

IN THE COURT OF APPEALS OF IOWA

No. 6-912 / 05-1988
Filed December 28, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DUSTIN JOSHUA CAMPBELL,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Jane F. Spande, motion to suppress, and Fae Hoover-Grinde, trial, District Associate Judges.

The defendant appeals following his conviction for possession of marijuana. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shellie L. Knipfer, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Harold Denton, County Attorney, and Nicholas Maybanks, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Vogel, J., and Brown, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

VOGEL, J.

Dustin Campbell appeals following his conviction for possession of marijuana, in violation of Iowa Code section 124.401(5) (2005). We affirm.

Background Facts and Proceedings.

At 1:43 a.m. on June 23, 2005, Officer Daniel Jabens of the Cedar Rapids Police Department observed Campbell pacing back and forth near a parked white van. Concerned that Campbell was attempting to break into the van, Officer Jabens parked his patrol car across the street and watched him. As Campbell neared the passenger side of the van, Officer Jabens called for assistance and approached the van. Jabens found Campbell sitting in the front passenger seat with his feet hanging out the open door and noticed a “very strong” smell of burned marijuana emanating from the van.

Officer Jabens asked Campbell what he was doing. Campbell, stepping out of the van, responded that the van belonged to his father but that because he had been smoking marijuana and drinking he did not want to drive it home. He claimed he was waiting for a ride from his sister. Jabens later testified that Campbell’s demeanor appeared to alternate between agitation, confusion, and indifference. Responding to Officer Jabens’ questioning, Campbell denied that he had any identification on his person.

At the hearing on the motion to suppress, the testimony of Officer Jabens and that of Campbell differed significantly as to what next occurred. According to Officer Jabens, he conducted a pat-down of Campbell during which he felt an object in Campbell’s front pocket that he believed, based on his experience in detecting and identifying drug paraphernalia, to be a marijuana pipe. He then

instructed Campbell to remove the object from his pocket. Campbell complied, produced a marijuana pipe, and also admitted to Officer Jabens that he had some marijuana in his wallet.

However, according to Campbell's version of the events, Officer Jabens told him that he "needed to search" him. Officer Jabens then patted him down and felt a check cashing card in his front pocket. As the officer removed the card, he discovered the marijuana pipe behind it. Campbell further testified that Officer Jabens next pulled Campbell's wallet out of his back pocket and discovered the marijuana.

Based on these discoveries the State charged Campbell with possession of marijuana. Campbell subsequently moved to suppress the evidence seized during the search of his person, contending Officer Jabens conducted an illegal search. Following a hearing, the court denied the motion. After the matter was submitted to the court for a bench trial, the court found Campbell guilty as charged. It sentenced him to two days in jail and fined him \$250. Campbell appeals, contending the court erred in denying his motion to suppress.

Scope of Review.

Campbell alleges the district court should have granted his motion to suppress based on the Fourth Amendment; therefore, our review is de novo. *State v. Carter*, 696 N.W.2d 31, 36 (Iowa 2005). "Under this review, we make an independent evaluation of the totality of the circumstances as shown by the entire record." *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001). "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.*

Analysis.

The Fourth Amendment to the United States Constitution assures “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV. Warrantless searches and seizures are per se unreasonable, unless one of the few carefully drawn exceptions to the warrant requirement exists. *State v. Lewis*, 675 N.W.2d 516, 522 (Iowa 2004). “Exceptions recognized by this court are searches based on consent, plain view, probable cause coupled with exigent circumstances, searches incident to arrest, and those based on the emergency aid exception.” *Id.* The State has the burden to prove by a preponderance of the evidence that a recognized exception to the warrant requirement is applicable. *State v. Cadotte*, 542 N.W.2d 834, 836 (Iowa 1996), *abrogated on other grounds by Turner*, 630 N.W.2d at 606 n.2.

In analyzing Campbell’s motion to suppress, the court rejected the State’s contention that Campbell had consented to the search of his person and the seizure of the drugs and pipe. It also found that Officer Jabens was not warranted in conducting a *Terry*¹ pat-down because “there’s nothing that would justify [the officer’s belief] that he was dangerous or armed.” However, it did conclude that the search was justified “under the automobile exception to the search warrant.”

On appeal, Campbell argues the court erred in applying the automobile exception, for the simple reason that the exception only applies to searches of motor vehicles, not people. See *State v. Dawdy*, 533 N.W.2d 551, 556 (Iowa

¹ *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

1995). While there is some merit to his assertion, we believe the court used the phrase “automobile exception” in a broader, more colloquial sense. We conclude the court actually determined the search was justified due to the existence of probable cause and exigent circumstances. *United States v. Banshee*, 91 F.3d 99, 102 (11 Cir. 1996) (recognizing that this “rule applies equally to searches of person and property.”). We find this manifested in the language used by the court in its motion to suppress. In its on-the-record ruling, the court stated:

But I find it very interesting in terms of the constitutional issue because the officer having at that point made a decision to not arrest the defendant is left with the choice of allowing the defendant to leave in an automobile, so in essence the defendant’s search is justified under the automobile exception to the search warrant. It’s no different than if the officer having grounds to stop the vehicle he detected an odor of alcohol, observed obvious impairments in the passenger, then has a right to search the passenger for evidence of use.

I find it very interesting, but *I find that as an exigent circumstance to this on the basis of probable cause only, not consent.*

(Emphasis added).

As the State properly characterizes it, the automobile exception is merely a “subset” of searches based on probable cause and exigent circumstances. See *State v. Nitcher*, 720 N.W.2d 547, 554 (Iowa 2006) (applying probable cause-exigent circumstances exception to search of home). We thus apply the rule that “[w]hen the police possess probable cause to conduct a search, but because of exigent circumstances, do not have time to obtain a warrant, they may search without a warrant.” *United States v. Juarez*, 573 F.2d 267, 274 (5th Cir. 1978).

First, from his own observations Officer Jabens had probable cause to believe that Campbell was both intoxicated and possessed illegal drugs. We thus next ask whether there were exigent circumstances. “Exigent circumstances usually include danger of violence and injury to the officers or others; risk of the subject’s escape; or the probability that, unless taken on the spot, evidence will be concealed or destroyed.” *State v. Holtz*, 300 N.W.2d 888, 893 (Iowa 1981).

Given the late hour, Campbell’s access to the van, or the anticipated arrival of his sister with a ride, along with the ready ability to discard the marijuana, we conclude the exigency of the situation was well-established. Accordingly, we conclude the court properly upheld the search of Campbell as a lawful search based on probable cause and exigent circumstances. We therefore affirm the ruling denying Campbell’s motion to suppress and thus his conviction for possession of marijuana.

AFFIRMED.