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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
RONALD JOSEPH HARDY,) 8-627 / 88-295
Defendant-Appellant.)

Appeal from the Iowa District Court for Lee County (CR 1728(S)1087), Gary R. Noneman, Associate Judge.

Defendant appeals from his conviction by a jury of possession of marijuana. **REVERSED.**

William L. Wegman, State Public Defender, and Linda Del Gallo, Assistant Public Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Bruce Kempkes, Assistant Attorney General, for plaintiff-appellee.

Considered by Schlegel, P.J., and Sackett and Habhab, JJ., but decided en banc.

SCHLEGEL, P.J.

The defendant, Ronald Joseph Hardy, appeals his conviction by a jury of possession of marijuana. The sole issue he raises on appeal is that the trial court erred by denying his motion to suppress evidence obtained through an improper investigatory stop of his car.

On August 28, 1987, at approximately 10:25 p.m., Captain George Morgan of the Keokuk Police Department was driving his squad car in an easterly direction in the center lane on Main Street. At the same time, a vehicle driven by Hardy was traveling westbound at the same location. Morgan testified that when the vehicle was opposite him, the driver screamed or yelled something at him which was unintelligible. As Morgan put on his brakes, Hardy turned northbound off Main Street, and Officer Morgan turned north on 11th Street to Concert Street and followed a parallel course while looking for Hardy's vehicle. Morgan then observed Hardy's vehicle turn east on Concert Street and as Hardy crossed the intersection, Captain Morgan, with his emergency light on, pulled in behind Hardy and stopped him. When Officer Morgan approached defendant's vehicle, he observed marijuana in the back seat of the car. A search of defendant's car revealed a quantity of rolled marijuana cigarettes in a plastic baggy under the driver's seat and a marijuana bong (pipe).

Hardy claims that because Officer Morgan did not have reasonable cause for the stop, all evidence obtained therefrom should have been suppressed. The fourth amendment requires reasonable cause to stop a vehicle 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 that 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; the officer may not rely on reasons that he or she could have had but did not actually have. Aschenbrenner, 289 N.W.2d at 619. 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).

Defendant cites us to the supreme court's decision in State v. Eis, 348 N.W.2d 224, 227 (Iowa 1984), in support of his claim. In Eis, the court held that a police officer did not have reasonable cause to stop a motor vehicle when he noticed, four hours prior to the stop, that the vehicle had been parked on the shoulder of a county road,

unoccupied, with the hood and passenger door partly open, and when the purpose of the stop was to "see who was in the vehicle or what kind of problems they had previously." Under these circumstances, the court held that the officer did not have reasonable cause to believe criminal activity may have occurred at the time he stopped the vehicle and affirmed the trial court's ruling sustaining defendant's motion to suppress.

We believe that, under the limited facts presented here, Officer Morgan did not have reasonable cause to believe criminal activity may have occurred under the Terry standard as set out by the United States Supreme Court and as applied by our courts in cases such as State v. Stevens, 394 N.W.2d 388, 391 (Iowa 1986); State v. Lamp, 322 N.W.2d at 51; and State v. Losee, 353 N.W.2d 876, 879 (Iowa App. 1984). Although the district court concluded that Hardy's "affirmative act" in drawing attention to himself and his vehicle justified the officer's belief that Hardy may have needed assistance or that he was creating some type of public disturbance, we believe that the facts fall far short of either of these situations. From the record, it is not clear that Hardy was in immediate distress or that his conduct amounted to a violation of the law and, as the supreme court stated in Eis:

> An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.

* * * 448

> Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.

348 N.W.2d at 227 (citing United States v. Cortez, 449 U.S. 411, 417-18, 101 S. Ct. 690, 695, 65 L.Ed.2d 621, 628-29 (1981)). We therefore hold that the trial court erred in denying Hardy's motion to suppress.

REVERSED.

All judges concur except Donielson, J., and Habhab, J., who dissent.

DONIELSON, J. (dissenting)

I join in Judge Habhab's dissent, but also dissent separately because of my strong disagreement with the majority and the desire on my part for a vigorous separate comment on the matter before this court.

Captain George Morgan, a sixteen-year veteran of the Keokuk Police Department, was going down Main Street in that city at approximately 10:30 P.M. A car approached him from the other direction and as it passed the officer, the driver "screamed or yelled something" at him. The officer could not understand what was said, but decided it could be someone yelling for help or a public disturbance, so he turned around and stopped the automobile to investigate what was actually occurring. Drugs and drug paraphernalia were subsequently found to be in plain sight.

The issue is solely whether the officer had "reasonable grounds" to stop the defendant.

My view is that this officer did exactly and precisely what a competent, able officer should do under the circumstances. Obviously, the average or normal person does not "yell or scream" at a police officer at 10:30 at night or, for that matter, at any time of the day. The logical and reasonable person, it seems to me, would assume something is wrong. So the officer's decision to stop that vehicle and investigate appears to me to be not only reasonable, but perhaps it would be unreasonable for a

police officer not to stop the auto and investigate. Even I could visualize a myriad of things that could be happening to cause such conduct--abduction, medical assistance, drug influence, alcohol influence, disturbing the peace, etc. The incident called for an investigation, and that was what he did and what he should have done.

