IN THE COURT OF APPEALS OF IOWA

No. 0-167 / 09-0735
Filed March 24, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SEAN MICHAEL CALIGIURI,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Carol Coppola, District Associate Judge.

Sean Caligiuri appeals his conviction and sentence for operating while intoxicated, first offense. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Thomas J. Gaul, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, John P. Sarcone, County Attorney, and David Porter, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

DOYLE, J.

Sean Caligiuri appeals his conviction and sentence for operating while intoxicated, first offense, in violation of Iowa Code section 321J.2 (2007), a serious misdemeanor. Caligiuri contends the district court erred in denying his motion to suppress evidence obtained during and after a traffic stop. Upon our review, we affirm Caligiuri's conviction and sentence.

***I. Background Facts and Proceedings*.**

During the 2008 floods, water covered Fleur Drive near Grays Lake and the Raccoon River in Des Moines, Iowa. Barricades were erected south of the intersection at which Martin Luther King Parkway turns east and the southbound street becomes Fleur Drive. On June 11, 2008, Sandra Ouimet, a parking meter checker for the City of Des Moines, was stationed at the Fleur Drive flood barricades to make sure no one drove past the barricades and into the flood waters. At about 8:00 a.m., Caligiuri, driving southbound on Fleur, passed the barricades, Ouimet, and Ouimet's parking enforcement car. He stopped his vehicle as he approached the flood water. Ouimet walked up to Caligiuri's car to ask Caligiuri where he was going. In Ouimet's words, "He seemed not okay." He told Ouimet he was going to Urbandale, which was not consistent with his direction of travel since Urbandale is north of the location. Ouimet said Caligiuri slurred his speech and "[h]e didn't seem like he was okay. Just his mannerisms and the way he was acting he appeared intoxicated to me." Ouimet noticed Caligiuri was not wearing shoes. Then, at some point during the encounter,

Ouimet obtained Caligiuri's driver's license, but the record does not indicate how this occurred. Ouimet then radioed for police assistance.

Des Moines police officer Matt Towers arrived at the scene, and Ouimet gave him Caligiuri's driver's license. Towers went up to Caligiuri's car and noticed "a strong odor of alcohol coming from the vehicle area inside the cabin area." In talking to Caligiuri, Towers observed Caligiuri's red, bloodshot eyes and slurred speech. Towers administered field sobriety tests, all of which Caligiuri failed. Caligiuri was arrested and taken to the Des Moines police station where his blood level was tested and found to be .215.

Caligiuri was charged with operating while intoxicated (first offense). He filed a motion to suppress "evidence obtained during and after a traffic stop," arguing Ouimet's stop and seizure of Caligiuri's driver's license was a violation of Caligiuri's rights under the Fourth and Fourteenth Amendments to the United States Constitution and under Article I, section eight of the Iowa Constitution. The State argued there was no stop and no seizure. After a hearing, the district court concluded Ouimet did not effectuate a stop, and it was Caligiuri himself that effectuated the stop when he encountered the flood waters. When pressed, the court stated it "is not finding that there was a seizure by the parking enforcement officer." The court denied the motion to suppress.

Caligiuri waived a jury trial and stipulated to a trial to the court on the minutes of testimony. He was convicted of operating while intoxicated (first offense) and sentenced to one year in jail with all but seven days suspended.

Caligiuri appeals, contending the trial court erred in failing to grant his motion to suppress.

II. Analysis.

Caligiuri's challenge to the district court's ruling on his motion to suppress is based on his constitutional right to be free from unreasonable search and seizure, as guaranteed by the Fourth Amendment to the United States Constitution and article 1, section 8 of the Iowa Constitution. *State v. Otto*, 566 N.W.2d 509, 510 (Iowa 1997). We review this alleged constitutional violation de novo in light of the totality of the circumstances as shown by the entire record. *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001). "We give deference to the district court's fact findings due to its opportunity to assess the credibility of witnesses, but we are not bound by those findings." *Id*. In reviewing a district court's denial of a motion to suppress custodial statements, or physical evidence obtained through a search or seizure, we may consider not only evidence admitted at the suppression hearing but also evidence admitted at trial. *State v. Brooks*, 760 N.W.2d 197, 203-04 (Iowa 2009); *State v. Washburne*, 574 N.W.2d 261, 263-64 (Iowa 1997).

Because the search and seizure provisions of article I, section 8 of the Iowa Constitution and the Fourth Amendment contain identical language, the two provisions are generally "deemed to be identical in scope, import, and purpose." *State v. Bishop*, 387 N.W.2d 554, 557 (Iowa 1986).[1] Therefore, while our

[1] Neither party suggests that the Iowa Constitution should be interpreted differently that the United States Constitution.

discussion focuses on the Fourth Amendment, it is equally applicable to the similar provision in the Iowa Constitution.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Evidence obtained in violation of this provision is inadmissible in a prosecution, no matter how relevant or probative the evidence may be. *State v. Manna*, 534 N.W.2d 642, 643-44 (Iowa 1995).

The Fourth Amendment is a limitation upon the government only. *Burdeau v. McDowell*, 256 U.S. 465, 41 S. Ct. 574, 65 L. Ed. 1048 (1921). The Fourth Amendment does not only regulate searches and seizures carried out by law enforcement officers, it regulates "governmental action" and is therefore applicable to the actions of public employees. *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985). Ouimet was employed by the City of Des Moines as a parking enforcement meter checker. Her actions, as a government employee discharging her duties controlling traffic, were subject to the protections of the Fourth Amendment.

