

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,)
)
 Plaintiff-Appellee,)
)
 v.) S.CT. NO. 16-2177
)
 JEFFREY JOHN MYERS,)
)
 Defendant-Appellant.)

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR FLOYD COUNTY
HONORABLE PETER B. NEWELL, JUDGE (MOTION TO
SUPPRESS, TRIAL ON THE MINUTES, & SENTENCING)

APPELLANT'S BRIEF AND ARGUMENT

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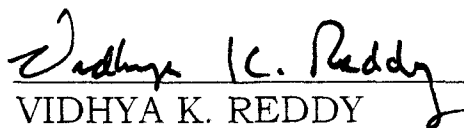
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CERTIFICATE OF SERVICE

On October 12, 2017, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Jeffrey Myers, 901 Vermont, Waterloo, IA 50701.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WAS THE EVIDENCE INSUFFICIENT TO ESTABLISH THAT DEFENDANT HAD ANY CONTROLLED SUBSTANCE PRESENT IN HIS SYSTEM, AS MEASURED IN HIS URINE?

Authorities

State v. Sayre, 566 N.W.2d 193, 195 (Iowa 1997)

State v. Abbas, 561 N.W.2d 72, 74 (Iowa 1997)

State v. Weaver, 608 N.W.2d 797, 803 (Iowa 2000)

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73 Fed. Reg. 71858, at 71898 § 12.15(b) (November 25, 2008)

**II. DID THE DISTRICT COURT ERR IN DENYING
DEFENDANT'S MOTION TO SUPPRESS WHERE THE STOP
WAS NOT SUPPORTED BY PROBABLE CAUSE FOR A
TRAFFIC VIOLATION?**

Authorities

State v. Wright, 441 N.W.2d 364, 366 (Iowa 1989)

State v. Countryman, 572 N.W.2d 553, 557 (Iowa 1997)

State v. Turner, 630 N.W.2d 601, 606 (Iowa 2001)

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U.S. Const. amend. IV

U.S. Const. amend. XIV

Iowa Const. Article I, Section 8

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State v. Predka, 555 N.W.2d 202, 205 (Iowa 1996)

Whren v. United States, 517 U.S. 806, 810, 116 S.Ct. 1769,
1772, 135 L.Ed.2d 89, 95 (1996)

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ROUTING STATEMENT

This case should be transferred to the Court of Appeals because the issues raised involve the application of existing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by Defendant-Appellant, Jeffrey John Myers, from his conviction, sentence, and judgment following a bench trial on the minutes for First Offense Operating While Intoxicated, a Serious Misdemeanor in violation of Iowa Code section 321J.2 (2015).

Course of Proceedings: On March 30, 2016, the State charged Myers with Operating While Intoxicated, First Offense, a Serious Misdemeanor in violation of Iowa Code section 321J.2 (2015). (Trial Information) (App. pp. 4-5). Myers pled not guilty and demanded his right to a speedy trial. (4/26/16 Record of Arraignment) (App. pp. 6-7).

On June 6, 2016, Myers filed a Motion to Suppress challenging the basis for the traffic stop underlying the instant prosecution. The Motion to Suppress noted that the claimed

basis for the stop was that Myers did not have his taillights illuminated. Myers argued that the stop was unlawful because he actually did have his taillights illuminated, as demonstrated by still images taken from the officer's dash cam video of the stop. (Mot. to Suppress) (App. pp. 8-13).

A suppression hearing was held on August 19, 2016. At that hearing, the State presented testimony from Officer Cody Van Horn, who conducted the traffic stop. (Suppr. Tr. p.1 L.1-p.15 L.18)¹. The State also submitted, and the court received, a copy of the dash cam video from Officer Van Horn's vehicle. (Suppr. Tr. p.12 L.18-p.13 L.17; State's Exhibit 1). The State argued that a traffic violation was established in that Myers's taillights were not illuminated. Myers urged the court to conclude that his taillights were, in fact, illuminated, and that no traffic stop was therefore established. (Suppr. Tr. p.15 L.19-p.19 L.9).

¹ The transcripts in the instant case were electronically filed and are thus excluded from the appendix. See Iowa R. App. P. 6.905(7).

On September 6, 2016, the district court issued a written ruling denying Myers's Motion to Suppress. The court concluded that Myers's taillights were not illuminated, and that the stop of his vehicle was justified by a traffic violation. (9/6/16 Order Denying Suppression) (App. pp. 14-16).

