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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-351 / 00-1123
Filed November 16, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SHAWN PATRICK PINK,
Defendant-Appellant.

Appeal from the Iowa District Court for Benton County, David S. Good (motion to suppress), Douglas S. Russell (trial and sentencing), Judges.

Defendant appeals from the judgment and sentence entered upon his convictions for third-offense operating while intoxicated in violation of Iowa Code section 321J.2 (1999), interference with official acts in violation of section 719.1, and failure to yield to an emergency vehicle in violation of section 321.324. **REVERSED AND REMANDED.**

Matthew S. Sheeley of Parrish, Kruidenier, Moss, Dunn, Montgomery & Boles, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, David C. Thompson, County Attorney, and Anthony H. Janney, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

000432

SACKETT, C.J.

Defendant appellant Shawn Pink was convicted of OWI third offense, in violation of Iowa Code section 321J.2 (1999); interference with official acts, in violation of Iowa Code section 719.1; and failure to yield to an emergency vehicle, in violation of Iowa Code section 321.324. He appeals, contending the district court erred in failing to suppress evidence he contends was obtained as a result of a search of his home. With respect to evidence admitted to convict defendant of OWI third offense, we reverse.

At approximately ten o'clock in the evening of July 2, 1999 Benton County Deputy Sheriff John Austin was notified by radio that a pickup truck with license plate number "904 GIM," driven by a man with a beard and baseball cap who may have been drinking, had followed a car full of teenagers to their destination, a residence at 6355 25th Avenue, and was causing a disturbance there. Information regarding the driver and the disturbance had been phoned in from the home at 6355 25th Avenue. After determining the identity of the registered owner of the vehicle, Deputy Austin parked his squad car at an intersection he believed the driver/defendant would likely pass through to get to his own home after leaving 6355 25th Avenue. Deputy Austin got out of his car to wait for the driver. Seeing the reported pickup, driven by defendant, approach the intersection and pass through it in a reasonable manner, Deputy Austin got into his car, turned on his red lights, and followed the car. According to the deputy's testimony, the defendant then sped up, so much so that he could not catch him, even at the deputy's own claimed speed of seventy miles per hour. In a further attempt to get the attention of defendant, the deputy turned on his white

sweeping light. He did not activate the siren. Immediately thereafter, the pickup slowed and turned into the defendant's drive, which was about one and one-half miles from the intersection. Deputy Austin entered the driveway as well, stopped, and noticed the defendant leave his vehicle and walk up the steps of his walk-in porch adjoining the house. The deputy called out to the defendant, "Stop. I want to talk to you." The defendant looked back at the deputy and proceeded into the porch. Deputy Austin again said, "Stop. I want to talk to you." The defendant paid no attention and walked into the house.

Deputy Austin then walked through the walk-in porch and knocked on the door. The defendant's girlfriend, Kelly Maynard, whom the deputy knew, opened the door. The deputy told her that he needed the defendant to talk to him, and that otherwise he would come in to talk to the defendant himself. She responded that the defendant was in the bathroom. According to Austin, upon his response that he would wait, Maynard said, "Come on in and wait in the kitchen here." Whether she responded as such is unclear: the deputy did not include this comment in his July 10 police report on the incident.

Deputy Austin testified that when the defendant came out of the bathroom he spoke with slurred speech, had bloodshot eyes and smelled of alcohol. The deputy asked the defendant whether he had been drinking. The defendant responded that he had been. The deputy asked the defendant whether he had drunk anything since entering the house. The defendant's response was that he had not. The defendant then consented to several sobriety tests performed outside of his house. He failed the tests and was arrested.

The defendant filed a motion to suppress any incriminating evidence Deputy Austin had gained as a result of his entry into the defendant's home. The district court overruled the motion to suppress, concluding the search was extremely limited, that the deputy did nothing more than wait for the defendant to exit the bathroom, and that the arrest was due to the deputy's observation of the defendant's physical condition after he exited the bathroom. The district court concluded that because the evidence against the defendant (namely, observations of him drunk) could have been procured in any site, public or private, the fact that Deputy Austin's observations of the defendant occurred in his home did not serve as grounds to suppress the evidence.

Our review of a district court's refusal to suppress the fruit of a search allegedly conducted in violation of constitutional guarantees is de novo. *See State v. Countryman,* 572 N.W.2d 553, 557 (Iowa 1997). Under this review, we make an independent evaluation of the totality of the circumstances as shown by the entire record. *State v. Howard,* 509 N.W.2d 764, 767 (Iowa 1993). We give deference to the district court's fact-findings due to its opportunity to assess the credibility of witnesses, but we are not bound by those findings. *See State v. Gravenish,* 511 N.W.2d 379, 381 (Iowa 1994).

The defendant contends that the warrantless search of his house was conducted without probable cause and in the absence of consent or exigent circumstances.

