

IN THE COURT OF APPEALS OF IOWA

No. 9-249 / 98-609

Filed June 23, 1999

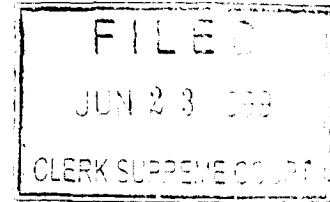
STATE OF IOWA,

Appellee,

vs.

JEFFREY JEAN OTT,

Appellant.



Appeal from the Iowa District Court for Polk County, Carol S. Egly and Douglas F. Staskal, Judges.

Defendant appeals from his convictions for operating a motor vehicle while intoxicated and interference with official acts in violation of Iowa Code sections 321J.2(2)(c) and 719.1 (1997). **AFFIRMED.**

Patrick W. O'Bryan, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, John P. Sarcone, County Attorney, and Michelle Chenoweth, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel, and Zimmer, JJ.

ZIMMER, J.

Defendant-appellant Jeffrey Ott appeals from the judgment and sentence entered by the district court upon his convictions of the offenses of operating a motor vehicle while intoxicated (third offense) and interference with official acts. *See* Iowa Code §§ 321J.2(2)(c), 719.1 (1997). We affirm.

Around midnight on August 23, 1997, Clive police officer Dennis Evans observed Ott driving a vehicle westbound on Hickman Road. Officer Evans observed Ott veer his car to the side of the road so that both tires on the passenger side of the vehicle were off the roadway onto the shoulder. Ott's vehicle then returned to the road.

Officer Evans continued to follow Ott and observed his vehicle once again swerve onto the right shoulder and back onto the road. Ott then turned left at an intersection and headed south. Evans observed that Ott turned so sharply his vehicle nearly went into a ditch adjacent to and on the east side of the northbound lane of travel. Officer Evans then turned on his red lights and continued to follow Ott. After Ott pulled over, Evans determined he was intoxicated.

As a result of evidence obtained from the stop, Ott was charged with several offenses, including third offense operating a motor vehicle while intoxicated and interference with official acts. Ott filed a motion to suppress any evidence obtained as a result of the stop. Following hearing held November 26, 1997, his motion to suppress was denied by the district court.

Several months later, Ott stipulated to a bench trial on the minutes of testimony and was found guilty of operating while intoxicated (third offense) and interference with official acts. The district court entered sentence on April 7 and Ott filed his notice of appeal.

Ott first asserts the district court erred by denying his motion to suppress evidence. He contends Officer Evans did not have reasonable grounds for stopping his vehicle and, consequently, evidence obtained by virtue of the stop was in violation of his constitutional rights. Because Ott raises a constitutional challenge, our review is de novo. *See State v. Lara*, 580 N.W.2d 783, 784 (Iowa 1998).

After carefully reviewing the record, we reject Ott's contention. Iowa appellate courts have found reasonable cause to justify stopping a vehicle in cases where the driver was weaving or driving erratically. In *State v. Otto* the Iowa Supreme Court concluded reasonable cause supported the stop of a vehicle that was weaving sharply back and forth, fluctuating in speed, and closely following another car. *See State v. Otto*, 566 N.W.2d 509, 510–11 (Iowa 1997). Similarly, the court concluded reasonable cause was present where a vehicle veered back and forth in its own lane, went over onto the shoulder, and hit a curb while making a U-turn. *See State v. Aschenbrenner*, 289 N.W.2d 618, 620–21 (Iowa 1980). In *Gehringer v. Iowa Department of Transportation*, the Iowa Court of Appeals determined that weaving back and forth into both lanes constituted “specific and articulable cause to support a belief [defendant] was operating his vehicle while under the influence of alcohol.” *Gehringer v. Iowa Dep't of Transp.*, 434 N.W.2d 910, 911 (Iowa App. 1988).

In this case, Officer Evans personally observed Ott's vehicle weaving to the extent both tires on the passenger side of the car veered completely over the line marking the lane boundary and onto the shoulder. He further observed Ott make an unusually sharp left turn, nearly driving his vehicle into the ditch bordering the opposite lane. These observations constituted "specific and articulable cause" to justify the stop of Ott's vehicle. We find the district court properly overruled Ott's motion to suppress.

