IN THE COURT OF APPEALS OF IOWA

No. 1-301 / 10-1194
Filed June 15, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

AMY LYNN VANWYK,
Defendant-Appellant.

Appeal from the Iowa District Court for Plymouth County, Robert J. Dull, District Associate Judge.

Appeal from the judgment and sentence for possession of a controlled substance. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney General, Darin J. Raymond, County Attorney, and Amy K. Oetken, Assistant County Attorney, for appellee.

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

SACKETT, C.J.

The defendant, Amy VanWyk, appeals from the district court's denial of her motion to suppress. She contends the court erred in concluding there was no seizure, or if there was, the community caretaking exception applied. We reverse and remand.

Background. A police officer patrolling around 1:00 in the morning on August 30, 2009, saw a car parked behind the town civic center. As he passed the car, the brake lights flashed. The officer turned his car around and came back. As he approached, the brake lights flashed again. Testifying he was unsure whether the brake lights were an attempt to signal him, the officer parked on the street and activated his emergency lights so the occupants of the car would know he was a police officer and not a threat. The female driver and male passenger got out of the car and started to walk toward the police car. The officer told them to get back into the car and he would "contact them shortly." He then came to the driver's door and asked her for identification. The officer noticed the defendant's hand was shaking when she gave him her license and she appeared nervous. The officer told the defendant to get out of the car testifying he did not know if she was having trouble with the male passenger, or if there was a possible domestic situation. The officer asked the defendant if she was all right and she said she was. The officer then asked her if there was anything illegal in the car. She said there was not. The officer asked her again and said his dog would find it if there was anything illegal in the car. The defendant told the officer she had marijuana in her purse.

The defendant was charged with possession of marijuana, possession of drug paraphernalia, and operating while intoxicated, first offense. A urinalysis revealed the presence of marijuana metabolites above the legal level. The defendant filed a motion to suppress, alleging the "stop was unsupported by probable cause and/or reasonable suspicion." Following a hearing, the court denied the motion. The court concluded

> the facts of this case support a conclusion that no "seizure" occurred in this case when [the officer] approached a parked vehicle and also that if a seizure did occur, it was justified under the "community caretaking" function of law enforcement.

The court also denied the defendant's subsequent motion to reconsider, amend, or enlarge its ruling.

The defendant waived a jury trial. Following a trial to the court, the court found the defendant guilty of operating while intoxicated and possession of marijuana. The defendant received a deferred judgment on the operating while intoxicated charge. The court sentenced the defendant to ninety days on the marijuana possession charge, suspended the sentence, and placed her on a year of probation with certain conditions. The court dismissed the possession of drug paraphernalia charge.

Scope of Review. Because the defendant raises a constitutional issue, our review is de novo. *See State v. Crawford*, 659 N.W.2d 537, 541 (Iowa 2003). We consider the evidence presented both in the hearing on the motion to suppress and in the trial. *See State v. Bruer*, 577 N.W.2d 41, 44 (Iowa 1998). We give deference to the district court's findings of fact because of the court's opportunity to assess the credibility of witnesses, but we are not bound them.

See State v. Turner, 630 N.W.2d 601, 606 (Iowa 2001). To the extent the defendant asserts a claim counsel was ineffective if error was not preserved, we perform a de novo review, making an independent evaluation of the circumstances shown in the entire record. *See State v. Gant*, 597 N.W.2d 501, 503 (Iowa 1999).

Motion to Suppress. Our federal and state constitutions protect citizens against unreasonable searches and seizures. U.S. Const. amend IV; Iowa Const. art. I, § 8. Evidence obtained in violation of these provisions is inadmissible no matter how relevant or probative it is. *State v. Manna*, 534 N.W.2d 642, 643–44 (Iowa 1995). "Warrantless searches and seizures are per se unreasonable unless the State proves by a preponderance of the evidence that a recognized exception to the warrant requirement applies." *State v. Howard*, 509 N.W.2d 764, 766 (Iowa 1993) (citation omitted). The defendant contends the court erred in denying her motion to suppress. She argues the court erred in concluding there was no seizure, or if there was, the community caretaking exception applied. Although she concedes in her brief that the officer "took the necessary steps to determine if assistance was warranted," she argues the officer's question whether she had anything illegal in the car prolonged the seizure beyond "any legitimate community caretaking function" and thus "must have been supported by some other exception to the warrant requirement."

The officer's actions in parking near the defendant's car, activating his emergency lights, and telling the occupants of the car to get back into the car and he would "contact them shortly" constituted a seizure. *See State v. Wilkes*, 756

N.W.2d 838, 845 (Iowa 2008) (finding that police authority is invoked with the activation of emergency lights commanding subjects to stop and remain). The district court erred in concluding there was no seizure. An officer is allowed to stop a vehicle for investigatory purposes based on specific and articulable facts, which taken together with rational inferences from those facts, give rise to a reasonable suspicion that a criminal act has occurred or is occurring. *State v. Kreps*, 650 N.W.2d 636, 641 (Iowa 2002). "Circumstances raising mere suspicion or curiosity are not enough." *Id.* (quoting *State v. Heminover*, 619 N.W.2d 353, 357 (Iowa 2000)). However, the evidence justifying the stop does not need to rise to the level of probable cause. *State v. Scott*, 409 N.W.2d 465, 468 (Iowa 1987). Whether an investigatory stop is lawful must be determined under the totality of the circumstances confronting the officer at the time of the stop. *Kreps*, 650 N.W.2d at 641-42. Here, the officer's belief that an occupant was trying to signal him by causing the brakes lights to illuminate two times was nothing more than a mere suspicion. The stop was not justified. The district court erred in denying the defendant's motion to suppress. We reverse the decision of the district court concerning the motion to suppress, reverse the defendant's conviction supported by the improperly-obtained evidence, and remand for new trial.

REVERSED AND REMANDED.