IN THE COURT OF APPEALS OF IOWA

No. 0-461 / 99-1044
Filed December 13, 2000

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANDREW THOMAS TUCKER,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Peter A. Keller and Gregory D. Brant, Judges

Andrew Tucker appeals from the district court's judgment and sentence following a bench trial finding him guilty of possession of marijuana. **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Martha J. Lucey, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, John P. Sarcone, County Attorney, and Stephanie Cox and Gary Kendell, Assistant County Attorneys, for appellee.

Heard by Zimmer, P.J., and Hecht and Vaitheswaran, JJ.

ZIMMER, P.J.

Andrew Tucker appeals from the district court's judgment and sentence following a bench trial finding him guilty of possession of marijuana. He contends police lacked reasonable suspicion to stop his vehicle, trial counsel was ineffective, and the district court failed to state reasons for the sentence it imposed. We conclude the police did not have reasonable cause to stop Tucker's vehicle and, therefore, we reverse.

On June 27, 1998, Officer Jason Bryan was working routine patrol in West Des Moines when he observed a black Ford mustang sitting in the parking lot of Hooters restaurant at around 3:00 a.m. He could see more than one person in the vehicle. As Officer Bryan turned into the lot, the driver turned the vehicle's lights on and proceeded out of the lot. Officer Bryan caught up to the vehicle as it entered eastbound I-235. He followed for about half a minute on the interstate and although he did not observe any traffic violations, he stopped the vehicle.

As Bryan approached the vehicle, he observed the front seat passenger trying to stuff something into the console between the driver and passenger seats. The driver, Andrew Tucker, turned out to be someone Officer Bryan recognized as a Hooters employee. Bryan never informed Tucker why he stopped the vehicle. Bryan asked Tucker and the two passengers to step out of the vehicle. As they did so, Officer Bryan asked Tucker if he had any weapons or contraband on his person. Tucker stated he did have a marijuana pipe. Bryan patted him down and seized the pipe. Bryan also asked Tucker if he could search the vehicle for contraband. In the center console, the officer found a glass narcotic pipe and a baggie containing a green leafy substance which

proved to be marijuana. Tucker denied the marijuana was his and claimed to have no knowledge it was in the car.

On July 21, 1998, the State charged Tucker with possession of a controlled substance (marijuana) in violation of Iowa Code section 124.401(5) (1997). He was arraigned on August 7, 1998, but was never appointed an attorney. On November, 12, 1998, Tucker filed an application for appointment of counsel and a public defender, K. West, was appointed. On January 13, 1999, the district court entered an order stating West withdrew and appointing Mike Oliver as defense counsel.

On March 11, 1999, a motion to suppress was filed challenging the grounds for the vehicle stop. The district court denied the motion as untimely. Tucker then filed a motion to enlarge the time to file the motion to suppress. This motion and the motion to suppress were scheduled for hearing on April 27, 1999. On that day, the court denied the motion to enlarge time because Tucker was not personally present for the hearing. Tucker filed a motion to reconsider the court's ruling on the motions to enlarge time and to suppress. The court again denied the motions, concluding that the defendant's presence was required under Iowa Rule of Criminal Procedure 25(1).

The case proceeded to a bench trial on May 26, 1999. Tucker's trial counsel renewed objection to the admission of evidence obtained following the alleged unlawful stop of Tucker's vehicle and informed the trial court that a defendant's presence is not required under rule 25(1) at a hearing on pre-trial motions on a serious misdemeanor charge. The trial court agreed to consider the merits of the motion to suppress along with the other issues at trial. The

court later denied the motion and found Tucker guilty. Tucker now appeals. He contends the district court erred in denying his motions to suppress and to enlarge time. We do not address the other issues raised.

I. Scope of Review. Tucker challenges the district court's denial of his motion to suppress. We review this constitutional question de novo in light of the totality of the circumstances. *State v. Heminover*, ___ N.W.2d ___, ___ (Iowa 2000); *State v. Cline*, 617 N.W.2d 277, 280 (Iowa 2000).

