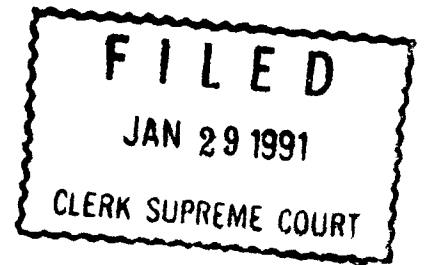


IN THE COURT OF APPEALS OF IOWA

No. 0-590 / 90-326



STATE OF IOWA,

Appellant,

vs.

437

GEORGE T. SWAN

Appellee.

Appeal from the Iowa District Court for Dubuque County,
Lawrence H. Fautsch, Judge.

In this OWI prosecution, the district court suppressed evidence resulting from an encounter between the defendant and a deputy sheriff. The State has been granted discretionary review to challenge this suppression order.

REVERSED AND REMANDED.

Bonnie J. Campbell, Attorney General; Amy M. Anderson, Assistant Attorney General; Fred H. McCaw, County Attorney; and Mark T. Hostager, Assistant County Attorney, for appellant.

Linda Del Gallo, Acting State Appellate Defender, and Shari Barron, Assistant State Appellate Defender, for appellee.

Heard by Donielson, P.J., and Hayden and Habhab, JJ.

DONIELSON, P.J.

The question here is whether a "seizure" implicating the fourth amendment occurred prior to the time a police officer observed indicia of defendant's intoxication. The State contends no unconstitutional seizure occurred and therefore the trial court erred in suppressing the breath test results.

Our review of the record bearing on this search and seizure issue is de novo. State v. Harlan, 301 N.W.2d 717, 718 (Iowa 1981). The police officer was the only witness to testify at the suppression hearing. He testified to the following sequence of events. On October 5, 1989, Dubuque County Sheriff Deputy Doyle was on road patrol. About two o'clock in the morning, Doyle saw a van proceeding down the road in a business district where there had recently been several thefts or burglaries. The van's interior dome light was on and the deputy could see three men inside the van. The deputy became curious due to the time of night and the nature of the neighborhood.

Doyle watched the van turn left off the road on which the officer and the van were both traveling. Doyle initially decided not to follow the van but at the next intersection he decided he should turn around "and see what these guys are up to or follow them for a little bit." Doyle was able to catch up to the van. He observed the van turn into the Double J parking lot. Doyle drove by the parking lot but, again, decided to turn around.

Doyle pulled into the parking lot and parked behind the van. One of the passengers emerged from the van, walked back to Doyle's car, and began to explain the men's presence in the area. The deputy smelled alcohol on the passenger's breath. The deputy then approached the van and spoke to the driver, defendant George Swan, who also showed signs of intoxication. On the basis of this conversation, Doyle called for a STOP officer (an officer who conducts sobriety tests and processes intoxicated persons). The STOP officer arrived and received a breath specimen from defendant. The defendant's blood alcohol level was .170.

Swan was charged with operating while intoxicated (OWI). Swan filed a motion to suppress the chemical test results on the ground the deputy had no reasonable cause to stop him. The State argued at the suppression hearing that Deputy Doyle's approach to the van was not an investigatory stop and, even if it were, the officer had specific and articulable facts to make the stop constitutional. The district court did not expressly determine when a seizure occurred but sustained Swan's motion and suppressed the chemical test results.

The State has now been granted discretionary review to challenge the suppression order. The adverse ruling at the suppression hearing preserved any alleged error for our review. See Harlan, 301 N.W.2d at 719, and cited authorities. The State contends the encounter between the defendant and the deputy did not amount to a stop or a

seizure, at least not prior to the time Doyle observed signs of defendant's intoxication; consequently, the State asserts defendant's fourth-amendment rights were not implicated and the motion to suppress should have been overruled. We reverse and remand.

"The fourth amendment's protections against unreasonable intrusions on a person's liberty arises when an officer seizes a person." Id. A seizure occurs when a police officer, by means of physical force or show of authority, has in some way restrained the person's liberty. Id.; see e.g., State v. Stevens, 394 N.W.2d 388 (Iowa 1986) (police officer's command of "wait here" constitutes seizure). We find the Harlan case particularly instructive in our determination.

In Harlan, our supreme court affirmed the district court's denial of Harlan's motion to suppress because it found no "seizure" implicating the fourth amendment had occurred until after the officer observed Harlan's intoxicated condition and then asked for his driver's license. In that case, Harlan stopped his car, apparently to pick up a passenger because he stayed in his car with the engine running. An officer, who was about one block behind, caught up with Harlan, stopped his vehicle behind Harlan's, and walked up to the defendant's car. He shined a flashlight into the car and observed that Harlan's eyes were bloodshot and watery. The officer also smelled alcohol. The officer then asked for Harlan's driver's

license, had Harlan perform field sobriety tests and arrested him. Harlan, 301 N.W.2d at 719.

. . . [W]e conclude that officer Hinton's initial observation of Harlan after Hinton walked up to the car was not a seizure. There was no evidence that officer Hinton stopped the car. He was at least a block behind Harlan when Harlan pulled over. Harlan stopped to pick up a passenger and not because Hinton signaled him over. Hinton did not turn on his red or yellow flashers but rather exited his car and walked up to Harlan's car. Prior to observing defendant's intoxicated state, there is no indication that Hinton spoke or gestured to Harlan. Cf. United States v. Palmer, 603 F.2d 1286 (8th Cir. 1979) (officer motioning and calling to the defendant constituted seizure). The officer, like any other citizen, had a right to look into the car. [State v. Holtz, 300 N.W.2d [888], 892 [Iowa 1981]]. See Illinois v. Holdman, 73 Ill. 2d 213, 220, 383 N.E.2d 155, 158 (1978), cert. denied, 440 U.S. 938 99 S. Ct. 1285, 59 L. Ed.2d 496 (1979) (alternatively holding that shining light into defendant's car not a stop). Hinton stood at the side of the car and did not restrain its movement. Officer Hinton's initial observation of Harlan was an innocuous police-citizen encounter that did not implicate the fourth amendment.

Id. at 720.

In the case at bar, the district court based the granting of the suppression motion on its belief "that the law requires that a police officer have reasonable and articulable cause to approach a motor vehicle as well as to stop the motor vehicle." Appendix at 29-30. The district court, in this regard, held an erroneous belief. "[N]ot all personal intercourse between policemen and citizens involves 'seizures' of persons." Terry v. Ohio, 392 U.S. 1, 19, n. 16 (1968). As noted in Harlan, the fourth amendment is not implicated where a person's liberty is not restrained. 301 N.W.2d at 719.

As in Harlan, there is no evidence Deputy Doyle stopped Swan's van. Doyle was traveling behind defendant's van without attempting to stop the van. Doyle was not making use of lights or siren. When Swan pulled into the Double J parking lot it was not because Doyle signaled him over. When Doyle pulled in some minutes later, the van was still in the parking lot. A passenger from the van first approached Doyle. Swan remained in the van with the engine running; Doyle did not order Swan to remain. Doyle later approached the van. There is no indication Doyle restrained the van's movement. The record before us discloses no indication that Deputy Doyle used physical force or a show of authority that in any way restrained Swan's liberty. Our review of the totality of the circumstances therefore reveals Doyle's approach of the van and initial observation of defendant was not a "seizure" within the meaning of the fourth amendment.

Because the fourth amendment was not implicated by Deputy Doyle's approach of the van the district court erred in suppressing the evidence resulting from the encounter on that basis. We reverse the district court's judgment and remand for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.