IN THE COURT OF APPEALS OF IOWA

No. 6-252 / 05-1316
Filed May 24, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANTONIO EUGENE RAGSDALE,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, K.D. Briner (Suppression) and Todd A. Geer (Trial), Judges.

Antonio Ragsdale appeals from his conviction and sentence for possession of marijuana with intent to deliver. **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Greta Truman, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brad Waltz and Bret Schilling, Assistant County Attorneys, for appellee.

Considered by Zimmer, P.J., and Miller and Hecht, JJ.

HECHT, J.

Antonio Ragsdale appeals from his conviction and sentence for possession of a controlled substance with intent to deliver. We reverse.

I. Background Facts and Proceedings.

In the afternoon of March 22, 2004, Waterloo police officer Steven Bose was on patrol in a high drug trafficking area and noticed Antonio Ragsdale standing near a convenience store. When Bose passed by the convenience store again a few minutes later, Ragsdale was still standing nearby. Bose stopped his vehicle and spoke with Ragsdale, who denied having anything illegal in his possession. When Bose requested consent to search Ragsdale, Ragsdale appeared nervous and responded by putting his hands in his pants pockets. After Ragsdale complied with Officer Bose's command to remove his hands from his pockets, Bose noticed a bulge in Ragsdale's left front pants pocket. When Bose asked what was in the pocket, Ragsdale retrieved only a business card and handed it to the officer. When Bose asked what else remained in the pocket, Ragsdale took flight.

Officer Bose apprehended Ragsdale after giving chase for about a block. Upon detaining Ragsdale, Bose reached into the left pants pocket and retrieved seven baggies containing marijuana. Based upon the nature of the packaging and the circumstances of Ragsdale's arrest, Ragsdale was charged with possession of marijuana with intent to deliver.

Ragsdale sought unsuccessfully to suppress the evidence obtained as a consequence of the warrantless search. Ragsdale waived his right to a jury trial and was subsequently convicted of possession of cocaine with intent to deliver

following a trial to the court. The district court imposed a suspended sentence of five years and Ragsdale was placed on probation.

Ragsdale now appeals, claiming the district court erred in denying his motion to suppress the fruits of the illegal search.

II. Scope and Standard of Review.

We review constitutional issues de novo. *State v. Biddle,* 652 N.W.2d 191, 200 (Iowa 2002). Any evidence obtained in violation of a defendant's Fourth Amendment right against unreasonable search and seizure is inadmissible and should be suppressed regardless of its relevance and probative value. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 1691, 6 L. Ed. 2d 1081, 1090 (1961); *State v. Jones*, 666 N.W.2d 142, 145 (Iowa 2003).

III. Discussion.

A warrantless search is per se unreasonable unless it falls within a recognized exception to the warrant requirement. *State v. Folkens*, 281 N.W.2d 1, 3 (Iowa 1979). "One such exception exists where there is probable cause for the search, and exigent circumstances require that the search be conducted immediately." *State v. Cline*, 617 N.W.2d 277, 282 (Iowa 2000) *abrogated on other grounds* by *State v. Turner*, 630 N.W.2d 601 (Iowa 2001). It is the burden of the State to prove by a preponderance of the evidence that the search falls within an exception. *Id.*

Probable cause exists when the totality of the circumstances would cause a reasonably prudent person to believe evidence of a crime will be discovered in the place to be searched. *Id*. Where the circumstances known to the officer give rise only to reasonable suspicion of criminal conduct, however, the officer is not

permitted to seize and conduct a full search of the detained person, but is instead only authorized to conduct a weapons search. *See Terry v. Ohio*, 392 U.S. 1, 29-30, 88 S. Ct. 1868, 1884, 20 L. Ed. 2d 889, 910-11 (1968) (noting that where reasonable suspicion exists, officer could touch the outer surface of suspect's clothing to determine if weapons were present and could remove from the suspect's person any weapons found from this limited search, but officer could not search inside the pockets or under the outer surface of the clothing); *see also Minnesota v. Dickerson*, 508 U.S. 366, 375-376, 113 S. Ct. 2130, 2137, 124 L. Ed. 2d 334, 340 (1993) (holding under an extension of the plain-view doctrine that officer conducting *Terry* weapons search may seize object "whose contour or mass makes its [illicit] identity immediately apparent," so long as the identity of object is not discovered as a result of overt squeezing or manipulation).

