

**IN THE COURT OF APPEALS OF IOWA**

No. 9-916 / 09-0260  
Filed December 30, 2009

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**ANTHONY MICHAEL MASON,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Marshall County, Carl D. Baker,  
Judge.

Mason appeals, asserting the district court should have granted his motion  
to suppress. **AFFIRMED IN PART AND REMANDED.**

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

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney  
General, Jennifer Miller, County Attorney, and James S. Sheetz, Assistant  
County Attorney, for appellee.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ.

**VOGEL, P.J.**

Defendant Anthony Michael Mason appeals the judgment and sentence entered following his convictions for possession of methamphetamine with intent to deliver, in violation of Iowa Code section 124.401(1)(c)(6) (Supp. 2007); having a prior drug conviction in violation of section 124.411 (2007), as a habitual offender under section 902.8 (2007); as well as possession of methamphetamine, third offense, in violation of Iowa Code section 124.401(5) (Supp. 2007), as a habitual offender under Iowa Code section 902.8 (2007). He asserts the district court should have granted his motion to suppress evidence. He also argues, and the State agrees, the two substantive offenses should have merged for sentencing purposes. We affirm in part and remand with direction.

**I. Background Facts and Proceedings**

On March 22, 2008, Marshalltown police officer David Powell was directed by dispatch to check on a person in a blue pickup truck parked in an alleyway. When he arrived, the officer saw the driver's side door was open and the man inside, Mason, was slouched down and sleeping. Powell recognized Mason from a prior drug related investigation. He also saw what he described as a "wad" of cash in a compartment left of the steering wheel. Powell then announced his presence, and Mason quickly woke up. Powell testified that "within a second or two" Mason bent down towards the floor where his DVD was playing a pornographic movie. When he "quickly reached behind the player," Officer Powell instructed Mason to step out of the vehicle.

Once outside the vehicle, Mason put his left hand in his pocket. When instructed to take his hand out of his pocket, Mason positioned his hand behind

himself, still out of sight of Officer Powell. With that, Powell “kind of spun him around” to see what he suspected Mason was hiding. With Mason’s sweatpants pulled down a bit, Powell pulled on the waist of the pants and saw a plastic baggie, later confirmed to contain methamphetamine. Mason was then handcuffed and placed under arrest.

In denying Mason’s motion to suppress, the district court found the suspicious circumstances of finding Mason slumped over on the seat with the driver’s side door open, “coupled with the defendant’s furtive movements justified the officer’s search of the defendant and recovery of the drug contraband.” On appeal, Mason argues under both the United States Constitution as well as the Iowa Constitution, the search was unreasonable.<sup>1</sup>

## **II. Standard of Review**

We review challenges to protected rights under the Fourth Amendment to the United States Constitution de novo. *State v. Lane*, 726 N.W.2d 371, 377 (Iowa 2007). In doing so, we make an “independent evaluation of the totality of the circumstances as shown by the entire record.” *Id.*

## **III. Motion to Suppress**

As he did before the district court, Mason asserts that once Officer Powell awakened Mason and Mason was responsive, “the intrusion stops right there.” While that argument has some initial appeal, the facts prove otherwise. Mason’s

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<sup>1</sup> While Mason also alleges a violation of Article I, section 8, of the Iowa Constitution which he asserts should “grant further protection,” Mason makes no further analysis to merit additional review. See, i.e., *Pfister v Iowa Dist. Court For Polk County*, 688 N.W.2d 790, 795 (Iowa 2004) (declining to apply a different analysis of a due process claim under the Iowa Constitution to the Federal Constitution, where parties failed to articulate a basis for such distinction.)

own actions did not freeze at that moment, but according to Officer Powell's testimony, within one or two seconds, Mason was reaching down and behind his DVD player. Powell testified:

I didn't know if he had something that he was trying to hide. I suspected he might be trying to hide something in the fashion that he bent down to put his hand down behind the player. . . . The position I was in and the position he was in at that point in time, I wanted him out of the vehicle just to be able to see him and control any—anything that he would do or . . . . Well, when he bent down, I really couldn't see—I couldn't even see the DVD player at the time, and when he would lean forward and bend down, I couldn't see his hands. . . . Just, again, the position, the closeness to him, if there was a weapon or something inside the vehicle, I couldn't see it. I just wanted him outside—I felt I could better control anything that would happen that way.

Had Mason simply awoken and sat calmly in his seat, we would agree that the purpose of Officer Powell approaching the vehicle and inquiring of the circumstances may not have warranted further action. However, Mason's own abrupt actions raised immediate concerns both for Officer Powell's safety, should Mason have been reaching for a weapon, and for securing evidence of a crime, if Mason was attempting to hide contraband.

"The principal function of an investigatory stop is to resolve the ambiguity as to whether criminal activity is afoot." *State v Richardson*, 501 N.W.2d 495, 497 (Iowa 1993). While the fourth amendment of the United States Constitution prohibits unreasonable searches and seizures, such as a warrantless search, an exception emerges when a finding officer, pointing to specific and articulable facts, reasonably believes the person presents a danger; in that situation the officer may make protective warrantless search of a person. *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968). Further,

furtive movements, accompanied by additional suspicious circumstances, are sufficient to justify a warrantless search. *State v. Riley*, 501 N.W.2d 487, 489 (Iowa 1993).

Following Powell's ordering of Mason to step out of the vehicle, Mason's actions continued to prompt concerns for Officer Powell. First, he was directed to remove his hand from his pocket, but on doing so, managed to put his hand behind his back, claiming he was "itching his butt." When Powell still did not know, but suspected Mason was hiding something in his pants, Powell spun him around, reached to check out the area where Mason's hand was, and discovered the baggie with methamphetamine. We agree with the district court that Mason's removal of his hand from his pocket and around to his back, out of Officer Powell's sight, provided Powell with sufficient probable cause to search Mason's hand. *State v. Merrill*, 538 N.W.2d 300, 301 (Iowa 1995); *Minnesota v. Dickerson*, 508 U.S. 366, 375-76, 113 S. Ct. 2130, 2137, 124 L. Ed. 2d 334, 340 (1993) (holding an officer may conduct a protective weapons search or pat-down of a suspect's outer clothing and may seize an object if its incriminating nature is immediately apparent through size or shape, and if that object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context).

We agree with the district court in denying Mason's motion to suppress evidence.

#### **IV. Merger**

Mason next asserts and the State agrees the district court should have merged his conviction for possession of methamphetamine with his conviction for

possession of methamphetamine with intent to deliver. See Iowa Code § 701.9 (2007). We therefore remand to vacate Mason's conviction for possession of methamphetamine as a habitual offender.

**AFFIRMED IN PART AND REMANDED.**