FILED
DEC 23 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed December 23, 1986
v.	)	6-323 85-1520
STEVEN GLENN WILBURN,	)	323
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Scott County (No. 120207) - David J. Sohr, Judge.

The defendant appeals from judgment and sentence entered on a jury verdict finding him guilty of first-degree murder in violation of Iowa Code sections 707.2 (1) and 707.2 (2). **AFFIRMED.**

Charles Harrington, Chief Appellate Defender, and John P. Messina, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Joseph P. Weeg, Assistant Attorney General, and Virginia D. Barchman, Assistant Scott County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., Donielson & Sackett, JJ. but decided en banc.

OXBERGER, C.J. 329

The defendant appeals his conviction for first degree murder in violation of Iowa Code sections 707.2(1) and 707.2(2), arguing that the trial court committed error in refusing to suppress evidence obtained after an allegedly illegal investigatory stop. We affirm.

I. STANDARD OF REVIEW

Because the appellant has alleged an infringement of his constitutional rights, we examine his claim by making an independent evaluation of the totality of the circumstances. State v. Conger, 375 N.W.2d 278, 279 (Iowa Ct. App. 1985). This is the equivalent of a de novo review. Id.; see also State v. Hillesheim, 291 N.W.2d 314, 316 (Iowa 1980). The burden is upon the State to establish that the evidence which the appellant seeks to suppress was lawfully obtained. State v. Hillesheim, 291 N.W.2d at 316.

II. INVESTIGATIVE STOP

The appellant was convicted for the murder of Michael Miller, whose body was found beaten to death in a Davenport alley. After the body was discovered, the police commenced an extensive investigation in an attempt to ascertain where Miller had been before the murder. The investigation revealed that Miller was last seen alive in Freeman's Tap and at the Soul Kitchen in Davenport. After questioning the owner of Freeman's Tap and a cook at the Soul Kitchen, it was determined that Miller was observed talking with a person named Steve in the Soul Kitchen. The investigation further revealed that Steve was observed admiring the gold rings which Miller was wearing, and that Steve left the restaurant immediately after Miller left. In addition, the police were given Steve's description and were told that he was driving a yellow pickup truck, was from Ohio, and was staying with a woman named Dorothy Perkins.

Approximately thirty-six hours after Miller's body was discovered, the police began surveilling Dorothy Perkins' residence. Shortly thereafter, Detective James Hammes observed the defendant leave Perkins' home, get into a yellow pick-up truck, and drive away. Hammes then radioed for a squad car to stop the vehicle and request the driver's identification.

The officer who received the call, officer Michael Jacobsen, prepared to stop the vehicle. Jacobsen then observed the defendant stop the truck and get out. At that point, Jacobsen exited his squad car, approached the defendant on foot, and asked him to produce his driver's license. When the defendant was unable to comply, he was placed under arrest for failing to have a valid driver's license, and was taken to the police station. While his truck was being impounded, blood matching Miller's blood-type was observed on the tailgate. The defendant subsequently consented to a search of the room where he had been staying, and two gold rings were found in a heat vent. The defendant then waived his Miranda rights[1] and gave a detailed statement concerning his involvement in Miller's homicide.

The appellant argues that the initial encounter instigated by officer Jacobsen was illegal, and that all of the evidence derived therefrom should have been suppressed because it was obtained in violation of his constitutional rights. In support of this assertion, the appellant reasons that when officer Jacobson approached him, he was "seized" within the meaning of the fourth amendment; consequently, he maintains that the encounter was illegal because it was not founded upon an objective justification such as probable cause or a reasonable and articulable suspicion of criminal activity. The State counterargues that no seizure within the ambit of the fourth amendment occurred. We think that

---

[1]The defendant does not challenge the validity of this waiver.

the defendant was seized, but that the seizure was properly justified. We now turn to the principles upon which each of these determinations is predicated.

