IN THE COURT OF APPEALS OF IOWA

No. 8-213 / 06-2113
Filed May 29, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LANETTE KAY STARR,
Defendant-Appellant.

Appeal from the Iowa District Court for Wapello County, Kirk A. Daily, District Associate Judge.

Defendant appeals following her conviction of possession of marijuana. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, Mark Tremmel, County Attorney, and Russell Rigdon, III, Assistant County Attorney, for appellee.

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

VOGEL, J.

Lynette Starr appeals from her conviction of possession of marijuana. She asserts that the district court erred in denying her motion to suppress and her trial counsel was ineffective for failing to challenge the admissibility of inculpatory statements she made. Because we agree with the district court the warrantless police entry into Starr's home was supported by probable cause and exigent circumstances and we conclude that Starr's trial counsel was not ineffective, we affirm.

I. Background Facts and Proceedings

In the early morning hours of February 15, 2006, during a criminal mischief investigation, Officer Scott Carlson of the Ottumwa Police Department went to Starr's trailer home and knocked on the door. When Starr opened the door, Officer Carlson noticed the strong odor of marijuana smoke. He then began questioning Starr of her whereabouts during the previous evening when the criminal mischief occurred and requested that Starr produce some identification. Starr then closed the door, presumably to retrieve her identification. Officer Carlson opened the door and entered Starr's home, to which Starr protested, stating that Officer Carlson had no right to enter her home.

Once inside the home, Officer Carlson continued questioning Starr about the criminal mischief complaint. Officer Jason Bell arrived to provide assistance and also entered Starr's home. Officer Bell testified that once he entered the home, he noticed the odor of burnt marijuana and then saw the remnants of a burnt marijuana cigarette in an ashtray in the kitchen area. When asked about

the marijuana cigarette, Starr admitted that it was hers and that she had smoked it.

Starr filed a pretrial motion to suppress any evidence obtained as a result of the officers' warrantless entry into her home. The district court denied Starr's motion, finding that the warrantless entry into her home was supported by probable cause and exigent circumstances. After the district court's ruling, Starr waived her right to a jury and stipulated to a trial on the minutes of evidence. She was found guilty of possession of marijuana in violation of Iowa Code section 124.401(5) (2005). The district court sentenced Starr to forty-five days in jail, suspended that sentence and placed Starr on unsupervised probation for two years.

II. Standard of Review

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). Due to the district court's opportunity to evaluate the credibility of the witnesses, we give deference to its factual findings, but are not bound by them. *Id*.

III. Motion to Suppress

Starr alleges her constitutional right to be free from unreasonable searches and seizures was violated when the officers entered her home without a warrant. *See* U.S. Const. amend. IV; Iowa Const. art. 1, 8; *see also 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))). Starr has not argued and we have not discovered a basis to distinguish between the federal and state constitutions; therefore, our analysis applies equally to the protections afforded to citizens under both constitutions. *State v. Nitcher*, 720 N.W.2d 547, 553 (Iowa 2006). A warrantless search is per se unreasonable unless one of the well recognized exceptions to the warrant requirement apply. *Id*. at 554. In the present case, the State asserts that the probable cause coupled with exigent circumstances exception applies. *See id*. (recognizing this exception). The State has the burden of proving by a preponderance of the evidence that the recognized exception to the warrant requirement is applicable. *Id.*

Starr first asserts that a warrantless entry into her home based upon exigent circumstances is prohibited because possession of marijuana is a minor offense, and cites to *Welsh v. Wisconsin*, 466 U.S.740, 104 S. Ct. 2091, 80 L. Ed. 732 (1984).[1] In Welsh, the court invalidated a warrantless entry into a home to arrest a suspect for "a noncriminal, civil forfeiture offense for which no imprisonment is possible." *Welsh*, 466 U.S. at 753, 104 S. Ct. at 2099, 80 L. Ed. 2d at 745 (holding "application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense, such as the kind at issue in this case, has been committed"). Following *Welsh*, the Supreme Court distinguished the

[1] The State contends Starr did not preserve this claim because she did not specifically cite to *Welsh* in her motion to suppress. However, Starr's motion to suppress alleged her state and federal constitutional rights were violated. Therefore, we conclude Starr preserved this issue as *Welsh* provides guidance when analyzing whether a warrantless search is reasonable.

"nonjailable" offense involved in *Welsh* from "jailable" offenses. *Illinois v. McArthur*, 531 U.S. 326, 336, 121 S. Ct. 946, 952-53, 148 L. Ed. 2d 838, 850 (2001). In this case, Starr was charged with possession of marijuana, a serious misdemeanor punishable by *imprisonment of up to six months* and a maximum fine of $1,000. *See* Iowa Code § 124.401(5) (emphasis added). Clearly *Welsh* does not prohibit the application of the exigent circumstances exception to misdemeanor cases that are punishable with imprisonment. Rather, as the Supreme Court concluded, "an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made." *Welsh*, 466 U.S. at 753, 104 S. Ct. at 2099, 80 L. Ed. 2d at 745. Furthermore, our Iowa Supreme Court discussed the *Welsh* case in *State v. Legg*, 633 N.W.2d 763 (Iowa 2001), and after weighing several factors, upheld a warrantless entry into a garage to effectuate an arrest for interference with official acts, a serious misdemeanor. *State v. Legg*, 633 N.W.2d 763, 772 (Iowa 2001); *see also State v. Hughes*, 607 N.W.2d 621, 631 (Wis. 2000) (holding exigent circumstances could justify a warrantless entry in a misdemeanor possession of marijuana case), *cert denied* 531 U.S. 856, 121 S. Ct. 138, 148 L. Ed. 2d 90 (2000). Therefore, we reject Starr's contention that the Welsh holding necessarily requires invalidating the officers' entry into her home.

