

IN THE COURT OF APPEALS OF IOWA

No. 0-743 / 10-0289
Filed November 10, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JEFFREY DAX FIELDER,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Odell McGhee,
District Associate Judge.

Jeffrey Fielder appeals from his conviction and sentence for operating
while intoxicated, third offense. **AFFIRMED.**

Scott A. Michels of Gourley, Rehkemper & Lindholm, P.L.C., Des Moines,
for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney
General, John Sarcone, County Attorney, and David Porter, Assistant County
Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ.
Tabor, J., takes no part.

DANILSON, J.

Defendant Jeffrey Dax Fielder appeals from his conviction and sentence following a bench trial on the charge of operating while intoxicated, third offense, in violation of Iowa Code section 321J.2 (2007). He contends the State failed to prove Trooper Nathan Ludwig of the Iowa State Patrol had the requisite probable cause or reasonable suspicion to stop his vehicle on July 4, 2009.

Because Fielder contends his constitutional rights under the Fourth Amendment of the United States Constitution were violated, our review is de novo. *State v. Naujoks*, 637 N.W.2d 101, 106 (Iowa 2001). Upon a defendant's challenge to a stop on the basis that proper cause for an investigatory stop did not exist, the State must show by a preponderance of the evidence that the stopping officer had specific and articulable facts, taken together with rational inferences from those facts, to reasonably believe criminal activity had occurred or was occurring. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968); *State v. Tague*, 676 N.W.2d 197, 201 (Iowa 2004); *State v. Kinkead*, 570 N.W.2d 97, 100 (Iowa 1997). An automobile stop is governed by these Fourth Amendment protections and will be upheld only when it was reasonable. *Whren v. United States*, 517 U.S. 806, 810, 116 S. Ct. 1769, 1772, 135 L. Ed. 2d 89, 95 (1996). Our task is to independently evaluate Fielder's claim under the totality of the circumstances as shown by the entire record. *Tague*, 676 N.W.2d at 201. "We give considerable deference to the trial court's findings regarding the credibility of the witnesses, but are not bound by them." *Id.*

Upon our de novo review, we conclude the facts and circumstances in this case gave rise to Trooper Ludwig's reasonable suspicion that criminal activity had occurred or was occurring and therefore justified the investigatory stop. See *Kinkead*, 570 N.W.2d at 100; *State v. Tompkins*, 507 N.W.2d 736, 740 (Iowa Ct. App. 1993). At approximately 10:30 p.m. on July 4, 2009, Trooper Ludwig was on routine patrol. He merged onto Highway 141 in a northbound direction and encountered Fielder's vehicle travelling northbound in the inside lane of Highway 141. As Fielder's vehicle passed and drove slightly ahead of Trooper Ludwig's patrol car, Trooper Ludwig noticed that "[t]he vehicle made two sudden movements off onto the shoulder." Trooper Ludwig did not observe any excessive traffic, pot holes, road kill, deer, or other obstructions on the highway that would cause Fielder to swerve his vehicle in that manner. At that point, Trooper Ludwig believed that a traffic violation had occurred,¹ but he wanted to get Fielder's driving on tape, so he slowed down, allowed Fielder's vehicle to get completely ahead of his, and activated the video camera in his patrol car.

As Trooper Ludwig drove behind Fielder, Fielder properly signaled and changed lanes. While driving in the right lane, Fielder's vehicle "slowly drifted onto the fog line" so that the tires touched the line for "a second or two," but the

¹ Trooper Ludwig believed Fielder's driving was a violation of Iowa Code section 321.306 ("A vehicle should be driven as nearly as practical entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."). The appropriate question, however, is not whether Fielder's driving amounted to a statutory violation. Instead, we must determine whether the facts articulated by Trooper Ludwig support a reasonable suspicion that criminal activity had occurred or was occurring. See *Kinkead*, 570 N.W.2d at 101 ("We do not require proof of criminality by a preponderance of the evidence to validate an investigatory stop, only a reasonable suspicion that criminal activity is occurring."); but see *Tague*, 676 N.W.2d at 204 ("Mere suspicion, curiosity, or hunch of criminal activity is not enough.").

movement “wasn’t as abrupt as the ones when he was in the inside lane.” All this occurred within the distance of a half mile, and the vehicles were travelling at approximately sixty to seventy miles per hour. At this point, Trooper Ludwig activated his emergency lights and stopped Fielder.

Fielder contends the video recording from Trooper Ludwig’s patrol car merely shows Fielder’s vehicle gradually veer toward the right fog line, and “there was no evidence that the movement of the vehicle across the fog line was not done safely or without first ascertaining it was safe to do so.” We reviewed the video, and although it is difficult to ascertain whether Fielder was on the fog line or not, we certainly can observe that he was not travelling straight down the center of the lane and he was at least very near the fog line.

Although the video recording does not depict Trooper Ludwig’s observations as well as we would hope, we are to consider the totality of the circumstances confronting the officer at the time of the stop in determining whether the investigatory stop was reasonable. *State v. Kreps*, 650 N.W.2d 636, 642 (Iowa 2002). Trooper Ludwig testified that as soon as he merged onto the highway and was travelling adjacent to Fielder, he observed Fielder make “two abrupt movements” within a matter of three to five seconds.² Initially, Trooper Ludwig testified that Fielder’s vehicle twice went upon the shoulder of the road but in later testimony, he stated, “what I witnessed was two abrupt movements moving off to the fog line, not on the traveled portion consistent with driving straight down the road.” In further describing the “abrupt movements,”

² The movements occurred before Trooper Ludwig was able to activate his camera.

Trooper Ludwig explained that what he observed “was more than just one bending over to grab a cell phone or tune the radio.” The facts here, as described by Trooper Ludwig, do not reflect a single momentary weave or slight mishap as noted in *Tague*, 676 N.W.2d at 204-05 (concluding officer lacked reasonable suspicion to stop defendant’s vehicle when officer observed the vehicle’s left tires cross briefly over the left edge line of divided highway one time and return to its lane).

Although Trooper Ludwig testified that he observed the movements “out of the corner of [his] eye,” we can rely on his testimony due to the close proximity of the vehicles (Fielder was travelling slightly ahead of Trooper Ludwig’s front driver’s door) and the fact that there were no impediments in Trooper Ludwig’s peripheral view of Fielder’s vehicle. Trooper Ludwig testified that there was little other traffic on Highway 141 at that time, and there were no obstructions on the road that would otherwise cause Fielder’s driving to be erratic. Further, Trooper Ludwig was an experienced law enforcement officer, having served ten years on the Iowa State Patrol, and Fielder was driving at 10:30 p.m. on the Fourth of July holiday, a time that experienced officers associate with alcohol consumption and late-night driving. See, e.g., *Kreps*, 650 N.W.2d at 647 (noting that late-night activity, when combined with other specific and articulable facts, may be a factor giving rise to reasonable suspicion that criminal activity was afoot).

We certainly do not find overwhelming evidence in this case. However, after a careful review of the record, we conclude the facts available at the time of

the stop would cause a reasonably cautious individual to deem the action taken by Trooper Ludwig appropriate. See *State v. Otto*, 566 N.W.2d 509, 511 (Iowa 1997); *Tompkins*, 507 N.W.2d at 738. The investigatory stop in this case was reasonable.

We affirm the district court's denial of Fielder's motion to suppress, as well as Fielder's conviction and sentence for operating while intoxicated, third offense.

AFFIRMED.