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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

309

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed August 26, 1987
vs.	)	
ESTEL WADE DUNSMORE,	)	7-121 86-884
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Dallas County (No. CR 9757), Arthur E. Gamble, Judge.

The defendant appeals from his conviction for first degree murder. He contends the district court should have suppressed all evidence resulting from his initial encounter with police officers. **AFFIRMED.**

Paul R. Huscher, Waukee, for defendant-appellant.

Thomas J. Miller, Attorney General; Roxann M. Ryan, Assistant Attorney General; and David J. Welu, Dallas County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson and Schlegel, JJ.

OXBERGER, C.J.

The defendant appeals his conviction for first degree murder in violation of Iowa Code sections 707.1 and 707.2(1) (1985), arguing that the trial court committed error in refusing to suppress evidence obtained after an allegedly illegal investigatory stop. We affirm.

I. STANDARD OF REVIEW

Because the appellant has alleged an infringement of his constitutional rights, we examine his claim by making an independent evaluation of the totality of the circumstances. State v. Conger, 375 N.W.2d 278, 279 (Iowa App. 1985). This is the equivalent of a de novo review. Id.; see also State v. Hillesheim, 291 N.W.2d 314, 316 (Iowa 1980). The burden is upon the state to establish that the evidence which the appellant seeks to suppress was lawfully obtained. State v. Hillesheim, 291 N.W.2d at 316.

II. INVESTIGATIVE STOP

On July 17, 1985, Illinois State Troopers Henry Simpson and Paul Steidinger were on routine patrol on Highway 116 near Pontiac, Illinois. About 8:30 p.m., Simpson and Steidinger spotted a vehicle on the shoulder of the southbound lane of Interstate 55. They turned south and pulled behind a green Dodge automobile with Iowa license plates. The doors were locked, the four-way flashers were operating, and there were no occupants. The officers ran a license check and found there was no police report on file. They then ran a check on the vehicle identification number and discovered the car was registered to a Pamela Proctor of Council Bluffs, Iowa, and was not reported stolen. The officers then proceeded south on Interstate 55.

After traveling about a mile, they came upon two pedestrians walking along the side of the road. They pulled in behind the pedestrians and activated their red flashing lights in accordance with routine procedure. The officers pulled

over to see if the pedestrians needed assistance, and because signs posted on Interstate 55 prohibited pedestrian travel. This law, however, was never proven at trial. Simpson got out of the car, motioned, and asked the two men to "move over in front of the headlights so we can see you." The men complied. Simpson then went over and asked the men where they were going. One of them replied they were going to the next rest area to get gas. Simpson asked if the green car belonged to them and one said yes. Simpson then requested some identification and the men produced their Nebraska drivers' licenses. Simpson then asked who owned the car. One of the men replied they borrowed it from a friend named Stephanie. Simpson asked "Stephanie who?" and received no response.

At this point Simpson told the men to get in the police car. No mention was made of where they were going, although the officers were treating it as a motorist assist. Dunsmore was seated in back with Trooper Steidinger, while Burr was seated in front with Simpson. The men were not searched or handcuffed at anytime. Simpson testified he intended to take the men back to Pontiac to get some gas and that he did not believe he had probable cause to arrest, but had cause to do some further checking since the information he already had did not coincide.

En route to Pontiac, Simpson ran a routine license check on the men's licenses. He also asked the dispatcher to contact Pamela Proctor and get more information concerning the car. The license check revealed neither man was wanted. The dispatcher also asked if Stephanie was in the car. Simpson replied that she was not. The officers then received a "hit tone" indicating a possible dangerous situation. Simpson then proceeded to the District Patrol Headquarters in Pontiac.

At the headquarters, the men were searched. A pistol was removed from Dunsmore; two knives, and a matchbook from the Ashworth Standard in Des Moines

were taken from Burr. A vehicle search after impoundment yielded a purse containing identification of Stephanie Vargas, miscellaneous papers, a pliers and screwdriver, and a transaction statement from an Omaha banking machine where a security videotape showed two individuals getting into the Vargas vehicle. The car also contained numerous fingerprints.

The body of Stephanie Vargas was found near Earlham, Iowa, and shell casings, bullets, and a gun repair receipt were obtained from the men's residences in Omaha. The state also obtained incriminating statements from Burr and Dunsmore after they were confined in the Livingston County Jail.

