

IN THE COURT OF APPEALS OF IOWA

No. 4-145 / 93-791

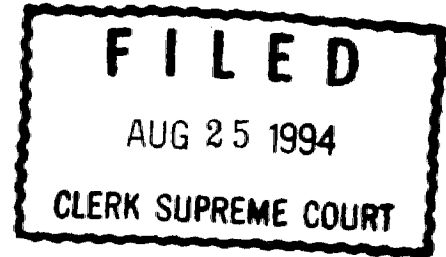
STATE OF IOWA,

Appellee,

vs.

LEROY SHERMAN DUNDEE,

Appellant.



Appeal from the Iowa District Court for Linn County,
John F. Siebenmann, Judge.

Defendant appeals from judgment and sentence, following bench trial, entered upon his conviction of operating a motor vehicle while license under suspension, in violation of Iowa Code section 321A.32 (1993). **AFFIRMED.**

Edward J. Leff of Wilson, Matias, Usher & Leff, Cedar Rapids, for appellant.

Bonnie J. Campbell, Attorney General, Sheryl A. Soich, Assistant Attorney General, Denver D. Dillard, County Attorney, and Jeffrey Clark, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Cady and Huitink, JJ.

CADY, J.

Leroy Dundee appeals from his conviction for operating a motor vehicle while under license suspension in violation of Iowa Code section 321A.32 (1993). He claims the district court erred in overruling his motion to suppress evidence gathered after an investigatory stop. Dundee asserts he was seized for purposes of the Fourth Amendment and that the arresting officer did not have a reasonable and articulable suspicion to justify the seizure.

On October 24, 1992, at about 3:30 a.m., sergeant Michael De La Mater investigated a citizen complaint of a gray Pinto with a blue stripe driving slowly through a mobile home park. De La Mater saw a vehicle matching that description pull into a parking space. When the driver exited the car, De La Mater asked for identification and asked what he was doing in the trailer court. The driver did not have identification. De La Mater asked whose car he was driving. The driver responded he was the registered owner. De La Mater was advised by police dispatch that the registered owner of the vehicle was Leroy Dundee, a person whose driving privileges were under suspension for being a habitual offender.

Dundee was charged with operating a motor vehicle while license under suspension. He filed a motion to suppress, alleging that the officer had no reasonable grounds for stopping his vehicle. At the hearing, De La Mater testified Dundee was not free to leave until he had

produced some identification and explained his presence. The district court ruled there was no seizure and thus the Fourth Amendment was not implicated. The case was then submitted to the court on the basis of the minutes of testimony. Dundee was convicted of operating while under suspension, and appeals.

We review search and seizure issues de novo. State v. Harlan, 301 N.W.2d 717, 718 (Iowa 1981). "The Fourth Amendment's protection against unreasonable intrusions on a person's liberty arises when an officer seizes a person." Id. at 719. It is important to note, however, that not all personal intercourse between police officers and citizens involve seizures. Id. Seizures occur only when an officer by means of physical force or by a show of authority in some way restrains a citizen's liberty. Id. "For a seizure there must be something uttered or done which would amount to an objective indication that the officer exercised some dominion over the person seized." State v. Gully, 346 N.W.2d 514, 517 (Iowa 1984). A police officer does not implicate the Fourth Amendment by merely walking up to a citizen on the street and asking that person to answer some questions. Id. at 516. If a seizure has been made, the inquiry is whether it is founded on an objective justification. Harlan, 301 N.W.2d at 719.

Dundee argues he was seized by sergeant De La Mater and was required to comply with his demands. He believes the circumstances revealed he was not free to leave. Dundee

bases his assessment on United States v. Mendenhall, holding that a person is seized within the meaning of the Fourth Amendment when, in view of all the surrounding circumstances, a reasonable person would have believed he or she was not free to leave. 446 U.S. 544, 553, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497, 509 (1980). Dundee feels reasonable persons would have felt they were seized. We disagree.

