IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

STATE OF IOWA,)

Plaintiff-Appellee,) Filed June 25, 1985

vs.)

PAUL HIRAM CALDWELL,) 5-129
84-640

Defendant-Appellant.)

Appeal from the Iowa District Court for Monroe County - James P. Rielly, Judge.

Defendant appeals his conviction of first degree theft in violation of Iowa Code sections 714.1(4) and 714.2(1) (1983). REVERSED AND REMANDED.

Charles L. Harrington, Chief Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Rebecca L. Claypool, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., Donielson, and Schlegel, JJ.

SCHLEGEL, J.

Defendant, Paul Caldwell, appeals his conviction of first degree theft in violation of Iowa Code sections 714.1(4) and 714.2(1) (1983). He asserts the trial court erred: (1) in overruling the defendant's motion to suppress evidence allegedly obtained as the result of an illegal investigatory stop; (2) in instructing the jury that, as an alternative to proving the defendant had actual knowledge the property was stolen, the State could prove that the defendant had reasonable cause to believe the property was stolen; (3) in refusing to instruct the jury that the State was required to prove the defendant did in fact believe the property was stolen; and (4) in overruling the defendant's motion for judgment of acquittal based on the State's failure to present sufficient evidence of the value of the stolen property. We reverse and remand for new trial.

Caldwell was driving a U-Haul truck north of Albia around 9:30 p.m. The manager of the Country Mill elevator saw Caldwell drive near the elevator, make a U-turn and drive halfway down a residential drive, stop for awhile, then turn around and drive past the elevator again. Caldwell was driving quite slowly, and subsequently changed his direction of travel again. The strange driving pattern of the U-Haul made the elevator manager suspicious, so he called the county sheriff. Two deputies were dispatched to investigate.

Deputy Lawrence eventually encountered the U-Haul and, acting under orders, stopped the truck. He was then joined by the other deputy. Lawrence checked Caldwell's driver's license, and asked if Caldwell was lost. Caldwell said he was looking for the HyVee store near Albia, so that he could meet someone there and deliver the load in the truck. Lawrence asked to look at the load, a tractor, and Caldwell consented. He let Lawrence into the back of the truck. Lawrence then examined the tractor and recorded its serial number.

The deputies discovered that the tractor had been stolen a day earlier, and took Caldwell into custody. He was subsequently charged with theft by exercising control over stolen property.

Before trial Caldwell moved to suppress the evidence obtained as a result of the stop and search of the U-Haul truck. He alleged the stop violated his fourth amendment rights. The trial court overruled the motion.

Caldwell was tried before a jury and convicted of first degree theft. He appeals that conviction.

I. Investigatory Stop. Caldwell challenges the constitutional validity of the investigatory stop which ultimately resulted in his arrest. Because he claims he was deprived of a constitutional right, our review of this issue is de novo. State v. Schubert, 346 N.W.2d 30, 32 (Iowa 1984). We independently review the totality of circumstances shown by the entire record. Id.

Investigative stops were approved by the United States Supreme Court in Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 906 (1968). Such stops are constitutionally valid, absent probable cause, if the stopping officer has specific and articulable cause to reasonably believe criminal activity is afoot. State v. Cooley, 229 N.W.2d 755, 760 (Iowa 1975). Circumstances that only evoke suspicion or curiosity do not justify an investigatory stop. Id.

The totality of the circumstances shows that there was a specific cause to reasonably believe criminal activity was afoot. Caldwell, at night in a rural area, was driving a U-Haul in a strange manner: back and forth very slowly on the highway, with occasional forays into private drives. He was observed driving halfway into one private drive and stopping. He stayed there several minutes. Caldwell drove past the County Mill several times. The County Mill is an elevator and farm supply outlet. It had been burglarized only one and one-half months before the night of Caldwell's arrest. In addition, there had been other burglaries and vandalism in the area. Finally, the sheriff's department had received intelligence reports that U-Haul trucks and similar trucks were being used in thefts of agricultural machinery and equipment. All these facts together are sufficient to support a reasonable belief that a burglary or theft was about to

occur. See State v. Donnell, 239 N.W.2d 575, 578 (Iowa 1976) (valid stop of van that was driving slowly at night through neighborhood subject to many burglaries).

Caldwell asserts, however, that the stop was invalid because Deputy Lawrence, the officer who stopped Caldwell, testified that he was not suspicious that a crime had been committed or was going to be committed. Caldwell relies on the following language to support his argument that the stop was invalid:

> The officer is bound by the true reason or reasons for making the stop; that is, the officer may not rely on reasons that he or she could have had but did not actually have.

State v. Lamp, 322 N.W.2d 48, 51 (Iowa 1982).

