IN THE COURT OF APPEALS OF IOWA

No. 7-955 / 07-0504
Filed January 30, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

WILLIAM ANDRE MORTON,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, John C. Nelson, Judge.

Defendant appeals his conviction for possession of a controlled substance. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender and Jason B. Shaw, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Patrick Jennings, County Attorney, and Amy Ellis, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., Vaitheswaran and Baker, JJ.

SACKETT, C.J.

Defendant, William Morton, appeals from his conviction for possession of marijuana following a bench trial. Morton claims the district court erred in overruling his motion to suppress evidence of marijuana on the grounds that the officer discovered the evidence during a permissible patdown search for weapons and that Morton impliedly consented to the search. We reverse and remand.

I. BACKGROUND.

At approximately 10:30 p.m. on June 6, 2006, a Sioux City police officer made a traffic stop of a vehicle for speeding. Terrence Givens was the driver and owner of the vehicle, and the defendant, William Morton, was the sole passenger. Prior to approaching the vehicle, the officer called for assistance. Sergeant Skaff and two additional officers arrived to assist with the stop. Skaff approached the passenger side of the vehicle and asked Morton for identification. As Morton provided a driver's license, Givens told the officers that they could search his vehicle if they wanted to. The officers accepted Givens's offer to conduct a search.

Givens and Morton were directed to exit the vehicle so the search could be conducted. When Morton exited the car, Sergeant Skaff told him, "I gotta pat you down real quick buddy." The recording of the stop shows Skaff proceeded to feel Morton's outer clothing. Sergeant Skaff communicated with Morton during the patdown, stating during the search "You ain't got nothing sharp on ya, do you? . . . Check your waist here on the front. . . . Pop your cap off for me real quick? . . . Can you kick your shoes off?" Morton fully complied with Sergeant

Skaff's directions and requests during the stop and patdown search. Sergeant Skaff found two baggies of marijuana in Morton's shoes. Morton was arrested for possession of a controlled substance in violation of Iowa Code section 124.401(5) (2005).

Morton filed a motion to suppress the evidence of marijuana. After a hearing, the court overruled the motion finding that (1) prevailing law permitted Sergeant Skaff to conduct the patdown search for weapons as a safety precaution, and (2) Morton consented to the search by quickly kicking off his shoes after Sergeant Skaff's request. Morton stipulated to a bench trial on the trial information, minutes of evidence, and a recording of the stop. He was found guilty. On March 9, 2007, after overruling a motion in arrest of judgment, the court sentenced Morton to two days in jail, a 180-day driver's license revocation, a $250 fine, $125 surcharge, court costs, and attorney fees.

II. STANDARD OF REVIEW.

Morton claims his motion to suppress evidence should have been granted under the federal and state constitutional protections against unreasonable searches and seizures. We review this claim de novo. *State v. Lane*, 726 N.W.2d 371, 377 (Iowa 2007). We make an "independent evaluation of the totality of the circumstances as shown by the entire record." *Id.* We may consider the evidence presented at the suppression hearing and at trial in our review. *State v. Andrews*, 705 N.W.2d 493, 496 (Iowa 2005). We give deference to the district court's factual findings due to its ability to evaluate witness credibility but we are not bound by its findings. *Lane*, 726 N.W.2d at

377. Error was preserved for our review by the district court's adverse ruling on the motion to suppress. *State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998).

III. PAT DOWN SEARCH FOR WEAPONS.

Morton first claims there was no basis for the patdown search because Sergeant Skaff did not have a reasonable suspicion that Morton was armed and dangerous. Morton claims that even if there was a reasonable basis for a patdown search for weapons, Seargent Skaff's search exceeded the permissible scope of a protective weapons search when he requested Morton take off his shoes and looked inside them.

"The Fourth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment assures '[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.'" *State v. Lewis*, 675 N.W.2d 516, 522 (Iowa 2004) (quoting U.S. const. amend. IV). Article one, section eight of the Iowa Constitution also protects against unreasonable searches and seizures. *State v. Jones*, 666 N.W.2d 142, 145 (Iowa 2003). Searches conducted without a warrant, subject to a few exceptions, are per se unreasonable under the Constitution. *Minnesota v. Dickerson*, 508 U.S. 366, 372, 113 S. Ct. 2130, 2135, 124 L. Ed. 2d 334, 343-44 (1993); *Lewis*, 675 N.W.2d at 522. One exception where a limited search is permitted without a warrant is "[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others." *Terry v. Ohio*, 392 U.S. 1, 24, 88 S. Ct. 1868, 1881, 20 L. Ed. 2d 889, 908-09 (1968). Confronted with these circumstances, "the officer may conduct a

patdown search 'to determine whether the person is in fact carrying a weapon.'" *Dickerson*, 508 U.S. at 373, 113 S. Ct. at 2136, 124 L. Ed. 2d at 344 (quoting *Terry*, 392 U.S. at 24, 88 S. Ct. at 1881, 20 L. Ed. 2d at 908). "If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed." *Id.* at 373, 113 S. Ct. at 2136, 124 L. Ed. 2d at 344.