We next review whether the State proved probable cause coupled with exigent circumstances justified the warrantless entry. The district court concluded the warrantless entry was justified based upon "the probable cause to believe the defendant was in possession of marijuana, and due to the exigent

circumstances that the marijuana would be susceptible to destruction while a warrant was obtained." We agree.

"Probable cause to search exists if, given the totality of the circumstances, a person of reasonable prudence would believe that evidence of a crime might be located on the premises to be searched." *Simmons*, 714 N.W.2d at 272. Officer Carlson testified that there was a strong odor of marijuana smoke in Starr's home and described Starr as lethargic. *See State v. Merrill*, 538 N.W.2d 300, 301 (Iowa 1995) (noting that a majority of states addressing the issue have held that the odor of marijuana alone may provide probable cause to justify a warrantless search). These facts establish probable cause to believe Starr was in possession of marijuana. *See, e.g.*, *Simmons*, 714 N.W.2d at 272 (citing *State v. Eubanks*, 355 N.W.2d 57, 59 (Iowa 1984) (finding an officer had sufficient probable cause to search a vehicle and its contents based on the odor of marijuana drifting from the vehicle)).

Once probable cause to search has been established, the State must also prove exigent circumstances existed to justify the warrantless entry. *See, e.g.*, *Johnson v. United States*, 333 U.S. 10, 13, 68 S. Ct. 367, 369, 92 L. Ed. 436, 440 (1948) ("[O]dors alone do not authorize a search *without* warrant" (emphasis added)). When Starr opened the door to her home, Officer Carlson detected the strong odor of marijuana. *Compare Johnson*, 333 U.S. at 13-15, 68 S. Ct. at 368-69, 92 L. Ed. at 436, 440 (finding no exigent circumstances when officers were aware of odor of burning opium *before* knocking on the door) *and State v. Ahern*, 227 N.W.2d 164 (Iowa 1975) (finding no exigent circumstances when officers were aware of odor of burning marijuana *before* knocking on the door),

with Hughes, 607 N.W.2d at 631 (finding exigent circumstances when officers were aware of the odor of burning marijuana *after* the door to the defendant's apartment was opened), *cert denied* 531 U.S. 856, 121 S. Ct. 138, 148 L. Ed. 2d 90 (2000). Starr then closed the door upon Officer Carlson's request to see some identification. The State asserts that because Starr was aware of police presence, exigent circumstances existed as she may have attempted to destroy any evidence of marijuana. This is supported by Officer Carlson's repeated testimony that he did not know what Starr intended on doing after she closed the door. He surmised that Starr may have been trying to destroy any evidence of marijuana. He also testified that because Starr was a suspect in a recent act of criminal mischief, she may have intended to flee the scene. As Starr was aware of the police presence, we agree with the district court that behind the closed door, the evidence of marijuana was susceptible to destruction, giving rise to an exigency. *See State v. Holtz*, 300 N.W.2d 888, 893 (Iowa 1981) ("[E]xigent circumstances exist when contraband is threatened with immediate removal or destruction.").

IV. Ineffective Assistance of Counsel

Finally, Starr alleges her constitutional right to effective assistance of counsel was also violated. Although ineffective-assistance-of-counsel claims "are typically preserved for postconviction relief actions, we will address such claims on direct appeal when the record is sufficient to permit a ruling." *Nitcher*, 720 N.W.2d at 553 (citations omitted). In this case, we conclude the record is sufficient to permit a ruling.

To prevail on a claim of ineffective assistance of counsel, Starr must show by a preponderance of the evidence that her trial counsel (1) failed to perform an essential duty and (2) prejudice resulted. *State v. Martin*, 704 N.W.2d 665, 668 (Iowa 2005). Starr claims that her trial counsel should have made a motion to suppress the inculpatory statements she made while being questioned in her home. Upon a Fifth Amendment challenge, a two-part test is utilized in determining whether inculpatory statements are admissible: (1) whether *Miranda* warnings were required, and if so whether they were properly given, and (2) whether the statement was voluntary and satisfies due process. *See State v. Countyman*, 572 N.W.2d 553, 558 (Iowa 1997). Upon our de novo review, we conclude that there was no basis to challenge Starr's inculpatory statement. First, *Miranda* warnings were not required as the record does not contain any evidence demonstrating Starr was in custody at the time of her admission. *Id*. ("*Miranda* warnings are not required unless there is both custody and interrogation."); *State v. Evans*, 495 N.W.2d 760, 762 (Iowa 1993) ("[T]he general rule is that in-home interrogations are not custodial for purposes of *Miranda*."). Additionally, the record does not support Starr's contention that her admission was involuntary. Therefore, we conclude that Starr's trial counsel was not ineffective as he owed no duty to assert Starr's inculpatory statements were inadmissible.

We affirm the district court's ruling on the motion to suppress and Starr's conviction.

AFFIRMED.