.W.2d 101, 107 (Iowa 2001). "A lawful arrest is, of course, a predicate for a lawful search incident to the arrest." *State v. Ceron*, 573 N.W.2d 587, 589 (Iowa 1997). A warrantless arrest must be supported by probable cause in order to be valid. *Id.* at 592.

Probable cause exists when the totality of the circumstances would lead a reasonable person to “believe that a crime has been or is being committed and that the arrestee committed or is committing it.” *State v. Freeman*, 705 N.W.2d 293, 298 (Iowa 2005) (quoting *State v. Bumpus*, 459 N.W.2d 619, 624 (Iowa 1990)). If the officer had probable cause to arrest at the time of the search, the search incident to arrest “need not be made *after* a formal arrest if it is substantially contemporaneous with it.” *State v. Horton*, 625 N.W.2d 362, 364 (Iowa 2001) (quoting *State v. Peterson*, 515 N.W.2d 23, 25 (Iowa 1994)).

Officer Wyatt approached the scene with a tip from an off-duty officer that the suspect was a known drug dealer. Officer Bonar believed she witnessed Russell complete a hand-to-hand sale of narcotics in exchange for cash. Wyatt obtained Russell’s consent to check his left pocket. Wyatt retrieved a large quantity of cash and a bag containing white powder, consistent with Bonar’s observation. After finding the drugs in the left pocket, Officer Wyatt had probable cause to arrest.

Because Officer Wyatt effectuated a lawful arrest, the search of the right and watch pockets were also lawful under the search incident to arrest exception to the warrant requirement. *See Freeman*, 705 N.W.2d at 298 (“If there is probable cause to arrest a person, then a search of the person arrested and the area within the person’s immediate control is lawful.”). Based on the temporal proximity between the search and the arrest, the search incident to arrest exception applies whether Russell was arrested immediately after the left pocket search or after the search of all pockets. Thus, the evidence from the right and watch pockets was lawfully obtained and admissible.

IV. Conclusion.

A warrantless search of the left pocket was valid pursuant to voluntary consent. Officer Wyatt inquired about the contents of Russell's pocket and requested permission to check it. Russell acquiesced. Russell did not object or give any other indication his consent was limited in scope. After Wyatt discovered suspected narcotics, he had probable cause to arrest. The search of the right and watch pockets was permissible pursuant to the search incident to arrest exception to the warrant requirement, as the search was conducted substantially contemporaneously with the formal arrest. All of the evidence was lawfully obtained and admissible. We affirm denial of the motion to suppress evidence from the right and watch pockets, and affirm Russell's conviction.

AFFIRMED.