

IN THE COURT OF APPEALS OF IOWA

No. 0-592 / 90-371

FILED

DEC 27 1990

CLERK SUPREME COURT

STATE OF IOWA,

Appellant,

vs.

BRUCE ROSENSTIEL,

Appellee.

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Appeal from the Iowa District Court for Kossuth County,
W.B. MacDonald, District Associate Judge.

The State has been granted discretionary review to
challenge a district court order suppressing evidence in an
OWI prosecution. **AFFIRMED.**

Thomas J. Miller, Attorney General, Amy M. Anderson,
Assistant Attorney General, William McNertney, County
Attorney, and David C. Skilling, Assistant County Attorney,
for appellant.

T.J. Braunschweig, Algona, for appellee.

Heard by Donielson, P.J., and Hayden and Habhab, JJ.

HAYDEN, J.

A police officer saw Bruce Rosenstiel drive from one point to another within a bar parking lot, stop his car, and pour liquid from a red and white can onto the parking lot. The officer then approached the Rosenstiel car, possibly positioning his squad car so Rosenstiel could not drive away. Rosenstiel stepped out of his car and approached the officer. The officer engaged Rosenstiel in conversation and asked him to perform some field sobriety tests, which Rosenstiel failed. The officer thereupon arrested Rosenstiel for operating while intoxicated.

Rosenstiel moved to suppress all evidence resulting from his encounter with the police officer. The district court sustained this motion and suppressed the evidence.

The State has been granted discretionary review to challenge the district court's suppression order. The State contends under the facts of this case the officer's encounter with Rosenstiel was not a stop or a seizure. The State therefore argues the encounter did not implicate Rosenstiel's fourth amendment rights.

In the alternative, even if the encounter was a stop or a seizure, the State argues there was reasonable and articulable suspicion to justify a stop.

We deal first with the State's argument there was no stop involving the fourth amendment. After a thorough review of the record and pleadings before the trial court, we can locate no place where the State raised this issue.

We will not consider issues raised the first time on appeal. State v. Miles, 344 N.W.2d 231, 233 (Iowa 1984).

Additionally, we note the State, in its application for review, characterizes the incident as a "stop." In its application, the State cites to Terry v. Ohio, 393 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) (outlining fourth amendment requirements for an investigatory stop and frisk), further indicating the State's belief this case implicated the fourth amendment. This essentially amounts to a waiver of the State's contention there was not a stop.

We next turn to the State's contention even if this was a stop, there was reasonable articulable suspicion criminal activity was afoot.

When the alleged error involves a constitutional right, such as here, we make a de novo independent evaluation of the totality of the relevant circumstances to determine if such an error was made. Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975); State v. Jeffries, 417 N.W.2d 237, 239 (Iowa App. 1987).

The fourth amendment requires reasonable cause to stop for investigatory purposes. Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 899, 906 (1968). When a stop is challenged on the basis that reasonable cause did 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." State v. Lamp, 322 N.W.2d 48, 51 (Iowa 1982) (quoting State v.

Aschenbrenner, 289 N.W.2d 618, 619 (Iowa 1980)). The officer is bound by the true reason or reasons for making the stop. Aschenbrenner, 289 N.W.2d at 619. The officer may not rely on reasons that he or she could have had but did not actually have. Id. The constitutionality of the stop is judged by balancing the degree of the intrusion against its promotion of legitimate governmental interests. State v. Hilleshiem, 291 N.W.2d 314, 317 (Iowa 1980).

First, the criminal activity the officer claimed to be investigating was a violation of the open container laws. The officer is bound by the true reason or reasons for making the stop. Aschenbrenner, 289 N.W.2d at 619. We assume the officer was testifying truthfully.

The open container law states in pertinent part:

A person driving a motor vehicle shall not knowingly possess in a motor vehicle upon a public street or highway an open or unsealed bottle, can, jar, or other receptacle containing an alcoholic beverage, wine, or beer with the intent to consume the alcoholic beverage, wine, or beer while the motor vehicle is upon a public street or highway.

Iowa Code § 123.28.

In this case Rosenstiel was on private property, not a public street or highway, for the period involved. The State has not referred us to, nor have we found, a criminal statute involving open containers in motor vehicles on private property. Therefore, there could be no reasonable articulable suspicion of criminal activity by definition, as the purported crime being investigated is in fact not a crime.

Second, the only unusual activity observed by the officer was the pouring of liquid out of a red and white can. The officer assumed this was a beer can. However, given the time of night, the distance, the fact Rosenstiel was holding the can partly obscuring it, and the indirect street lighting, the officer could not say with certainty it was a beer can.

Without more, the facts the officer relied upon do not amount to the required reasonable articulable suspicion. What was found subsequently is not material as to the legality of the initial stop. See cf. United States v. Jefferson, 906 F.2d 346 (8th Cir. 1990). Indeed, if the stop was illegal, the evidence found pursuant to that stop is inadmissible under the "fruit of the poisonous trees" doctrine. Id. at 348.

We determine the stop was without the requisite reasonable articulable suspicion. All evidence obtained subsequent to this illegal stop must therefore be suppressed. We affirm the trial court in all respects.

AFFIRMED.

Donielson, P.J., concurs; Habhab, J., dissents.

HABHAB, J. (dissenting)

I respectfully dissent. I believe the fourth-amendment requirement of reasonable cause to stop for investigatory purposes is present here. Thus, I would reverse.