

IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

STATE OF IOWA,

Plaintiff,

34264

34265

v.

ORDER

GARRICK JOHN FORKENBROCK
JUSTIN DAVID SIDWELL,

Defendants.

On April 8, 1994, hearing was held on the Defendants' motions to suppress. Defendants appeared personally with counsel. The state was represented by Assistant County Attorney David Tiffany.

On November 24, 1993, Officer Jacobs of the Iowa City Police Department responded to a noise complaint at 1237 E. Burlington Street in Iowa City, Iowa. Upon arrival there, he noted a loud party in progress. In response to the officer's knock, Defendant Justin Sidwell, a co-tenant with Garrick Forkenbrock, opened the front door and went onto the porch, closing the door behind him. Before the door closed, however, the officer asserts he smelled an odor like burning marijuana emanating from the interior of the house. Sidwell denied Jacobs' request to enter, demanding a search warrant. At this point, Officer Brucher arrived at the scene. He also smelled marijuana smoke. Brucher arrested Sidwell for a violation of Iowa City ordinance section 24-48, Keeping Disorderly House.

With Sidwell under arrest, Jacobs entered the dwelling. He claims to have observed several baggies of green leafy substance, a cigarette roller, and rolling papers all allegedly in plain view, despite the fact the people inside the apartment were aware that Mr. Sidwell was talking to one or more police officers on the front porch. In the kitchen, a third officer, Officer Noble, discovered more green leafy substance in an open kitchen cupboard. The officers arrested the dwelling's four residents, including Defendants. Authorities later seized additional evidence upon execution of a search warrant.

Defendants face the charges of Possession with Intent to Deliver a Schedule I Controlled Substance and Violation of the Iowa Drug Tax Act. They argue both searches were illegal: the first search lacking a warrant and the subsequent search warrant obtained on the basis of the initial warrantless search. Each defendant filed a motion to suppress all physical evidence seized

in both searches.

CONCLUSIONS OF LAW

There is a strong constitutional preference for the police to secure warrants before engaging in a search. Katz v. United States, 389 U.S. 347 (1967). A warrantless search is per se unreasonable. Id. In a warrantless search, the burden is on the state to show the search was lawful. State v. Oliver, 341 N.W.2d 25 (Iowa 1983). Subsequent searches are tainted if the warrants are based on information obtained in an initial, illegal warrantless search. State v. Folkens, 281 N.W.2d 1 (Iowa 1979).

Warrantless seizures are presumptively unreasonable unless they fall within a few carefully circumscribed exceptions: search by consent, search incident to arrest, and search based on probable cause with exigent circumstances present which make it impractical to obtain a warrant. (citations omitted). People v. Cohen, 496 N.E.2d 1231, 1234 (Ill. App. 2d. 1986). Defendants did not consent to the search, leaving the other two exceptions for analysis.

I. Search incident to arrest

The officers arrested Defendant for violation of Iowa City ordinance section 24-48, Disorderly House. A peace officer may make an arrest for a public offense committed in the officer's presence. Iowa Code section 804.7(1) (1993). The officers confirmed the ordinance violation upon arrival. Sidwell lived at the location of the disturbance, allowing for his lawful arrest. Search incident to a lawful arrest is a valid exception to the warrant requirement. State v. King, 191 N.W.2d 650, 654 (Iowa 1971). Three considerations are relevant to whether a search incident to arrest is proper: (1) whether the arrest is valid, (2) whether the search is contemporaneous with the arrest, and (3) whether the search is reasonable both as to area searched and time within which search is made. State v. Shane, 255 N.W.2d 324, 326 (Iowa 1977). Prongs one and two are met; the third prong is not.

In a search incident to arrest, an officer may search for weapons or evidence that can be concealed or destroyed. The arresting officer may search the area within the arrestee's "immediate control." This is defined as "the area from within which he might gain possession of a weapon or destructible evidence." King, 191 N.W.2d at 654 (quoting Chimel v. California, 395 U.S. 752, 763 (1969)). This would not include an entire house and rarely will justify more than the room in which the arrest takes place. Id. The officers arrested Sidwell outside the front door of the dwelling. The appropriate area to search for weapons would be the curtilage of the dwelling in the vicinity of the front door. There is no destructible evidence

1994 MAY -6 AM 9:36
EDWARD J. COFFEE
CLERK OF DISTRICT COURT
IOWA
FILED

associated with an arrest for disorderly house violation. In other words, the search was not reasonable with respect to the area searched.

In the context of a generic arrest, the officers did not have sufficient grounds to enter the dwelling. Nevertheless, the facts in this case would allow such an entrance where the disorder or disturbance continued in spite of the officers' presence at the front door. An entrance to restore order to a residence would allow seizure of contraband in "plain view." The state, however, failed to meet its burden in proving the officers in fact entered to quell a continuing disturbance. Neither did the state meet its burden in proving the contraband was actually in "plain view."

II. Probable cause with exigent circumstances

It is elementary that probable cause, however well founded, can provide no justification for a warrantless intrusion of a person's home absent a showing "the exigencies of the situation made that course imperative." Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971). The odor of burning marijuana cannot supply both probable cause to enter and exigent circumstances avoiding the need for a search warrant. Polson v. City of Lee's Summit, 535 F.Supp. 555, 559 (8 Cir. 1982); see also Johnson v. United States, 333 U.S. 10 (1948). The "plain smell" of marijuana does not invite warrantless searches. Id.

"[T]he odor of marijuana would only suggest to the officers the commission of a misdemeanor, which would not present the kind of exigent circumstances which would permit a warrantless intrusion into a person's home or living quarters." People v. Hoffstetter, 128 Ill. App.3d 401, 407, 470 N.E.2d 1247 (1984).

"Incontrovertible testimony of the senses that an incriminating object is on the premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure." State v. Davis, 228 N.W.2d 67, 72 (Iowa 1975) (quoting Coolidge, 403 U.S. at 454-55).

"The intruding officers in this case apparently did not grasp that what significantly needs to be in view is the thing to be seized, not the thing or place to be searched." Davis, 228 N.W.2d at 73. (pre-intrusion view created probable cause, but did not disclose actual contraband, making entry illegal and invalidating subsequent plain view seizure). As in Davis, the officers in the immediate case had probable cause, but did not actually view contraband PRIOR to entry. The odor did not verify the existence of contraband, it merely created probable cause. The case law indicates exigent circumstances shall not be

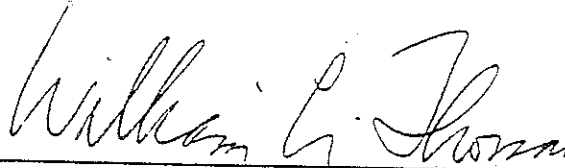
1994 MAY 5 AM 9:36
FILED
COURT
IOWA

manufactured based on possible destruction of unverified evidence. The State has failed to prove that there were exigent circumstances justifying the warrantless entry.

It is therefore ORDERED that the Defendants' motions to suppress all physical evidence seized in the initial, warrantless search, and all subsequent searches stemming therefrom, are GRANTED.

Clerk to notify.

May 4, 1994.



WILLIAM L. THOMAS,
JUDGE, SIXTH JUDICIAL DISTRICT OF IOWA

RECEIVED
CLERK OF COURT
JUDICIAL DISTRICT OF IOWA

1994 MAY - 6 AM 9:36

FILED