The appellant argues that the initial encounter instigated by Officer Simpson was illegal, and that all of the evidence derived therefrom should have been suppressed because it was in violation of his constitutional rights. In support of this assertion, appellant reasons that when Simpson made contact with him, he was "seized" within the meaning of the Fourth Amendment and subjected to an investigatory stop. He maintains the stop was not founded upon an objective justification such as probable cause or a reasonable, specific, and articulable suspicion that criminal activity was afoot. The State, in response, argues that there was not a stop, and that no "seizure" within the ambit of the Fourth Amendment occurred. They argue the Fourth Amendment requires a balancing of the Government's interest against the individual's privacy interest in order to determine the reasonableness of the intrusion. We find the initial encounter was not a seizure, but that defendant was "seized" when placed in the police car, and that the seizure was justified and did not amount to an arrest. We now turn to the principles upon which each of these determinations is predicated.

The Fourth Amendment's protection against unreasonable intrusions upon an individual's liberty is implicated when that person is "seized." United States v. Mendenhall, 446 U.S. 544, 552, 100 S.Ct. 1870, 1876, 64 L.Ed.2d 497, 507 (1980);

State v. Stevens, 394 N.W.2d 388, 390 (Iowa 1986); State v. Harlan, 301 N.W.2d 717, 719 (Iowa 1981). A "seizure" occurs when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen. Terry v. Ohio, 392 U.S. 1, 19 n.16, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889, 905 (1968); State v. Harlan, 301 N.W.2d 717, 719 (Iowa 1981).

There are countless ways in which the police and public can come into contact, but "not all personal intercourse between policemen and citizens involves 'seizures' of persons." INS v. Delgado, 466 U.S. 210, 215, 104 S.Ct. 1758, 1762, 80 L.Ed.2d 247, 254 (1984) (citing Terry, 392 U.S. 1 at 19 n.16, 88 S.Ct. at 1879, 20 L.Ed.2d at 905). "The Fourth Amendment does not proscribe all contact between the police and citizens, but is designed 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" Delgado, 466 U.S. at 215, 104 S.Ct. at 1762, 80 L.Ed.2d at 254 (1984) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 554, 96 S.Ct. 3074, 3081, 49 L.Ed.2d 1116 (1976)).

In Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (plurality opinion), the court clearly implies that questioning relating to a person's identity or requesting identification by a police officer does not, alone, constitute a Fourth Amendment seizure. Id. at 501, 103 S.Ct. at 1326, 75 L.Ed.2d at 239 ("asking for and examining Royer's ticket and his driver's license were no doubt permissible in themselves . . ."). Id.

> [L]aw enforcement officials do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.

Id. at 497, 103 S.Ct. at 1324, 75 L.Ed.2d at 236.

In Delgado, supra, the Court found that immigration agents questioning and requesting identification from factory workers to determine their citizenship were "classic consensual encounters rather than Fourth Amendment seizures." Delgado, 466 U.S. at 221, 104 S.Ct. at 1765, 80 L.Ed.2d at 258.

> While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response. Cf. Schneckloth v. Bustamonte, 412 U.S. 218, 231-234, 93 S.Ct. 2041, 2049-2051, 36 L.Ed.2d 854, 865-867 (1973). Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment.

Id., at 216, 104 S.Ct. at 1762-1763, 80 L.Ed.2d at 255.

A consensual encounter, however, can turn into a seizure "if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Id. at 215, 104 S.Ct. at 1762, 80 L.Ed.2d at 255; United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497, 509 (1980) (footnote omitted). But, if "the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification." Mendenhall, supra, at 554, 100 S.Ct. at 1877, 64 L.Ed.2d at 509.

Applying these principles to the present case, we find the initial encounter between Dunsmore and the police was consensual and, therefore, not a seizure within the ambit of the Fourth Amendment. After passing an abandoned vehicle, the troopers came upon two pedestrians. They pulled in behind the men and activated their red flashing lights. They asked the men to step in front of the headlights. At this point, the men were free to leave and disregard the officer's request. We find that under these particular facts, the circumstances were not so intimidating that a reasonable person would have believed he was not free

to leave if he had not responded. There is no evidence that Simpson used any physical force or other show of authority to compel the men to answer. The use of the red lights was a reasonable safety measure to alert other motorists of the activities taking place ahead of them. Instead, the defendant's voluntarily complied and responded to the questions. A police officer does not commit a Fourth Amendment violation by merely approaching a citizen and questioning him about his identity. Royer, supra at 497, 103 S.Ct. at 1324, 75 L.Ed.2d at 236. The fact that the men were not advised they could refuse to answer does not vitiate the consensual nature of the encounter.