The quoted statement was clearly dicta in the Lamp case, and a check of supporting citations shows that the legal proposition has not been applied to a factual situation similar to the one in this case. Nevertheless, we need not decide whether an officer's subjective lack of belief that criminal activity may be afoot invalidates an investigative stop when the underlying facts are sufficient to support such a stop. It is well settled that an investigative stop is constitutionally valid when the officer who makes the stop does so in reliance on another officer's specific and articulable belief that reasonable cause exists to effect the stop. See United States v. Hensley, ___ U.S. ___, 105 S. Ct. 675, 681-83, 83 L. Ed. 2d 604, 613-14 (1985); State v. Schubert, 346 N.W.2d 30, 32 (Iowa 1984). See also White v. United States, 448 F.2d 250, 251-52 (8th Cir. 1971).

The sheriff in this case had a subjective belief that criminal activity was afoot. His belief was supported by sufficient factual circumstances. Therefore, his order to Deputy Lawrence to stop Caldwell's U-Haul truck was a constitutionally sufficient basis for the investigatory stop. The trial court did not err in overruling Caldwell's motion to suppress evidence obtained as a result of the investigatory stop.

II. Motion for Acquittal. Caldwell asserts the trial court erred in overruling his motion for judgment of an acquittal. He argues the State's evidence of the value of stolen property was insufficient to support any conviction.

A motion for judgment of acquittal pursuant to Iowa Rule of Criminal Procedure 18(8)(a) is, in effect, a motion for a directed verdict. See State v. Holderness, 293 N.W.2d 226, 229 (Iowa 1980). The motion should be refused and the charged crime submitted to the jury if there is any substantial evidence in the record reasonably tending to support the charge. State v. Rich, 305 N.W.2d 739, 741 (Iowa 1981). Substantial evidence means such evidence as could convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. Id. Viewing all of the State's evidence together, it is abundantly clear that there was substantial evidence of the value of the stolen property. The trial court did not err in overruling the motion.

III. Jury Instructions. Caldwell argues the jury instructions were erroneous because they did not require the State to prove Caldwell in fact knew the property was stolen, but allowed the State to prove its case by showing Caldwell had reasonable cause to believe the property was stolen. We agree.

Iowa Code section 714.1(4) (1983) specifically states it is a crime to exercise control over stolen property "having reasonable cause to believe that such property has been stolen . . . ." However, the outcome of this case is determined by the proper interpretation of State v. Hutt, 330 N.W.2d 788 (Iowa 1983), a case construing section 714.1(4).

In Hutt, the defendant was convicted of violating section 714.1(4) even though the trial court made a specific finding that the defendant had no intent to break the law. Id. at 789. Conviction was based upon the trial court's finding that the defendant had reasonable cause to believe the property was stolen. Id.

The supreme court stated that the issue in Hutt was "whether it is . . . a necessary element of [the crime of violating section 714.1(4)] that the accused in

fact believe that the property is stolen." Id. The court concluded that section 714.1(4) was a restatement of prior law, which did require proof that "the accused actually did believe the property was stolen." Id. at 790.

Two factors in the Hutt opinion lead to some uncertainty about its meaning. First, the court also discussed the need to prove general criminal intent. Id. at 789-90. Second, the court did not explicitly state that the clause in section 714.1(4)—"having reasonable cause to believe that such property has been stolen"—is void and of no effect. Because of those two factors, one could reasonably argue that the holding in Hutt should be construed narrowly, in accordance with the specific facts of that case, to stand for the proposition that a defendant cannot be convicted of violating section 714.1(4) absent a finding of general criminal intent. We cannot, however, accept that argument. To do so would require us to ignore the court's own statement of the issue before it.

The proper holding of State v. Hutt is that the State must prove the defendant in fact knew the property was stolen. See id. at 790. The clause in Iowa Code section 714.1(4) which states, "having reasonable cause to believe that such property has been stolen," is void and of no effect.

We find further support for our holding in the amended Uniform (Criminal) Jury Instructions 1423 and 1424. Both instructions require proof that the defendant knew or believed the property was stolen. Both instructions cite Hutt as supporting authority.

The jury instructions submitted by the trial court were erroneous. This case must be reversed and remanded for new trial.

REVERSED AND REMANDED.

Oxberger, C.J., concurs; Donielson, J., specially concurs.

DONIELSON, J. (specially concurring)

I agree with the majority's determination that the jury instructions were erroneous since this result is required by the supreme court's holding in State v. Hutt, 330 N.W.2d 788 (Iowa 1983). What troubles me, however, is that the instruction in question was a verbatim quote of section 714.1(4) which provides that a person commits theft when he "exercises control over stolen property, knowing such property to have been stolen, or having reasonable cause to believe that such property has been stolen . . . ." (emphasis added). In light of this language, it is inconceivable to me how it can be said that "reasonable cause to believe the property was stolen" is insufficient to support a conviction. Such a conclusion is obviously in direct conflict with the plain language of the statute. Although a contrary result is mandated by the language in Hutt, I believe that an instruction which directly quotes the statute which is the basis for the conviction cannot be considered anything other than an accurate statement of the law.