IN THE COURT OF APPEALS OF IOWA

No. 2-654 / 91-1797

STATE OF IOWA,

Plaintiff-Appellee,

vs.

CHAD EUGENE RICHARDSON,

Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert Hutchison, Judge.

Chad Richardson appeals from his convictions, following a bench trial on the minutes of testimony, of burglary in the second degree and possession of burglar's tools. **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Patricia J. Cone-Fisher, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Amy M. Anderson, Assistant Attorney General, John Sarcone, County Attorney, and George Karnas, Assistant County Attorney, for appellee.

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

SACKETT, J.

Defendant-appellant Chad Eugene Richardson appeals following his conviction of burglary in the second degree and possession of burglar's tools. Defendant contends the investigatory stop of his car was unreasonable. He contends the trial court erred in refusing to suppress evidence obtained through the stop. We agree and reverse and remand.

On May 22, 1991, at about 12:30 a.m., an officer of the Polk County Sheriff's Department, Rick Briggle, was heading home in a marked car after completing his duty. At about 12:40 a.m. Briggle stopped defendant's car. The State contends the officer had reason to stop the car and defendant contends he did not.

The Fourth Amendment requires reasonable cause to stop a vehicle for investigatory purposes. See State v. Rosenstiel, 473 N.W.2d 59, 61 (Iowa 1991). When a stop is challenged on the basis that reasonable cause does 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. See State v. Lamp, 322 N.W.2d 48, 51 (Iowa 1982); State v. Aschenbrenner, 289 N.W.2d 618, 619 (Iowa 1980). Circumstances giving rise to suspicion or curiosity will not suffice. Lamp 322 N.W.2d at 51. The officer is bound by the true reason or reasons he or she could have had but did not actually have. See Rosenstiel, 473 N.W.2d at 62; Lamp, 322 N.W.2d at 51.

Because we are confronted with an alleged constitutional violation, we resolve the issue by making our own independent evaluation of the totality of the circumstances. See Lamp, 322 N.W.2d at 50; State v. Hilleshiem, 291 N.W.2d 314, 316 (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 invasion. Hilleshiem, 291 N.W.2d at 316.

An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity. State v. Eis, 348 N.W.2d 224, 227 (Iowa 1984). This determination must be based upon the whole picture; the detaining officers must have a particularlized and objective basis for suspecting the particular person stopped of criminal activity. Id.

The State contends these facts justified the stop.

On May 22, 1991, Officer Briggle saw a 1977 Monte Carlo automobile parked next to Dave's Marina at 60th Avenue. Dave's Marina was closed. Officer Briggle said he was aware Dave's Marina and other boat dealerships in the immediate area had been burglarized in the past; the marinas in that area are the frequent targets of burglaries and stuff. There were no open businesses in the area where the Monte

Carlo was parked. Neither were there any homes in the immediate vicinity. As the officer drove toward the Monte Carlo in his marked patrol car, defendant started to leave. The officer had an impression the defendant actually saw him turn around in his police car. However, the officer did not know this for certain. The officer followed defendant's car and when he changed lanes without using his turn signal, the officer stopped defendant.[1]

At the suppression hearing, the trial court ruled the stop proper finding:

> The Monte Carlo was parked, with it lights on, in an area where there is no apparent business at 12:40 am. The immediate area was an area known to the officer as being one frequently the target of burglaries. There were no businesses open in the area. There were no homes in the immediate vicinity. The officer was in a marked patrol car. When he made a U-turn to approach the subject vehicle, it immediately attempted to move away, albeit at a normal rate of speed.

In reviewing the issue, we consider the following factors:

> (1) No particular crime was under investigation. See United States v. Nicholas, 448 F.2d 622, 624-25 (8th Cir. 1971) (fact no crime was under investigation was one factor used to determine officers were not justified in stopping the defendant).
>
> (2) The officer had no information about the car

1. The alleged turn signal violation which the officer referred to as "frosting on the cake" was not used by the trial court as a basis for its ruling and is not used by the State as such on appeal. There was no evidence another vehicle was affected by the lane change. Section 321.314 does not require a driver to use a turn signal in all instances; only in the event another vehicle may be affected. State v. Malloy, 453 N.W.2d 243, 245 (Iowa App. 1990).

or its occupants. Id. (fact police had no information on car or occupant a factor considered in determining a stop was not justified).

