IN THE COURT OF APPEALS OF IOWA

No. 9-426 / 08-1136
Filed July 22, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANTONY LEE SHERROD,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Jeffrey L. Larson (motion to suppress) and Greg W. Steensland (trial), Judges.

Antony Sherrod appeals his conviction for second-degree robbery. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Shellie Knipfer, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Shelly Sedlak, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

I. Background Facts and Proceedings

Around noon on March 3, 2008, an African-American male robbed the Telco Triad Credit Union in Council Bluffs, Iowa. At 12:02 pm, a 911 dispatcher broadcast that an armed robbery had just occurred and the suspect was wearing a light blue coat, baggy blue jeans, and heading east down Avenue A.[1] Officer Keith Longnecker received the call reporting the incident and was in the area. Roughly four and one-half blocks from the credit union, Longnecker saw Antony Sherrod, an African-American male, wearing dark clothing "jogging, walking real fast" eastward on Avenue A. At 12:04 pm, Longnecker got out of his vehicle and ordered Sherrod to the ground. Longnecker noticed Sherrod was breathing heavily and sweating.

Shortly thereafter, Officer Higgins and Detectives Andrews, Clark, and Elonich arrived to assist Longnecker. Andrews handcuffed Sherrod, and Longnecker read him his *Miranda* rights. Higgins conducted a patdown search for weapons, and discovered a mesh laundry bag full of cash in the beltline of Sherrod's pants. Higgins testified that when she felt the cash, she knew it was not a weapon. She testified the object sounded like paper rustling, and since they were investigating a bank robbery, she believed it was money. Though witnesses said the robber had a gun, officers did not find a weapon on Sherrod. Officers then searched the path between the credit union and the location of

[1] The broadcast initially reported the suspect was heading west, but was quickly corrected to state the suspect was going east.

Sherrod's arrest and found a pair of gloves, a light blue coat, a stocking hat, and a BB pistol that looked like a gun.

Sherrod asserted the officers violated his Fourth Amendment rights, and he filed a motion to suppress the evidence seized as a result of the stop and search. Specifically, the motion to suppress stated the officers failed to develop specific and articulable cause to reasonably believe Sherrod was engaged in criminal activity, and thus Longnecker had no grounds to stop him. The district court denied Sherrod's motion to suppress, finding the search was incident to a lawful arrest and that probable cause existed at the time of the search.

A bench trial began June 3, 2008. At the end of trial, Sherrod renewed his motion to suppress. The district court again denied the motion to suppress, finding the search of Sherrod's person was incident to arrest and there was probable cause for the arrest. The district court found Sherrod guilty of second-degree robbery in violation of Iowa Code sections 711.1 and 711.3 (2007). Sherrod appeals, arguing the district court erred in denying his motion to suppress.

II. Standard of Review

Because Sherrod challenges the constitutionality of the seizure and search, our review is de novo. *State v. Weir*, 414 N.W.2d 327, 329 (Iowa 1987). We must evaluate the totality of the circumstances as shown by the record. *State v. Lane*, 726 N.W.2d 371, 377 (Iowa 2007). We give deference to the district court's findings of fact, but we are not bound by these findings. *Id.*

III. Fourth Amendment

The Fourth Amendment guarantees "[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. According to the Iowa Rules of Criminal Procedure, anyone who is "aggrieved by an unlawful search and seizure may move to suppress for use as evidence anything so obtained" if the property was "illegally seized without a warrant." Iowa R. Crim. P. 2.12(1)(*a*). "The State must prove by a preponderance of the evidence that a search or seizure was lawful." *State v. Bumpus*, 459 N.W.2d 619, 622 (Iowa 1990).

A. Reasonable Suspicion to Stop Sherrod

"Generally, to be reasonable, a search or seizure must be conducted pursuant to a warrant . . . ." *State v. Kreps*, 650 N.W.2d 636, 641 (Iowa 2002). Warrantless searches are presumed to be unreasonable unless the search falls within one of several exceptions to the warrant requirement. *Id.*

"One exception to the warrant requirement allows an officer to stop an individual . . . for investigatory purposes based on a reasonable suspicion that a criminal act has occurred . . . ." *Id.* This stop is a "seizure" within the meaning of the Fourth Amendment. *Id.* An investigatory stop is lawful if the officer can "point to specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id*. (internal quotations omitted). "Circumstances raising mere suspicion or curiosity are not enough." *Id.* (quoting *State v. Heminover*, 619 N.W.2d 353, 357 (Iowa 2000)).

