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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

Filed October 22, 1986

STATE OF IOWA,

Plaintiff-Appellee,

vs.

GENE HOWARD LOVE,

Defendant-Appellant.

466

6-290
85-1328

Appeal from the Iowa District Court for Story County (10604) - Thomas R. Hronek, District Associate Judge.

Defendant appeals judgment by the trial court finding him guilty of operating a motor vehicle while intoxicated in violation of Iowa Code section 321.281. **AFFIRMED.**

Charles Harrington, Chief Appellate Defender, and John P. Messina, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Elizabeth E. Ciebell, Assistant Attorney General, for plaintiff-appellee.

Considered by Donielson, P.J., Schlegel, and Hayden, JJ.

HAYDEN, J. 467

On February 17, 1985, Story County Deputy Sheriff Terry Stark observed defendant's pickup leave a residence in Roland, Iowa, at approximately 3:00 a.m. Deputy Stark proceeded to follow the pickup as it was driven along several streets in Roland. The deputy did not initially know who the driver was. During the time the deputy followed the pickup he observed nothing unusual or improper about the manner of driving. Stark testified that he was interested in this vehicle because garden tractors had been recently stolen and this vehicle was adapted to such a crime. The pickup eventually pulled onto Maple Street and headed west, with the deputy following.

The pickup turned down a dead end street, Brinton Circle. The deputy drove past the Circle, turned around, and proceeded back on Maple. As Deputy Stark turned down Brinton Circle, defendant was stopped at the Maple intersection. As the deputy pulled onto Brinton Circle, defendant pulled onto Maple heading east back into town. Deputy Stark testified at this point he recognized defendant as Gene Howard Love. Stark knew defendant because in late 1984 he participated in a search of defendant's residence. The deputy then backed out of Brinton Circle and followed defendant east on Maple. When asked why he continued to follow, the deputy stated a sheriff had told him that defendant had been arrested for OWI in late December or early January and had tested over the legal limit. From this information the deputy concluded defendant's driving privileges had been suspended.

The deputy followed defendant east on Maple. He testified defendant accelerated over the "25 m.p.h." speed limit in an attempt to elude him. The actual speed limit along this portion of highway decreases from 35 to 30 m.p.h. The officer did not radar check or pace defendant's vehicle. He caught up to defendant's vehicle, turned on his red lights, and stopped the truck. Defendant

brought his vehicle to rest on private property, and exited the truck. Deputy Stark, while asking for defendant's license, noted an odor of alcohol and administered a field sobriety test, which defendant failed. While at the scene the deputy received a radio report defendant's license had been revoked. Defendant was placed under arrest for OWI and issued a citation for driving while his license was revoked. After arresting defendant, Stark transported him to the Story County jail. Defendant consented to a blood test, which showed a concentration of 215 milligrams of alcohol per 100 milliliters of blood. Defendant was never given a ticket for speeding and the citation was eventually dismissed.

On May 8, 1985, defendant filed a pretrial motion to suppress the fruits of Stark's investigatory stop of Love's vehicle. Following an evidentiary hearing the court denied his motion and upheld the vehicle stop as a lawful stop for speeding or for investigating whether defendant was driving with a valid license. After defendant waived his right to a jury trial and agreed to stipulate to trial on the minutes of testimony, the trial court found him guilty of OWI as charged. On September 9, 1985, defendant was sentenced to serve two days in the county jail and was given a suspended fine.

Defendant contends that the trial court erred in overruling his motion to suppress the fruits of the investigatory stop of his vehicle. Defendant asserts the investigatory stop was not constitutionally justifiable on the claim of speeding or upon the suspicion that defendant did not have a valid driver's license.

Since a constitutional challenge is made, we review the evidence de novo. State v. Hilleshiem, 291 N.W.2d 314, 316 (Iowa 1980). We must make an independent evaluation of the totality of the circumstances. State v. Losee, 353 N.W.2d 876, 878 (Iowa Ct. App. 1984).