(3) There was no showing the officer had any knowledge of any suspicious activity at the time. Id. (fact no showing police had knowledge of specific activity was a factor considered in determining the stop was not justified.

(4) The officer observed the defendant for a very short time. Id. (fact defendant's auto was observed for a short time a factor considered in determining a stop was not justified); State v. Donnell, 239 N.W.2d 575, 578 (Iowa 1976) (court considered fact arresting officer had observed van in three separate residential areas factor considered in finding stop justified).

(5) Defendant was in a car at 12:30 at night. Nicholas, 448 F.2d at 624-25 (court in finding stop not justified determined 11:15 p.m. was a reasonable hour to be out on a June evening).

(6) Burglaries in the past and the marina had frequently burglaries. There was no specific evidence on this issue. See State v. Cooley, 229 N.W.2d 755, 761 (Iowa 1975) (the court in finding a stop not justified recognized that the vehicle had been seen parked in a high crime area).

(7) There were no homes in the immediate area.

(8) There were no businesses in the area open for business.

(9) When defendant allegedly saw marked patrol car, he drove away at a normal rate of speed.

(10) Defendant's actions were subject to a legitimate explanation. See Colley, 229 N.W.2d at 761 (fact the defendant's conduct was susceptible to a legitimate explanation one factor considered in finding stop not justified); State v. Losee, 353 N.W.2d 876, 879 (Iowa App. 1984) (fact officer conceded there could be another explanation for movement of car considered by court in finding stop not justified).

We also look at the fact the officer was not certain if the car's lights were on when he first saw it; the officer

had no report of any suspicious activity that evening in the area; there was no evidence defendant's car was driven in a suspicious manner, the officer was not certain if the occupant of the car saw him make a U-turn, the officer did not know how long the car had been parked where it was as he had observed it for a very short time; and the area was heavily traveled.

We examine all the evidence available to the officer. See State v. Bumpus, 459 N.W.2d 619, 623 (Iowa 1990).

The motion to suppress should have been sustained.

We reverse and remand.

REVERSED AND REMANDED.

Oxberger, C.J., concurs; Habhab, J., dissents.

HABHAB, J. (dissenting)

I respectfully dissent. I would affirm the trial court when it overruled the defendant's motion to suppress. I would find that Officer Briggle did have reasonable cause to stop the defendant's car for investigatory purposes. As a result, I would affirm the defendant's convictions of second-degree burglary and possession of burglary tools in violation of Iowa Code sections 713.1, 713.5, and 713.7.

The relevant facts relating to the stop of the defendant's car are as follows. Officer Briggle saw a 1977 Monte Carlo automobile parked next to Dave's Marina on 60th Avenue. It was late--12:40 a.m. Dave's Marina was closed. Officer Briggle was aware that Dave's Marina and other boat dealerships in the immediate area had been burglarized in the past. The marinas in that area are "frequent targets of burglaries and stuff." Given that this is a commercial area, Officer Briggle stated that he could not think of a legitimate reason for the defendant's car to be parked there at that hour. There were no businesses open anywhere near the area where the Monte Carlo was parked, nor were there any homes in the immediate vicinity. Officer Briggle described his suspicion generally:

> The vehicle, as near as I could tell, had no reason to be there. The business, like I said, to the south of where he was parked and Dave's Marina to the north is a residential house, but it sits clear back, and there was no reason to park there if he was going to visit the house because the house sits hundreds of feet back from the street.

Finally, as Officer Briggle drove towards the defendant's car in his patrol car, the defendant started to leave. The officer's suspicions were "definitely aroused as to why [the defendant] left as [the officer] was turning around." Officer Briggle had the impression that the defendant actually saw him turn around in his police car, however, the officer did not know this for certain.

