

Erdahl

IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

STATE OF IOWA,)
)
 Plaintiff,)
)
 vs.)
)
 MICHAEL ALAN PETRAK II,)
)
 Defendants.)

NO. SRCR061125

RULING ON
MOTION TO SUPPRESS

Date: November 25, 2002

FILED
2002 NOV 26 PM 2:04
CLERK OF DISTRICT COURT
JOHNSON COUNTY, IOWA

Defendant's Motions to Suppress came before the Court for hearing as scheduled. Defendant appeared in person and with Attorney Clemens Erdahl. The State appeared by Assistant Johnson County Attorney Linda M. Paulson. Witnesses were sworn, and evidence was presented. The Court, having heard the testimony presented, now makes the following findings, conclusions and ruling.

FACTS

Officer Terry Lee Bringman of the University of Iowa Department of Public Safety was on duty on January 23, 2002. At about 2:42AM he responded to Room N231 at Currier Hall, a residence hall on the University of Iowa campus, in Iowa City, Johnson County, Iowa, regarding a report of odor of marijuana. Officer Shawn Sharp arrived at the residence hall at about same time and they went to the room.

The Defendant was identified as one of three persons in the room when the officers arrived. Officer Bringman spoke with the Defendant in the hallway while Officer Sharp remained in the room with the other individuals present, Ryan Baack, the resident of the room and a third individual named Perkins was seated near a bong on the floor of the room. Perkins claimed ownership of the bong and was placed under arrest by Officer Sharp.

Officer Bringman asked the Defendant if he had anything illegal on him and he responded that he did not. Bringman asked if he would mind showing him and the Defendant started taking things out of his pockets. Officer Bringman may have said, "would you mind emptying your pockets."

Bringman testified that he observed a bulge in one of the Defendant's coat pockets and asked what that was. He stated that the Defendant reached into his pocket and pulled out a baggie that appeared to contain marijuana. He testified that the Defendant was not told to empty his pockets, nor did he seem to resist doing so. The Defendant handed the baggie to Officer Bringman. Officer Bringman then placed the Defendant under arrest.

The Defendant was 18 years of age at the time of this event. He was a first year student at the University and lived in another room in Currier Hall. The Defendant testified that he was told to empty his pockets. He removed some items, including a cell phone and keys, but not the contraband. The officer then reached into his pockets and removed the rest of the items, including the contraband. Officer Bringman removed a baggie containing marijuana, a one-hitter pipe that looked like a pen, and a bag of seeds and stems from another pocket.

The Defendant was subsequently placed under arrest and charged with the crime of **Possession of a Controlled Substance, Schedule I – Marijuana**, in violation of Iowa Code Section 124.204 and 124.401.

CONCLUSIONS

A search conducted without a warrant is per se unreasonable unless a valid exception to the warrant requirement exists. State v. Cadotte, 542 N.W.2d 834 (Iowa 1996) (citing State v. Cullor, 315 N.W.2d 808 Iowa 1982)). Valid exceptions exist for warrantless searches (1) with consent, (2) based on probable cause and exigent circumstances, (3) involving items in plain view, or (4) incident to arrest. State v. Eubanks, 355 N.W.2d 57 (Iowa 1984). The State has the burden to prove by a preponderance of the evidence that a warrantless search falls within one of these exceptions. State v. Howard, 509 N.W.2d 764 (Iowa 1993).

The State argues that the Defendant consented to the search. The Defendant asserts that the State did not prove that the Defendant voluntarily consented to a warrantless search. Assuming, arguendo that the Defendant did give consent, the standard for considering the issue of voluntariness in the context of a consent search was established by the United States Supreme Court in Schneckloth v. Bustamonte, 412 U.S. 218 (1973) where the Court held that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given and not the result of duress or coercion, express or implied.

Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establish a voluntary consent. *Id.* at 248-249. Whether a consent to search was in fact voluntarily or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. *Id.* at 227.

The totality of the circumstances should be considered in determining voluntariness. Case law (with the exception of the Court of Appeals for the Ninth Circuit) has established that knowledge of a right to refuse consent is not required and a person's knowledge of a right to refuse consent is just one factor to be taken into account.

See, Schneckloth at 223, 226-27, 231 nn.13 &14; see also, State v. Folkens, 281 N.W.2d 1 (Iowa 1979); State v. Ege, 274 N.W.2d 350 (Iowa 1979). Consent searches are part of the standard investigatory techniques of law enforcement agencies and can normally occur on the highway, ..., and under informal and unstructured conditions. Id. at 231-232. Additionally, the fact that a suspect is in custody is not sufficient to demonstrate a coerced consent to search. United States v. Watson, 423 U.S. 411 (1976).

