IN THE COURT OF APPEALS OF IOWA

No. 0-505 / 09-1694
Filed August 25, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID LEE FERNAU,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Nathan A. Callahan (suppression hearing) and James D. Coil (trial and sentencing), District Associate Judges.

Defendant appeals from his conviction of operating while intoxicated. **AFFIRMED.**

Carter Stevens of Roberts, Stevens & Prendergast, P.L.C., Waterloo, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Jeremy Westendorf, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ. Tabor, J., takes no part.

VOGEL, P.J.

David Lee Fernau appeals from his conviction for operating while intoxicated, first offense, in violation of Iowa Code section 321J.2 (2009). He claims the district court erred in denying his motion to suppress. We affirm.

I. Background Facts and Proceedings.

On January 20, 2009, at approximately 2:00 a.m., officers from the Cedar Rapids police department were responding to a traffic accident when they came across Fernau. A passenger in the accident reported that she had borrowed a cell phone from a man in a pickup truck parked in a nearby driveway, who she believed was intoxicated and officers later identified as Fernau. She explained that the man had been sleeping in the driver's seat with his head against the window and the engine running. After she knocked on the window and woke the man up, she used his cell phone. She described him as "out of it" and believed he was intoxicated. As the officers spoke to the woman, they heard the truck's tires spinning.

As officers approached the truck, its engine was running. Fernau turned off the engine and got out of the driver's side door. He began "stumbling" away from the officers and toward his house. Fernau was in his driveway when the officers asked him to stop so that they could talk to him. Fernau did so and walked with the officers to one of their patrol cars. The officers noticed the odor of alcohol on Fernau, that Fernau's eyes were bloodshot and watery and he had vomit on his clothing. A subsequent breath test demonstrated that Fernau had a blood alcohol content of .135. While Fernau admits he had consumed some beer, he claims he merely approached the passenger side of the truck, opened

the door, retrieved some personal items and reached over to lock the driver's side door when the police approached him. At the suppression hearing, the parties stipulated to the fact that the officers observed Fernau as being intoxicated at that time.

The State charged Fernau with operating while intoxicated in violation of Iowa Code section 321J.2. Fernau filed a motion to suppress, which the district court denied following a hearing. On October 13, 2009, following a trial on the minutes of evidence, the district court found Fernau guilty as charged. Fernau appeals and asserts that his motion to suppress should have been granted.

II. Standard of Review.

Fernau alleges a violation of his constitutional rights; therefore, our review is de novo. *State v. Lewis*, 675 N.W.2d 516, 521 (Iowa 2004). This review requires us to "make an independent evaluation of the totality of the circumstances as shown by the entire record." *State v. Kinkead*, 570 N.W.2d 97, 99 (Iowa 1997) (internal quotations and citations omitted). Due to its opportunity to evaluate the credibility of the witnesses, we give deference to the factual findings of the district court, but are not bound by such findings. *Lewis*, 675 N.W.2d at 521.

III. Analysis.

Fernau asserts that the district court erred in denying his motion to suppress, which alleged Fourth Amendment violations.[1] The Fourth Amendment

[1] Fernau also asserts that the stop violated article I, section 8 of the Iowa Constitution.

> Our court has consistently construed Iowa's prohibition against unreasonable searches and seizures as having the same scope and

imposes a general standard of reasonableness on all searches and seizures. *Id*. at 522. A warrantless search is per se unreasonable, unless the search falls within one of the recognized exceptions to the warrant requirement. *Id*. In this case, the district court found that the stop of Fernau in his driveway was an investigatory stop supported by reasonable suspicion. *See Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883, 20 L. Ed. 2d 889, 909 (1968); *Lewis*, 675 N.W.2d at 524–25 (discussing that an officer may conduct a brief investigatory stop of an individual when the officer has a reasonable and articulable suspicion that criminal activity is afoot).

Fernau argues the investigatory stop exception to the warrant requirement does not apply in this case. He argues that his driveway is part of the curtilage of his home in which he has an expectation of privacy. Therefore, he asserts the officers were required to have probable cause to stop him. We disagree. In *State v. Lewis*, our supreme court examined whether a driveway in a residential area was within the curtilage. *Lewis*, 675 N.W.2d at 523. The court stated:

> [W]e find the driveway was not within the curtilage. It is common for solicitors, operators of motor vehicles, and other individuals to enter unsecured driveways of private residences. [The defendant] could not have had a reasonable expectation of privacy in his driveway. Therefore, the Fourth Amendment did not prohibit the police from entering [the defendant's] driveway.

Id. We find this analysis controlling in the present case—Fernau's driveway was not within the curtilage and the officers were permitted to conduct an

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> purpose as the Fourth Amendment. [Fernau] has not given us reason to do otherwise, thus our discussion of the Fourth Amendment is equally applicable to his Iowa constitutional claim.

Lewis, 675 N.W.2d at 522–23.

investigatory stop in the driveway.[2] Finding no violation of Fernau's constitutional right to be free from unreasonable search and seizure, we affirm.

AFFIRMED.

[2] Fernau does not challenge the district court's finding that reasonable suspicion supported the stop. In the present case, officers received a report from a citizen informant that Fernau appeared intoxicated while sitting in a running vehicle and after approaching the vehicle, the officers witnessed Fernau turning off the engine and stumbling away from the truck. We agree with the district court that reasonable suspicion supported the stop.