The fourth amendment provides:

> [T]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches shall not be violated.

Whenever a police officer accosts an individual and restrains his freedom to walk or move away, he has "seized" that person. Terry v. Ohio, 392 U.S. 1, 16, 88 S. Ct. 1868, 1877, 20 L. Ed. 2d 889, 903 (1968). From the record we conclude that defendant was "seized" when Deputy Stark signaled defendant to pull over by using his flashing red lights.

The purpose of the fourth amendment search and seizure proscriptions is to impose a standard of reasonableness upon the government's exercise of discretion, in order to protect the privacy and security of individuals against arbitrary invasions. Delaware v. Prouse, 440 U.S. 648, 653-54, 99 S. Ct. 1391, 1396, 59 L. Ed. 2d 660, 667 (1979). The police may not use their inspection powers as a pretext for stopping motorists for the purpose of inquiring about the traveler's business on the road. State v. Cooley, 229 N.W.2d 755, 758 (Iowa 1975) (quoting United States v. Cupps, 503 F.2d 277, 282 (6th Cir. 1974)). In Prouse, the United States Supreme Court recognized the following proposition:

> An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed.

Prouse, 440 U.S. at 662-63, 99 S. Ct. at 1400-01, 59 L. Ed. 2d at 673.

The fourth amendment requires a police officer to have reasonable cause to stop the vehicle for investigatory purposes. Terry v. Ohio, 392 U.S. at 21, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906; State v. Eis, 348 N.W.2d 224, 226-27 (Iowa 1984). To establish reasonable cause, the State must show that the officer had specific and articulable cause to support a reasonable belief that criminal activity may have occurred. State v. Aschenbrenner, 289 N.W.2d 618, 619 (Iowa 1980). The test for such a stop is whether the record discloses articulable objective facts available to the officer to justify the stop, not the policeman's subjective theory. State v. Peck, 329 N.W.2d 680, 686 (Iowa Ct. App. 1982). The officers are bound by the true reason for making the stop. Aschenbrenner, 289 N.W.2d at 619. Probable cause, sufficient to justify an arrest, is not necessary, however, mere suspicion or curiosity will not suffice. State v. Donnell, 239 N.W.2d 575, 577 (Iowa 1976).

We must balance the government's role in criminal investigations with the individual's right to privacy. To determine whether a seizure is unreasonable, we consider whether the thing done, in the sum of its form, scope, nature, incidents, and effects, impresses as being fundamentally unfair or unreasonable in the specific situation when the immediate end sought is considered against the private right affected. Hilleshiem, 291 N.W.2d at 316. We focus on whether specific and articulable facts existed, which can objectively be said to have warranted the vehicle's stoppage. Here the facts were: Deputy Stark was concerned because of the recent theft of garden tractors, particularly since a pickup truck was suited for this crime; defendant and the deputy were the only vehicles on the street at three o'clock in the morning; and Stark recognized defendant as someone who had recently had his license revoked (although this was not confirmed until after the arrest).

The key factor to consider in determining whether the stop was reasonable is that Stark identified defendant and thereby concluded that his license had been revoked. "All that Prouse requires is an articulable and reasonable suspicion that the motorist is unlicensed or that the vehicle being stopped is unregistered [or that the vehicle or the occupant is otherwise subject to seizure for a law violation]." State v. Jackson, 315 N.W.2d 766, 767 (1982) (citing Delaware v. Prouse, 440 U.S. at 661, 99 S. Ct. at 1400, 59 L. Ed. 2d at 672). Based upon Deputy Stark's conversation, a few months prior, with Sergeant Bearden, he concluded that defendant had tested over the legal limit and his license had therefore been revoked. We conclude Stark's knowledge regarding defendant's license revocation created a reasonable suspicion, sufficient to warrant him stopping defendant's car.