In applying the Fourth Amendment to police officer conduct, it is clear that an encounter between the police and an individual will not trigger Fourth Amendment scrutiny unless the encounter loses its consensual nature. The Fourth Amendment is not violated simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would free to disregard the police and go about his business, the encounter is consensual, and no reasonable suspicion is required. California v. Hodari D., 499 U.S. 621, 628 (1991) and Florida v. Bostick, 501 U. S. 429, 497 (1983).

The crucial test is whether, taking into account all of the circumstances surrounding the encounter, a police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business. Michigan v. Chesternut, 486 U.S. 567, 569 (1988). "Consent" that is the product of official intimidation or harassment is not consent at all. Citizens do not forfeit their constitutional rights when they are coerced to comply with a request that they would prefer to refuse. Bostick, Id. at 438.

The law of consent searches has been recently visited by the Iowa Supreme Court in State v. Reinier, 628 N.W.2d 460 (Iowa 2001). The Court stated, "(i)n examining the presence of coercive tactics to determine the voluntariness of the consent to search a house, it is important to take subtle police actions into account as well as direct actions. Id. at 468.

In Reinier, supra, narcotics officers, responding to a complaint indicating that the defendant was selling drugs, decided to initiate a "knock and talk" investigation of the defendant's home. Two officers went to the defendant's home and knocked on the door. The defendant opened a door to the porch and the officers stepped inside. The officers were in plain clothes and identified themselves as police officers. They told the defendant that they were investigating a narcotics complaint and that they preferred to investigate drug complaints by going to the suspect's home and instead of getting a warrant, looking around the house to rule out bogus or petty use complaints.

The officers asked the defendant if she had any drugs in the house and she said that she did. They reiterated that they weren't concerned about the petty use of drugs and asked to look through the house. They told the defendant that since she had acknowledged that there were drugs inside, they had probable cause for a warrant. The defendant consented to a search.

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The Court found that the officers made an illegal entry onto the porch in that there was not a clear invitation to enter; they explained their normal procedure for investigating drug complaints; and they indicated that personal use drugs were not the subject of the search. This was balanced by the fact that the defendant admitted there were drugs in the house; that there was probable cause for a warrant; and the defendant signed a written consent form.

The Court in Reinier found that the subtle coercive actions engaged in by the police of intimidation, implied authority and minimization of consequences invalidated the consent given by the defendant.

Further, compliance with an officer's request to empty one's pockets does not amount to a consent to search. State v. Horton, 625 N.W.2d 362, 364 (Iowa 2001).

The Court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officer's request or otherwise terminate the encounter. In this regard, the Court finds the following facts to be significant. Two uniformed officers came to the dorm room. The Defendant was instructed to accompany one of the officers into the hallway. The Defendant was asked if he had any contraband, which he denied. The Defendant was then asked to prove his statement by showing the officer what was in his pockets. Whether the officer directly asked the Defendant to empty his pockets or simply asked the Defendant to show him what he had in his pockets is not a significant distinction.

The Defendant clearly did not want to produce the contraband he knew was in his pockets. He denied having any contraband and attempted to show the officer other items in his pockets to prove his claim. The officer suspected that the Defendant was not being truthful and pursued his inquiry by asking specifically what the Defendant had not removed from his pockets. The Defendant, according to the officer, then reached into his pocket and produced the contraband. According to the Defendant, the officer then reached into his pocket and retrieved the contraband. The latter would clearly be a warrantless search, without consent. The former is a submission to the authority of the officer and lacked the willing and voluntary consent given freely without duress or coercion. See State v. Drury, 2000 WL 1827815 (Iowa App.).

Evidence obtained in violation of the Fourth Amendment is inadmissible at trial under the exclusionary rule. State v. Breuer, 577 N.W.2d 41, 45 (Iowa 1998). Accordingly, Defendant's Motion to Suppress should be sustained and the evidence seized herein should be suppressed and not admitted at trial herein.

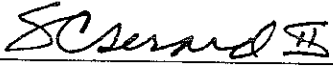
RULING

For the reasons set forth herein, the Defendants' Motions to Suppress is sustained.

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JUDICIAL DISTRICT NO. 1
POLK COUNTY IOWA

These files are referred to the Court Administrator for further proceedings accordingly and rescheduling of a **Pretrial Conference and Trial** herein.

Clerk to notify.



STEPHEN C. GERARD II
District Associate Judge

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JOHNSON COUNTY, IOWA

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