FILED
MAR 29 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Appellee,	)	Filed March 29, 1978
vs.	)	
LARRY GATES,	)	382 / 60598
Appellant.	)	

Appeal from Dickinson District Court - Tom Hamilton and Joseph P. Hand, Judges.

Defendant appeals his conviction of possession of marijuana, amphetamines and phencyclidine with intent to deliver, in violation of § 204.401(1), The Code 1975, alleging error in trial court's ruling on his motion to suppress evidence and his objection to the admission of documentary evidence. AFFIRMED.

Dick H. Montgomery, of Greer, Nelson, Bertell, Montgomery & Barry, of Spencer, counsel for appellant.

Richard C. Turner, Attorney General of Iowa, Lona Hansen, Assistant Attorney General, and James O. Ladegaard, Dickinson County Attorney, counsel for appellee.

Heard by Allbee, C. J., Donielson, Snell, Oxberger and Carter, JJ.

DONIELSON, J.

Defendant-Larry Gates appeals his conviction of possession of marijuana, phencyclidine, and amphetamines with intent to deliver, in violation of § 204.401(1), The Code 1975. He contends that the trial court erred in overruling his motion to suppress evidence and in admitting into evidence at trial handwritten documents found in his wallet.

During the late evening hours of September 7 or the early morning hours of September 8, 1976, Anthony Rogers was driving his automobile in the south part of Arnolds Park, when he spotted defendant's blue and white Chevrolet Monte Carlo traveling northbound on Highway 71 toward Spirit Lake at approximately 15 to 20 miles per hour. Rogers, a resident of the Arnolds Park area for 20 years, had worked as a part-time special deputy for the Dickinson County Sheriff's Department during the summer of 1976 until the third weekend in August.

Rogers first observed the vehicle traveling along the highway in front of a local cocktail lounge, although he did not know whether the car had stopped at the tavern. According to Rogers, Gates proceeded along the highway for a short distance and turned onto a diagonal road leading to an amusement park. Rogers followed the Gates vehicle and observed it traveling for some distance on the left side of the traveled portion of the roadway. Rogers testified that he thought it was rather unusual for a vehicle to travel on the left side of the road for such a distance. Rogers also noticed that the car bore out-of-state license plates which he believed were either Pennsylvania or New York plates.

Rogers testified that he thought the vehicle was driving "a little erratically" and that the driver might have had too much to drink. Rogers had a citizens' band radio in his car and he knew that Officer Wendall Kilts was on duty that evening and that he also had a citizens' band radio in his patrol car. Rogers called Kilts over the radio and informed him that he had observed a car which was, in his opinion, being driven erratically over the road and that possibly the driver was drunk. Rogers also gave the description and location of the vehicle, the direction it was headed, and indicated that he believed that there were three other passengers. Both Kilts and Officer Tom Loebach, who was present in the patrol car with Kilts that evening, corroborated Roger's version of the substance of the radio communication.

Rogers followed the Gates vehicle for a distance but then turned off. After Kilts and Loebach received the communication, they drove south on the highway until they saw Gates' car stopped at a traffic signal in southwest Arnolds Park at approximately 1:30 a.m. Kilts pulled the patrol car next to the Gates vehicle and motioned for Gates to remain stopped at the signal. Although there is some confusion in the testimony, it appears that while the two vehicles were stopped, Rogers passed by the intersection in his vehicle and radioed Kilts that the stopped vehicle was the same one he had described earlier.

Kilts and Loebach got out of their car and Kilts approached Gates' side and asked him to get out of the vehicle and show his drivers license. Gates complied with these requests. Meanwhile, Loebach walked around to the passenger side of the vehicle. Dean Soper, one of three other people in the car, was sitting in the front seat on the passenger side. During this time, Kilts testified that he was observing Gates, his actions and behavior in an effort to determine if he was in an intoxicated condition and unable to drive safely.

