IN THE COURT OF APPEALS OF IOWA

No. 0-953 / 10-0756
Filed February 23, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

THOMAS ALLEN DICKINSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Joseph Moothart, Judge.

Dickinson appeals from his conviction for operating while intoxicated, first offense. **REVERSED AND REMANDED.**

John J. Rausch of Rausch Law Firm, Waterloo, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Jeremy Westendorf and Shana Guthrie, Assistant County Attorneys, for appellee.

Considered by Eisenhauer, P.J., and Potterfield and Doyle, JJ. Tabor, J., takes no part.

EISENHAUER, P.J.

Thomas Dickinson appeals from his conviction for operating while intoxicated (OWI), first offense. Dickinson asserts the district court erred in denying his motion to suppress. Because we find the stop of Dickinson's vehicle was not supported by reasonable suspicion, we reverse and remand.

I. BACKGROUND FACTS AND PROCEEDINGS.

Approximately 1:10 a.m. on June 11, 2009, University of Northern Iowa Public Safety Officer Dana Jaeger was in a parking lot on the UNI campus off of West 23rd Street. Jaeger observed Dickinson's car going westbound on West 23rd Street and continuing past a sign warning the road ahead was closed. Dickinson was "driving in a normal driving manner," he had his lights on, he was not speeding, and he was not driving erratically.

In the front of the SAE house there is a curb cut entrance to a ten-foot-wide concrete entryway running from West 23rd Street to the house's front door. This concrete is the size of a single-garage driveway. The entryway is a right turn for westbound traffic and it crosses the regular-sized sidewalk running east/west parallel to the street. The entryway does not lead to a parking lot and there are no parking places on its sides. The West 23rd Street curb is painted blue on both sides of the entryway's curb cut. The parallel parking space immediately before the curb cut has a blue handicapped-parking symbol painted on the street. There is a sign authorizing two-hour handicapped parking located in the SAE yard near the curb cut.

Officer Jaeger observed Dickinson's car travel past two driveways (St. Stephens church, UNI parking lot), pull "into the handicap access going up to the SAE house," and then back out of the entryway and proceed eastbound. Officer Jaeger described Dickinson's driving while going in reverse: "I'd say not really fast. It was more of a slow—he didn't punch it. I mean, he was backing out, I guess like I would out of my driveway." There were not any pedestrians or motor vehicles in the street at this time.

Officer Jaeger's incident report states Dickinson's "vehicle backed out without slowing." Officer Jaeger stopped Dickinson's car and administered field sobriety tests, which he failed. Dickinson failed subsequent Datamaster testing.

On July 22, 2009, the State charged Dickinson with operating while intoxicated, first offense, in violation of Iowa Code section 321J.2 (2009). In August 2009, Dickinson moved to suppress the evidence resulting from the stop. At the September 2009 hearing on Dickinson's motion, Officer Jaeger testified:

> Q. And the specific reason why you stated you pulled Mr. Dickenson over was because he pulled—he pulled out of the driveway without stopping; isn't that correct? A. That's what I wrote the citation for, correct.
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> . . . .
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> Q. And isn't it correct, Officer, that your specific reason . . . for pulling Mr. Dickinson over is because . . . in your mind he violated 321.353[1] by not stopping before pulling out? Is that fair to say? A. Yes.

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[1] Iowa Code section 321.353(1), entitled "Stop before crossing sidewalk—right of way," provides:

> The driver of a vehicle emerging from a private roadway, alley, driveway or building shall stop such vehicle immediately prior to driving onto the sidewalk area . . . and the driver shall yield the right-of-way to any vehicular traffic on the street into which the driver's vehicle is entering.

However, at the hearing, Officer Jaeger admitted Dickinson's car "actually stopped. When he pulled in, he stopped for about five seconds and then backed out."

