

FILED

AUG 25 1981

CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Plaintiff-Appellee,

vs.

MICHAEL EUGENE OSBORNE,

Defendant-Appellant.

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Filed August 25, 1981

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Appeal from Lee District Court.

David B. Hendrickson, Judge.

Defendant appeals his conviction for robbery in the first degree in violation of section 711.2, The Code 1979, contending that the trial court erred in denying his motion to suppress evidence allegedly procured in violation of his constitutional rights.
AFFIRMED.

David U. Sallen, Fort Madison, Ia., for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa and Thomas N. Martin, Assistant Attorney General for plaintiff-appellee.

Heard by Oxberger, C. J., and Donielson, Snell, Carter, and Johnson, JJ.

PER CURIAM

Defendant appeals his conviction for robbery in the first degree in violation of section 711.2, The Code 1979, contending that the trial court erred in denying his motion to suppress evidence allegedly procured in violation of his constitutional rights. We affirm the trial court.

Defendant, Michael Eugene Osborne, was convicted by a jury of robbery in the first degree in violation of section 711.2, The Code 1979. Since the issues in this case primarily revolve around factual determinations of probable cause, a rather lengthy rendition of the relevant facts follows.

On December 6, 1979, at 9:00 p.m., the Keokuk police dispatcher received a call that the Niemann Food Store had just been robbed. The dispatcher radioed a description of the robber to Captain Ramon N. Weldon of the Keokuk police. The robber was described as a lone black male armed with a handgun, between six and six feet and three inches tall, weighing 180 pounds, wearing blue jeans with a white or light stripe on the sides, a hooded coat, a stocking cap pulled down over his head, a white glove and heading west from the Niemann Food Store. Captain Weldon, responding to the call, turned left off Eleventh Street and west onto Morgan street. While approaching the intersection of Twelfth and Morgan, Captain Weldon saw an individual run from the north to the south side of Morgan, in the vicinity of Morgan's intersection with Thirteenth street. As Captain Weldon approached Thirteenth Street, an Illinois car with Illinois plates pulled away from the south side of Morgan and headed east toward Captain Weldon's patrol car. Captain Weldon stopped the car by blocking the road with his patrol car. The Illinois car was stopped at 9:01 p.m. at the intersection of Thirteenth and Morgan, two blocks from Niemann's Food Store.

After the Illinois car was stopped, Captain Weldon shined the spotlight on the car and determined that it contained a single black male, weighing approximately one hundred eighty to one hundred ninety pounds. Because he could not see the hands of the individual in the car, Captain Weldon remained in his squad car until a second squad car arrived. When the second car arrived, Captain Weldon and the two other officers approached the car and asked the occupant to identify himself and his business in the area. The defendant, Michael Osborne, identified himself and gave no reason for being in the area. The defendant then permitted Captain Weldon to look in the glove box of

his car, which was found to contained nothing. There was no evidence in the car in plain view of Captain Weldon. Captain Weldon then left the defendant with the remaining two officers and went to Neimann's to obtain a better physical description of the suspect. When he arrived at Neimann's he instructed the officers detaining the defendant to take him to the station rather than detain him at the intersection.

The three Niemann employees who were present during the robbery went to the station and each signed an affidavit containing their account of the facts of the robbery. On the basis of the facts in Captain Weldon's affidavit and the employees' affidavits, Magistrate John Pepple issued a warrant to search the defendant's car. The search of the defendant's car produced a handgun and a sack of money with the Neimann logo printed on the outside of the sack.

The defendant moved to suppress all of the evidence recovered from the search of his car. The defendant asserted that there was no probable cause to stop the defendant, to arrest the defendant or to search his car. The motion to suppress was overruled. The defendant was subsequently convicted in a jury trial.

I. Our review of this case is de novo. The defendant has asserted a violation of one of his basic constitutional safeguards, and for that reason we make our own evaluation of the totality of circumstances under which the trial court made its ruling. Our duty is to exercise our independent judgment to determine whether the defendant's constitutional rights were compromised. Kellogg v. State, 288 N.W.2d 561, 563 (Iowa 1980).