Reasonable suspicion is an objective test determined in light of the totality of the circumstances. *Id*. at 642. A good test of reasonable suspicion is whether

"the possibility of criminal conduct was strong enough that, upon an objective appraisal of the situation, we would be critical of the officers had they let the event pass without investigation." *Id.* at 642-43 (quoting 4 Wayne R. LaFave, *Search and Seizure* § 9.4(b), at 148 (3d ed. 1996)).

Longnecker had reasonable suspicion sufficient to justify stopping Sherrod. Sherrod matched the description provided by the 911 dispatch in that he was an African-American male walking eastbound on Avenue A. Sherrod was spotted jogging or walking very fast within a few blocks and a few minutes of the robbery. Sherrod was sweating, breathing heavily, and not wearing a coat though it was cold outside. Longnecker did not rely solely on Sherrod's presence in the area or Sherrod's race, as Sherrod argues. *See Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S. Ct. 673, 676, 145 L. Ed. 2d 570, 576 (2000) ("An 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."). Longnecker relied on a combination of factors in deciding to stop Sherrod, including Sherrod's proximity to the robbery in time and space, direction of travel, behavior, and the similarities Sherrod shared with the suspect described by the 911 dispatch. After considering the totality of the circumstances, we believe we would be critical of Longnecker had he not stopped Sherrod for investigatory purposes. The State has proven Longnecker's investigatory stop was based on reasonable suspicion.

B. Search of Sherrod's Person

Sherrod argues Higgins's search of his person went beyond the scope of a *Terry* patdown.[2] The district court found Higgins's search of Sherrod's person was a lawful search incident to arrest. On our de novo review of the record, we find it unnecessary to determine whether there was probable cause to arrest or search, since we find the patdown search conducted by Higgins did not exceed the permissible scope of a *Terry* patdown.

In *Minnesota v. Dickerson*, 508 U.S. 366, 373, 113 S. Ct. 2130, 2136, 124 L. Ed. 2d 334, 344 (1993), Justice White wrote for the majority of the Justices about the permissible scope of a patdown search:

> "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence . . . ." Rather, a protective search—permitted without a warrant and on the basis of reasonable suspicion less than probable cause—must be strictly "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." 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.

(Internal citations omitted).

The question presented in *Dickerson* and in this case is whether police officers may seize nonthreatening contraband detected during a protective *Terry* patdown. The answer depends upon whether the officer is immediately aware that the object felt in the patdown is contraband so that the officer has probable cause to expand the search. As the Supreme Court stated, the protection

[2] *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968) allows an officer who reasonably believes a suspect being investigated at close range may be armed and dangerous to conduct a patdown search to determine whether the suspect is carrying a weapon.

against "excessively speculative seizures" that might otherwise arise in a plain touch situation is the Fourth Amendment's requirement that the officer have probable cause to believe that the item is contraband before seizing it. *Id.* at 376, 113 S. Ct. at 2137, 124 L. Ed. 2d at 346-47.

The police overstep the bounds of a weapons search where an item is only recognized as contraband after "squeezing, sliding and otherwise manipulating the contents of the defendant's pocket." *Id.* at 378, 113 S. Ct. at 2138, 124 L. Ed. 2d at 347. However, "[i]f a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent," its seizure is authorized. *Id.* at 375, 113 S. Ct. at 2137, 124 L. Ed. 2d at 346. Higgins testified that she felt the object, "absolutely" thought it was cash, and seized it. There is no evidence in the record to suggest she manipulated the bag before pulling it out of Sherrod's waistband. Because it was immediately apparent to Higgins that the object was cash, its seizure was within the scope of the "plain feel" exception to the warrant requirement as set forth in *Dickerson*. *See State v. Harriman*, 737 N.W.2d 318, 321 (Iowa Ct. App. 2007) (finding contraband was properly discovered under *Dickerson* where the identity of the contraband was immediately apparent).

Because we find the search of Sherrod's person was permissible in scope, the search was lawful, and the evidence seized was admissible.

AFFIRMED.