IN THE COURT OF APPEALS OF IOWA

No. 7-602 / 06-1770
Filed October 12, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT ARTHUR ALLEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, James D. Coil, District Associate Judge.

Robert Allen appeals following his convictions of assault on a peace officer causing bodily injury, interference with official acts causing bodily injury, assault on a peace officer, and possession of marijuana. **AFFIRMED.**

Andrew Howie of Hudson, Mallaney & Shindler, P.C., West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Michelle Wagner, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Vogel and Baker, JJ.

VOGEL, J.

Robert Allen appeals from his convictions for possession of marijuana, assault on a peace officer, assault on a peace officer causing bodily injury, and interference with official acts causing bodily injury. Allen asserts on appeal that the district court erred in not granting his motion to suppress and in not instructing the jury on self defense. Because we agree with the district court that the search of Allen and his backpack were incident to a lawful arrest and there was not substantial evidence to instruct the jury on self defense, we affirm.

I. *Background Facts and Proceedings*.

On July 2, 2006, police officers were called to the Three Kings bar as the result of a fight. After the officers secured the outside premises, a bar employee requested that the officers assess the damage that occurred inside the bar. Once inside, an officer heard a man at the back of the bar, yelling loudly and using vulgar language. The officer went to investigate and discovered it was Allen who was yelling obscenities and requested that he quiet down. In spite of this request, Allen, who had the odor of alcohol on his breath and was slurring his speech, continued to act in a loud and disruptive manner. The officer decided to place Allen under arrest for public intoxication. Allen resisted the officer's attempts to handcuff him by refusing to place his arms behind his back. After two requests for Allen to relax his arms and allow the officer to handcuff him, the officer warned Allen that he would use pepper spay on him if he did not comply with his request. Allen did not comply and the officer sprayed Allen's face. Allen was then handcuffed and removed from the bar. Outside the bar, Allen continued to resist arrest by trying to pull away from the officer and reach into his

pockets. Seeing that Allen was still struggling, another officer came to assist in subduing and searching Allen. During the struggle, Allen attempted to spit on an officer and bit another officer's finger. Allen was then sprayed with pepper spray a second time, which ultimately enabled the officers to gain control over Allen. Officers searched Allen and found three folding knives and a marijuana pipe in his pocket and then searched Allen's backpack, finding a second marijuana pipe and an unopened can of beer, among other items.

Allen was charged with public intoxication in violation of Iowa Code sections 123.46 and 123.91 (2005), assault on a peace officer in violation of Iowa Code sections 708.1 and 708.3A, assault on a peace officer causing bodily injury in violation of Iowa Code sections 708.1 and 708.3A, interference with official acts causing bodily injury in violation of Iowa Code section 719.1, and possession of a controlled substance in violation of Iowa Code section 124.401(5). Allen pled not guilty. Prior to trial, Allen filed a notice of self defense and a motion to suppress all evidence obtained from the search of his person and backpack. The motion to suppress was denied and the case went to trial. At trial, the court declined Allen's request to instruct the jury on self defense. The jury returned a not guilty verdict on the charge of public intoxication, but returned guilty verdicts on all the remaining charges, from which Allen appeals.

II. *Motion to Suppress.*

Allen first argues that the district court erred in denying his motion to suppress, which alleged Fourth Amendment violations. We review constitutional claims de novo. *State v. McGrane*, 733 N.W.2d 671, 675 (Iowa 2007). This review requires us to "'make an independent evaluation of the totality of the

circumstances as shown by the entire record.'" *State v. Simmons*, 714 N.W.2d 264, 271 (Iowa 2006) (quoting *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001)). In a review of the district court's ruling on a motion to suppress, we consider both the evidence presented during the suppression hearing and the evidence introduced at trial. *State v. Andrews*, 705 N.W.2d 493, 496 (Iowa 2005) (citations omitted). We give deference to the factual findings of the district court due to its opportunity to evaluate the credibility of the witnesses, but we are not bound by such findings. *McGrane*, 733 N.W.2d at 675-76 (citing *Turner*, 630 N.W.2d at 606).