In Harlan, the supreme court emphasized each case must be decided on its facts, but some guidelines exist to help determine when a person has been seized. Harlan, 301 N.W.2d at 719. The court enumerated a list of situations where a seizure has been found to have occurred: if an officer takes hold of a suspect, if there was the threatening presence of several officers, if the officer displayed a weapon, if an officer's language or tone of voice indicated a demand of compliance, or if the officer used sirens or flashing lights to pull a moving vehicle over. Id. at 719-20. In Harlan the court found there was no seizure because the officer did not pull over the car, did not use his siren or flashing lights when he approached the car, and did not restrain the movement of the car. Id. The Harlan court labeled such a stop as an "innocuous police-citizen encounter." Id.

Dundee argues he was not free to leave without complying with the officer's demands and the evidence regarding his conviction was obtained after his submission

to the officer's authority. This argument parallels the claim submitted in State v. Gully, in which a defendant accompanied an officer to the station after he was told he was wanted for questioning. 346 N.W.2d at 516. The court concluded, "this argument suggests that an outright command to submit was withheld by the officer merely to render the confrontation ambiguous and to thereby conceal from our review that which was made obvious to the defendant: that he had to submit to authority." Id.

We find in this case there was no objective evidence suggesting the confrontation was anything more than an investigatory stop. Sergeant De La Mater testified he did not pull Dundee over, he did not use his sirens or lights when he approached the car, and he did not physically restrain Dundee. Rather Dundee had parked in a lot and exited the vehicle when sergeant De La Mater approached. De La Mater did nothing more than ask Dundee the nature of his business and whether he had a driver's license. This is exactly the type of "innocuous police-citizen interaction" that should not implicate the Fourth Amendment. Dundee did not have a reasonable reason to believe his liberty was being restrained.

Even if we assume the investigatory stop was indeed a seizure, sergeant De La Mater had a reasonable and articulable suspicion criminal activity was afoot. "While an unparticularized suspicion will not do, an officer may make an investigatory stop with considerably less than

proof of wrongdoing by a preponderance of the evidence." State v. Richardson, 501 N.W.2d 495, 496-97 (Iowa 1993). The principal function of an investigatory stop is often to resolve any ambiguity regarding the possibility of criminal activity. Id. at 497. The district court noted the officer was simply responding to a phone call from a resident of the mobile home park who observed Dundee's car driving slowly and what the caller believed to be "prowling cars." The officer observed a car matching the description given by the caller. As soon De La Mater pulled into the trailer park, Dundee pulled his car into a lot. Given the caller's suspicions and the fact it was 3:30 a.m., the officer's actions were reasonable.

Given the totality of the circumstances, we conclude that the district court did not err in denying Dundee's motion to suppress.

AFFIRMED.

Huitink, J., concurs; Sackett, P.J., dissents.

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SACKETT, J. (dissenting)

I must dissent. The first question is whether defendant had been seized by the officer. The majority has correctly set forth the law on the issue. However; in applying the facts to the case, they apparently have seen fit to disregard the testimony of the stopping officer which is the only testimony in the record on defendant's right to leave.

The testimony was as follows:

Q. Did you indicate to him [defendant] that you wanted to talk to him? A. Yes, certainly.

Q. Was [defendant] free to leave? A. No.

Q. And would you agree with me that he [defendant] was not free to leave until he provided you with some identification? A. Yes, and I was going to make some determination as to whether or not he [defendant] belonged at that trailer he pulled in front of.

If the officer's testimony is accepted as true, defendant was not free to leave and a seizure had taken place. I believe the officer and respect his candor. This leaves me no course but to find there was a seizure.

The second question I then need address is whether the officer had a reason to believe criminal activity was afoot.

A call came into the police station at about 3:30 a.m. that there was a car, matching the description of defendant's car, driving slowly in the trailer court. The speed limit in the trailer court is 15 miles per hour. There had been a statement made the car might be "prowling cars." There is nothing in the record defining "prowling

cars." There was no evidence there had been any illegal activity at the time of the call or in the past in the area of the stop.

The officer candidly admitted the citizen who called in had seen no criminal activity and he himself had no knowledge of any improper activities.

That testimony was:

Q. So would you agree with me that it was your understanding that the citizen had not seen any criminal activity? A. It was my understanding that all they saw was suspicious activity.

