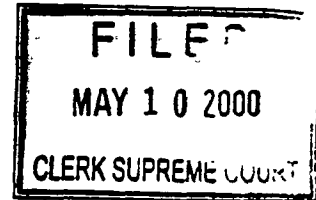


IN THE COURT OF APPEALS OF IOWA

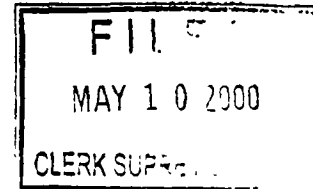
No. 1999-359 (9-612) / 98-1890
Filed May 10, 2000



STATE OF IOWA,
Plaintiff-Appellee,

vs.

KEITH HEMINOVER,
Defendant-Appellant.



Appeal from the Iowa District Court for Black Hawk County, J. G. Johnson,
District Associate Judge.

Defendant appeals his convictions for second-offense operating while
intoxicated, two counts of child endangerment, and failure to obey an officer.

REVERSED AND REMANDED.

Paul Demro of Correll, Sheerer, Benson, Engels, Galles & Demro, Cedar
Falls, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney
General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple, Assistant
County Attorney, for appellee.

Considered by Huitink, P.J., and Mahan and Hecht, JJ.

PER CURIAM

Karl Heminover appeals his convictions for operating while intoxicated, second offense, in violation of Iowa Code section 321J.2 (1997); two counts of child endangerment, in violation of section 726.6(1)(a); and failure to obey an officer, in violation of section 321.299. Heminover claims (1) officers could not properly stop him after he avoided an illegal roadblock and (2) officers did not have reasonable cause to stop him to due his driving. We reverse and remand for further proceedings.

On August 29, 1997, the Black Hawk County Sheriff's Department was conducting a traffic safety enforcement roadblock at the intersection of Plaza Drive and Gilbertville Road. Contrary to section 321K.1(2)(b), there were no advance warning signs "erected to provide timely information to approaching motorists of the roadblock and its nature."

The roadblock was set up by a sergeant in the sheriff's department. It was conducted about 500 feet from a lighted intersection. There were no lighted houses or businesses in the area. Nonreflective orange cones were used to direct traffic into the traffic safety checkpoint. Four or five sheriff's vehicles were present with their headlights on, but not the top lights. One vehicle had a flashing red light on the dashboard.

At about 9 p.m., Heminover turned onto Gilbertville Road. It was not completely dark outside, but dark enough for vehicles to use their headlights. Deputy Ben Ramirez testified he saw Heminover approaching and motioned with his flashlight for the vehicle to stop for a safety check. Heminover testified he saw the

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sheriff's vehicles ahead, but he did not see Deputy Ramirez. Heminover assumed there was an accident, stopped his vehicle, and backed up. He testified he was careful to remain on the shoulder while backing up and around the corner until he could proceed on Plaza Drive. Deputy Ramirez testified he saw Heminover back up on the road.

Deputy Ramirez decided to stop Heminover's vehicle because he believed Heminover was trying to avoid the roadblock. Heminover pulled into a McDonald's parking lot, and Deputy Ramirez followed. As Heminover exited his vehicle, Deputy Ramirez noticed he had bloodshot eyes and an odor of alcohol. Heminover failed the horizontal eye nystagmus test. He refused to consent to a breath test. Heminover's two minor children were in the vehicle with him. Heminover was charged with operating while intoxicated, second offense; two counts of child endangerment; and failure to obey an officer.

Heminover filed a motion to suppress, claiming there was no legal basis for the stop and his arrest. The district court determined the roadblock was not proper because it was not authorized by policy-making administrative officers, as required by section 321K.1(2)(a), and there were no advance warning signs, as required by section 321K.1(2)(b). The court concluded that because the roadblock was illegal, Deputy Ramirez was not authorized to stop Heminover at the roadblock. The court concluded Heminover's failure to obey any signals by Deputy Ramirez was not a violation of law and did not create reasonable cause for Deputy Ramirez to stop him. The court went on to find, however, Heminover's action of backing up and

around the corner was at least a possible violation of the law and gave Deputy Ramirez reasonable cause to pursue Heminover and make the initial stop.

The case proceeded to a bench trial held solely on the minutes of testimony. The court found Heminover was guilty of the charges against him. He was sentenced on these charges. Heminover appealed, claiming the traffic stop in this case violated the Fourth Amendment.

I. Our review of a constitutional challenge is de novo. *State v. Loyd*, 530 N.W.2d 708, 710 (Iowa 1995). We make an independent evaluation of the totality of the circumstances as shown by the entire record. *State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998).