While Kilts was conversing with Gates, Loebach called Kilts to the passenger side of the vehicle, where Loebach informed Kilts that he saw Soper attempting to stuff a pipe under his leg or in the seat. Loebach also told him that he observed an open can of beer sitting on the floorboard on the front passenger side. Kilts thereupon instructed Soper to get out of the car, step to the rear of it and produce some identification. At that point, the pipe was on the front seat where Soper had been sitting, and Loebach proceeded to pick up the pipe and can of beer.

Kilts then asked Gates if the car belonged to him and, if so, if Gates would consent to a search of the vehicle. Gates responded that the vehicle was his and he asked if Kilts had a search warrant. Kilts replied "No, but I can get one." Kilts testified that Gates answered "Go ahead and search," at which point Kilts instructed Loebach to look through the front part of the vehicle while the two other passengers remained in the back seat. In the glove compartment, Loebach found three pipes, a leather pouch containing money, and a plastic bag and small jar containing "a green plantlike material." Inside the console, he found another plastic bag containing the same material. Kilts then asked Gates and Soper to empty their pockets out on the car and he arrested them both. Their wallets and identification cards were returned to them. The other two passengers were not arrested.

Loebach then took Gates' car keys and opened the trunk, wherein he found two coffee cans which were later opened and found to contain cash, checks, written notes, drug paraphenalia, and other items. The Gates vehicle was then towed to the Sheriff's office. There, police found handrolled cigarettes, packets of paper, powder, and pills under the rear seat of the patrol car where Gates and Soper had been sitting. When Gates was being processed at the Sheriff's Office, some handwritten documents were found in his billfold and seized by authorities. Subsequent tests revealed that the green plantlike material was marijuana.

Gates argues that his motion to suppress the various items found in his automobile should have been granted on the ground that the initial investigatory stop of his vehicle was constitutionally impermissible. Because Gates contends that the search and seizure violated his constitutional rights, our review is **de novo**, i.e., we independently evaluate the circumstances in totality. State v. Iowa District Court in and for Johnson County, 247 N.W.2d 241, 245 (Iowa 1976); Bettuo v. Pelton, 260 N.W.2d 423, 425 (Iowa 1977). Because the search and seizure were made without a warrant, the burden is upon the State to demonstrate that the police action was lawful and fell within one of the exceptions to the warrant requirement of the Fourth Amendment to the United States Constitution. State v. King, 191 N.W.2d 650, 654 (Iowa 1971). This burden must be met by a preponderance of the evidence since defendant has invoked the protection of the federal constitution, United States v. O'Looney, 544 F.2d 385, 388 (9 Cir.), cert. denied, 429 U.S. 1023, 97 S.Ct. 642, 50 L.Ed.2d 625 (1976), citing United States v. Matlock, 415 U.S. 164, 177-178 & n. 14, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974), although we recognize that Iowa apparently demands a showing by clear and convincing evidence. State v. Smith, 178 N.W.2d 329, 333 (Iowa 1970).

The State contends that the police officers were in the process of conducting a lawful and reasonable investigatory stop of the Gates automobile. In State v. Cooley, 229 N.W.2d 755, 760 (Iowa 1975), the court adopted the principles articulated in Terry v. Ohio, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), that 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 not sufficient probable cause to make an arrest. Circumstances for an investigatory stop exist "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his

experience that criminal activity may be afoot." Id.; State v. Donnell, 239 N.W.2d 575, 577 (Iowa 1976). See Adams v. Williams, 407 U.S. 143, 145, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972). In order for the State to establish that the officers had reasonable grounds to conduct an investigatory stop of a motor vehicle when the grounds are questioned, the State must show that the officers possessed objective facts which indicate "the stopping officer has specific and articulable cause to reasonably believe criminal activity is afoot. Circumstances evoking mere suspicion or curiosity will not suffice." State v. Dixon, 241 N.W.2d 21, 23 (Iowa 1976); State v. Reese, 259 N.W.2d 793, 795 (Iowa 1977). In other words, we must ascertain whether the facts available to the officers at the moment of the investigatory stop, together with rational inferences derived from those facts, would warrant a man of reasonable caution in the belief that the action taken was appropriate. Terry v. Ohio, supra, 392 U.S. at 21-22; State v. Cooley, supra, at 760.