A protective search for weapons is permissible if "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry*, 392 U.S. at 27, 88 S. Ct. at 1883, 20 L. Ed. 2d at 909). In evaluating whether the officer's action was reasonable, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906; *State v. Riley*, 501 N.W.2d 487, 489 (Iowa 1993). A suspect's talking with known drug addicts alone is not a sufficient justification for a protective weapons search. *Sibron v. New York*, 392 U.S. 40, 64, 88 S. Ct. 1889, 1903, 20 L. Ed. 2d 917, 935 (1968). Companionship with known criminals alone will not justify a search and seizure, but this is a factor to consider in the totality of the circumstances. *State v. Kreps*, 650 N.W.2d 636, 647 (Iowa 2002). Furtive movements by a suspect and other suspicious circumstances will justify an officer's protective search for weapons on a passenger of a vehicle. *Riley*, 501 N.W.2d at 490.

Sergeant Skaff testified that he suspected Morton might be armed and dangerous because Morton was riding in a car with Givens, a person Skaff knew had a criminal history and was involved with drug activities. Skaff testified he

considered the drug culture violent by nature and had purportedly received complaints that Givens carried handguns. These articulated suspicions are largely directed at Givens rather than Morton. However, even if these circumstances provide a reasonable basis for the protective weapons search, Sergeant Skaff's search must fall within the permissible bounds of such a search.

Protective searches for weapons are limited to ensuring safety. *Terry*, 392 U.S. at 29, 88 S. Ct. at 1884, 20 L. Ed. 2d at 911. The search for weapons "must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Id.* at 29, 88 S. Ct. at 1884, 20 L. Ed. 2d at 911. "Evidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation." *Id.* at 29, 88 S. Ct. at 1884, 20 L. Ed. 2d at 910. The scope of the patdown authorized in *Terry* is "a carefully limited search of the outer clothing . . . in an attempt to discover weapons which might be used to assault [the officer]." *Id.* at 30, 88 S. Ct. at 1884-85, 20 L. Ed. 2d at 911.

"The scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible." *Id.* at 19, 88 S. Ct. at 1878, 20 L. Ed. 2d at 904. The inquiry is dual, considering whether the officer's initial action relates to the reasons for the suspicion and whether the extent of the search is also related to the original justification. *Id.* at 19-20, 88 S. Ct. at 1879, 20 L. Ed. 2d at 905. An officer's continued exploration of an area on a suspect after the officer has learned that there is no weapon in the specific area exceeds the permissible scope of the protective search. *State v. Scott*, 518 N.W.2d 347,

349 (Iowa 1994). The further search is no longer reasonable because it is now an evidentiary search, unrelated to the justification of a search for weapons permitted by *Terry*. *Id.* In situations where

> an officer who is executing a valid search for one item seizes a different item, [the Supreme Court] rightly has been sensitive to the danger . . . that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will.

Dickerson, 508 U.S. at 378, 113 S. Ct. at 2138, 124 L. Ed. 2d at 347.

Sergeant Skaff's search went beyond a patdown of Morton's outer clothing. Skaff first patted down Morton's outer clothing and checked Morton's waist band for sharp objects. This part of the search is permitted by *Terry* and is reasonably related to ensuring Morton was not armed and dangerous. Skaff then asked Morton to take his cap off and kick his shoes off. Removing a suspect's shoes without a reasonable belief that a weapon is being hidden in the shoes has been held to exceed the proper scope of a protective search. *See State v. Valle*, 996 P.2d 125, 128 (Ariz. 2000); *Thompson v. State*, 551 So.2d 1248, 1249-50 (Fla. Ct. App. 1989); *Commonwealth v. Borges*, 482 N.E.2d 314, 318 (Mass. 1985); *State v. Mitchell*, 622 N.E.2d 680, 683-86 (Ohio Ct. App. 1993). However, some states have held that removal of shoes is permitted as part of a *Terry* search if the officer had the appropriate intention of locating a weapon. *See C.G. v. State*, 689 So.2d 1246, 1248 (Fla. Ct. App. 1997); *People v. Sorenson*, 752 N.E.2d 1078, 1088-90 (Ill. 2001); *Stone v. State*, 671 N.E.2d 499, 502-03 (Ind. Ct. App. 1996); *In re Andre W.*, 590 N.W.2d 827, 831 (Neb. 1999); *see also Hodges v. State*, 678 So.2d 1049, 1051 (Ala. 1996) (finding removal of shoes is reasonable because weapons could be hidden in them). In most of the cases