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; *See State v. Carter*, 696 N.W.2d 31, 37 (Iowa 2005) (stating the Fourth Amendment to the federal constitution is binding on the states through the Fourteenth Amendment to the federal constitution (citing *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 1691, 6 L. Ed. 2d 1081, 1090 (1961))). The Iowa Constitution also guarantees "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated." Iowa Const. art. I, § 8. Allen has not argued and we have not discovered a basis to distinguish between the federal and state constitution; therefore, our analysis applies equally to the protections afforded to citizens under both constitutions. *See State v. Nitcher*, 720 N.W.2d 547, 553 (Iowa 2006) (citing *Simmons*, 714 N.W.2d at 271). A warrantless search is per se unreasonable, unless the search falls within one of the recognized exceptions to

the warrant requirement. *McGrane*, 733 N.W.2d at 676 (citing *State v. Kubit*, 627 N.W.2d 914, 918 (Iowa 2001)). "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." *State v. Lewis*, 675 N.W.2d 516, 522 (Iowa 2004) (citations omitted). 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. Cline*, 617 N.W.2d 277, 282 (Iowa 2000). We use an objective standard to assess an officer's conduct. *State v. Freeman*, 705 N.W.2d 293, 297 (Iowa 2005).

A. Probable Cause to Arrest.

First, Allen argues his arrest was not valid because it was without a warrant and not supported by probable cause. "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) (citing *State v. King*, 191 N.W.2d 650, 654 (Iowa 1971)). Iowa Code section 804.7(3) authorizes an officer to make an arrest without a warrant if the officer has reasonable grounds to believe that an indictable public offense has been committed and the person arrested committed it. The reasonable ground standard is the equal to the probable cause standard. *Freemen*, 705 N.W.2d at 289. Therefore, a warrantless arrest must be supported by probable cause in order to be valid. *Ceron*, 573 N.W.2d at 592. Probable cause exists when the totality of the circumstances within the arresting officer's knowledge would lead a person of reasonable prudence to believe that a crime

has been or is being committed and the person arrested committed the crime. *Freeman*, 705 N.W.2d at 298.

In this case, Allen was arrested for public intoxication. Iowa Code § 123.46(2). Officers were investigating an unrelated fight between patrons in a bar that was open to the public. While standing at the front of the bar, an officer heard someone yelling vulgarities from the back of the bar. As the officer approached Allen, other patrons warned Allen to quiet down because police officers were in the building. The arresting officer testified that he could smell alcohol on Allen's breath, Allen was slurring his words, and wearing sunglasses in dim lighting, which concealed his eyes. Allen was standing by a pitcher of beer that was half empty with one glass next to it and admitted to the officer that he had been drinking. After the officer requested that Allen quiet down, Allen continued to yell obscenities and act in a disruptive manner. All of these factors taken together could lead an officer to conclude that Allen was intoxicated in a public place. *See State v. Harris*, 490 N.W.2d 561, 563 (Iowa 1992) (stating that the odor of alcohol on the defendant's breath and bloodshot, watery eyes is sufficient to support a finding of probable cause in a drunk driving context (citing *State v. Harlan*, 301 N.W.2d 717, 720 (Iowa 1981))). The arresting officer testified that he also arrested Allen on a charge of disorderly conduct and the district court found there was probable cause for an arrest on either the public intoxication or the disorderly conduct charge. We agree with the district court that there was probable cause for the arrest of Allen. Because his arrest was lawful, the search of his person was permitted as a search incident to arrest. *Ceron*, 573 N.W.2d at 589.

B. Search of the Backpack.

Allen next argues that the search of his backpack exceeded the scope of the search allowed under the search incident to arrest exception. If there is probable cause to arrest a person, then a lawful search may be conducted of the person and the area within the person's immediate control. *New York v. Belton*, 453 U.S. 454, 460, 101 S. Ct. 2860, 2864, 69 L. Ed. 2d 768, 774-75 (1981); *Chimel v. California*, 395 U.S. 752, 763, 89 S. Ct. 2034, 2040, 23 L. Ed. 2d 685, 694 (1969); *Freeman*, 705 N.W.2d at 298. "The purpose of such a search is to prevent the arrestee from destroying evidence or gaining possession of a weapon which could be used to resist arrest or effect an escape." *State v. Canas*, 597 N.W.2d 488, 492 (Iowa 1999), *overruled in part on other grounds by State v. Turner*, 630 N.W.2d 601, 606 n.2 (2001) (citing *Chimel*, 395 U.S. at 763, 89 S. Ct. at 2040, 23 L. Ed. 2d at 694). Therefore, in order for a search incident to an arrest to be constitutional, the search must be "confined to the immediate vicinity of the arrest" and "must be substantially contemporaneous with the arrest." *Id*. (citing *Vale v. Louisiana*, 399 U.S. 30, 33, 90 S. Ct. 1969, 1970, 26 L. Ed. 2d 409, 413 (1970)).