II. Stopping a vehicle at a roadblock constitutes a seizure for Fourth Amendment purposes. *Michigan Dep't. of State Police v. Sitz*, 496 U.S. 444, 450, 110 S. Ct. 2481, 2485, 110 L. Ed. 2d 412, 420 (1990). In Iowa, section 321K.1(2) includes the requirements that are necessary for a roadblock to be constitutional. *State v. Day*, 528 N.W.2d 100, 102 (Iowa 1995).

Here, the roadblock was unconstitutional because it did not meet the requirements of section 321K.1(2) in two particulars: (1) the procedure for conducting the roadblock was not determined by policymaking administrative officers, as required by section 321K.1(2)(a); and (2) no adequate advance warning signs were erected, as required by section 321K.1(2)(b). A vehicle stop at such a roadblock violates a person's Fourth Amendment rights. See *State v. Hilleshiem*, 291 N.W.2d 314, 319 (Iowa 1980).

Heminover was convicted of failure to obey an officer because he drove away from the traffic safety roadblock after Deputy Ramirez waved him over. In

ruling on the motion to suppress, the district court concluded that because the roadblock was illegal, Deputy Ramirez was not authorized to stop Heminover at the roadblock. The court concluded Heminover's failure to obey any signals by Deputy Ramirez was not a violation of law. The charge of failure to obey an officer should be dismissed.

III. The other charges against Heminover, operating while intoxicated and child endangerment, arose due to evidence that came to light after Deputy Ramirez stopped Heminover's vehicle. We must consider whether Deputy Ramirez had reasonable cause for the stop.

The Fourth Amendment requires that an officer have reasonable cause or suspicion to stop a vehicle for investigatory purposes. *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S. Ct. 1391, 1401, 59 L. Ed. 2d 660, 673 (1979). In order to establish reasonable cause, the State must show the officer had "specific and articulable cause to support a reasonable belief that criminal activity may have occurred." *State v. Wiese*, 525 N.W.2d 412, 414 (Iowa 1994). We consider whether the facts available to the officer at the time of the stop would lead a reasonable person to believe the action taken by the officer was appropriate. *State v. Jones*, 586 N.W.2d 379, 382 (Iowa 1998) (citing *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968)).

The State argues Deputy Ramirez had reasonable cause to stop Heminover's vehicle because he engaged in improper backing and this constituted

a traffic violation.¹ A traffic violation, however minor, gives an officer probable cause to stop a motorist. *State v. Aderholdt*, 545 N.W.2d 559, 563 (Iowa 1996).

However, the record does not show Deputy Ramirez stopped Heminover's vehicle for improper backing. At the suppression hearing, Deputy Ramirez testified on direct examination as follows:

Q. And then, deputy, can you explain to us, why did you go after the defendant's vehicle? A. When he pulled in here and backed up, like I said, first I thought he might be confused as to what he was supposed to do, and I started waving him on, and I observed him starting to back up. I believe he was trying to avoid the traffic point.

We find Deputy Ramirez stopped Heminover's vehicle because he believed Heminover was attempting to avoid the roadblock. Officers are held to their true reason for stopping a vehicle. *State v. Jones*, 586 N.W.2d 379, 382 (Iowa 1998). A court will not allow officers to justify a stop with reasons upon which they did not actually act. *State v. Wiese*, 525 N.W.2d 412, 415 (Iowa 1994). We must then consider whether Heminover's avoidance of the roadblock gives rise to a reasonable suspicion of criminal activity.

There is little agreement among jurisdictions concerning whether avoidance of a roadblock is a sufficient reason to stop a vehicle. Some states have found an officer did not have reasonable cause to stop a vehicle when the driver avoided a roadblock. See *Howard v. Voshell*, 621 A.2d 804, 807 (Del. Super. Ct. 1992) (no

¹ We should point out backing up on the roadway may not be a traffic violation anyway. Section 321.323 provides:

A person shall not cause a vehicle to be moved in a backward direction on a highway unless and until the vehicle can be backed with reasonable safety, and shall yield the right of way to any approaching vehicle on the highway or an intersecting highway which is so close as to constitute an immediate hazard.