Although we are aware of no case directly on point, certain cases exist which bear directly upon the issues presented herein. In State v. Dixon, supra, at 23, the court upheld the validity of an investigatory stop of a vehicle which was based solely upon information obtained by the stopping officer in a radio dispatch. In that case, the court held that the stopping of defendant's vehicle was good police work and reasonable under the circumstances. In Whiteley v. Warden of Wyoming Penitentiary, 401 U.S. 560, 568-569, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971), the court held that although police are entitled to act on the strength of a radio dispatch or bulletin, there was insufficient evidence of reliability provided by the details in the police bulletin in that case to support an arrest based upon probable cause. See Chambers v. Maroney, 399 U.S. 42, 44-46, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); State v. Salazar, 213 N.W.2d 490, 491-492 (Iowa 1973). In United States v. Hernandez, 486 F.2d 614, 615-618 (7 Cir. 1973), cert. denied, 415 U.S. 959, 94 S.Ct. 1488, 39 L.Ed.2d 574 (1974), the court carried the holding in **Whiteley** one logical step further and concluded that **Whiteley** "clearly contemplated that the arresting officer would have an opportunity to stop the suspect and attempt to corroborate the radio bulletin before making an arrest." Id. at 617.

In Carpenter v. Sigler, 419 F.2d 169, 171 (8 Cir. 1969), the court indicated that under **Terry**, our inquiry into the question of "reasonableness" should focus upon:

> "...(1) whether the facts warranted the intrusion on the individual's Fourth Amendment rights, and (2) whether the

> scope of the intrusion was reasonably related 'to the circumstances which justified the interference in the first place.' " (footnote omitted).

State v. Cooley, supra, at 760; see United States v. Harflinger, 436 F.2d 928, 932 (8 Cir. 1970), cert. denied, 402 U.S. 973, 91 S.Ct. 1660, 29 L.Ed.2d 137 (1971). In Carpenter v. Sigler, supra, a case in which the court upheld an investigatory stop, the facts are closely analogous to those in the instant case. There, the stop took place during an early morning hour in a small town where unidentified cars do not routinely travel at that time. The car bore out-of-county license plates, and the officers making the stop personally observed the vehicle traveling in an erratic manner. Id. at 171.

Since it is clear that police are entitled to rely upon radio dispatches and communications, we must next consider whether the police acted reasonably in stopping the Gates vehicle in light of the information they possessed. That determination may depend upon whether we are entitled to consider the objective facts known by Rogers at the time he radioed Kilts as well as the facts known by Kilts himself, or whether our inquiry is limited to an evaluation of the information possessed by Kilts at the time he made the stop.

Police officers are entitled to view information supplied via police radio communications as reasonably trustworthy bases for actions. United States v. Stevens, 509 F.2d 683, 687 (8 Cir.), cert. denied, 421 U.S. 989, 95 S.Ct. 1993, 44 L.Ed.2d 479 (1975); Klingler v. United States, 409 F.2d 299, 303 (8 Cir.), cert. denied, 396 U.S. 859, 90 S.Ct. 127, 24 L.Ed.2d 110 (1969). Where a radio communication is sent from one police officer to another, we may consider the collective information possessed by both officers as underlying factual bases for the stop. Brewer v. Wolff, 529 F.2d 787, 790 (8 Cir. 1976); United States v. Regan, 525 F.2d 1151, 1154 (8 Cir. 1975); United States v. Heisman, 503 F.2d 1284, 1290 n. 5 (8 Cir. 1974). Where probable cause or reasonable grounds for an investigatory stop are at issue, the information supplied by one police officer to a second arresting or detaining officer must be buttressed by some of the underlying facts and circumstances as to how the first officer came by such information. See United States v. Wixom, 460 F.2d 206, 208 (8 Cir. 1972). In other words, the State must demonstrate that the information so provided "itself had a reasonable foundation." United States v. Vasquez, 534 F.2d 1142, 1145 (5 Cir.), cert. denied, Chavez-Cortinos v. United States, 429 U.S. 962, 97 S.Ct. 389, 50 L.Ed.2d 330

