IN THE COURT OF APPEALS OF IOWA

No. 1-374 / 10-0861
Filed June 29, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RYAN EDWARD PETZOLDT,
Defendant-Appellant.

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

Ryan Petzoldt appeals from his conviction and sentence for operating while intoxicated, second offense. **REVERSED, CONVICTION AND SENTENCE VACATED, AND REMANDED.**

Richard A. Bartolomei of Bartolomei & Lange, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, 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.

DOYLE, J.

Ryan Petzoldt appeals from his conviction and sentence for operating while intoxicated, second offense. We reverse the district court's suppression ruling, vacate Petzoldt's conviction and sentence, and remand for further proceedings consistent with our opinion.

***I. Background Facts and Proceedings*.**

During the early morning hours of April 2, 2009, Le Mars police Officer Jay King sat in his patrol car parked on a side street off Central Avenue. Officer King resorted to playing Solitaire on his computer to break the monotony of a very slow night. At 2:38 a.m., the stillness was broken when a pickup truck, northbound on Central Avenue, passed by Officer King's location. Believing the truck was speeding, Officer King pulled out onto Central Avenue and took off in pursuit of the truck. By this time, the pickup was some blocks ahead of Officer King.

After travelling several blocks, Officer King activated his cruiser's emergency lights. When he was about half a block behind the pickup, Officer King observed it turn left onto a side street, and he lost sight of it for a couple of seconds. Officer King rounded the corner and turned into an alley where he observed a pickup parked in a driveway next to a house. Officer King pulled in right behind the pickup, blocking it in the driveway. He observed the driver get out of the pickup and walk towards the patrol car. Officer King got out of his car and met the driver, Ryan Petzoldt. After conversing with Petzoldt, Officer King suspected Petzoldt was intoxicated. Officer King administered field sobriety

tests, arrested Petzoldt for operating while intoxicated, and transported him to the Plymouth County jail for processing.

Petzoldt was charged with operating while intoxicated, second offense, an aggravated misdemeanor, in violation of Iowa Code section 321J.2 (2009). Petzold pled not guilty and filed a multi-faceted motion to suppress all evidence stemming from the stop. The district court summarized the motion:

> [Petzoldt] now moves to suppress based upon lack of legal cause to stop [Petzoldt's] vehicle, improper administration of field sobriety tests, lack of grounds to request a preliminary breath test and/or invoke implied consent, violation of Iowa Code section 804.20, not requesting a breath specimen in writing, lack of certification to operate the DataMaster, and improper questioning of [Petzoldt] prior to *Miranda* warning.

The district court denied the motion as to all items except the preliminary breath test.[1]

A bench trial on the minutes of testimony followed. Petzoldt was found guilty of operating while intoxicated, second offense, in violation of section 321J.2. He was sentenced to jail for a term of sixty days, with all but seven days suspended.

Petzoldt now appeals, arguing the district court erred in denying his motion to suppress. He contends Officer King's investigative stop was not justified and was an illegal seizure in violation of the Fourth Amendment to the United States Constitution and article 1, section 8 of the Iowa Constitution.

[1] The State had conceded that the results of the preliminary breath test could not be used as the instrument had not been calibrated as required.

***II. Scope and Standards of Review*.**

We review these alleged constitutional violations de novo in light of the totality of the circumstances as shown by the entire record. *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001). "We give deference to the district court's fact findings due to its opportunity to assess the credibility of witnesses, but we are not bound by those findings." *Id*. (footnote omitted).

***III. Discussion*.**

Petzoldt invokes both the federal and the state constitutional prohibitions against unreasonable searches and seizures, which contain identical language and are generally "deemed to be identical in scope, import, and purpose." *See* U.S. Const. amend. IV; Iowa Const. art. I, § 8; *see also State v. Bishop*, 387 N.W.2d 554, 557 (Iowa 1986). He has not argued that the interpretation of the two provisions should differ. We will therefore construe them together. *See State v. Jones*, 666 N.W.2d 142, 145 (Iowa 2003).