The fourth amendment's protection against unreasonable intrusions upon an individual's liberty is implicated when that person is "seized." United States v. Mendenhall, 446 U.S. 544, 552, 100 S.Ct. 1870, 1876, 64 L.Ed.2d 497, 507 (1980); State v. Stevens, No. 85-1130, slip op. at 6 (Iowa Oct. 15, 1986). If a seizure has occurred, it must be supported by either probable cause or a founded suspicion premised upon specific, articulable facts that criminal activity is afoot. State v. Gully, 346 N.W.2d 514, 516 (Iowa 1984).

The starting point in analyzing an alleged seizure that does not technically amount to an arrest is the seminal case of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). In Terry, the Supreme Court stated that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." Id. at 16, 88 S.Ct. at 1877, 20 L.Ed.2d at 903. In addition, the Court noted that "[o]bviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons." Id. at 19 n. 16, 88 S.Ct. at 1879, 20 L.Ed.2d at 905. The Court further instructed that it is "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen [that a court may] conclude that a 'seizure' has occurred." Id.

Furthermore, in United States v. Mendenhall, Justice Stewart espoused the following test for determining whether a "restraint" constituting a seizure has been imposed: "if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." 446 U.S. at 553-54, 100 S.Ct. at 1875-77, 64 L.Ed.2d at 509 (opinion of Stewart, J.). A plurality of the Court recently reaffirmed this test in Florida v. Royer, 460

U.S. 491, 502, 103 S.Ct. 1319, 1326, 75 L.Ed.2d 229, 239 (1983) (plurality opinion); see also Gomez v. Turner, 672 F.2d 134, 144 (D.C. Cir. 1982) ("the demeanor of the approaching officer, the tone of voice used, the nature of the questions asked, and the time and place of the encounter are among the factors to be considered").

Applying this test to the instant case, we conclude that when Officer Jacobsen requested the defendant's driver's license, a reasonable person in the defendant's position would have believed that he was not free to leave. The State argues that Jacobsen's mere request for identification does not convert a voluntary exchange into a constitutionally protected stop; this contention belies the circumstances. The record discloses that the defendant had been operating his vehicle immediately prior to the encounter with Jacobsen. When Jacobsen subsequently requested to see his driver's license, the defendant was effectively immobilized. He could neither ignore Jacobsen's arrest nor drive away without facing possible arrest for driving without a license. See Iowa Code § 321.174 (1985).

Moreover, existing case law confirms our conclusion. In United States v. Thompson, 712 F.2d 1356 (11th Cir. 1983), the Eleventh Circuit Court of Appeals concluded that the defendant in that case had been seized in circumstances *strikingly similar to those in the instant case. In Thompson, the police officer* retained the defendant's driver's license while asking him a number of questions. 712 F.2d at 1359. The court found that, when the officer retained the license, the encounter matured into an investigative stop protected under the fourth amendment. The basis of the court's conclusion was its finding that, without his license, the defendant was immobile because he could drive away only at the risk of arrest. Id. at 1359-61. The defendant in the case at bar faced an

identical predicament.[2] 333

We now turn to the validity of the defendant's seizure. In construing the demands of the fourth amendment, the Supreme Court has recognized three distinct categories of police-citizen encounters, each of which requires a different objective justification. United States v. Thompson, 712 F.2d at 1359. First, some very limited contact, such as the mere approaching and questioning of an unrestrained citizen, is said to fall outside the purview of the fourth amendment. See Florida v. Royer, 460 U.S. at 497, 103 S.Ct. at 1324, 75 L.Ed.2d at 236; State v. Gully, 346 N.W.2d at 516. Secondly, in Terry v. Ohio, the Court recognized a class of cases in which the police-citizen contact constitutes a seizure under the fourth amendment, but may be justified upon less than probable cause. Such "Terry-stops" satisfy the fourth amendment if the officer has an objective, reasonable suspicion of criminal activity. Florida v. Royer, 460 U.S. at 497, 103 S.Ct at 1324, 75 L.Ed.2d at 236; State v. Stevens, No. 85-1130, slip op. at 7 (Iowa Oct. 15, 1986). Finally, some highly intrusive police-citizen encounters, such as a full-scale arrest, must be founded upon probable cause. See generally Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975); see also State v. Hardnett, No. 85-1636, slip op. (6th Cir. Nov. 6, 1986).