A week before the suppression hearing Officer Jaeger, learned about Cedar Falls ordinance 26-115, which states: "The driver of a vehicle shall not drive within any sidewalk area except at a permanent or temporary driveway." Officer Jaeger admitted he did not cite Dickinson for a violation of any Cedar Falls code section. Further:

> Q. It would be fair to say you didn't have a very good angle as far as depth perception regarding that vehicle. Is that fair to say? . . . A. Yes.
>
> Q. There weren't any signs that a person couldn't pull into this SAE drive and back out . . . . A. No, there's no signs that say no entrance.
>
> Q. And you stated you've seen other people actually drive into the SAE house? A. People that live there.
>
> Q. Okay. Have they ever got arrested for that? A. No, because they're dropping stuff off. It's usually during move-in when they [had] get-togethers. I mean, it's their residence.
>
> Q. So they're allowed to do it. Is that fair to say, Officer? A. I guess, like said, I've never seen anyone pull in, just pull right back out.
>
> Q. When you say pull in and pull right back out, there's a five-second pause in there; is that correct? A. Right.
>
> Q. If . . . Mr. Dickinson would have pulled into the St. Stephens or one of [the] other driveways, you would not have pulled him over. Is that fair to say? A. That is very fair to say.

Given the late hour and the driving he observed, Office Jaeger described his concerns:

> I guess I've never seen anybody drive up that sidewalk in all the years I've worked at UNI and done a turnaround. I mean, there's people that live in the house that drop people off that have pulled up there, but I've never seen anyone turn around in there and back

> out and then go down the street. So I thought he was intoxicated or a possibility.

On September 22, 2009, the court denied Dickinson's motion to suppress. The court ruled Dickinson did not violate Iowa Code section 321.353 because the evidence established Dickinson "stopped approximately five seconds before" backing up. However, the court determined the officer's stop of Dickinson's car met the objective test for a valid investigatory stop, ruling:

> The motivation articulated by the officer for stopping a vehicle is not controlling and the State is not limited to the reasons stated by the officer. [*State v. Heminover*, 619 N.W.2d 353, 361 (Iowa 2000).] Cedar Falls Traffic Code section 26.115 provides that: "The driver of a vehicle shall not drive within any sidewalk area except at a permanent or temporary driveway." The officer's observation of the defendant driving up the SAE sidewalk and backing up to proceed the other direction on West 23rd Street provided reasonable cause to believe [Dickinson] violated section 26.115 even though the officer was not aware of the section at the time that he stopped [Dickinson's] vehicle.

In October 2009, Dickinson filed motions to reopen the record and/or reconsider his motion to suppress. Dickinson wanted an opportunity "to present testimony that SAE driveway entrance . . . is actually a driveway and not a sidewalk."

Hearing on Dickinson's motions was held on December 14, 2009. Dickinson entered into evidence a picture sent to his cell phone on November 13, 2009. The picture shows two cars parked on the SAE entryway during the daytime.

Ronald Arends, senior engineer for Cedar Falls, testified he looked at aerial photos from a website and determined the SAE entryway was a driveway

from the 1930's, 1940's and was built to driveway standards at one time. Arends explained:

> A. Well, we had the street closed, and [the SAE entryway] was—it was used to turn around, yes.
>
> Q. Okay. And that was by you and others? A. Well, yes, I—yes.
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> Q. And you didn't consider that a violation of the law, is that correct? . . . A. No, I guess I didn't know that it was.
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> . . . .
>
> Q. Is this concrete approach to the SAE house, in your opinion, is it currently a driveway or a sidewalk? A. Well, that would—I don't know. That's—I've seen it used as a driveway, but it's—it doesn't lead to a garage, so I don't know. I've seen cars driving in it.
>
> . . . .
>
> A. At the present time, I said, I've seen it used for motor vehicles, but I assume the use is primarily sidewalk at this point.

On December 23, 2000, the court again denied Dickinson's motion to suppress, stating:

> The concrete entryway at issue was apparently used as a driveway since the 1930's or 1940's. Evidence does not indicate that a permit was ever obtained to reconstruct the entryway. However, [Dickinson's] Exhibit 2 portrays concrete that is much newer than 60 to 70 years old and an SAE house that is relatively new. The designated parking area is to the rear of the SAE house. This entryway leads directly to the front door. Although the entryway is 10 feet wide, its predominant use appears to be as a service walk for pedestrians or a handicapped access.
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> The court concludes . . . the concrete entryway to the SAE house is a "sidewalk area" even though cars drive on the entryway and people have used the entryway to turn vehicles around. [Dickinson's] actions provided reasonable cause to support an investigatory stop for a violation of [Cedar Falls] section 26.115 . . . .