II. Motion to Enlarge Time. Before we reach the merits of the motion to suppress, we first address a preliminary issue. The State concedes the district court erred in denying Tucker's motion to enlarge time based on his absence at the motion hearing under Iowa Rule of Criminal Procedure 25. However, the State contends this denial was a harmless error.

Iowa Rule of Criminal Procedure 10 requires that motions to suppress be filed no later than forty days after arraignment. *See* Iowa R. Crim. P. 10(4). Tucker's motion was clearly untimely and the failure to file a timely pretrial motion constitutes a waiver of any issues that might have been raised. *See* Iowa R. Crim. P. 10(3). However, a court, for good cause shown, may grant relief from such waiver. *Id.* Rule 25(1) implements a defendant's constitutional right to be present at all critical stages of the case. *State v. Randle*, 603 N.W.2d 91, 93 (Iowa 1999). However, the rule only requires a defendant's presence at most proceedings in *felony* cases. *See* Iowa R. Crim. P. 25(1). Tucker was charged with a serious misdemeanor. *See* Iowa Code § 124.401(5). Therefore, his presence was not required and the district court abused its discretion in denying his motion to enlarge time based only on his absence at the motion hearing. *See*

State v. See, 532 N.W.2d 166, 168 (Iowa App. 1995) (utilizing abuse of discretion standard in reviewing whether good cause existed for defendant's untimely motion to suppress). Because the district court ultimately reached the merits of Tucker's motion to suppress at trial, we conclude the denial of the motion to enlarge time was harmless error. Therefore, we now consider the merits of the motion to suppress.

III. Motion to Suppress. Tucker contends Officer Bryan had nothing more than a general suspicion that any vehicle in the vicinity of a closed business might be engaged in criminal activity. Therefore, he urges the stop was unfounded and any evidence seized as a result of the stop should be suppressed. We agree.

An officer may stop an individual or vehicle for investigatory purposes based on a reasonable suspicion, supported by specific and articulable facts, that a criminal act has occurred or is occurring. *See State v. Kinkead,* 570 N.W.2d 97, 100 (Iowa 1997) (citing *Terry v. Ohio,* 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968)). The test is an objective one. *Heminover,* ___ N.W.2d at ___. We look at the record as a whole to determine what facts were known to police at the time of the stop and then consider whether a reasonable officer in those circumstances would have believed the defendant was committing a crime. *See id.* at ___ (citation omitted). "Unparticularized suspicion" is an unacceptable reason for a stop. *State v. Jones,* 586 N.W.2d 379, 382 (Iowa 1998). For a stop to be valid, the officer must be acting on facts directly relating to a suspect's guilt, and not just on circumstances which describe a very broad category of predominantly innocent persons. *State v. Rosenstiel,*

473 N.W.2d 59, 62 (Iowa 1991), *rev'd on other grounds,* 617 N.W.2d 277, 281 (Iowa 2000). However, an officer may make an investigatory stop with considerably less than proof of wrongdoing by a preponderance of the evidence. *Kinkead,* 570 N.W.2d at 100. The State carries the burden to show the officer had reasonable cause for the stop. *Jones,* 586 N.W.2d at 382 (citations omitted). Evidence obtained through an unjustified investigatory stop must be suppressed. *Id.*

We conclude the officer's reasons for stopping Tucker's vehicle did not amount to reasonable suspicion. In this case, Officer Bryan testified that he stopped the vehicle for the following reasons: (1) it was 3:00 a.m.; (2) there were no lights on in the business; (3) the vehicle was parked near the business when it appeared to be closed; (4) as soon as police pulled into the lot, the vehicle exited the lot; and (5) he was concerned the vehicle's occupants were involved in a burglary of the restaurant. The State points out that Bryan also testified that there had been some break-ins in the shopping complex near Hooters and on a street a few blocks away.