This case presents two potential issues of constitutional law. *See State v. Wilkes*, 756 N.W.2d 838, 841 (Iowa 2008). The first constitutional question is whether Officer King "seized" Petzoldt under the Fourth Amendment prior to reasonably suspecting Petzoldt was driving a motor vehicle while intoxicated. *See id.* (citing *United States v. Drayton*, 536 U.S. 194, 210, 122 S. Ct. 2105, 2111, 153 L. Ed. 2d 242, 257 (2002)). "If no such seizure occurred, the motion to suppress is without merit." *Id*. If a seizure occurred, the next question is whether the seizure was reasonable. Evidence obtained in an unreasonable search or seizure is inadmissible in a prosecution, no matter how relevant or probative the

evidence may be. *State v. Manna*, 534 N.W.2d 642, 643-44 (Iowa 1995) (citing U.S. Const. amend IV).

***A. Seizure*.**

Finding Petzoldt voluntarily stopped his vehicle before Officer King got to it, the district court opined this fact eliminated the issue of whether a constitutional seizure occurred. Petzoldt argues the district court erred in determining that Officer King had not effectuated a "constitutional seizure."

Not all contacts by police or government employees with individuals are deemed seizures within the meaning of the Fourth Amendment. *State v. Smith*, 683 N.W.2d 542, 546 (Iowa 2004). A person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave. *Id*. at 547. "According to the Supreme Court, 'Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.'" *Wilkes*, 756 N.W.2d at 842 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 n.16, 88 S. Ct. 1868, 1879 n.16, 20 L. Ed. 2d 889, 905 n.16 (1968)).

Officer King blocked Petzoldt's pickup with his marked patrol car. The patrol car's activated emergency lights were shining on Petzoldt's already stopped vehicle. *Id*. at 844 (noting activation of emergency lights "invoke police authority and imply a police command to stop and remain"). Officer King agreed that activation of the emergency lights is an indication to an individual that they are not to leave. While "bathed in the strobic show of authority from the patrol vehicle," as Petzoldt states in his brief, Petzoldt was immediately questioned by

uniformed Officer King about what he was doing, and he was ordered to produce his driver's license, registration, and proof of insurance card. Based on the totality of the circumstances, we conclude a reasonable person would have believed that he or she was not free to leave. Petzoldt was "seized" within the meaning of the Fourth Amendment.

***B. Reasonableness of Seizure*.**

The issue then becomes whether the stop was justified. Warrantless searches and seizures are per se unreasonable unless they fall within one of the carefully drawn exceptions to the warrant requirement. *State v. Simmons*, 714 N.W.2d 264, 271-72 (Iowa 2006). One exception[2] permits "a law enforcement officer to stop a vehicle when the officer observes a traffic violation, no matter how minor." *State v. Louwrens*, 792 N.W.2d 649, 651-52 (Iowa 2010). The State has the burden "to prove by a preponderance of the evidence that the officer had probable cause to stop the vehicle. If the State does not meet this burden, the evidence obtained through the stop must be suppressed." *Id*. (internal citations omitted).

> Probable cause exists if the totality of the circumstances as viewed by a reasonable and prudent person would lead that person to believe that a crime has been or is being committed and that the arrestee committed or is committing it.

[2] "Police may also stop a vehicle for a brief investigatory stop if they have reasonable suspicion to believe that criminal activity is occurring, such as when officers observe erratic, but not illegal, driving that would indicate the operator of the vehicle is intoxicated." *See State v. Louwrens*, 792 N.W.2d 649, 651-52 n.3 (Iowa 2010) (citing *State v. Tague*, 676 N.W.2d 197, 204 (Iowa 2004)). However, no allegation has been made in this case that Officer King had grounds to suspect Petzoldt was driving while intoxicated until he interacted with him during the stop. Accordingly, we, like the court in the *Louwrens* case, will limit our analysis to determining whether King had probable cause to believe a traffic violation had occurred. *See id*.

State v. Tague, 676 N.W.2d 197, 201 (Iowa 2004) (quoting *State v. Bumpus*, 459 N.W.2d 619, 624 (Iowa 1990)).

The district court found Officer King had observed a vehicle which appeared to be speeding. The court concluded, "Officer King did observe what he reasonably believed to be a traffic violation and was within legal parameters when he initiated pursuit of [Petzoldt]." Based on that language, Petzoldt argues the district court did not find Officer King had probable cause to stop Petzoldt for a traffic violation, but instead, apparently decided the stop issue on the basis of reasonable suspicion. He then posits, under a reasonable suspicion analysis, that Officer King had no "sufficient, specific, articulable facts to substantiate a particularized suspicion to justify making an investigatory stop." We cannot say whether the district court employed a probable cause standard. Nevertheless, our analysis is limited to determining whether Officer King had probable cause to stop Petzoldt, so we must determine under a de novo review whether the totality of the circumstances as viewed by a reasonable and prudent person would have led Officer King to believe that Petzoldt's truck was speeding.