Here, it is undisputed that when Officer Bose reached into the pocket and retrieved the individually packaged baggies of marijuana, his search of Ragsdale's clothing went well beyond the scope of a weapons pat-down. The State, therefore, must show probable cause, not merely reasonable suspicion, existed at the time Bose conducted the search. *Cline*, 617 N.W.2d at 282.

The following facts were known to Officer Bose at the time he conducted his search of Ragsdale: (1) Ragsdale had been loitering around a convenience store in an area known to Bose to have high drug traffic, (2) Ragsdale appeared nervous, (3) a bulge was visible in Ragsdale's left pants pocket, (4) Ragsdale fled upon being asked to remove the contents of the pocket. The State contends

these factors, viewed together in the light of Officer Bose's unique experience and training, give rise to probable cause.[1]

In support of its contention, the State references our supreme court's opinion in *State v. Bumpus*, 459 N.W.2d 619, 624 (Iowa 1990), where we find the following language:

> It is a well-recognized principle that once a police officer has the requisite reasonable suspicion to make a '*Terry* stop,' and the subject takes flight when approached by the officer, the circumstances may justify the officer making the arrest [and conducting a search of the individual].

However, it is clear from the holding in *Bumpus* that the arresting officer must possess a reasonable and articulable suspicion of criminal activity prior to the suspect's flight before the suspect's flight will be said to raise that suspicion to the level of probable cause. We note that in *United States v. McFadden*, 722 F.

[1] The State also asserts Officer Bose possessed probable cause to arrest Ragsdale for interference with official acts, and hence could have performed the search incident to that arrest. We find this assertion to be without merit. At the time Bose asked Ragsdale about the bulge in his pocket, Ragsdale was not under reasonable suspicion and was not obligated to answer. *Florida v. Royer,* 460 U.S. 491, 497, 103 S. Ct. 1319, 1324, 75 L. Ed. 2d 229, 236 (1983); *see also Graves v. City of Coeur D'Alene,* 339 F.3d 828, 840-841 (9th Cir. 2003) (holding that defendant's refusal to give name, provide identification, and to consent to search were not legitimate bases on which to support an arrest for obstructing an officer where officer did not possess independent probable cause to arrest). Bose was not attempting to execute a search warrant naming Ragsdale, nor do we believe Bose possessed probable cause to arrest Ragsdale at the time Ragsdale chose to flee and was apprehended. *See State v. Hauan*, 361 N.W.2d 336, 340 (Iowa Ct. App. 1984) (noting that generally, convictions for obstruction of justice occur where defendants fail to cooperate with officers who already possess probable cause to believe the defendant was involved or connected to some criminal activity). To countenance the State's obstruction of justice argument in the context of a random investigatory search would give police probable cause to arrest whenever a suspect flees or is otherwise less than forthcoming with answers to investigative questions, and would therefore undercut the protections afforded to every citizen under the Fourth Amendment to be free from unreasonable search and seizure.

Supp. 807, 809-10 (D.D.C. 1989), a case cited in *Bumpus* in support of our supreme court's holding, the court stated:

> While flight alone cannot give rise to probable cause; when coupled with a pre-existing reasonable and articulable suspicion, it can be important corroborating evidence. Thus, if there already exists a significant degree of suspicion concerning a particular person, the flight of that individual upon the approach of the police may be taken into account and may well elevate the pre-existing suspicion up to the requisite Fourth Amendment level of probable cause.

In *McFadden*, the police were provided with an anonymous tip concerning a future drug transaction which also provided an exact description of the suspect's vehicle, license plate, and physical characteristics. *Id*. at 809. These circumstances, coupled with the fact that the encounter took place in a high drug-trafficking area, provided police with a pre-existing reasonable suspicion. Because the suspect attempted to flee, the court concluded the police had probable cause to arrest him. *Id*. at 810. Similarly, in *Bumpus*, the arresting officers possessed reasonable suspicion before the suspect took flight because the officers had previously observed the suspect and others make some type of exchange in an area noted for heavy drug trafficking. Bumpus, 459 N.W.2d at 623-24. In short, we find the circumstances of both *Bumpus* and *McFadden* are distinguishable from those in the case now before us.