In February 2010, the court found Dickinson guilty of OWI, first offense and this appeal followed.

II. STANDARD OF REVIEW.

Because this case concerns the constitutional right to be free of unreasonable searches and seizures, our review of the district court's suppression ruling is de novo. *State v. Kreps*, 650 N.W.2d 636, 640 (Iowa 2002). We independently evaluate the totality of the circumstances shown by the entire record. *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001).

III. LEGALITY OF STOP.

The stop of an automobile for investigatory purposes is upheld if supported by reasonable suspicion that criminal activity has occurred or is occurring. *State v. Kinkead*, 570 N.W.2d 97, 100 (Iowa 1997). "The motivation of the officer stopping the vehicle is not controlling in determining whether reasonable suspicion existed." *Kreps*, 650 N.W.2d at 641. Therefore, "the State is not limited to the reasons stated by the investigating officer in justifying the stop." *Id*.

> When a person challenges a stop on the basis that reasonable suspicion did not exist, the State must show by a preponderance of the evidence that the stopping officer had specific and articulable facts, which taken together with rational inferences from those facts, *to reasonably believe criminal activity may have occurred. Mere suspicion, curiosity, or hunch of criminal activity is not enough*.

State v. Tague, 676 N.W.2d 197, 204 (Iowa 2004) (citations omitted) (emphasis added). An objective standard is used to judge whether the facts known to the officer at the time of the stop would lead a reasonable person to believe the stop was appropriate. *Kinkead*, 570 N.W.2d at 100. If the State fails to carry its burden, any evidence obtained through the investigatory stop is inadmissible. *Id.*

Applying an objective standard to the facts available to the officer when he stopped Dickinson, we conclude the facts available at the time of the stop would not lead a reasonable person to believe the stop was appropriate. A good test is "'the possibility of criminal conduct was strong enough that, upon an objective appraisal of the situation, we would be critical of the officers had they let the event pass without investigation.'" *Kreps*, 650 N.W.2d at 642 (quoting 4 Wayne R. LaFave, *Search and Seizure* § 9.4(b), at 148 (3rd ed. 1996)).

The officer observed the vehicle for a very short time and 1:15 a.m. is not an unreasonable time to be out and about. *See State v. Haviland*, 532 N.W.2d 767, 769 (Iowa 1995). Dickinson's driving was "normal" and did not amount to the significant weaving or the erratic speeds observed by the officers in cases where reasonable suspicion was found to exist. *See State v. Otto*, 566 N.W.2d 509, 510-11 (Iowa 1997); *State v. Tompkins*, 507 N.W.2d 736, 740 (Iowa Ct. App. 1993). Dickinson backed out of the entryway in the same manner the officer backs out of his own driveway. The officer would not have stopped Dickinson if he had picked a different driveway. Further, the officer "was not investigating a crime or responding to an 'in-process' crime," and "the area was not a particularly 'high crime' spot." *Haviland*, 532 N.W.2d at 769.

Although the evidence was disputed as to whether the entryway should be considered a driveway or a sidewalk, it is undisputed the officer knew there was a curb cut into the wide, concrete entryway and he had observed cars parked on the concrete entryway in the past. Therefore, the combination of facts observed by the officer can, at most, objectively support a generalized "mere suspicion,

curiosity, or hunch of criminal activity." This was insufficient justification for a stop under Iowa law. The totality of the circumstances did not support a reasonable suspicion that criminal activity had occurred or was occurring. We cannot say we would be critical of Officer Jaeger "had he let the event pass without investigation." *See Kreps*, 650 N.W.2d at 648. Accordingly, the stop violated Dickinson's right to be free of arbitrary intrusion by the police. *See Tague*, 676 N.W.2d at 206. Because the officer did not have reasonable suspicion to stop Dickinson's vehicle, all evidence flowing from the stop is inadmissible. We reverse the trial court's denial of Dickinson's motion to suppress and remand the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.