In this case, Allen's backpack was sitting on the floor next to him when he was arrested. The arresting officer testified that Allen's backpack was "right down at his feet next to him" and that Allen could have reached the backpack. After officers were able to handcuff Allen, Allen demanded that his backpack and pool cue be brought with him. As one officer escorted Allen outside, another officer followed immediately behind, carrying Allen's backpack. Once Allen was outside and next to the patrol car, he again resisted officers and it took multiple

officers to subdue and search him. Upon searching Allen, the officers found three folding knives and a marijuana pipe in his pocket. Allen was placed in the patrol car and officers immediately searched the backpack. Allen disputed this testimony, claiming the backpack was twenty to twenty-five feet from him in the bar when he was arrested and he never requested officers to bring his backpack and pool cue outside with him. However, the district court found the testimony that Allen's backpack was located at his feet when he was arrested and Allen demanded his backpack and pool cue be taken with him was more credible.

We agree with the district court that the search of Allen's backpack was a valid search incident to arrest. First, the search was limited to the immediate vicinity of the arrest or the defendant's "grab area". *See McGrane*, 733 N.W.2d at 676 (citing *Chimel*, 395 U.S. at 763, 89 S. Ct. at 2040, 23 L. Ed. 2d at 694). Officers may search any containers located in the defendant's grab area upon the defendant's arrest. *See Belton*, 453 U.S. at 460 n.4, 101 S. Ct. at 2864 n.4, 69 L. Ed. 2d at 775 n.4 (stating that containers include "luggage, boxes, bags, clothing, and the like"); *United States v. Morales*, 923 F.2d 621, 626-27 (8th Cir. 1991) (holding the search of two bags the defendant was holding when approached by officers at a bus station was a valid search incident to arrest); *United States v. Kimball*, 842 F. Supp. 462, 468 (D. Kan. 1994) (holding the search of a defendant's luggage when arrested at a train depot was a valid search incident to arrest); *State v. Smith*, 835 P.2d 1025, 1029 (Wa. 1992) (holding the search of the defendant's fanny pack which the defendant dropped while being pursued by officers was a valid search incident to arrest). Allen's backpack was sitting at his feet within his reach, and therefore was within his

grab area. *See Belton*, 453 U.S. at 461, 101 S. Ct. at 2860, 69 L. Ed. 2d at 768 (stating police may examine the contents of any containers within reach of the arrestee); *State v. Shane*, 255 N.W.2d 324, 327-28 (Iowa 1977) (holding the officers' search that was confined to a small hotel room where the defendant was arrested was a valid search incident to arrest); *compare United States v. Johnson*, 846 F.2d 279, 283-84 (5th Cir. 1988) (holding a briefcase was within the defendant's immediate control when it was sitting on the floor next to the defendant and within the defendant's reach), *with United States v. Johnson*, 16 F.3d 69, 73 (5th Cir. 1994) (holding a briefcase was not within the defendant's immediate control when prior to his arrest the defendant was talking to officers and his briefcase was eight feet away with officers standing between the defendant and the briefcase).

In addition, the search of Allen's backpack was contemporaneous with his arrest. Officers gained control of Allen, placed him in the patrol car, and proceeded to search his backpack. *See Belton*, 453 U.S. at 462, 101 S. Ct. at 2865, 69 L. Ed. 2d at 776 (discussing that officers searched the defendant's jacket immediately following the defendant's arrest); *Shane*, 255 N.W.2d at 327-28 ("hold[ing] that police may see to the safe custody and security of suspects first and then make the limited search which the circumstance of the particular case permit"). There was no delay between Allen's arrest and the search of his backpack. *See United States v. Chadwick*, 433 U.S. 1, 4, 97 S. Ct. 2476, 2479, 53 L. Ed. 2d 538, 543-44 (1977) (finding the search of a footlocker was not contemporaneous with the arrest when it was brought to the federal building and searched an hour and a half after the arrest); *Morales*, 923 F.2d at 626-27

(finding a search of the defendant's luggage was contemporaneous with the arrest when they occurred about the same time).