In summarizing the events of February 17, 1985, we note the only record regarding that night is the testimony from the suppression hearing. The suppression hearing consisted of direct and cross-examination of Deputy Stark, no one else testified. Initially the Deputy followed defendant because of the recent theft of garden tractors. When defendant pulled down Brinton Circle, Stark drove past, turned around, and turned down Brinton Circle. At this point Deputy Stark visually identified defendant and recognized that he might be driving with a revoked license. From Brinton Circle defendant headed back into town; Deputy Stark followed and testified that defendant increased his speed, as though running away. Upon catching up with defendant, Stark turned on his lights and pulled defendant over.

Deputy Stark had reasonable cause to stop defendant's truck based upon the facts that his license was revoked. We affirm the trial court.

AFFIRMED.

Donielson, P.J., concurs; Schlegel, J., dissents.

SCHLEGEL, J. (dissenting)

The fourth amendment requires that an officer have "reasonable cause" to stop a vehicle for investigatory purposes. Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968). An officer must have specific and articulable cause to support a reasonable belief that criminal activity may have occurred. State v. Conger, 375 N.W.2d 278, 279 (Iowa Ct. App. 1985). The record must disclose objective facts available to the officer to justify the stop under the circumstances. State v. Losee, 353 N.W.2d 876, 878 (Iowa Ct. App. 1984). The test is not the officer's subjective theory. State v. Peck, 329 N.W.2d 680, 686 (Iowa Ct. App. 1982). Mere suspicion or curiosity is not sufficient to justify the stop of a vehicle for investigatory purposes. State v. Donnell, 239 N.W.2d 575, 577 (Iowa 1976).

Since our review is de novo, we must review all the evidence and make an independent evaluation of whether the stop in question was based on the theory, curiosity, or mere suspicion of the officer, or whether the specific and articulable facts which led to the stopping of the defendant's vehicle were sufficient to warrant a person of reasonable caution to believe the action was appropriate. I find no evidence in the record that the stop was based on anything but the theory, curiosity, and mere suspicion of the officer.

The record shows:

1) The officer followed defendant around a small town because he was interested as to what the vehicle was doing on the road at that hour.

2) The officer testified that the car did not proceed erratically, run off the road, squeal tires, or do anything that would raise a suspicion that it was being driven under the influence of alcohol.

3) The officer said that the car began to speed. When later confronted with the evidence of the speed limit, the officer admitted he had thought the speed limit was different than it actually was. Furthermore, the officer admitted he did not use radar, pace the car, discuss speeding with the defendant, or issue a speeding ticket.

4) The officer testified that he recognized the defendant and had heard from another officer that the defendant had been picked up several months previously for OWI. The officer reasoned that anyone picked up for OWI and testing high on a blood test might be driving without a license.

I do not think these facts in the record indicate anything more than mere suspicion on the part of the officer. The officer was curious as to the reason the car was on the road in the early morning hours. The vehicle was not observed in any actions that would lead a reasonable person to believe the driver was intoxicated. There was no evidence presented to show that defendant was speeding.

The reasonableness of the stop, then, comes down to whether the officer's hearing about the defendant's previous OWI arrest and alcohol test raised mere suspicion to the level of specific and articulable facts that would warrant the stop. We should not place on our officers the burdensome task of forecasting the outcome of arrests and then, contrary to the presumption of innocence that is the cornerstone of our judicial system, ask them to come to affirmative conclusions as to guilt and subsequent conviction of citizens. No fact existed which raised the officer's grounds for the stop above a theory; no fact existed which raised the officer's grounds for the stop above mere suspicion. As the officer testified, he had no knowledge whether the defendant had been brought to trial or if the case had been set aside or appealed. As he testified, "Well, my immediate thoughts were that possibly his drivers license may be suspended."

The words "possibly" and "may" do not suggest objective facts available to the officer. They indicate a theory or a mere suspicion.

When the legal standard for such a stop is not satisfied as it was not here, I do not believe that the subsequent positive testing for OWI after the stop is sufficient reason to jettison the fourth amendment. For these reasons, I must dissent.