II. The defendant initially claims the police violated his constitutional right to be free from unreasonable governmental seizures. Defendant contends Captain Weldon effected a constitutionally impermissible seizure when he stopped the defendant's car. For the defendant to prevail on this issue, the State must have failed to prove that Captain Weldon had reasonable cause to stop the vehicle. State v. Cooley, 229 N.W.2d 755, 759 (Iowa 1975). Reasonable cause to stop a car is established when the State proves the officer effecting the stop had a specific and articulable basis to support a reasonable belief that the car stopped was somehow related to criminal activity. State v. Reese, 259 N.W.2d 793, 795 (Iowa 1977). The State's failure to establish facts of reasonable cause would require suppression of the evidence obtained from the stop.

Captain Weldon, a veteran Keokuk police officer of eighteen years, had reasonable cause to stop Osborne's car. When the police dispatcher informed Captain Weldon of

the armed robbery of Neimann's, he was within blocks of the store. He was given a description of the robber and the direction of his flight. Within one minute of the receipt of the radioed information, Captain Weldon saw an individual run across the street in front of him. The individual entered a car and started to pull away from the curb. The sighting of the suspect and his car was within two blocks of the robbed store and within one minute of the robbery report. We are convinced Captain Weldon knew sufficient facts to support a specific and articulable cause for him to reasonably conclude criminal activity was afoot and that the defendant was party to it. The stop of the defendant's car was constitutionally permissible.

III. The defendant next asserts that his fourth amendment rights were violated because at the time of his arrest the officers did not have probable cause to support his arrest. Our review of the circumstances preceding the defendant's arrest lead us to conclude the officers had probable cause to arrest Osborne.

An officer is privileged to effect a warrantless arrest when the officer has probable cause to believe a crime has been committed and the suspect committed it. Probable cause consists of circumstances that would lead a reasonable person to believe the suspect committed the crime. §804.7(2), The Code 1979; State v. Shane, 255 N.W.2d 324, 326 (Iowa 1977).

The following facts support our finding of probable cause to arrest the defendant. At 9:00 p.m. Captain Weldon was informed a robbery of the Niemann Food Store just occurred and the robber was heading west. The robber was described as a lone black male, between six feet and six feet three inches tall, weighing one hundred eighty to one hundred ninety pounds. A rather detailed description of the apparel worn by the robber was also given. When Captain Weldon was within two blocks of Neimann's he saw an individual run from the north to the south side of the street one block in front of him. Within five to ten seconds of seeing the individual running across the street, a car with Illinois license plates pulled away from the south curb of the street. Captain Weldon noted that a black male was alone in the car. Before approaching the stopped car, Captain Weldon, with his spotlight on the suspect concluded the driver approximately fitted the description of the robber. After Captain Weldon approached the car, the heavily breathing defendant told the officer he had no particular reason or purpose for being in the neighborhood. When the defendant stepped out of the car,

Captain Weldon immediately saw the physical description of the robber matched the defendant's very closely, except for the clothing the defendant was wearing. Given that we are dealing with probabilities and not with technical precision, State v. Shane, 255 N.W.2d at 326, we hold there was probable cause to arrest the defendant. See United States v. Wright, 565 F.2d 486, 488-90 (8th Cir. 1977); State v. Dixon, 241 N.W.2d 21, 22-23 (1976); State v. Salazar, 213 N.W.2d 490, 492 (1973).

IV. The defendant's final contention, that the search of his automobile was constitutionally defective because the search warrant was issued on the basis of tainted affidavits, is also rejected. In division IV we held there was probable cause to arrest the defendant. Subsequent to the arrest, clothing matching the clothing worn by the robber was found hidden in the alley west of Neimann's Food Store. The recovered clothing, when put on by the defendant in custody, fit over the defendant's clothing perfectly. That information was included in Captain Weldon's affidavit attached to the application for a warrant to search the defendant's car. The three employee's present during the robbery also provided sworn statements stating their versions of the facts, which were considered by Magistrate John Pepple. There is ample evidence upon which the Magistrate could reasonably conclude the defendant's automobile contained evidence of the armed robbery of Neimann's Food Store. State v. Post, 286 N.W.2d 196, 199 (Iowa 1980).

Even if it was assumed that probable cause was lacking for defendant's arrest the circumstances were such that he nevertheless would have been subjected to a process of witness identification during a continuation of the investigatory stop. This circumstance would have provided sufficient probable cause for the search warrant even if the arrest had not occurred. The warrant is therefore not tainted by the arrest.

V. The trial court's order overruling the defendant's motion to suppress evidence is affirmed.

AFFIRMED.