The State simply failed to prove the level of crime in the area would reasonably justify any potential suspicion that Tucker was engaged in or preparing to commit a crime. Officer Bryan could not recall when the burglaries in the nearby shopping complex or surrounding area occurred, how many there had been, or even the names of the businesses. He could only say that there had been "a break-in in a cigar store that occupies the same lot [as Hooters]" that summer, but he could not remember the date. As far as anyone knows, that burglary could have occurred after the incident involving Tucker. There was no

testimony that Hooters itself had previously been burglarized. Officers were not responding to any report of crime on the night in question. This evidence is insufficient for us to base reasonable suspicion on the fact the locale was a 'high crime area.' *See State v. Wiese*, 525 N.W.2d 412, 415-16 (Iowa 1994) (concluding State failed to prove area was 'high crime' when only crimes officer could recall in the area during the year before the stop were a speeder and two "skinny-dippers"), *rev'd on other grounds*, 617 N.W.2d 277, 281 (Iowa 2000); *see also State v. Reese*, 259 N.W.2d 793, 796 (Iowa 1977) (concluding police lacked reasonable suspicion for stop where only grounds were that car was being driven around at a late hour with no apparent purpose in a residential town that had increasing crime rate).

This case is like *State v. Haviland*, 532 N.W.2d 767 (Iowa 1995). In *Haviland*, the Iowa Supreme Court concluded a stop was not justified by reasonable suspicion under the following facts: the defendant turned on his lights and drove away from a closed business toward an oncoming vehicle, which the defendant did not know belonged to police; police were not investigating a report of a crime; the area was not a high crime spot; and the driver did not commit any traffic violations. *See id.* at 768-69. Here, Tucker was stopped for leaving a parking lot of a closed business at 3:00 a.m. in an area in which there had been infrequent criminal activity. Officer Bryan conceded that Tucker committed no traffic violations. He could only characterize Tucker's departure from the lot as "rapid"—Tucker did not "peel out" or speed away in an extreme manner. Furthermore, mere avoidance of a police car is insufficient to support a stop, unless the avoidance is erratic, fast and extreme. *See id.* at 769 (citing *State v.*

Sarhegyi, 492 N.W.2d 284, 287 (N.D. 1992) (holding the fact a car was parked in lot of farm implement dealership at 1:30 a.m. and attempted to leave at officer's approach did not support stop)). The circumstances in this case lead to nothing more than an unparticularized suspicion. *See Haviland,* 532 N.W.2d at 768. (concluding the fact a vehicle was parked by a closed business and left as police approached was insufficient to justify traffic stop).

The lack of significant criminal activity in the area distinguishes this case from two others in which the level of criminal activity supported the reasonableness of a police stop: *State v. Richardson,* 501 N.W.2d 495 (Iowa 1993) and *State v. Donnell,* 239 N.W.2d 575 (Iowa 1976). In *Richardson,* the Iowa Supreme Court held that an officer had reasonable cause to stop a vehicle where the defendant had parked his vehicle at 12:40 a.m. in a location where all the surrounding businesses were closed, there were no residences in the vicinity, the suspect vehicle pulled out of the area after the officer turned his car around to investigate, and the area was known to be frequently burglarized. *See Richardson,* 501 N.W.2d at 496. In *Donnell,* the Iowa Supreme Court upheld a police stop of a van which was driving slowly at 2:00 a.m. through a residential area where in the year previous to the stop, residential break-ins had totaled "almost in the hundreds." *Donnell,* 239 N.W.2d at 576-77.

In *Haviland,* the supreme court also distinguished *Richardson* in part because defendant Richardson had seen that it was the police approaching before he drove away and because the business near which he parked had been burgled frequently. *See id.* at 769. Here, the evidence did not demonstrate Tucker even knew a vehicle had entered the lot, much less that it was a police

vehicle—he did not notice the police car behind him until he was on the interstate. Furthermore, as discussed, the State did not establish Hooters or surrounding businesses had been frequently burglarized. We conclude the State failed to establish Officer Bryan had reasonable basis for the stop. The district court erred in denying the motion to suppress. Therefore, we reverse Tucker's conviction and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.