We believe that with proper foundation, an officer's visual estimation of speed may be sufficient to supply probable cause to stop a vehicle for speeding.[3] But that is not the case here.

---

[3] *See*, *e.g.*, *State v. Allen*, 978 So.2d 254, 255-56 (Fla. Dist. Ct. App. 2008) (finding officer's observations of Allen's vehicle provided reasonable suspicion that the vehicle was speeding where the officer testified that he had to "accelerate quite a bit" to catch up to Allen's vehicle because Allen appeared to be moving at a high rate of speed and that the area had a speed limit of twenty-five miles per hour and that he had to drive well over fifty miles per hour to catch up to Allen); *State v. Barnhill*, 601 S.E.2d 215, 216 (N.C. Ct. App. 2004) (finding officer's observations of Barnhill's vehicle provided reasonable suspicion that the vehicle was speeding where the officer testified that he believed the vehicle was exceeding a safe speed, estimating the vehicle to be traveling

Here, Officer King testified he was playing Solitaire when observed Petzoldt's pickup truck briefly as it passed in front of his patrol car. Although he testified he believed the truck was travelling at a speed greater than the posted speed limit, Officer King made no estimate as to how fast the truck was travelling or how much over the posted limit he thought the pickup was travelling. The posted speed limit is not even in the record before us.[4] Officer King's visual estimate of speed was not confirmed by any other means of corroboration of the speed, such as radar or pacing.[5] Officer King observed no other traffic infractions or driving anomalies by the pickup. He reached his conclusion based upon "years of experience looking at vehicles and the speeds they are going," something he did every day in his job as a thirty-one-year veteran of the police force. Further, he said that as he attempted to catch up to the pickup, he "could tell that it was still going over the speed limit." Officer King did not charge Petzoldt with speeding. The speed of Petzoldt's truck cannot be discerned from viewing the video taken by Officer King's dashboard-mounted camera.

"40 m.p.h. in a 25 m.p.h." zone, hearing a loud sound from the vehicle's engine when Barnhill accelerated, and seeing Barnhill's truck bouncing as it proceeded through the intersection because it appeared it had gone through at a high rate of speed); *see also United States v. Ludwig*, No. 10-8009, ___ F.3d. ___, ___ (10th Cir. April 22, 2011) ("It's long been the case that an officer's visual estimation can supply probable cause to support a traffic stop for speeding in the appropriate circumstances.").

[4] In its brief, the State notes that section 321.285(2)(a) sets the default speed limit in business districts at twenty miles per hour and twenty-five miles per hour in residential and school districts.

[5] Petzoldt contends the State had the burden to introduce objective data, not some mere belief by the officer that a speed violation occurred. He suggests that a visual estimate of speeding must be supplemented by "some other independent, mechanical means of corroboration of the speed [such as radar, laser, vascar, or pacing]." Although such corroboration would be helpful, to date, our jurisprudence has imposed no such obligation upon the State.

Officer King's testimony is solely conclusory. Having failed to articulate his observations of the movement of the Petzoldt truck in his testimony, Officer King's opinion lacks any factual foundation. Other than relying on his experience as a police officer, he failed to express any reasons for his belief the truck was speeding.

Without the facts upon which Officer King formed his belief that Petzoldt's truck was speeding, we cannot determine whether his belief was reasonable. This record is simply insufficient to supply the requisite probable cause for the stop of Petzoldt's truck for speeding. Consequently, Officer King's stop violated Petzoldt's rights as guaranteed by the Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution. Thus, all evidence flowing from the stop is inadmissible. *See Louwrens*, 792 N.W.2d at 651-52. The district court erred in failing to grant Petzoldt's motion to suppress. We therefore reverse the district court's suppression ruling, vacate Petzoldt's conviction and sentence, and remand for further proceedings consistent with our opinion. In view of our conclusion, we need not address Petzoldt's remaining argument that Officer King did not have sufficient identification of the pickup truck to permit him to conclude it was Petzoldt's.

REVERSED, CONVICTION AND SENTENCE VACATED, AND REMANDED.