Myers subsequently waived his right to a jury trial and submitted to a bench trial on the minutes.² The bench trial on the minutes was held on November 29, 2016, and the court entered a verdict of guilty on the charged offense at that time. (10/10/16 Motion; 10/12/16 Order) (App. pp. 17-19); (Trial p.1 L.1-25, p. 4 L.16-p.7 L.12); (11/29/16 Waiver of Jury; 11/30/16 Order Re: Verdict) (App. pp. 20-23).

A sentencing hearing was held on December 16, 2016. At that time, the district court entered judgment against Myers for Operating While Intoxicated (First Offense), a Serious

² Myers's submission to a bench trial on the minutes was also based on an agreement pursuant to which the State would dismiss two related simple misdemeanor charges at Myers's costs. (Sent. Tr. p.7 L.3-8, p.8 L.1-4).

Misdemeanor in violation of Iowa Code sections 321J.2(1)(c)³ and 321J.2(2)(a) (2015). The court imposed two days in jail, to be served in a hotel program. The court also imposed a \$1,250 fine plus statutory surcharge and a \$10 DARE surcharge. The court also ordered Myers to follow any recommendations contained in his substance abuse evaluation, ordered fingerprinting, ordered his driving privileges be revoked, and ordered that he complete a course for drinking drivers. The court found Myers did not have the ability to pay his attorney fees. (Sent. Tr. p.9 L.2-23, p.10 L.1-3); (Judgment and Sentence) (App. pp. 24-27).

Myers filed a Notice of Appeal on December 22, 2016. (12/28/16 Certified Notice of Appeal) (App. pp. 28-29).

³ Though the sentencing order specifies subsections (a)-(b) of section 321J.2(1), the charge and verdict were actually under subsection (c) of that statute. Compare (Judgment and Sentence) (App. pp. 24-27), with (Trial Information) (App. pp. 4-5), and (Trial p.6 L.12-18, p.6 L.25-p.7 L.7). See also Iowa Code § 321J.2(1)(a)-(c) (2015).

Facts:

a. Trial on the Minutes:

Based on the stipulated minutes of evidence, the district court could have found the following facts:

Shortly before 1:00 a.m. on March 12, 2016, Officer Cody Van Horn conducted a traffic stop on a vehicle. The stop culminated with the Officer's arrest of the driver, Jeffrey Myers, for Operating While Intoxicated. Upon inquiry by the officer, Myers denied being under the influence of any narcotic, marijuana, or alcohol. He stated that he had been taking over-the-counter cold medicine and was also really tired. (Min: Officer Van Horn 3/12/16 Report, p.1-2) (Conf. App. pp. 4-5).

Myers consented to a urine test, and a urine sample was submitted to the Division of Criminal Investigations (DCI) Criminalistics Laboratory. Analysis of the urine sample indicated a "Positive Screen" for marijuana metabolites and amphetamines. According to the DCI laboratory report, "[a] positive screen indicates the *possible* presence of a substance

and/or its metabolites....” (Min: DCI Lab Report) (Conf. App. pp. 8-9) (emphasis added). The lab report stated that additional “[r]eport(s) on positive screens to *confirm* the presence of specific drugs or metabolites will follow.” (Min: DCI Lab Report) (Conf. App. pp. 8-9) (emphasis added). However, no additional lab reports were included in the minutes or submitted to the court at the trial on the minutes. The minutes do not indicate that any such confirmatory testing was ever accomplished.

b. Suppression Hearing:

The Officer’s claimed basis for the stop of Myers’s vehicle was that the taillights were not illuminated. (Suppr. Tr. p.7 L.6-12). Myers disputed that claim, arguing that his taillights were in fact illuminated and that the stop was therefore unlawful. (Mot. to Suppress) (App. pp. 8-13); (Suppr. Tr. p.18 L.7-p.19 L.2).