Warrantless searches and seizures are per se unreasonable unless they fall within one of the carefully drawn exceptions to the warrant requirement. *State v. Simmons*, 714 N.W.2d 264, 271 (Iowa 2006). The State has the burden of proving by a preponderance of the evidence that a warrantless search falls

within one of the exceptions to the warrant requirement. *State v. Naujoks*, 637 N.W.2d 101, 107-08 (Iowa 2001).

One of the well-established exceptions to the warrant requirement is that exception formulated in *Terry v. Ohio*, which allows an officer to 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. *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)).

A. Stop.

On appeal, Caligiuri notes he contested the basis of the stop in his motion to suppress and suggests a "stop" did occur, but his argument focuses on the seizure by Ouimet. We agree with the district court when it concluded the preponderance of the evidence established

> that [Ouimet] did not in fact effectuate a stop in this case, that the stop was effectuated by [Caligiuri] himself who obviously passed the barricades and then realized that he could go no further or he would end up in the waters that had overcome the streets at that time.

B. Seizure.

The fighting issue is really whether or not Ouimet "seized" Caligiuri under the Fourth Amendment prior to reasonably suspecting Caligiuri was driving while intoxicated. *See*, *e.g.*, *United States v. Drayton*, 536 U.S. 194, 210, 122 S. Ct. 2105, 2111, 153 L. Ed. 2d 242, 257 (2002). If no such seizure occurred, the motion to suppress is without merit. *State v. Wilkes*, 756 N.W.2d 838, 841 (Iowa 2008). To the extent Caligiuri was subject to seizure after Ouimet had

reasonable suspicion that Caligiuri was driving while intoxicated, such evidence is admissible. *See id.* at 841-42 (citing *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906).

After having passed through the barricades and by Ouimet and her parking enforcement car, Caligiuri stopped his car at the edge of the flood waters. Ouimet walked to the car to ask where Caligiuri was going. She was dressed in her summer uniform that clearly stated parking enforcement on it. She was wearing a badge. Her parking enforcement car was equipped with amber lights, but no red, blue, or strobe lights. It was not equipped with a siren. She did not move the car or activate its amber lights before approaching Caligiuri.

Not all contacts by police or government employees with individuals are deemed seizures within the meaning of the Fourth Amendment. *State v. Smith*, 683 N.W.2d 542, 546 (Iowa 2004). A person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave. *Id.* at 547. "According to the Supreme Court, 'Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.'" *Wilkes*, 756 N.W.2d at 842 (quoting *Terry*, 392, U.S. at 20 n.16, 88 S. Ct. at 1879 n.16, 20 L. Ed. 2d at 905 n.16). There was no "seizure" when Ouimet approached Caligiuri's car. *Id.* at 844; *State v. Harlan*, 301 N.W.2d 717, 719-20 (Iowa 1981); *see also* 4 Wayne R. LaFave, *Search and Seizure* § 9.4(a), at 420

(4th ed. 2004) ("If an officer merely walks up to a person . . . who is seated in a vehicle located in a public place and puts a question to him, this alone does not constitute a seizure.") (hereinafter "LaFave"). Ouimet's questioning of Caligiuri and asking for his identification did not constitute a "seizure." *See Smith*, 683 N.W.2d at 546-48; *see also* 4 LaFave, § 9.4(a), at 426 ("As for 'an officer's asking for identification,' such action 'alone does not amount to a seizure under the Fourth Amendment.'"). There is no evidence Ouimet used a commanding or threatening tone, displayed a weapon, or touched Caligiuri. She did not block Caligiuri's exit and made no threats. Up to this point Ouimet did nothing to transform this encounter into a seizure for Fourth Amendment purposes. However, when Ouimet retained Caligiuri's driver's license, we believe Ouimet effectuated a "seizure" under the Fourth Amendment. *United States v. Thompson*, 712 F.2d 1356, 1359 (11th Cir. 1983); *see also* 4 LaFave, § 9.4(a), at 427-28 ("[A]n encounter becomes a seizure if the officer . . . [holds] a person's identification papers or other property."). At that point the non-seizure encounter became transformed into a *Terry*-type seizure for which reasonable suspicion is required.

Upon approaching and observing Caligiuri, "[h]e seemed not okay" to Ouimet. He slurred his speech. He was headed in the opposite direction of his stated destination. He had just passed through barricades erected to keep motorists from driving into flood waters. Upon these observations, Ouimet had a reasonable and articulable suspicion of criminal activity, i.e. operating while intoxicated, to detain Caligiuri. *Wilkes*, 756 N.W.2d at 844-45. It was only after

these observations that Ouimet obtained and held Caligiuri's driver's license. At this point, the seizure was justified. *Harlan*, 301 N.W.2d at 719. No seizure occurred prior to the point at which Ouimet had reasonable suspicion to believe that Caligiuri was driving his car while intoxicated. Although we disagree with the district court's conclusion that no seizure occurred, we find there was no unlawful or unreasonable seizure that would require suppression of the evidence. Therefore, the district court was correct in denying Caligiuri's motion to suppress. We accordingly affirm Caligiuri's conviction and sentence.

AFFIRMED.