(1976) and Vasquez v. United States, 429 U.S. 979, 97 S.Ct. 489, 50 L.Ed.2d 587 (1976); see United States v. Impson, 482 F.2d 197, 199 (5 Cir.), cert. denied, 414 U.S. 1009, 94 S.Ct. 371, 38 L.Ed.2d 246 (1973), appeal after remand, 506 F.2d 1055 (5 Cir.), vacated, 422 U.S. 1031, 95 S.Ct. 2647, 45 L.Ed.2d 688 (1975), on remand, 531 F.2d 274 (5 Cir.), reh. denied, 535 F.2d 286 (5 Cir. 1976). Although the instant case does not specifically involve such a situation, we conclude that Rogers served in a quasi-official capacity in light of his police background and the fact that he was well known in the area by local law enforcement officers. Clearly, Rogers was much more like a police officer than a casual informer, either identified or anonymous.

Assuming that Rogers is a police officer for purposes of evaluating the stop, the following information may be considered in determining its reasonableness:

(1) The Gates vehicle was first seen by Rogers on a highway directly in front of a cocktail lounge.

(2) The vehicle was a blue and white Chevrolet Monte Carlo with out-of-state license plates, which appeared to be either Pennsylvania or New York plates.

(3) The car was seen in a small Iowa city during the late evening or early morning hours, with the stop being made at approximately 1:30 a.m.

(4) The vehicle was seen on a diagonal road near an amusement park traveling on the left side of the traveled portion of the roadway for some distance.

(5) Rogers, who had been a part-time deputy and was known to law enforcement officers in the area, radioed Kilts and informed him to be on the lookout for a blue and white Chevrolet Monte Carlo which was, in his opinion, driving erratically over the road and that possibly the driver was drunk. Rogers gave the location of the car, the direction it was headed, and indicated that he believed there were three other passengers in the vehicle. The substance of this radio communication was substantiated by both Kilts and Loebach.

(6) Loebach stated that the vehicle he and Kilts stopped was a white and blue Chevrolet Monte Carlo with Pennsylvania license plates and that three passengers were riding therein.

(7) Rogers passed by the intersection where the two vehicles were stopped and radioed Kilts that that was the vehicle he had described to officers earlier.

Under this set of facts, we conclude that officers were justified in believing that criminal activity was afoot and that the investigatory stop was reasonable under the circumstances. See §§ 321.209(2) and 321.281, The Code. We further conclude that, based upon the information he had, Rogers acted reasonably in believing criminal activity was afoot and in conveying those beliefs to Kilts by radio.

However, even if we do not classify Rogers as a police officer, the investigatory stop passes constitutional muster. If Rogers is merely a citizen informer, the

reasonableness of the stop must be evaluated with reference to the information contained in items 5 through 7 of the list previously enumerated. See Orricer v. Erickson, 471 F.2d 1204, 1205-1208 (8 Cir. 1973). We hold that under the circumstances existing in the instant case, the investigatory stop satisfied the reasonableness criteria established in **Terry** and **Carpenter.** Kilts testified that after receiving the radio report, he stopped defendant's vehicle to observe Gates, his actions and behavior, and to see if he was in an intoxicated condition or if something was wrong with him, and to determine if he was "in a passing condition to drive his vehicle or not." Under the facts and circumstances of this case, we are convinced that the investigatory stop comported with the standards of "reasonableness" set forth in **Terry, Carpenter** and **Cooley.**

Since we conclude that the investigatory stop was reasonable, Loebach's observation of the open can of beer and pipe was constitutionally valid under the "plain view" doctrine, because it was made by an officer from a position where he was entitled to be. State v. Donnell, supra, at 577; State v. Cooley, supra, at 760; State v. Dixon, supra, at 24. A vehicle investigatory stop complying with the **Terry** standards may include the observation of anything to be seen from outside the vehicle. State v. Donnell, supra.