We first address the question of probable cause. Initially Deputy Austin's reason for investigating the defendant was due to a tip provided by someone living at 6355 25th Avenue. For a tip to provide the basis of probable cause, it

must contain a moderate indicia of reliability. *See Florida v. J.L.*, 529 U.S. 266, 120 S. Ct. 1375, 1378, 146 L. Ed. 2d 254, 260 (2000).

In *State v. Markus*, 478 N.W.2d 405, 409 (Iowa Ct. App. 1991), we found that if an anonymous citizen informant tip was sufficiently corroborated by "the identification of the [named] vehicle and its location," that corroborated tip furnished "sufficient reasonable suspicion" to justify an investigative stop. The United States Supreme Court found in *J.L.* that reasonable suspicion can be derived from an anonymous tip only if reliability relating to the tip's assertion of illegality, not merely to its tendency to identify a determinate person, can be demonstrated. *J.L.*, 529 U.S. at 272, 120 S. Ct. at 1379, 146 L. Ed. 2d at 261. The Iowa Supreme Court distinguished *Markus* from *J.L.* in *State v. Walshire*, ___ N.W. 2d. ___ (Iowa 2001) by finding that an investigative stop based on an anonymous tip which identifies only a determinate person does not violate the Fourth Amendment if 1) the tip alleges the commission of a crime open to public observation (rather than a crime of concealment); 2) the tip alleges the existence of a serious public hazard possibly calling for a relaxed standard of reliability; and 3) the resulting intrusion on privacy interests is slight.

We believe the case at hand is factually distinguishable from *Walshire*. In this case an informant living at 6355 25th Avenue notified police that defendant was causing a disturbance and had possibly been drinking. In *State v. Peck*, 517 N.W.2d 230, 232-3 (Iowa Ct. App. 1994), we found that information imparted by a named citizen informant is generally reliable. *See also, State v. Post*, 286 N.W.2d 195, 200 (Iowa 1979). However, we look at the totality of the circumstances, including the predictions of the tip and how accurate they prove

to be, in determining the tip's reliability and the amount of suspicion which can reasonably be derived from it. *See Alabama v. White,* 496 U.S. 325, 330-1, 110 S. Ct. 2412, 2416, 110 L. Ed. 2d 301, 308-9 (1990).

While the description of the driver and truck proved to be accurate in this case, we find it significant that, unlike in *Walshire,* Deputy Austin actually observed the identified vehicle and found that its movement did *not* corroborate the tipster's claim that the driver was possibly drunk. Deputy Austin testified that defendant's pickup proceeded normally through the intersection. He also testified that the pickup was not operated in an erratic manner and that it never crossed the center line or moved onto the shoulder. This, we believe, distinguishes both *Walshire* and *Marcus* from the case at hand. In those cases the officers did not make independent observations of the identified vehicles and find that the driver was proceeding normally. Although in this case Deputy Austin testified that the defendant was speeding to elude him, given the time it would have taken the deputy to get back in his vehicle and proceed through the intersection, the defendant would have moved a considerable distance beyond the deputy, possibly almost to his house only a mile and a half away, even if he had been driving fifty-five miles per hour. Consequently we do not subscribe to the state's contention that the driver was speeding and that this speeding bolstered the deputy's reasonable suspicion. Therefore, the reasonable suspicion which may have been present due to an initially reliable tip, and which would have justified an investigative stop upon identification of the named vehicle, should have been rendered nugatory as soon as the deputy found that

the movement of the truck did not reflect the allegations of the tip. This reasoning should apply whether the informant was "citizen" or "anonymous."

Even if *Walshire* were not factually distinguishable, however, its scope does not extend to this case. The third prong of the reasoning in the *Walshire* holding is that the resulting intrusion on privacy interests is slight. In *Walshire* the privacy intrusion was an investigative stop. In this case the privacy intrusion was entry, for twenty minutes, into defendant's house and kitchen. A warrantless arrest must be supported by probable cause. *State v. Harris,* 490 N.W. 2d 561, 563 (Iowa 1992).

The State claims that defendant's "flight" into his house elevated that reasonable suspicion to probable cause. The State cites *State v. Bumpus*, 459 N.W.2d 619, 625 (Iowa 1990), for the proposition that reasonable suspicion can be raised to probable cause if that reasonable suspicion is accompanied by "flight." In that case, after police had observed the defendant engage in suspicious activities in a suspicious location, they approached him. *Id.* at 621. The suspect initially ran away, attempting to conceal a black pouch. *Id.* After he'd been cornered, he threw the pouch away and attempted to flee again. *Id.*

We do not have such a case. The State's evidence does not establish that the defendant had been fleeing in his car, and the deputy did not contend the defendant knew he was being chased. There is no concrete evidence of defendant's speed, and when Deputy Austin flashed the sweeping white light, defendant slowed down and pulled into his driveway. Once out of the car, although defendant may have ignored Deputy Austin, he did nothing resembling running or flight before entering his house, nor did he attempt to conceal or

discard concrete evidence of his suspected crime. Deputy Austin may have had reasonable suspicion when he approached the house. But given the facts regarding defendant's behavior, both in and out of the truck, we find that he did not have probable cause.