reasonable suspicion where vehicle stopped 1000 feet from roadblock, then made lawful U-turn); *People v. Scott*, 660 N.E.2d 555, 559 (Ill. Ct. App. 1996) (no reasonable suspicion arose solely because vehicle turned at an intersection before the roadblock); *State v. Powell*, 591 A.2d 1306, 1308 (Me. 1991) (no reasonable cause where driver turned around 700 yards before roadblock); *State v. McCleery*, 560 N.W.2d 789, 793 (Neb. 1997) (the fact a person avoided a constitutional roadblock was determined not to be a sufficient reason for a traffic stop); *People v. Rocket*, 594 N.Y.S. 568, 570 (N.Y. Just. Ct. 1992) (merely making a U-turn or turnoff to avoid a roadblock is not a sufficient basis for a stop); *Pooler v. Motor Vehicles Div.*, 755 P.2d 701, 703 (Or. 1988) (a legal U-turn before reaching a roadblock does not give rise to reasonable suspicion); *Commonwealth v. Scavello*, 703 A.2d 36, 38 (Pa. Super. Ct. 1998), *aff'd* 734 A.2d 386 (Pa. 1999) (a motorist's avoidance of a roadblock must be coupled with other facts to give an officer reasonable suspicion); *State v. Binion*, 900 S.W.2d 702, 706 (Tenn. Crim. App. 1994) (there was no reasonable cause where a driver turned in to a parking lot 1000 feet before the roadblock); *State v. Talbot*, 792 P.2d 489, 495 (Utah Ct. App. 1990) (generally, an avoidance of a police confrontation does not create an articulable basis for a stop); *Murphy v. Commonwealth*, 384 S.E.2d 125, 126 (Va. Ct. App. 1989) (a lawful turn 350 feet before a roadblock did not give rise to reasonable suspicion).

Other states have found an officer did have reasonable cause to stop a vehicle because the driver attempted to avoid a roadblock. See *Smith v. State*, 515 So.2d 149, 151 (Ala. Crim. App. 1987) (reasonable suspicion where defendant turned rapidly into a driveway 200 yards from roadblock); *Coffman v. State*, 759

S.W.2d 573, 575-76 (Ark. Ct. App. 1988) (upon seeing roadblock, defendant turned into a driveway, backed out, and drove in other direction); *Castillo v. State*, 502 S.E.2d 261, 263 (Ga. Ct. App. 1998) (reasonable suspicion arose where driver engaged in an unusual and unsafe turning maneuver); *Snyder v. State*, 538 N.E.2d 961, 966 (Ind. Ct. App. 1989) (a driver's attempt to avoid a roadblock, by turning around, gives rise to a reasonable suspicion); *Steinbeck v. Commonwealth*, 862 S.W.2d 912, 914 (Ky. Ct. App. 1993) (reasonable suspicion arose where a driver turned before a roadblock onto an unpaved country road which did not lead to any visible structures); *Boches v. State*, 506 So.2d 254, 263 (Miss. 1987) (when a motorist evades a police roadblock, the police may stop them); *State v. Thill*, 474 N.W.2d 86, 88 (S.D. 1991) (reasonable suspicion where driver pulled into driveway and then headed the other direction); *Commonwealth v. Eaves*, 408 S.E.2d 925, 927 (Va. Ct. App. 1999) (reasonable suspicion arose where a motorist made an abrupt turn before a roadblock).

We determine the general rule is the avoidance of a roadblock, standing alone, does not give rise to reasonable suspicion that would allow an officer to stop a vehicle for investigatory purposes. As one court stated:

it appears that the prevailing view and that more consistent with the articulations made by the U.S. Supreme Court is that the mere making of a U-turn or a turnoff to avoid a DWI checkpoint is not, in and of itself, sufficient basis for a stop.

Rocket, 594 N.Y.S. at 570.

The Virginia Court of Appeals stated a driver's avoidance of a roadblock does not give rise to a reasonable suspicion of criminal activity unless the driver's action is "coupled with other articulable facts, such as erratic driving, a traffic violation, or

~~some factor which independently raises suspicion of criminal activity."~~ *Murphy*, 384 S.W.2d 128. The Tennessee Court of Criminal Appeals set forth the following factors for use in determining whether reasonable suspicion exists: (1) the driver's distance from the roadblock when the turn-off or U-turn was made; (2) whether the driver was able to see the roadblock before evasive action was taken; (3) the manner in which the driver operates his or her automobile; and (4) other circumstances which would indicate the driver intentionally avoided the roadblock to evade arrest or detection. *Binion*, 900 S.W.2d at 706.

In the present case, Heminover stopped about 350 feet before the roadblock. Heminover could see there was some kind of official activity ahead, but it is doubtful he would have been able to see there was a roadblock before he took evasive action. There were no signs warning motorists of the upcoming roadblock. It was dusk at the time Heminover came upon the area. There was no overhead lighting, just the deputies' headlights. The area was blocked off with nonreflective orange cones. Heminover backed his car back out to the intersection. The record does not disclose any other circumstances that would indicate Heminover was engaged in criminal activity.

Considering the totality of the circumstances, including the fact the roadblock did not meet the requirements of constitutional or statutory law, we conclude Heminover's actions did not give rise to a reasonable suspicion of criminal activity. The stop was not justified under the facts of this case. Evidence obtained through an unjustified investigatory stop must be suppressed. *State v. Kinkead*, 570 N.W.2d 97, 100 (Iowa 1997). The district court erred in denying the motion to suppress.

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~~We reverse Heminover's convictions and remand for further proceedings.~~

~~REVERSED AND REMANDED.~~

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