We believe the facts of this case more closely resemble those present in *Cline*. In *Cline*, officers arrived at night at an abandoned, uninhabitable house which had been the subject of two independent concerned- citizen reports received earlier the same day, both complaining of drug activity at the house. *Cline*, 617 N.W.2d at 279. As the officers approached the house on foot, they heard a vehicle start in a side alley. *Id*. One of the officers proceeded around

the house and saw a van backing out of the alley with its headlights off in an attempt to avoid detection. *Id*. The officer successfully stopped the van and arrested the driver. *Id*. After handcuffing the driver, the officer reached into her pants pocket and retrieved methamphetamine. *Id*. Despite the fact that the driver of the van had been present in a house noted for recent drug activity and which was the subject of two independent, reliable citizen tips that very day, our supreme court held that the driver's subsequent flight was not sufficient to elevate whatever pre-existing suspicion the officers maintained concerning the driver's narcotics possession to the level of probable cause. *Id.* at 283.

Here, unlike in *McFadden* or *Bumpus*, Ragsdale was not observed participating in an exchange before he was approached by Officer Bose, nor was there a readily verifiable anonymous tip available to Bose which linked Ragsdale to drug activity. We do not believe Ragsdale's apparent nervousness and his day-time presence in a high drug-trafficking area, without more, can together transform a simple hunch into a reasonable suspicion. *See Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S. Ct. 673, 676, 145 L. Ed. 2d 570, 576 (2000) (stating "[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime"); s*ee* also *Alabama v. White,* 496 U.S. 325, 329, 110 S. Ct. 2412, 2416, 110 L. Ed. 2d 301, 308 (1990) (noting that reasonable suspicion does not equate with a mere inchoate speculation or unparticularized hunch, rather the circumstances must provide an objective, articulable basis for the officer's suspicion of wrongdoing).

Indeed, we believe the officers' suspicion that the driver in *Cline* was in possession of illicit drugs is far more reasonable in our view because unlike Ragsdale – a random person who happened to be standing alone in an area generally known for drug traffic – the driver in *Cline* had emerged from an uninhabitable house about which two concerned citizens had earlier in the day reported possible drug activity. *Cline*, 617 N.W.2d at 279. While there are very few reasons why a person would be present in the house in *Cline* other than the drug activity reported by concerned neighbors, there are by comparison a myriad of reasons unrelated to drug trafficking for a person to stand near a convenience store in broad daylight.

We also do not believe the additional fact that Officer Bose observed a bulge in Ragsdale's pocket is sufficient confirmation of his initial hunch to transform the hunch into the reasonable suspicion needed to permit Bose to conduct a *Terry*-frisk prior to Ragsdale's flight. While Bose testified at the suppression hearing that he "presumed [the bulge] was possible narcotics," we note there was no objective indicator on which Bose could rest his suspicion. Nothing about the shape or contour of the bulge suggested it was the result of baggies containing marijuana, and the mere fact that Ragsdale refused to show Bose the contents of his pocket, which was his right, cannot provide the necessary support to broaden the investigation. *See Graves v. City of Coeur D'Alene,* 339 F.3d 828, 840-841 (9th Cir. 2003) (holding that defendant's refusal to give name, provide identification, and to consent to search could not be used in determining whether probable cause existed to arrest defendant based on the suspicion he was carrying a bomb).

To be sure, Ragsdale's subsequent flight, when combined with the other factors, did provide Bose with the requisite reasonable suspicion to detain Ragsdale, make further investigative inquiry, and conduct a pat-down search of Ragsdale's person. *Wardlow*, 528 U.S. at 124, 120 S. Ct. at 676, 145 L. Ed.2d at 576-77 (holding that suspect's flight while present in an area known for heavy drug activity gave rise to reasonable suspicion to perform a *Terry* stop and frisk). Bose, however, exceeded his authority by searching inside the pants pocket without probable cause and in violation of Ragsdale's Fourth Amendment rights. *Cline*, 617 N.W.2d at 283. We conclude the evidence seized as a result of this unreasonable search should have been suppressed. *Jones*, 666 N.W.2d at 145. We therefore reverse the district court's denial of Ragsdale's motion to suppress, vacate the conviction and sentence, and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.