The defendant in the matter sub judice maintains that the State must demonstrate that his seizure was justified by probable cause. He asserts that the principles upon which an investigatory stop is predicated have no application here, where the crime has been completed and two days have elapsed since its occurrence. We disagree. In United States v. Hensley, 469 U.S.221, 105 S.Ct. 675,

---

[2]Our result is not at odds with the Eighth Circuit Court of Appeals' decision in State v. Weir, 748 F.2d 459, 460 (8th Cir. 1984). In Weir, the court found that the defendant had not been detained because he was never "intercepted" by the police; rather, the defendant initiated the contact by approaching the patrol car. Thus, Weir is factually distinct.

83 L.Ed.2d 604 (1985), the Supreme Court explicitly held that the police are not precluded from stopping an individual for investigatory purposes because they suspect that he was involved in a completed rather than an ongoing crime. Specifically, the Court stated that:

> [I]f the police have a reasonable suspicion, grounded in articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a Terry stop may be made to investigate that suspicion.

469 U.S. at 229, 105 S.Ct. at 681, 83 L.Ed.2d at 612; see also United States v. McBride, 801 F.2d 1045, 1047 (8th Cir. 1986). Moreover, the defendant in Hensley was stopped eight days after the commission of the crime. 469 U.S. at 223-24, 105 S.Ct. at 678, 83 L.Ed.2d at 609. The juxtaposition of Hensley leads us to conclude that the defendant's seizure in the instant case constituted only an investigatory stop. See also generally Terry v. Ohio, 392 U.S. at 16, 88 S.Ct. at 1877, 20 L.Ed.2d at 903 (mere stop and detention for questioning is not tantamount to an arrest and need not be based upon probable cause). The remaining question, then, is whether the seizure was premised upon a reasonable, articulable suspicion of criminal activity — the standard of justification required in order for investigatory stops to satisfy constitutional strictures. United States v. Brigoni-Ponce, 422 U.S. 873, 881-82, 95 S.Ct. 2574, 2580, 45 L.Ed.2d 607 (1975); State v. Stevens, No. 85-1130, slip op. at 7 (Iowa Oct. 15, 1986).

The test of whether an investigatory stop is supported by reasonable cause requires that articulable objective facts be available to the officer instigating the contact. State v. Donnell, 239 N.W.2d 575, 578 (Iowa 1976). If the State does not establish the existence of such facts, the evidence seized as a result of the stop must be suppressed. State v. Lamp, 322 N.W.2d 48, 51 (Iowa 1982); see also State v. Stevens, No. 85-1130, slip op. at 7 (Iowa Oct. 15, 1986). Upon our de novo review, we conclude that the facts available to the police when the

defendant was intercepted were sufficient to support a reasonable suspicion of criminal activity.

The record discloses that the investigating officers had received information from two informants. The information indicated that a man named Steve, fitting the defendant's description, who was from Ohio, who drove a yellow pick-up truck, and who was staying with Dorothy Perkins, was one of the last persons seen talking with the victim. Steve was observed admiring the victim's rings, and was seen leaving the Soul Kitchen soon after the victim. Before initiating the contact, the police observed a man fitting Steve's description exit Perkins' house and enter a yellow pick-up truck. We think that this evidence comprises a proper foundation for a reasonable and articulable suspicion of the defendant's involvement in criminal activity. See State v. Stevens, No. 85-1130, slip op. at 2-7.

We do not think that the above conclusion is weakened by the fact that one of the informants was paid by the police. The record discloses that the paid informant had previously been reliable. See State v. Hennan, 314 N.W.2d 405, 407-408 (Iowa 1982) (one way to demonstrate reliability is to show that the informant previously gave accurate information). Moreover, the information given to the police was also provided by a citizen informant. See State v. Drake, 224 N.W.2d 476, 478-79 (Iowa 1974) (citizen informant is without motive to exaggerate or falsify the facts). Under the totality of the circumstances, we conclude that the officers acted upon reliable information which constituted a reasonable suspicion of the defendant's involvement in criminal activity. See State v. Bishop, 387 N.W.2d 554, 558 (Iowa 1986); see also United States v. McBride, 803 F.2d 1045, 1047 (8th Cir. 1986) (anonymous caller's tip found sufficiently reliable for police to form reasonable, articulable suspicion properly justifying investigatory stop).