Q. So the citizen did not see anything criminal, to our knowledge? A. That's correct.

Q. And you did not see anything criminal, did you? A. No, I did not.

Again, I note with respect the police officer's candor.

The essential purpose of the Fourth Amendment proscription is to impose a standard of reasonableness upon law enforcement officers to safeguard the privacy and security of individuals against invasion. See State v. Hilleshiem, 291 N.W.2d 314, 316 (Iowa 1980).

Protection afforded by the Fourth Amendment cannot be disregarded by the courts despite a zeal for effective law enforcement. To disregard the protection afforded by the Fourth Amendment is to place in jeopardy our free society and the privacy of all of our citizens. See Collidge v. New Hampshire, 403 U.S. 443, 455, 29 L.Ed.2d 564, 576, 91 S.Ct. 2022, 2032 (1971). An individual's reasonable expectation of privacy is not subject to arbitrary

invasions solely at the unfettered discretion of officers in the field. Brown v. Texas, 443 U.S. 47, 51, 61 L.Ed.2d 357, 362, 99 S.Ct. 2637, 2640 (1979). See also Delaware v. Prouse, 440 U.S. 648, 654-55, 59 L.Ed.2d 660, 667, 99 S.Ct. 1391, 1396 (1979). The key principle of the Fourth Amendment is reasonableness and a balancing of competing interests. Michigan v. Summers, 45 U.S. 692, n.12, 700, 69 L.Ed.2d 340, 348, 101 S.Ct. 2587, 2593 (1981).

The State bears the burden of showing the evidence was lawfully obtained. See Hilleshiem, 291 N.W.2d at 316; State v. Shea, 218 N.W.2d 610, 613 (Iowa 1974). For a stop to be valid, an officer must be acting on facts directly relating to a suspect's guilt and not just on circumstances that describe a very broad category of predominately innocent persons. See United States v. Jones, 759 F.2d 633, 643 (8th Cir.), cert. denied, 474 U.S. 837 (1985); State v. Rosenstel, 473 N.W.2d 59, 61 (Iowa 1991). The question is whether the officer can draw a reasonable and articulate inference of criminal activity from the act. See State v. Aschenbrenner, 289 N.W.2d 618, 619 (Iowa 1980).

When a stop is challenged on the basis that reasonable cause does not exist, the state must show the stopping officer had specific and articulable cause to support a reasonable belief that criminal activity may have occurred. See Lamp, 322 N.W.2d at 51; Aschenbrenner, 289 N.W.2d at 619. Circumstances giving rise to suspicion or curiosity will not suffice. Lamp, 322 N.W.2d at 51.

I would find the officer's reasons for stopping defendant, that being, the fact defendant's car was traveling slowly in a 15 mile per hour zone at 3:30 in the morning insufficient.

In reviewing the issue, I consider the following factors:

(1) No particular crime was under investigation. See United States v. Nicholas, 448 F.2d 622, 624-25 (8th Cir. 1971) (fact no crime was under investigation was one factor used to determine officers were not justified in stopping the defendant).

(2) There was no showing the officer had any knowledge of any suspicious activity and driving slowly in a 15 mile per hour zone at three thirty in the morning is not suspicious. Id. (fact no showing police had knowledge of specific activity was a factor considered in determining the stop was not justified).

(3) The officer observed the defendant for a very short time. Id. (fact defendant's auto was observed for a short time a factor considered in determining a stop was not justified); State v. Donnell, 239 N.W.2d 575, 578 (Iowa 1976) (court considered fact arresting officer had observed van in three separate residential areas factor considered in finding stop justified).

(4) There was no evidence of any crime in the area.

(5) Defendant's actions were subject to a legitimate explanation. See State v. Cooley, 229 N.W.2d 755, 761 (Iowa 1975) (fact the defendant's conduct was susceptible to a legitimate explanation one factor considered in finding stop not justified); State v. Losee, 353 N.W.2d 876, 879 (Iowa App. 1984) (fact officer conceded there could be another explanation for movement of car considered by court in finding stop not justified).