Officer Van Horn testified at a hearing on Myers’s Motion to Suppress. The Officer testified that, as Myers’s vehicle passed in front of him traveling from the east to the west, the

Officer saw that Myers's headlights were on but that the taillights were not illuminated. The officer turned left to get behind Myers's vehicle and then effected a stop on the vehicle. (Suppr. Tr. p.7 L.16-p.8 L.25). The officer testified that Myers's headlights, brake lights, and turn signal were all working and illuminated at appropriate times, but that his taillights were not illuminated. (Suppr. Tr. p.7 L.6-15, p.8 L.14-18, p.9 L.1-8). He testified that it is possible in some newer cars to have the headlights on without the taillights on, and that the taillights can be operated by a separate switch. (Suppr. Tr. p.14 L.14-22). He testified that after approaching Myers's car and telling him that his taillights weren't on, Myers reached down and flipped a switch, causing his taillights to "brighten up." (Suppr. Tr. p.11 L.7-13). On cross-examination, Officer Van Horn denied that the taillights were already on and merely brightened when Myers flipped the switch. He claimed the taillights were not on before Myers flipped the switch. (Suppr. Tr. p.14 L.3-6). The Officer acknowledged that he did not file any citation or issue any

warnings regarding the taillights. (Suppr. Tr. p.14 L.8-10). Officer Van Horn also acknowledged that the video footage from his dash cam (Exhibit 1) makes it appear that Myers's taillights were actually illuminated even prior to the stop. However, he testified that was merely a distortion caused by the reflection of the Officer's headlights on Myers's taillights. The Officer claimed that Myers's taillights were not actually on. (Suppr. Tr. p.10 L.1-18).

Myers argued that the video confirmed his taillights were in fact illuminated. Myers, through counsel, denied that the headlights and taillights of the vehicle operated on separate switches, and argued that the taillights would be on when the headlights are on. Myers urged the court to conclude from the video that the taillights were in fact on and that the stop was therefore improper. (Suppr. Tr. p.18 L.6-p.19 L.2).

Other relevant facts will be discussed below.

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT DEFENDANT HAD ANY CONTROLLED SUBSTANCE PRESENT IN HIS SYSTEM, AS MEASURED IN HIS URINE.

A. **Preservation of Error:** A trial on the stipulated minutes of testimony is a bench trial, meaning “the decision of whether to convict remains with the fact finder....” State v. Sayre, 566 N.W.2d 193, 195 (Iowa 1997) (contrasting trial on stipulated minutes with guilty plea).

Unlike a jury trial, in a bench trial the defendant is not required to move for a judgment of acquittal to preserve error on a sufficiency of the evidence claim. State v. Abbas, 561 N.W.2d 72, 74 (Iowa 1997). This is because, in a bench trial, the court is the fact finder and its finding of guilt necessarily includes a finding that the evidence was sufficient to sustain a conviction. Id.

In the present case, the verdict of guilt was rendered by the judge rather than by a jury. The issue of the sufficiency of

the evidence is thus preserved for appellate review despite the fact that no motion for judgment of acquittal was made.

B. Standard of Review: The Court reviews a trial court's verdict following a bench trial as it would review a jury verdict. State v. Weaver, 608 N.W.2d 797, 803 (Iowa 2000); City of Des Moines v. Huff, 232 N.W.2d 574, 576 (Iowa 1975). Challenges to the sufficiency of evidence to support a guilty verdict are reviewed for correction of errors at law. State v. Petithory, 702 N.W.2d 854, 856 (Iowa 2005).

C. Discussion: The burden is on the State to prove every fact necessary to constitute the offense with which a defendant has been charged. State v. Gibbs, 239 N.W.2d 866, 867 (Iowa 1976) (citing In Re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1075, 25 L.Ed.2d 368, 375 (1970)).

To withstand a sufficiency of the evidence challenge, a verdict of guilt must be supported by substantial evidence. State v. Hopkins, 576 N.W.2d 374, 377 (Iowa 1998).

Substantial evidence means evidence which would convince a rational fact finder that the defendant is guilty beyond a

reasonable doubt. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). Evidence must be viewed in the light most favorable to the State, and consideration must be given to all of the evidence, not just the evidence supporting the verdict, in determining if there is substantial evidence to support the charge. Petithory, 702 N.W.2d at 856-57; State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). To suffice, the evidence presented must raise a fair inference of guilt on every element and do more than create speculation, suspicion, or conjecture. State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981). “Evidence that allows two or more inferences to be drawn, without more, is insufficient to support guilt.” State v. Brubaker, 805 N.W.2d 164, 172 (Iowa 2011).

In the present case, the evidence contained in the minutes was insufficient to establish a necessary element of the offense – namely, that any amount of controlled substance was actually present in Myers’s person as measured in his urine. See Iowa Code § 321J.2(1)(c) (2015).

The State pointed to a March 22, 2016 lab report by DCI Criminalist Traci Murano contained in the minutes as establishing that Myers had marijuana metabolites and amphetamines in his system. (Trial p.5 L.12-21, p.6 L.14-18). See also (Min: DCI Lab Report) (Conf. App. pp. 8-9). The court, relying on that report, found that “[t]he urine sample was positive” for those substances, and that Myers’s guilt was therefore established beyond a reasonable doubt. (Trial p.7 L.4-9).