The State also cites *State v. Dawdy,* 533 N.W. 2d 551 (Iowa 1995), and *United States v. Dawdy,* 46 F.3d 1427 (8th Cir. 1995) for the proposition that the defendant's refusal to obey orders created sufficient additional probable cause. Whether or not at the moment defendant disregarded the deputy's attempts to prevent his entering the house the deputy had probable cause to arrest him for interference with official acts under Iowa Code section 719.1, the deputy *never* attained probable cause with respect to the OWI charge, nor would probable cause for a violation of section 719.1 merit a warrantless entry into defendant's house in a case such as this where defendant posed no apparent threat to the officer.

Even if he had had probable cause, however, Deputy Austin's warrantless entry into defendant's house cannot be justified as a consent search or an exigent circumstances search. Absent exigency or consent, warrantless entry into the home is impermissible under the Fourth Amendment. *Steagald v. United States,* 451 U.S. 204, 211, 101 S. Ct. 1642, 1647, 68 L. Ed. 2d 38, 45 (1981); *Illinois v. Rodriguez,* 497 U.S. 177, 181, 110 S. Ct. 2793, 2797, 111 L. Ed. 2d 148, 156 (1990).

Consent justifies a warrantless entry by a deputy into a residence, but only if that consent was voluntarily given and is more than mere acquiescence to a claim of lawful authority. *State v. Hatter,* 342 N.W.2d 851, 854 (Iowa 1983). The

facts show that defendant's girlfriend's "invitation" to Deputy Austin to enter the house was made after he made the comment, ". . . otherwise I'm coming in there to talk to him myself." Given this ultimatum, we find defendant's girlfriend merely acquiesced to a show of authority and did not consent to Austin's entry into the house.

Further we fail to find an exigency in this case. The ultimate issue in a determination of exigency is whether an emergency or urgent need for the warrantless entry existed. *Hatter,* 342 N.W.2d at 855 (Iowa 1983). The claimed exigency in this case was that defendant's blood-alcohol level might dissipate in the time it would take to obtain a warrant. In *Welsh v. Wisconsin,* 466 U.S. 740, 754, 104 S. Ct. 2091, 2100, 80 L. Ed. 2d 732, 746 (1984), the Supreme Court found that exigent circumstances did not justify a warrrantless OWI arrest in the home merely because, in the time it would take to obtain a warrant, the alcohol might dissipate sufficiently to preclude successful conviction on the OWI charge. However, as indicated in *State v. Legg,* __ N.W.2d __ (Iowa 2001), the court's reluctance to find exigent circumstances merely for the purpose of preserving evidence of intoxication may only apply to minor non-criminal offenses. As the supreme court of Iowa stated in *Legg,* our main concern when faced with an issue of exigency is to weigh the competing privacy and law enforcement concerns to determine whether the officer's intrusion was reasonable. *Id.* at __, *citing Illinois v. McArthur,* 531 U.S. 326, ___, 121 S. Ct. 946, 950, 148 L. Ed. 2d 838, 848 (2001). In looking at relevant law enforcement concerns, we recognize that in Iowa OWI is a criminal offense punishable by time served in jail. See Iowa Code § 321J.2. We also recognize that the delay required in getting a warrant

would have been sufficient time for the alcohol in defendant's blood to dissipate. However, regardless of the legislated punishment for the crime or the risk of losing evidence, in this case we must also consider the privacy interests allegedly being violated. Unlike in *Legg,* which relies on the United States Supreme Court's decisions in *U.S. v. Santana,* 427 U.S. 38, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976), and *McArthur*, the officer in this case was not merely pursuing a suspect he had probable cause to believe was driving under the influence of alcohol, only to have that pursuit frustrated when the defendant reached his home, as if it were "base" in a game of tag. *See Gasset v. State,* 490 So. 2d 97, 98-99 (Fla. Dist. Ct. App. 1986). Indeed under the facts here, the defendant proceeded "normally" through the intersection, and with the exception of questionable allegations of speeding, made no suspicious maneuvers in his car. *The defendant's retreat into his house, coupled only with a tip which was* unsupported by the deputy's observations, is the substance of the claimed probable cause. We therefore find that the home in this case does not merely create a technical obstruction to the apprehension of a clearly guilty and fleeing defendant, but is instead the very target of the protections of the Fourth Amendment.

Furthermore, we examine the nature of the intrusion in our consideration of the competing law enforcement and privacy concerns at issue. Unlike in *Legg,* where the officer entered a garage, in this case Deputy Austin actually entered defendant's home and kitchen and remained there for about twenty minutes. Because the deputy had to enter into defendant's home and kitchen in order to

procure evidence to build a case against him, we find the entry was unreasonable and cannot be justified as an exigent circumstances search.

Therefore, with respect to the defendant's conviction for OWI third offense, we reverse the district court's denial of defendant's motion to suppress the evidence obtained as a result of the unlawful entry.

REVERSED AND REMANDED.