Ott next argues the district court improperly determined he was operating while intoxicated as a matter of law. Following hearing on Ott's motion to suppress, the district court verbally stated, "[t]he defendant was operating under the influence." The court's actual written order denying Ott's motion to suppress did not, however, assert Ott was operating under the influence. Rather, it stated "[t]he officer had reasonable cause to believe that the defendant was operating a motor vehicle under the influence." Ott appears to contend that because of the court's verbal comment at the close of the suppression hearing, he had little choice but to stipulate to a finding of guilt, as the district court had already found him guilty. He apparently claims he was therefore deprived of his right to a fair and impartial jury trial.

We determine it inappropriate to address Ott's contentions as this matter has not been properly presented to us on appeal. Ott stipulated to a bench trial on the minutes of testimony, indicating to the court that no promises or threats had been made to get him to enter into this stipulation. From the record, it appears Ott never raised in district court the issues now presented to us on appeal. Nor did Ott file a

motion in arrest of judgment under Iowa Rule of Criminal Procedure 23(3) before he was sentenced. Even errors of a constitutional nature must be properly preserved. *See State v. Simpson*, 528 N.W.2d 627, 635 (Iowa 1995) (determining constitutional challenge to search was not preserved for appeal because it was not raised in district court); *State v. Taylor*, 310 N.W.2d 174, 178 (Iowa 1981) (constitutional issues not presented to trial court cannot be presented for the first time upon appeal). It does not appear to us error has been preserved. However, even if we were to assume error had been preserved, we find no support in the record for Ott's contention that he waived his right to jury trial because of a single verbal comment made by the suppression hearing judge.

AFFIRMED.

No. 98-609. [9-249] STATE v. OTT

Appeal from the Iowa District Court for Polk County, Carol S. Egly and Douglas F. Staskal, Judges. **AFFIRMED.** Considered by Sackett, C.J., and Vogel, and Zimmer, JJ. Opinion by Zimmer, J. (5 pages \$2.00)

Ott appeals from the judgment and sentence entered by the district court upon his convictions of the offenses of operating a motor vehicle while intoxicated (third offense) and interference with official acts. Clive police officer Dennis Evans observed Ott driving a vehicle westbound on Hickman Road. Officer Evans observed Ott veer his car to the side of the road so that both tires on the passenger side of the vehicle were off the roadway onto the shoulder. Ott's vehicle then returned to the road. Officer Evans continued to follow Ott and observed his vehicle once again swerve onto the right shoulder and back onto the road. Ott then turned left at an intersection and headed south. Evans observed that Ott turned so sharply his vehicle nearly went into a ditch adjacent to and on the east side of the northbound lane of travel. Officer Evans then

turned on his red lights and continued to follow Ott. After Ott pulled over, Evans determined he was intoxicated. Ott filed a motion to suppress any evidence obtained as a result of the stop. His motion to suppress was denied by the district court. **OPINION HOLDS:** Ott first asserts the district court erred by denying his motion to suppress evidence. He contends Officer Evans did not have reasonable grounds for stopping his vehicle and, consequently, evidence obtained by virtue of the stop was in violation of his constitutional rights. We reject Ott's contention. Officer Evans personally observed Ott's vehicle weaving to the extent both tires on the passenger side of the car veered completely over the line marking the lane boundary and onto the shoulder. He further observed Ott make an unusually sharp left turn, nearly driving his vehicle into the ditch bordering the opposite lane. These observations constituted "specific and articulable cause" to justify the stop of Ott's vehicle. We find the district court properly overruled Ott's motion to suppress. Ott next argues the district court improperly determined he was operating while intoxicated as a matter of law. Ott appears to contend that because of a verbal comment made by the court at the close of the suppression hearing, he had little choice but to stipulate to a finding of guilt, as the district court had already found him guilty. He apparently claims he was therefore deprived of his right to a fair and impartial jury trial. Ott never raised this issue in district court. Nor did Ott file a motion in arrest of judgment under Iowa Rule of Criminal Procedure 23(3) before he was sentenced. We determine it inappropriate to address Ott's contentions as this matter has not been properly presented to us on appeal.