The referenced lab report, however, stated only that the urine analysis indicated a “Positive Screen” for the substances, and that “[a] positive screen indicates the *possible* presence of a substance and/or its metabolites”. The report stated that additional “[r]eport(s) on positive screens to *confirm* the presence of specific drugs or metabolites will follow.” (Min: DCI Report, p.1) (Conf. App. p. 8) (emphasis added). However, no further DCI reports are attached, and the minutes do not indicate that any such confirmatory testing was ever accomplished. The minutes thus establish only the *possible*

presence of a controlled substance, not the *actual* presence of a controlled substance.

Urine Drug Testing is performed by the DCI Laboratory in two steps. First, an initial screening test is performed on the urine sample. Then, if the initial screening test indicates a positive result, a second confirmatory test is performed to confirm the presence of a controlled substance. See Dep't of Public Safety, Div. of Criminal Investigation, Criminalistics Laboratory, *Toxicology: Urine Drug Analysis*, at http://www.dps.state.ia.us/DCI/lab/toxicology/Urine_Drug_Analysis.shtml (last accessed April 5, 2017); State v. Comried, 693 N.W.2d 773, 774 (Iowa 2005).

Iowa's initial test requirements are based on nationally accepted federal standards set forth in the Substance Abuse and Mental Health Services Administration's "Mandatory Guidelines for Federal Workplace Drug Testing Programs."⁴

See Iowa Code § 321J.2(12)(c) (2015); IOWA ADMIN. CODE r. 661-

⁴ The federal guidelines are available at: <https://www.gpo.gov/fdsys/pkg/FR-2008-11-25/pdf/E8-26726.pdf> (last accessed April 5, 2017).

157.7 (3/2/2016); Comried, 693 N.W.2d at 777. According to those federal guidelines, an “Initial Drug Test” is a “test used to differentiate a negative specimen from *one that requires further testing for drugs or drug metabolites.*” 73 Fed. Reg. 71858, at 71878 § 1.5 (November 25, 2008). A “Confirmatory Drug Test”, on the other hand, is a “second analytical procedure performed on... the... specimen to identify and quantify the presence of a specific drug or drug metabolite.” Id.

While a *negative* initial screening test would establish the *absence* of drugs in the sample, a *positive* initial screening test does not prove the *presence* of drugs in the sample – only the second confirmatory test can do that. Even a sample that initially screens positive may ultimately be found to test negative (and therefore not actually contain any drug) when subjected to the second confirmatory test. Thus the federal regulations specify that a positive *confirmatory* test is necessary to conclude that drugs are present – a positive *initial screening* test is not sufficient to generate that conclusion.

See 73 Fed. Reg. 71858, at 71894 § 11.19(b) (November 25, 2008) (A specimen is “reported negative when each initial drug test is negative or it is negative on a confirmatory drug test....”); Id. at § 11.19(c) (A “specimen is reported positive for a specific drug when the initial drug test is positive *and* the confirmatory drug test is positive....”) (emphasis added). See also Id. at 71898 § 12.15(b) (An initial testing facility is to report a specimen “negative when each drug test is negative”; but if the specimen tested positive in the initial testing, then the initial testing facility must send the remaining specimen to a laboratory for further testing – not report it positive). Here, the minutes do not indicate that any confirmatory testing was ever accomplished.

The minutes, by their terms, establish only the “*possible* presence” of a controlled substance in Myers’s urine. (Min: DCI Laboratory Report) (Conf. App. pp. 8-9) (emphasis added). ‘[P]ossible presence’ does not establish actual presence as is required under the OWI statute. Any conclusion that controlled substances were *actually* present in Myers’s urine

would be based only on speculation, suspicion, or conjecture, which cannot sustain a guilty verdict. See e.g., Brubaker, 805 N.W.2d at 172–73 (simply being “consistent in appearance with” an illegal substance is insufficient).

The evidence contained in the minutes is insufficient to establish Myers’s guilt beyond a reasonable doubt.

Accordingly, Myers’s conviction should now be reversed and remanded to the district court for dismissal of the charge.

D. Conclusion: Defendant-Appellant Jeffrey John Myers respectfully requests this Court to reverse his conviction for Operating While Intoxicated and to remand this matter to the district court for dismissal of the charge.