where the removal of shoes was permitted as part of a protective search for weapons, other suspicious circumstances confirmed the officer's need to check for weapons. *See Sorenson*, 752 N.E.2d at 1087 (finding protective search of shoes valid when officer made stop alone and vehicle contained three passengers and vehicle had just left from a known drug house); *In re Andre W.*, 590 N.W.2d at 831-32 (finding protective search of shoes valid when officer was executing a search warrant at a known drug house and officer testified that suspects often conceal weapons on their persons while search warrants are executed); *C.G.*, 689 So.2d at 1248 (finding search of shoes valid when officer saw suspect make furtive movements, and remove and replace his shoes); *Stone*, 671 N.E.2d at 502-03 (finding search of shoes valid when officer was investigating a suspected drug transaction, a weapon had already been found on another suspect, and officer had sincere concern for his safety).

Under the totality of the circumstances we find Sergeant Skaff's further search inside Morton's shoes exceeded the permissible scope of a protective search for weapons. Sergeant Skaff did not notice any suspicious movements or activity by Givens or Morton. Sergeant Skaff was not alone when he approached the car. There were three other officers present during the stop. He testified that Morton and Givens were both very compliant and cooperative throughout the traffic stop. Skaff did testify that he has encountered persons who hide knives in their shoes but did not explain why he suspected Morton might have a weapon inside his shoes. Although we are keenly aware of the need for officers to conduct protective searches, under the facts of this case, we cannot identify any circumstances that would raise a reasonable suspicion that Morton was carrying

a weapon inside his shoes. Sergeant Skaff exceeded the permissible scope of a protective weapons search when he continued beyond a patdown of the outer clothing without any circumstances indicating Morton was concealing a weapon.

IV. CONSENT.

The State argues that even if the search exceeded the scope of a protective weapons search, the motion to suppress was still properly overruled because Morton consented to the search. The district court agreed that Morton "consented to a search of his shoes when he quickly kicked them off following the Sergeant's request that he do so."

One exception to the warrant requirement for searches and seizures is when a suspect consents to a search. *State v. McConnelee*, 690 N.W.2d 27, 30 (Iowa 2004). "Consent may be express or implied." *Id.* We may find consent was given through verbal means, or given by gestures and non-verbal conduct. *Id.* "A warrantless search conducted by free and voluntary consent does not violate the Fourth Amendment." *State v. Reiner*, 628 N.W.2d 460, 465 (Iowa 2001). Consent is voluntary when it is given without duress or coercion, either express or implied. *See Schneckloth v. Bustamonte,* 412 U.S. 218, 225-26, 93 S. Ct. 2041, 2047, 36 L. Ed. 2d 854, 862 (1973). "The State is required to establish the consent was voluntary by a preponderance of the evidence." *Reiner*, 628 N.W.2d at 465.

A suspect's cooperation cannot be equated with consent. *State v. Lathum*, 380 N.W.2d 743, 745 (Iowa Ct. App. 1985). When a law enforcement officer claims authority to conduct a search, he announces in effect that there is no right to resist the search. *See Bumper v. North Carolina*, 391 U.S. 543, 550,

88 S. Ct. 1788, 1792, 20 L. Ed. 2d 797, 803 (1968). A search conducted under the assertion of authority is "instinct with coercion-albeit colorably lawful coercion [and] [w]here there is coercion there cannot be consent." *Id.* at 543, 88 S. Ct. at 1792, 20 L. Ed. 2d at 803.

We cannot conclude that Morton's kicking off his shoes upon Sergeant Skaff's request was implied consent to conduct the search. Although Sergeant Skaff was friendly and polite during the encounter, asking "Can you kick your shoes off?," his politeness does not transform the situation into a voluntary exchange. Sergeant Skaff's requests cannot be isolated from his mandate moments earlier that "I gotta pat you down real quick buddy." To the average person, the request to remove one's shoes would be part of the patdown rather than a separate request for consent to expand the search for weapons. Under these circumstances, we find Morton did not give consent to the search by kicking off his shoes after the Sergeant's request.

V. CONCLUSION.

The district court erred in overruling Morton's motion to suppress evidence. Sergeant Skaff exceeded the scope of a protective weapons search by requesting Morton remove his shoes without a reasonable belief that Morton was concealing a weapon in them. Since the request was made under the assertion of authority to conduct a patdown, Morton's compliance with the request was not voluntary consent to the search. We reverse Morton's conviction and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED.