

IN THE COURT OF APPEALS OF IOWA

No. 1-551 / 10-1531
Filed July 27, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID LEE CARNEY,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Cynthia Moisan,
District Associate Judge.

David Lee Carney appeals from his conviction and sentence for operating
while intoxicated, first offense. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Vidhya K. Reddy, Assistant
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik and Matthew Oetker,
Assistant Attorneys General, John P. Sarcone, County Attorney, and Anastasia
Hurn, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

DANILSON, J.

David Lee Carney appeals from his conviction and sentence for operating while intoxicated, first offense, in violation of Iowa Code section 321J.2 (2009). He argues the State failed to meet its burden of showing 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 Carney's driving would not find criminal activity was occurring or had occurred such that an investigatory stop was justified. We therefore reverse and remand.

I. Background Facts and Proceedings.

Shortly before 2:00 a.m. on February 11, 2010, Des Moines Police Officer Colin Boone was on patrol, traveling northbound on East 14th Street, a divided four-lane road. Officer Boone followed a silver Pontiac Grand Prix and observed the vehicle make a "wide [left] turn going across lanes of traffic" onto East University Avenue. At that point, East University Avenue is a divided four-lane road with two lanes going eastbound and two going westbound.

According to Officer Boone, the vehicle turned from the left turn lane on East 14th Street immediately into the outside, northern-most lane of East University Avenue, near the curb. As Officer Boone continued to follow the car from the inside lane, he observed it straddle the lane line and take up both lanes on East University Avenue and then move back into the right lane. Officer Boone was particularly concerned about the vehicle's driving given the weather conditions (snow and/or ice covered roads that had not been plowed) and the time of night (approximately 2:00 a.m.). In particular, Officer Boone observed

that Carney's vehicle did not follow the "imprints" made in the snow by other vehicles, but instead was "out of where everybody was travelling [and] not within part of the lane."

Based on his observations, Officer Boone performed a traffic stop and identified the driver, David Lee Carney. Officer Boone observed Carney had "bloodshot/watery eyes, mumbling speech, dull behavior, and smelled of alcohol." Carney admitted he had been drinking earlier in the evening, but claimed to have stopped around 11:30 p.m. Carney submitted to field sobriety tests; the results suggested intoxication. Upon request, Carney agreed to a preliminary breath test, which revealed a blood alcohol level of 0.121. At the Des Moines Police Department, Carney consented to a DataMaster breath test, and the results confirmed a blood alcohol level of 0.112. Officer Boone arrested Carney for operating while intoxicated and issued a citation for improper use of lanes.

The State charged Carney by trial information with operating while intoxicated, first offense, on March 16, 2010. Carney entered a plea of not guilty. Carney filed a motion to suppress on June 10, 2010. In the July 20, 2010 hearing on the motion to suppress, Carney and Officer Boone both testified, and a digital recording from Officer Boone's car displaying what he observed was admitted. The district court ruled Officer Boone did have probable cause to stop Carney's vehicle based on Carney's direct turn into the far lane and that Carney's vehicle straddled both lanes of traffic. The motion to suppress was denied.

Carney waived his right to a jury trial and stipulated to a trial on the minutes of testimony. The State agreed to stand silent at sentencing. On

September 13, 2010, the district court entered judgment against Carney in a bench trial for operating while intoxicated, first offense, and he was sentenced to one year of incarceration, all but three days suspended. The district court placed Carney on probation for one year and imposed a fine. Carney appeals.

II. Scope and Standard of Review.

Because Carney's challenge to the district court's denial of his motion to suppress implicates his constitutional rights, our review is *de novo*. *State v. Otto*, 566 N.W.2d 509, 510 (Iowa 1997). We independently evaluate the totality of the circumstances as shown by the entire record. *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001). While we give deference to the district court's findings regarding the credibility of witnesses, we are not bound by them. *Id.*

III. Merits.

Carney argues the district court erred in denying his motion to suppress because the record does not support that Officer Boone had probable cause or reasonable suspicion to stop his vehicle. We agree.

A police officer has probable cause to stop a vehicle when he or she observes any violation of our traffic laws, no matter how minor. *State v. Tague*, 676 N.W.2d 197, 201 (Iowa 2004); *State v. Mitchell*, 498 N.W.2d 691, 693 (Iowa 1993). The State must prove probable cause by a preponderance of the evidence. *Tague*, 676 N.W.2d at 201. Here, the district court determined, "The combination of the Defendant turning into the far lane of traffic and driving in both lanes of traffic gave the officer probable cause to stop."

Officer Boone issued Carney a traffic citation in violation of section 114-306 of the City of Des Moines Code of Ordinances. Section 114-306(b)(1) provides that when a roadway has three or more lanes for traffic:

A vehicle shall be driven as nearly as practical entirely within a single lane and shall not be moved from that lane until such movement can be made with safety.

Our supreme court has explained the intention of Iowa Code section 321.306, which is nearly identical to section 114-306 of the City of Des Moines Code of Ordinances, as follows:

The dual purpose of the statute is to promote the integrity of the lane markings on the highway and to ensure the safe movement of vehicles on laned roadways. A violation does not occur unless the driver changes lanes before the driver ascertains that he or she could make such movement with safety.

Tague, 676 N.W.2d at 203.

Officer Boone testified Carney made his left turn by crossing over the inside lane and driving directly into the outside lane. Officer Boone testified Carney then straddled over the center line for a short time before returning to the outside lane. He opined that Carney's lane shifting prevented him from driving in the safer, more-traveled tracks of the snow-covered road that had been made by vehicles before him. We acknowledge that following the tracks made by other vehicles is sometimes the only manner to travel after a heavy snowfall. However, there is no law requiring a vehicle to follow the imprints in the snow made by other vehicles. We further note the digital recording from Officer

Boone's patrol car does not support a finding Carney crossed over the center line other than when he was completing his turn and traversing into the far lane.¹

Carney testified he was trying to avoid ice and snow on the side of the road and he was certain he could make the movement to the other lane safely. See *id.* (reiterating that a violation does not occur unless the driver changes lanes before the driver ascertains he could make such movement with safety). We find Carney's testimony to be credible based upon our review of the evidence in the record and the video recording, particularly because there were no other vehicles in the vicinity and it was clear the change of lanes could be made, and was made, safely.² Under these circumstances, we find any momentary lane change by Carney did not give Officer Boone probable cause to stop him for a traffic violation under section 114-306 of the City of Des Moines Code of Ordinances.

The State also contends Officer Boone had probable cause to stop based on Carney's "illegal left-hand turn" into the far outside lane. Although prudent and safe driving would suggest that a left hand turn be completed by turning into the lane nearest the center line, there is no law that requires such action.³ See Iowa Code § 321.311 (1)(b); City of Des Moines Code of Ordinances § 114-311(2). It follows that Carney's left turn into the outside lane did not give Officer Boone cause to stop him for a traffic violation.

¹ The ability to see the center line was also difficult in light of the snowfall.

² A different result may have been reached if other vehicles were present and/or Carney failed to determine that the movement could be made safely.

³ Error was preserved on this issue through Carney's motion to suppress, as well as the district court's ruling. The only possible violation of the traffic laws would be an illegal lane change as previously discussed.

The State also argues the investigatory stop was supported by reasonable suspicion. We disagree. To justify an investigatory stop based on a reasonable suspicion, it is the State's burden to demonstrate by a preponderance of the evidence that the stopping officer has specific and articulable facts that, along with rational inferences, demonstrate the officer reasonably believed criminal activity was occurring or about to occur. *State v. Vance*, 790 N.W.2d 775, 781 (Iowa 2010). The evidence necessary to justify a stop under reasonable suspicion is not required to rise to the level of probable cause. *State v. Scott*, 409 N.W.2d 465, 468 (Iowa 1987).

The existence of reasonable suspicion is based on an objective standard: whether the facts available to the officer at the time of the stop would lead a reasonable person to believe that the action taken by the officer was appropriate.

State v. Kinkead, 570 N.W.2d 97, 100 (Iowa 1997).

We concur with the district court's assessment that Carney turned left into the outside lane, near the curb. However, such action is only imprudent, not illegal, and Carney's testimony indicates he chose that path as the safest route considering the weather conditions and snow on the road, and after being certain he could make the movement safely. The video recording does not otherwise depict Carney's vehicle crossing over the center line or weaving giving reasonable cause to stop. Perhaps additional time following and observing Carney would have provided the officer with reasonable suspicion of criminal activity, but these facts do not.

We have carefully reviewed the evidence in the record. Under the facts and circumstances of this case, we conclude a reasonable person observing

Carney's driving could not find a stop was justified. Without the reasonable suspicion or probable cause necessary to stop Carney, we reverse his conviction and remand for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.