

IN THE COURT OF APPEALS OF IOWA

No. 3-667 / 12-1150
Filed September 5, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JUSTIN DEAN SHORT,
Defendant-Appellant.

Appeal from the Iowa District Court for Plymouth County, James D. Scott (suppression) and Jeffrey A. Neary (trial), Judges.

Justin Dean Short appeals from his convictions of burglary and theft.

AFFIRMED.

Mark C. Smith, State Appellate Defender, and Theresa Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, and Darin J. Raymond, County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Vaitheswaran and Doyle, JJ.

EISENHAUER, C.J.

Justin Short, convicted of burglary and theft, appeals claiming the court erred in denying his pretrial motion to suppress. To the extent trial counsel failed to preserve error on his argument on Iowa constitutional grounds, he claims counsel was ineffective. We affirm.

I. Background Facts and Proceedings

On the morning of May 18, 2011, a rural Plymouth County home was burglarized. Stolen items included two flat-screen televisions, jewelry, and a \$100 gift card to Minerva's restaurant. The gift card was soon used at Minerva's, and the diner signed the receipt, "Justin Short." The waitress and manager identified a photo of defendant Justin Short as the person who used the card. Short was on probation, and his probation officer was contacted to get his most recent address. The probation officer accompanied deputies to a home belonging to Short's mother. His mother told the officers Short had been living with his girlfriend, Leya Lorenzen, and she hadn't seen him for a couple of weeks. Further investigation revealed Lorenzen's car was parked at a house on Jones Street in Sioux City. The officers were granted a search warrant, but when they arrived at the house, a local police officer assisting in the search reported he knew the home's resident was not Lorenzen. The resident did not know Lorenzen or Short, but told the officers there was an apartment next door and "people are coming and going from there all the time." When contacted, the owner of the apartment building informed the deputies Lorenzen had rented an apartment.

Deputy Craig Bartolozzi called the judge who had issued the search warrant and asked whether they should return to Le Mars to get another search warrant. The judge told Deputy Bartolozzi to change the address on the search warrant and execute it. The deputy crossed out the address of the house on the search warrant and wrote the address of the apartment. One of the deputies was also aware Short had signed a probation agreement “where he was subject to search.” Short was on probation for theft. Short had signed an agreement outlining several conditions of probation. Condition number four states:

I will submit my person, property, place of residence, vehicle, and personal effects to search at any time, with or without a search warrant or warrant of arrest, by any probation officer or law enforcement officer having reasonable grounds to believe contraband is present. Items found which are in violation of supervision or the law may be seized. I further understand that a refusal to consent to a search constitutes a violation of this agreement.

When the deputies executed the amended search warrant, Short, Lorenzen, and some children were present in the apartment. The search found the two flat-screen televisions and two jewelry boxes taken in the burglary, and Short admitted he had stolen them from the house. They also found the stolen Minerva’s gift card and a receipt in Short’s wallet. Short admitted he pawned some of the jewelry and took Lorenzen to eat at Minerva’s. Some of the stolen jewelry was recovered from the pawn shop.

A joint trial information charged Short and Lorenzen with burglary in the third degree and theft in the second degree. Short was also charged as a habitual offender on both of his charges. Short filed a motion to suppress, questioning the validity of the search warrant. The district court held a hearing

on the motion to suppress on March 20, 2012, and ultimately denied the motion. In a thorough analysis of the issuance of the warrant and its alteration, the trial court concluded the telephonic request to alter the search warrant was not a sufficient application for a search warrant, the telephonic authorization to search the premises at the other address did not amount to a valid search warrant, and the search pursuant to the telephonic authorization was improper. The court also found no exigent circumstances to permit the search. However, it denied the motion to suppress based on the consent given by Short in his probation agreement.