"[T]he ultimate test of search and seizure cases is reasonableness." *Shane*, 255 N.W.2d at 328. In this case, the search was reasonable because it was limited to the area within Allen's immediate control and was contemporaneous with his arrest. Furthermore, it is reasonable to allow for an officer to protect himself by searching items he places in his patrol car and transports to the police station. *See Belton*, 453 U.S. at 461, 101 S. Ct. at 2864, 69 L. Ed. 2d at 768 ("[A container] within an arrestee's reach could be searched because of the danger their contents might pose to the police."); *Chimel*, 395 U.S. at 762, 89 S. Ct. at 2040, 23 L. Ed. 2d at 694 ("When an arrest is made, it is reasonable for the arresting officer to search . . . [o]therwise the officer's safety might well be endangered . . ."); *Shane*, 255 N.W.2d at 328 ("It would be impractical and unrealistic to say the purposes for which an arrest-related search may be made can be satisfied only if the officer first exposes himself to the very dangers he is supposed to guard against."). We therefore find that the district court correctly denied Allen's motion to suppress.

II. *Self-Defense Instruction.*

Allen argues that the district court erred in failing to give a self-defense instruction. We review challenges to the district court's refusal to submit a jury instruction for errors at law. Iowa R. App. P. 6.4; *State v. Ceaser*, 585 N.W.2d 192, 193 (Iowa 1998) (citing *State v. Rains*, 574 N.W.2d 904, 915 (Iowa 1998)). If substantial evidence exists demonstrating that a justification defense applies, the district court must instruct on the justification defense. *Rains*, 574 N.W.2d at

915. Substantial evidence triggering the trial court's duty to submit a justification defense instruction to the jury may come from any source. *Id*. Although the burden to disprove a justification defense rests with the State, the defendant bears the initial burden of demonstrating that the record contains substantial evidence to support the instruction. *Ceaser*, 585 N.W.2d at 194 (citing *State v. Lawler*, 571 N.W.2d 486, 489 (Iowa 1997)). Self defense is statutorily designated as a defense of justification. *State v. Dunson*, 433 N.W.2d 676, 677 (Iowa 1988). The Iowa Code provides: "A person is justified in the use of reasonable force when the person reasonably believes that such force is necessary to defend oneself or another from any imminent use of unlawful force." Iowa Code § 704.3.

Allen specifically claims the court erred by impermissibly considering his decision not to testify in finding there was not sufficient evidence. In examining Allen's request, the district court noted,

> [A]lthough the defendant has filed notice of self-defense, the defendant did not testify and -- although there was some testimony by the police officers that the defendant was yelling for help. Mr. Abbott, you stated it was your client's reasonable belief that he needed to defend himself, but he's not testified to that effect. So there is a lack of evidence here upon which to instruct the jury with regard to self-defense in this case.

The district court's discussion with counsel does not appear to be punishing Allen for not testifying, but rather concluding there was simply a lack of evidence from the defense as to the need for a self-defense instruction.

Allen points to the officers' testimony that he looked scared and acted panicky as substantial evidence to require the giving of the instruction. However, the unrefuted testimony was that Allen had multiple opportunities to peaceably submit to arrest, but he refused to do so. An officer told Allen he was under

arrest, directed him to relax his arms so that he could be handcuffed, and gave him several warnings. Allen refused to submit to the arrest. Even after the officers used pepper spray on Allen, he still continued to thrash and resist arrest until officers used pepper spray on him a second time. The district court held that "substantial evidence does not support the submission of a self-defense instruction in this case. The officers gave the defendant opportunity to peaceably submit to the arrest, and he . . . did not do so." Allen did not present evidence to suggest that self defense was applicable, namely that Allen had a reasonable belief that use of force was necessary to defend himself from unlawful force. We therefore conclude the district court did not err in declining to instruct the jury on self defense. *See State v. Shanahan*, 712 N.W.2d 121, 141 (Iowa 2006) ("A court should not submit an instruction on an issue for which there is not substantial evidence to support that issue." (citing *Seaway Candy, Inc. v. Cedar Rapids YMCA*, 283 N.W.2d 315, 316 (Iowa 1979))).

The district court correctly denied Allen's motion to suppress and denied Allen's request for a self-defense instruction; therefore, we affirm.

AFFIRMED.