It is most interesting to review the trial court's careful dissertation in its ruling on the motion to suppress, both in findings as to the facts and the application of the law to those facts:

> Obviously, this leaves in question the real issue presented by the facts of this case, that being whether or not the officer was justified in "stopping" the defendant's vehicle in this case. This to the Court presents an extremely close question for two reasons. First of all, the Court is convinced that the primary reason for the contact of the defendant on Concert Street was for the purpose of determining whether assistance of the officer was being requested by the defendant yelling in the direction of the officer. Secondly, the Court is convinced that the officer was in fact also attempting to make a determination as to whether a public offense such as disturbing the peace (City Code Section 8.03083) or disorderly conduct (Iowa Code Section 723.4) had been committed. The Court believes that the primary purpose for the stop, however, was as a stop to determine if a request for assistance was being made in light of the overall facts and circumstances, including the discussion that took place between the officer and the defendant immediately prior to the officer's notice of the marijuana which was in plain view. . . .
>
> The Court has not been able to find any case directly on point that covers the issue at bar, but the Court feels that where the defendant made an affirmative act to draw the officer's attention to himself, especially under circumstances where the officer in good faith reasonably believed he was being summoned by the defendant, the defendant

> has little grounds to complain that his actions succeeded in their purpose of drawing the officer's attention to him and obtaining the officer's services. . . .
>
> First of all, the officer testified that he was in fact yelled at on Main Street. The defendant in his testimony denied any such conduct even though the defendant at the time of the incident told the officer that he was yelling at someone other than the officer. Secondly, the officer made no claim that he understood the defendant to be making an abusive statement or that he understood the defendant to be specifically requesting assistance. The officer testified that he heard the defendant yell at him and that he did not understand what was said, and that he was acting in response to what appeared to him a summons for assistance but was not sure that that was in fact what was given. This supports the truthfulness of the officer, because the officer could well have made his case better by simply stating some content that would have clearly given him cause for stopping the defendant for a criminal act.
>
> Taking into account the officer's obvious good faith and what the Court believes is the defendant's attempt to present false testimony, this Court is convinced that the stop itself and the facts surrounding it as described by Officer Morgan gave him reasonable cause to act in the manner he did. The evidence, therefore, should not be suppressed simply because it was discovered in the manner in which it was discovered in this case.

The majority states the officer is bound by the true reasons for making the stop, but they fail to state what the "true reasons" were. It is not discernible from the trial judge's ruling on the motion to suppress nor the defendant's testimony, nor anyplace else what these true reasons were. I view this as a perfect example of what Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), and its progeny were attempting to accomplish.

HABHAB, J. (dissenting)

I respectfully dissent. I believe the trial court should be affirmed.

The facts that gave rise to this dispute are relatively simple. At about 10:25 P.M., Captain Morgan of the Keokuk Police Department was driving his squad car in an easterly direction in the center lane on Main Street. At the same time, a vehicle driven by the defendant Hardy was traveling westerly at the same location. Captain Morgan testified that when the Hardy vehicle was opposite him, the driver screamed or yelled something at him which was unintelligible. Captain Morgan turned his vehicle around and stopped the defendant's car. When Captain Morgan approached the defendant's car, he observed marijuana in the back seat, and a search of the defendant's car revealed a quantity of rolled marijuana cigarettes in a plastic baggie under the driver's seat and a marijuana pipe.

The defendant claims that Captain Morgan did not have reasonable cause for the stop and thus the evidence obtained should be suppressed. I am of the opinion that Captain Morgan did have reasonable cause to stop the defendant's vehicle.

The constitutionality of the defendant's stop is judged by balancing the degree of intrusion against its promotion of legitimate governmental interests. State v. Hilleshiem, 291 N.W.2d 314, 317 (Iowa 1980). The essential purpose of

the fourth amendment search and seizure proscriptions is to impose a standard of reasonableness upon the exercise of discretion by government officials, including law enforcement officials, in order to safeguard the privacy and security of individuals against arbitrary invasions. Id. at 316.

Our Iowa Supreme Court, in State v. Stevens, 394 N.W.2d 388, 391 (Iowa 1986), quoted with approval the following from Terry v. Ohio, 392 U.S. 1, 22, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906-07 (1968):

> [T]hat "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape . . . . A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

I believe the conduct of the defendant was such as to create a suspicion of possible criminal behavior. The defendant's screaming or yelling at Captain Morgan was, in my opinion, sufficient reasonable cause for Captain Morgan to stop the defendant. As the United States Supreme Court, in United States v. Cortez, 449 U.S. 411, 417-18, 101 S. Ct. 690, 695, 66 L. Ed. 2d 621, 628-29 (1981), stated:

> An investigatory stop may be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.

* * * 151

> Based upon that whole picture the detaining officer must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.

I believe based upon the whole picture Officer Morgan did have a particularized and objective basis for suspecting the defendant of criminal activity. I would affirm.

Donielson, J., joins this dissent.