

IN THE COURT OF APPEALS OF IOWA

No. 1-268 / 10-1263
Filed June 29, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ERNEST TERRELL LOMAX,
Defendant-Appellant.

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

Ernest Lomax appeals from his conviction and sentence for operating
while intoxicated, second offense. **REVERSED AND REMANDED.**

John Audlehelm of Audlehelm Law Office, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sharon Hall, Assistant Attorney
General, John P. Sarcone, County Attorney, and Anastasia Hurn, Assistant
County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ. Tabor, J., takes
no part.

DANILSON, J.

Ernest Lomax appeals from his conviction and sentence for operating while intoxicated, second offense, in violation of Iowa Code section 321J.2 (2009). He contends the State failed to prove the police officer had the requisite probable cause or reasonable suspicion to stop his vehicle. Under the facts and circumstances of this case, we conclude a reasonable person observing Lomax's driving would not find that criminal activity was occurring or had occurred such that an investigatory stop was justified. We therefore reverse and remand.

I. Background Facts and Proceedings.

On March 3, 2010, at approximately 10:53 p.m., Des Moines police officer Tony Beminio observed Lomax's vehicle travelling north on Martin Luther King Jr. Parkway. It was a dry and cold evening. Officer Beminio followed the vehicle for a little over a minute and noticed "the vehicle was making full use of its lane, weaving from the left to the right, back and forth." Officer Beminio saw the car "cross the divider line to the right, come back across to the left, and then come over across to the right, brake heavily, and crank its steering or turn back into its left lane." At that point, Officer Beminio stopped Lomax and asked Lomax to perform field sobriety tests. According to Officer Beminio, Lomax failed the field sobriety tests resulting in Lomax's arrest for operating while intoxicated.¹

On April 6, 2010, the State charged Lomax with operating while intoxicated, second offense. The State offered into evidence a digital recording from Officer Beminio's car depicting approximately one minute of Lomax's driving. The district court denied Lomax's motion to suppress evidence gained

¹ Officer Beminio also issued Lomax a citation for improper use of lanes.

as a result of the stop of his vehicle. Following a bench trial, the court found Lomax guilty as charged. Lomax appeals.

II. Scope and Standard of Review.

Because Lomax contends his stop for investigatory purposes was without probable cause or reasonable suspicion and violated his Fourth Amendment rights, our review of a district court's refusal to suppress is de novo. *State v. Crawford*, 659 N.W.2d 537, 541 (Iowa 2003). Our task is to independently evaluate Lomax's claim under the totality of the circumstances as shown by the entire record. *State v. Tague*, 676 N.W.2d 197, 201 (Iowa 2004). "We give considerable deference to the trial court's findings regarding the credibility of the witnesses, but are not bound by them." *Id.*

III. Merits.

Lomax argues the district court erred in overruling his motion to suppress because the record does not support a finding that Officer Beminio had probable cause or reasonable suspicion to stop his vehicle. Lomax preserved error through his motion to suppress challenging the grounds for Officer Beminio's investigatory stop of his vehicle.

The State must demonstrate that Officer Beminio had a reasonable suspicion criminal activity was occurring or had occurred to justify stopping Lomax's vehicle. *Id.* at 204. The evidence justifying a stop under reasonable suspicion does not need to rise to the level of probable cause. *State v. Scott*, 409 N.W.2d 465, 468 (Iowa 1987). The stopping officer must have specific and articulable facts that, along with rational inferences, demonstrate that he or she

reasonably believed criminal activity was occurring or imminent. *State v. Vance*, 790 N.W.2d 775, 781 (Iowa 2010). Reasonable suspicion is determined by an objective standard: whether a reasonable person would deem the officer's actions appropriate given the totality of the circumstances confronting the officer at the time of the stop. *State v. Kinkead*, 570 N.W.2d 97, 100 (Iowa 1997); *State v. Kreps*, 650 N.W.2d 636, 641-42 (Iowa 2002). Unparticularized suspicion is not an acceptable reason for a stop. *Kreps*, 650 N.W.2d at 641.

We have held that an officer's observation of a vehicle weaving within its own lane, without crossing either side boundary, may justify an investigatory stop. *State v. Tompkins*, 507 N.W.2d 736, 740 (Iowa Ct. App. 1993). Our supreme court has clarified that *Tompkins* does not hold weaving within one's own lane always provides reasonable suspicion for a stop. *State v. Otto*, 566 N.W.2d 509, 511 (Iowa 1997). In *Otto*, our supreme court concluded reasonable suspicion existed where the vehicle was constantly weaving within its own lane and fluctuated in speed. *Id.* The facts and circumstances of each individual case determine the reasonable suspicion analysis. *Id.* Our supreme court found more recently that crossing an edge line once on a divided highway, without weaving, veering, or erratic speed changes, is insufficient to support an investigatory stop. *Tague*, 676 N.W.2d at 205-06.

We have carefully reviewed the evidence in the record, including Officer Beminio's testimony and the digital recording taken from his vehicle. Officer Beminio stopped Lomax after observing Lomax's vehicle hit the brakes and make an alleged sharp correction at a curve in the road. Officer Beminio also testified

that the vehicle was slowly weaving within its lane. From the recording, we are unable to detect weaving in the course of Lomax's driving. We do observe a momentary braking and a slight lane correction as Lomax was approaching a curve in the road, but the movement can hardly be characterized as erratic or significant. Aside from the correction, Lomax's driving appears to be nondescript and unremarkable. There is no additional evidence to support a stop of Lomax's vehicle. In objectively reviewing the totality of the circumstances, we conclude this evidence is insufficient to raise reasonable suspicion or probable cause for an investigatory stop. See *Kinkead*, 570 N.W.2d at 100.

Under the facts and circumstances of this case, we conclude a reasonable person observing Lomax's driving could not find that a stop was justified. Without the reasonable suspicion or probable cause necessary to stop Lomax, we reverse his conviction and remand for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.