The appellant also argues he was seized when Officer Simpson requested and retained his driver's license. The Supreme Court has implied in Royer that asking for a driver's license is permissible. Although there may be cases in which the taking of a driver's license will be a seizure, this is not one of those cases. Officer Simpson retained the license so he could run a routine warrant check. He testified that he was going to return them when they reached a gas station. We conclude that under the particular facts of this case, Officer Simpson's retaining of the licenses was not a seizure of the defendant.

Because we find the initial encounter to be consensual, constitutionally, an objective justification was not required. Mendenhall, supra, at 554, 100 S.Ct. at 1877, 64 L.Ed.2d at 509. We feel the troopers were justified in approaching the men. The officers believed the two men were the stranded motorists of the abandoned car they had just passed. It was their duty to stop and render assistance. To find, as defendant suggests, that the troopers should have pulled alongside and asked the men if they needed help would ignore the realities and dangers of the modern highway system.

III. SEIZURE

Although the defendant's initial encounter with the police was consensual, we conclude that the defendant was, in fact, "seized" when he was placed in

the patrol car. We also conclude that the seizure was justified.

For Fourth Amendment purposes, a person is "seized" when a police officer by physical force or show of authority restrains the person's freedom to walk away. Terry v. Ohio, 392 U.S. 1, 16, 88 S.Ct. 1868, 1877, 20 L.Ed.2d 889, 903 (1968). What begins as an initially consensual encounter can mature into a full investigatory stop when a reasonable person would not believe he was free to leave. INS v. Delgado, 466 U.S. 210, 215, 104 S.Ct. 1758, 1762, 80 L.Ed.2d 247, 255 (1984); United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1877, 1870, 64 L.Ed.2d 497, 509 (1980). To justify an investigatory stop, an officer must show specific and articulable facts that lead him to reasonably conclude criminal activity may be afoot. State v. Lamp, 332 N.W.2d 48, 51 (Iowa 1982); State v. Donnell, 239 N.W.2d 575, 577 (Iowa 1976).

We find that the officers seized Dunsmore when they placed him in the patrol car. Dunsmore was told to get in the police car and was seated in back with Officer Steidinger, while his partner, Burr, was placed in front with Officer Simpson. Under these circumstances, a reasonable person would feel he or she was not free to leave.

The seizure, however, was justified under the circumstances. Officer Simpson knew there was an abandoned car with Iowa plates registered to a Pamela Proctor. He saw two pedestrians walking away from the car. They told Simpson they borrowed the car from a friend named Stephanie, but could not recall Stephanie's last name. The information that Stephanie owned the car did not coincide with the information regarding Proctor's ownership of the car. We conclude these facts would give Officer Simpson a reasonable suspicion that criminal activity, namely auto theft, was afoot, and warrant a brief detention to conduct a further investigation.

Defendant contends that when he was placed in the car and transported, he was arrested without probable cause. He argues he was never told where he was being taken. He relies heavily on our decision in State v. Lathum, 380 N.W.2d 743 (Iowa App. 1985). The state counterargues that the investigatory stop and the officers' actions in transporting the men must be examined for their reasonableness under all the circumstances. We find that Lathum, although similar, does not govern this case.

In Lathum, the defendant was approached by police officers who told him he was a suspect, who then frisked him, and who made him empty his pockets. The police then took the defendant to the crime scene and began interrogating him. We found the defendant had been arrested without probable cause. In the present case, the men were placed in the car so they could be taken to a gas station. While they were not told where they were going, it was obvious from the circumstances since they told the officers they had run out of gas and were going to get some. Also, a routine check only was run on their licenses. There was no indication by the officers that they were under arrest. They were not searched before being placed in the car. At this point, the police procedures were not so intrusive that the full panoply of Fourth Amendments rights was triggered. State v. Lathum, 380 N.W.2d 743, 745 (Iowa App. 1985). In this case, the transportation was no more than a de minimis intrusion on the defendant's rights. We do not mean to imply that all transportations of defendants will pass constitutional muster; but, if the investigation had not led to probable cause to arrest, the defendant would have been taken to a gas station regardless of where the investigation had taken place. The transportation was done merely to expedite the process of taking Dunsmore to get gas and conduct the investigation at the same time. Under these facts, we hold the defendant was not arrested when the men were transported from the scene.

The defendant does not challenge the officers' probable cause to arrest when the "hit tone" sounded. Accordingly, for the reasons set forth, we affirm the defendant's conviction and find the trial court did not err in denying defendant's suppression motion.

AFFIRMED.