Officer Briggle testified that he stopped the defendant's car for two reasons: to investigate his [defendant's] presence at Dave's Marina and that the defendant made an improper lane change. Officer Briggle referred to the illegal lane change as the "frosting on the cake."

After the suppression hearing, the district court ruled that the stop was proper. It stated:

> The Monte Carlo was parked, with its lights on, in an area where there is no apparent business at 12:40 a.m. The immediate area was an area known to the officer as being one frequently the target of burglaries. There were no businesses open in the area. There were no homes in the immediate vicinity. The officer was in a marked patrol car. When he made a U-turn to approach the subject vehicle, he immediately attempted to move away, albeit at a normal rate of speed.

The stop, in my opinion, was justified. I agree an officer needs "reasonable cause" to stop and briefly detain an individual. Specifically, an officer needs reasonable and articulable cause to believe criminal activity is afoot. State v. Rosenstiel, 473 N.W.2d 59 (Iowa 1991). That kind of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence.

In sum, Officer Briggle had reasonable cause to stop the defendant's car. First, it is significant that the defendant's car was parked against a chain link fence late at night at a business establishment that was closed. Officer Briggle testified "There is no legal reason" for the defendant's car to be parked there. I believe, especially during the hours of darkness, that police have sufficient basis to stop in order to investigate whether a burglary of a closed commercial establishment is pending or has occurred when the suspect is seen in such close proximity to that establishment that he appears to be something other than a mere passerby. This is particularly so in this instance for this area is a high-crime area and the marinas have been a frequent target of burglaries.

I believe the possibility of criminal conduct was strong enough that upon an objective appraisal, one would be highly critical of Officer Briggle had he driven by Dave's Marina without investigating. In addition, I believe that Officer Briggle had a reasonable belief "that criminal activity may be afoot." Terry v. Ohio, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884, 20 L. Ed. 2d 889, 911 (1968) (emphasis added). Thus I would affirm the trial court's overruling the suppression motion.

As it relates to the defendant's other contentions for reversal, I find them to be without merit. When the defendant was apprehended, he was short of breath. When asked if he had been running, the defendant stated he had

been chased by individuals unknown, and when he was asked for identification, the deputy sheriff observed a large red bag in the back seat of the defendant's car. In addition, there were a pair of gloves and a pair of pliers lying on the floorboard. When the defendant was asked what was in the bag, he replied "stuff I bought at a garage sale." When the deputy looked into the bag, he observed numerous items of stereo equipment, speakers, tools, fishing equipment, wire cutters, and a number of other items. The defendant then claimed that the items were hot and that he had purchased them that afternoon.

The owner of S & J Marine and the owner of Dave's Marina arrived at the scene. A patrolman also was on the scene and discovered that the chain link fence protecting boats at S & J Marine had been cut and that, judging by the gap along the cut line of the fence, entry had been made. Those items in the defendant's vehicle were identified and later turned over to the owners.

The owner of Dave's Marina was contacted as to whether anything was missing, and he, before realizing who had been stopped, informed the deputy that he had been burglarized in the past by individuals named Chad Richardson (the defendant here) and James Rattray (a passenger in the defendant's car). This information was provided to the deputy prior to the owner realizing the deputy had stopped both those individuals.

Much of the aforesaid is relevant to determine whether the investigative technique employed by Officer Briggle was proper in the course of a Terry stop. When the record is considered as a whole, I believe the stop was appropriately limited as to the length and the investigative techniques employed by Officer Briggle. None of his investigative procedure was itself a search requiring probable cause. The detention of the defendant at the scene did not exceed the permissible scope of an investigatory stop. It appears that from the time of the stop to the formal arrest, approximately thirty minutes elapsed. However, the officer clearly had probable cause for an arrest as early as 12:45 a.m. when, after being advised of his constitutional rights, the defendant told the officer that he knew he was in possession of stolen property. I agree with the trial court that in any event a thirty-minute period under the circumstances here does not appear unreasonable. I would affirm.