Finally, we are not persuaded that officer Hammes' testimony regarding the purpose for the defendant's seizure requires a different result. Hammes testified that, on the basis of the information provided by the two informants, the police "wanted to know who was in the vehicle." Significantly, we do not think that this testimony is a basis for concluding that the defendant's seizure was merely an arbitrary request for identification. Cf. State v. Eis, 348 N.W.2d 224, 227 (Iowa 1984) (unconstitutional stop of vehicle where record was void of suspicious activity and officer testified that purpose of stop was merely to identify occupants). As discussed above, the facts available to the officers at the time of the defendant's seizure clearly indicated the existence of an objectively justifiable suspicion of criminal activity. See State v. Thompson, 712 F.2d at 1361. As such, we think that this case falls directly within the ambit of the Supreme Court's statement in Adams v. Williams, 407 U.S. 143, 146, 92 S.Ct. 1921, 1924, 32 L.Ed.2d 612, 617 (1972) that, "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."

We conclude that the trial court did not err in overruling the defendant's motion to suppress, and the judgment against him is affirmed.

AFFIRMED.

All judges concur except Schlegel, J.

SCHLEGEL, J. (dissenting)

There is no question in this case of there being probable cause for defendant's seizure. In fact, the State initially argues there was no seizure. The State contends, however, that even if a seizure occurred, the seizure was justified as a Terry stop. The majority agrees that the fighting issue is whether this was a valid Terry stop. In order for a valid Terry stop, there must be a reasonable, articulable suspicion of criminal activity. United States v. Hensley, 469 U.S. 221, 229, 105 S. Ct. 675, 681, 83 L. Ed. 2d 604, 612 (1985).

I believe that the majority has substituted its own rendition of the circumstances of this case for the evidence actually presented. The officer who ordered the stop testified:

> Q. So, based upon the testimony of the informant or the information the informant had, you had yellow pickup, black male, Steve from Ohio?
>
> A. Right.
>
> Q. And based upon that information, you thought that was enough to stop the vehicle?
>
> A. Well, with that information, we wanted to know who was in the vehicle, and we know that person does drive the vehicle.
>
> Q. You obviously had no connection that the person driving the vehicle a day and a half later was the same person you were looking for?
>
> A. We didn't know.
>
> Q. And so you had no way of knowing when the vehicle pulled away that anybody in there was named Steve?
>
> A. No, we didn't; that's correct.
>
> Q. The sole purpose of the stop was to identify who was driving?
>
> A. Correct.

Q. And your only identification of the vehicle was a yellow pickup?

A. That's correct.

Q. Didn't have a plate or a make or anything like that?

A. Nothing.

The officer testified that the sole purpose of the stop was to identify the driver. The officer did not testify that at that time he had any reasonable, articulable suspicion that the defendant was currently or had previously been involved in criminal activity.

Police officers must have knowledge of objective facts which lead to a specific and articulable cause to support a reasonable belief that criminal activities may have occurred. State v. Aschenbrenner, 289 N.W.2d 618, 619 (Iowa 1980). Mere suspicion or curiosity on the part of the police will not suffice. State v. Dixon, 241 N.W.2d 21, 23 (Iowa 1976). Police cannot stop a vehicle merely to see who was in it at the time. State v. Eis, 348 N.W.2d 224, 227 (Iowa 1984). Police are bound to the true reasons for making the stop and may not rely upon reasons that the officer may have had but did not in fact actually have. State v. Lamp, 322 N.W.2d 48, 51 (Iowa 1982).

The testimony given by the police clearly shows that defendant was stopped solely for the purpose of identifying the driver and not for any valid Terry reason. Therefore, the evidence eventually acquired against defendant was through an exploitation of the illegal seizure. I believe the majority should recognize this fact and then proceed to either remand the case for a new trial or make a full determination as to whether the illegal evidence so acquired was harmful to defendant's case relating to intent to commit first degree murder.