A jury convicted Short of burglary in the third degree and theft in the second degree. Short acknowledged two prior felony convictions for the purpose of the habitual offender enhancement. The court sentenced Short to an indeterminate term of imprisonment not to exceed fifteen years with a three-year mandatory minimum on both counts and ordered the sentences to run concurrently with one another. Short appeals.

II. Scope and Standard of Review

“We review claims the district court failed to suppress evidence obtained in violation of the federal and state constitutions de novo.” *State v. Dewitt*, 811 N.W.2d 460, 467 (Iowa 2012). When presented with such a claim, “we make an independent evaluation [based on] the totality of the circumstances as shown by the entire record.” *State v. Kurth*, 813 N.W.2d 270, 272 (Iowa 2012) (quoting *State v. Krogmann*, 804 N.W.2d 518, 522 (Iowa 2011)). “Each case must be evaluated in light of its unique circumstances.” *Id.* at 272 (quoting *Krogmann*,

804 N.W.2d at 523). Claims of ineffective assistance of counsel are reviewed de novo. *State v. Straw*, 709 N.W.2d 128,133 (Iowa 2006).

III. Error Preservation

Short contends the warrantless search was unconstitutional under article I, section 8 of the Iowa Constitution. While the State contends Short has failed to preserve his claims of an independent interpretation of the Iowa Constitution regarding warrantless searches of probationers, we conclude the issue was argued to the trial court, and the trial court's discussion of *State v. Ochoa*, 792 N.W.2d 260 (Iowa 2010), adequately preserved this issue for our review.¹

IV. Discussion

Short claims the trial court erred in holding the consent to search in his probation contract combined with the officer's reasonable suspicion Short had engaged in criminal activity made the search constitutional. Short argues the Iowa Constitution as interpreted in *Ochoa* stands for the proposition "probationers and parolees do not have a more limited right to privacy when it comes to their homes." See *Ochoa*, 792 N.W.2d at 289 ("[W]e find that the protection afforded by article I, section 8 extends beyond privacy and includes at least some notion of place and security.").

¹ Although the trial court discussed *Ochoa*, it concluded it was not determinative in this case. We agree. The search in *Ochoa* was a warrantless, *suspicionless* search of a *parolee*. *Ochoa*, 792 N.W.2d at 262. In the case before us, Short was on probation, not parole, and the officers had reasonable suspicion of criminal activity and that they would find stolen articles in Short's residence. In addition, our supreme court recently distinguished the analysis of consent in cases dealing with probation agreements from those dealing with parole agreements. *State v. Baldon*, 829 N.W.2d 785, 795 (Iowa 2013) (noting "we largely set aside the cases dealing with probation agreements. These cases are of limited value in analyzing the consent issue in parole agreements"). Both *Ochoa* and *Baldon* dealt with parolees and left open the question whether a warrantless search based on reasonable suspicion is unconstitutional. See *Baldon*, 829 N.W.2d at 789-90; *Ochoa*, 792 N.W.2d at 263.

The officers knew Short had been convicted of burglary, he was on probation, and consent to search was a condition of his probation. They had reasonable grounds to believe he had specific stolen property in his possession in the residence. Possession of stolen property is unlawful. Because of the terms of his probation, Short had a limited expectation of privacy.² Lorenzen's apartment was one of Short's residences, which he had agreed could be searched for contraband by a law enforcement officer. Considering the totality of the circumstances, we conclude the officers' warrantless search of Short's residence, based on a reasonable suspicion of criminal activity and limited in scope to specifically-described stolen property, was constitutionally valid under article I, section 8. The court did not err in overruling Short's motion to suppress.

AFFIRMED.

² Even if *Ochoa* is understood to extend Iowa's constitutional protection beyond privacy, the court only answered the question whether warrantless searches of parolees "without any particularized suspicion or limitations to the scope of the search" were permissible. *Ochoa*, 792 N.W.2d at 291. In the case before us, the officers had a reasonable, particularized suspicion Short had stolen property in the residence, and the scope of the search was very limited.