Upon seeing the open can of beer, officers had probable cause to arrest defendant for violation of § 123.46, The Code 1975. See State v. Billings, 242 N.W.2d 726, 729 (Iowa 1976). Consequently, the warrantless search of the Gates vehicle can be justified both as one made incident to a lawful arrest, State v. Farrell, 242 N.W.2d 327, 330 (Iowa 1976), and as one made in the presence of exigent circumstances and probable cause to search for contraband. See State v. Simmons, 195 N.W.2d 723, 724-725 (Iowa 1972); State v. Baych, 169 N.W.2d 578, 581-582 (Iowa 1969); State v. Dixon, supra, at 24; see State v. Jackson, 210 N.W.2d 537, 539 (Iowa 1973) and State v. King, supra, at 654-655. Since the State has demonstrated that probable cause to arrest existed prior to the search of Gates' vehicle, the admissibility of the evidence obtained as a result of that search is not affected by the fact that a formal arrest was not made until a few minutes later. State v. Harvey, 242 N.W.2d 330, 339 (Iowa 1976).[1]

[1] Since we are able to uphold the search and seizure as one made incident to a valid arrest, we need not consider the consent issue raised by Gates.

Finally, we do not believe that the search was unreasonable merely because it was started at the scene of the arrest and completed at the Sheriff's office. See State v. Shane, 255 N.W.2d 324, 328 (Iowa 1977). It was dark on the street where the stop was made. The initial search was made there; the car was locked and towed to the Sheriff's office and searched as soon as Gates was processed. These measures satisfy Fourth Amendment requirements. See Chambers v. Maroney, supra.

We need not reach Gates' other argument regarding the admissibility of the handwritten documents. When Exhibit No. 41 was offered into evidence, the only objection made by defendant which is relevant here is that there was "no foundation laid as to whose it is." At the close of the State's evidence, defendant made a motion to strike testimony regarding Exhibit No. 41 because the exhibit is in violation of § 622.28, The Code. On appeal, Gates urges that these handwritten documents should not have been admitted into evidence because no proper foundation was laid under § 622.28. In State v. Bruno, 204 N.W.2d 879, 887 (Iowa 1973), the court held that a motion to strike or withdraw evidence is not timely where it should have been apparent at the time the evidence was offered that it would be inadmissible if challenged by a proper objection in the first instance and such objection is not timely made. This is also true where the specific ground asserted in the motion to strike was not urged as a preliminary objection; see State v. Raue, 214 N.W.2d 162, 163-164 (Iowa 1974); State v. Houston, 206 N.W.2d 687, 691 (Iowa 1973); State v. Bell, 223 N.W.2d 181, 184 (Iowa 1974); State v. Welsh, 245 N.W.2d 290, 294-296 (Iowa 1976).

However, assuming arguendo that defendant did preserve error on this issue, we would still hold that this evidence is admissible. Section 622.28, The Code, refers to writings offered as memoranda or records of acts, conditions or events to prove the facts stated therein. The handwritten documents found in defendant's wallet are admissible because they were introduced not to prove the facts stated therein, but as circumstantial evidence of his guilt of the offense with which he was charged. As such, the weight to be accorded such evidence and the inferences to be drawn from it are matters to be resolved by the jury. State v. Phillips, 226 N.W.2d 16, 19 (Iowa 1975); State v. Lowenberg, 216 Iowa 222, 229, 243 N.W. 538 (1932); see United States v. Page, 544 F.2d 982, 987 (8 Cir. 1976) and United States v. Natale, 526 F.2d 1160, 1172-1173 (2 Cir. 1975), cert. denied, 425 U.S. 959, 96 S.Ct. 1724, 48 L.Ed.2d 193 (1976). Criminal intent is

seldom subject to direct proof; it must ordinarily be discerned from the circumstances attending the alleged crime. State v. Graham, 221 N.W.2d 258, 260 (Iowa 1974). We think that these documents constitute circumstantial evidence which, if given weight by the jury, help establish defendant's criminal intent and are therefore admissible on that basis.

AFFIRMED.