II. THE DISTRICT COURT ERRED IN DENYING DEFENDANT’S MOTION TO SUPPRESS. BECAUSE DEFENDANT’S TAILLIGHTS WERE ILLUMINATED, THE STOP WAS NOT SUPPORTED BY PROBABLE CAUSE FOR A TRAFFIC VIOLATION.

A. Preservation of Error: Error was preserved by Myers’s motion to suppress arguing that vehicle stop was improper, and by the district court’s denial thereof. (Mot. to Suppress; 9/6/16 Order Denying Suppression) (App. pp. 8-

16). See State v. Wright, 441 N.W.2d 364, 366 (Iowa 1989) (Adverse ruling on pretrial suppression motion suffices to preserve error for appellate review, though defendant stipulates to trial based on minutes of testimony).

B. Standard of Review: The challenge on appeal arises from a violation of constitutional rights. Review is therefore de novo. State v. Countryman, 572 N.W.2d 553, 557 (Iowa 1997) (review of district court’s denial of motion to suppress is de novo).

On de novo review, this Court makes an “independent evaluation of the totality of the circumstances as shown by the entire record.” State v. Turner, 630 N.W.2d 601, 606 (Iowa 2001). The Court may give deference to the trial court’s findings regarding the credibility of the witnesses, but is not bound by the district court’s findings. Id.; State v. Harriman, 737 N.W.2d 318, 319 (Iowa App. 2007).

C. Discussion: The Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 8 of the Iowa Constitution protect individuals from

unreasonable searches and seizures. State v. Hoskins, 711 N.W.2d 720, 725-26 (Iowa 2006). “When the police stop a car and temporarily detain an individual, the temporary detention is a ‘seizure’” which is subject to the requirement of constitutional reasonableness. State v. Predka, 555 N.W.2d 202, 205 (Iowa 1996) (citing Whren v. United States, 517 U.S. 806, 810, 116 S.Ct. 1769, 1772, 135 L.Ed.2d 89, 95 (1996)).

Warrantless searches and seizures are per se unreasonable unless an exception to the warrant requirement exists. Hoskins, 711 N.W.2d at 726. The State bears the burden of proving by a preponderance of the evidence that such an exception applies. Id. One exception to the warrant requirement arises where a driver commits a traffic offense. A police officer’s observation of a traffic law violation, however minor, gives rise to probable cause to stop a motorist. State v. Mitchell, 498 N.W.2d 691, 693 (Iowa 1993).

In the instant case, the district court concluded that probable cause for the stop was created by Myers’s commission of a traffic offense in that he failed to have his

taillights illuminated. (9/6/16 Order Denying Suppression) (App. pp. 14-16). On its de novo review of the record below, including the video of the stop, this Appellate Court should hold that no traffic violation was committed as Myers's taillights were in fact illuminated. The vehicle stop was improper, and the Motion to Suppress should therefore have been granted.

The dash cam video from Officer Van Horn's vehicle indicates that Myers's taillights were in fact illuminated. (Exhibit 1, at 00:49:01-00:49:33). Officer Van Horn testified that the glow emitting from Myers's taillights on the video is actually just a distortion caused by the reflection of the Officer's headlights on Myers's taillights. (Suppr. Tr. p.10 L.1-18). However, the video appears to depict that Myers's taillights glowing even at the time Myers passed the officer's vehicle at the intersection of Cottage Court and 16th Avenue, prior to the time the officer pulled behind Myers's vehicle. (Exhibit 1, at 00:49:01-00:49:07).

Because Myers's taillights were in fact illuminated, there was no traffic violation and, thus, no probable cause for the stop. The stop therefore violated Myers's rights under the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 8 of the Iowa Constitution. Consequently, any evidence flowing from the stop should have been suppressed.

D. Conclusion: Defendant-Appellant Jeffrey John Myers respectfully requests that this Court reverse his conviction and judgment for Operating While Intoxicated, First Offense, and remand for suppression of all evidence flowing from the stop.

NONORAL SUBMISSION

Oral submission is not requested unless this Court believes it may be of assistance to the Court.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$ 3.17, and that amount has been paid in full by the Office of the Appellate Defender.

MARK C. SMITH
State Appellate Defender

VIDHYA K. REDDY
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**CERTIFICATE OF COMPLIANCE WITH TYPEFACE
REQUIREMENTS AND TYPE-VOLUME LIMITATION**

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(f)(1) because:

[X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 3,272 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(f)(1).

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