IN THE COURT OF APPEALS OF IOWA

No. 2-072 / 91-538

FILED
MAR 24 1992
CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

JON J. KIRLIN,

Defendant-Appellant.

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Appeal from the Iowa District Court for Pottawattamie County, James M. Richardson and Leo F. Connolly, Judges.

Kirlin appeals from his convictions, following a bench trial, for robbery in the first degree and theft in the third degree. **AFFIRMED.**

Clarence B. Meldrum, Jr., Council Bluffs, for appellant.

Bonnie J. Campbell, Attorney General, Julie A. Halligan, Assistant Attorney General, and Richard Crowl, County Attorney, for appellee.

Heard by Oxberger, C.J., and Sackett and Habhab, JJ.

SACKETT, J.

Defendant-appellant Jon J. Kirlin was tried and convicted of robbery in the first degree and theft in the third degree following a robbery at Eddy's Filling Station in Council Bluffs. The questions in this appeal are whether (1) the trial court should have suppressed evidence obtained in a search of the defendant's car, and (2) whether the trial court erred in admitting evidence that the victim identified the defendant as the perpetrator on two occasions. We affirm.

The filling station was robbed at about 3:00 in the morning. After the robbery, the attendant who was working at Eddy's when the robbery occurred reported it. In reporting the robbery he identified the robbers as two white men who left the station on foot. A Council Bluffs police officer patrolling in the area of Eddy's received the robbery report and noticed a car containing two white men being driven slowly, and the two men looked at the police officer. The officer also observed a tail light on the car was out and it did not have a license plate. The car did have a paper plate from Nebraska in its back window. The police officer stopped the car.

The defendant's argument is the fact that two white men in a car being driven slowly in the area of the robbery and they looked at a police officer does not form a reasonable basis to stop their vehicle where the evidence was the

robbers left on foot. This is a constitutional issue and our review is de novo. State v. Bumpus, 459 N.W.2d 619, 622 (Iowa 1990). The defendant contends there was no reasonable basis for the officer to stop the vehicle. We do not disagree with the defendant that those facts are not sufficient to form the basis of a stop. However, the defendant's argument ignores the fact the officer also testified there was a tail light out. This gave the officer probable cause to stop the vehicle. See State v. Rosenstiel, 473 N.W.2d 59, 62 (Iowa 1991). We, therefore, disagree with the defendant on this issued.

After the stop was made, the officer received information that one robber was wearing a white tee shirt and blue jeans, and the second was wearing blue jeans and a blue top. This was the description of the clothing worn by the two men in the stopped car. On the basis of that information, coupled with the men's close proximity to the crime scene, the car was searched and the men were arrested.

In searching the car, the officers found cash and a gun. The defendant sought to have these items suppressed as evidence because he contends the officer had no reason to stop the car and no basis to search the car after it was stopped. The trial court denied the defendant's motion and he contends this was error.

We have rejected the defendant's argument there was no basis to stop the car. The State contends the search was incident to the arrest.

We need not decide the issue on these facts alone. After the car was stopped and while the passengers were handcuffed at the scene, the station attendant that had reported the robbery went to the scene and identified the two men as the robbers. These factors gave the officer sufficient basis to make the arrest and search the car.

The defendant's next contention is the identification by the station attendant was suggestive. The attendant identified him at the scene of the stop. Several days later the attendant identified two pictures given to him as the robbers. The defendant argues the identification procedures were suggestive, and this evidence should have been excluded at trial. The question is whether in the identifications there was a substantial likelihood of misidentification. See State v. Nagel, 458 N.W.2d 10, 12 (Iowa App. 1990). The factors we look at include the opportunity of the witness to view the alleged criminal during the alleged crime, the accuracy of the witness's prior description of the person, and the certainty or uncertainty of the witness in making the identification, as well as the time period between the alleged crime and the identification. See Nagel, 458 N.W.2d at 13. The suspects spent some time in the station and were facing the

attendant when they pointed the gun at him. The attendant gave a general description of the clothing they wore. The attendant recognized the defendant at the stop before he was asked to do so. The attendant's identification came shortly after the crime. There was no error here.

AFFIRMED.