IN THE COURT OF APPEALS OF IOWA

No. 2-401 / 11-1410
Filed June 27, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TREVOR JEROME ABBEY,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Gregory D. Brandt, District Associate Judge, (motion to suppress and sentencing) and Joe E. Smith, Judge (trial).

Trevor Abbey appeals from the judgment and sentence entered following a verdict finding him guilty of driving while revoked; he contends the district court erred in denying his motion to suppress evidence. **AFFIRMED.**

Michael B. Oliver of Oliver Law Firm, P.C., Windsor Heights, for appellant.

Thomas J. Miller, Attorney General, Kyle P. Hanson, Assistant Attorney General, John P. Sarcone, County Attorney, and Shannon Archer, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Mullins, JJ.

POTTERFIELD, J.

Trevor Abbey appeals from the judgment and sentence entered following a verdict finding him guilty of driving while revoked. He contends the evidence against him was obtained in violation of his rights under the Iowa and United States Constitutions. Upon our de novo review, we find the Iowa constitutional claim was not preserved, and that no Fourth Amendment violation occurred as reasonable suspicion existed for the stop.

I. Background Facts and Proceedings

On March 12, 2011, at around six o'clock in the evening, Trevor Abbey was seated in the driver's seat of a parked car with the engine running in a higher crime area of Des Moines known for narcotics activity. Two law enforcement officers patrolling the area watched as a group of three or four women walked up to the car, spoke with Abbey, and walked away. The officers pulled their cruiser behind Abbey's car without activating their lights or siren. The cruiser left an exit available for Abbey's car. Abbey turned off his engine upon their approach. The officers walked to the passenger side of Abbey's vehicle and had a brief conversation with him. During this conversation they noticed the zipper on Abbey's pants was down.

The officers requested Abbey step out of the car and speak further with them. Abbey complied and also agreed to their request to produce his license. During this conversation the officers dispelled suspicion about Abbey's unzipped pants. They also ran Abbey's driver's license through the LENCIR system, found his license was revoked, and arrested him.

Abbey filed a motion to suppress evidence of the license revocation, asserting it was the fruit of an improper seizure in violation of his constitutional rights under the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Iowa constitution. The district court denied the motion, finding no seizure by the officers and that Abbey "freely chose to speak with the officers and answer their questions including his identity[.]" Abbey filed a motion to reconsider under the Fourth Amendment arguing the seizure occurred when he was asked to get out of his car. The court denied the motion. Abbey stipulated to a trial on the minutes of testimony, and the court entered a guilty verdict. He was sentenced to a fine of $1000. Abbey appeals, arguing the district court erred in denying his motion to suppress.

II. Standard of Review

We review constitutional claims de novo. *State v. Walshire*, 634 N.W.2d 625, 626 (Iowa 2001). This review requires an independent evaluation of the totality of the circumstances shown by the record as a whole. *State v. Lane*, 726 N.W.2d 371, 377 (Iowa 2007). We give deference to the district court's findings of fact and credibility determinations, but are not bound by such findings. *Id*.

III. Analysis

A. Preservation of Iowa Constitutional Claim

While Abbey brings his claim under both the Iowa and United States Constitutions, the State contends the Iowa constitutional claim is not preserved for appeal. We agree. An issue will be reviewed on appeal only after it has been presented to and ruled upon by the district court. *State v. Mitchell*, 757 N.W.2d 431, 435 (Iowa 2008).

Here, Abbey brought claims under both constitutions in his motion to suppress. In its ruling, the district court addressed the motion only under the Fourth Amendment. In his motion to reconsider, Abbey solely addressed the Fourth Amendment, not the Iowa constitutional claim. Because the district court never ruled on the Iowa constitutional claim, it cannot now be raised on appeal. Therefore, we address only the Fourth Amendment issue on appeal.

B. Unlawful Seizure

Abbey contends the police action prior to his arrest constituted an unreasonable seizure.

> Whether a seizure occurred is determined by the totality of the circumstances. The Supreme Court has long recognized that not all police contacts with individuals are deemed seizures within the meaning of the Fourth Amendment. Encounters with the police remain consensual [s]o long as a reasonable person would feel free to disregard the police and go about his business. Generally, police questioning, and the responses it elicits, does not constitute a seizure.
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> For a seizure to occur, there must be objective indices of police coercion. The fact that an officer . . . is in uniform has been given little weight to the analysis. In order to maintain the consensual nature of the encounter, there should be no show of authority, no intimidation, and no use of physical force by the officers in their encounter.

State v. Lowe, ____ N.W.2d ____, 2012 WL 163027, at *8 (Iowa 2012) (internal citations and quotation marks omitted). The Supreme Court has stated that examples of coercion triggering Fourth Amendment protections include the "threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). The

absence of sirens or emergency lights by officers in a police vehicle and the availability of an exit weigh against coercion. *State v. Wilkes*, 756 N.W.2d 838, 842–43 (Iowa 2008). Mere conversation and request for identification by an officer to a defendant is not a seizure under the Fourth Amendment. *State v. Smith*, 683 N.W.2d 542, 547–48 (Iowa 2004); *see also Florida v. Royer*, 460 U.S. 491, 501 (1983).

When the officers pulled behind Abbey's vehicle, they did not activate emergency lights or sirens and did not block his vehicle from exiting. The officers approached the passenger-side window and spoke with Abbey. Thus, no seizure occurred until the officers requested Abbey leave the vehicle. *See State v. Harlan*, 301 N.W.2d 717, 720 (Iowa 1981) (noting in encounter with stopped vehicle, earliest point at which seizure may have occurred was when license and field sobriety test requested).

Abbey argues that the seizure occurred when the officers requested he exit the vehicle and produce his license. Even assuming Abbey was no longer free to leave and the encounter became a seizure at that point, we agree with the State that the officers possessed reasonable suspicion supported by specific facts to justify the request. No Fourth Amendment infringement will be found if a reasonable suspicion supported by specific facts exists to conduct a stop. *Mendenhall*, 446 U.S. at 554; *see also State v. Kinkead*, 570 N.W.2d 97, 100 (Iowa 1997) (finding officer may stop an individual for investigatory purposes based on reasonable suspicion supported by specific and articulable facts that criminal act has occurred or is occurring). This suspicion need not rise to the level of probable cause; it need only fulfill the purpose of an investigatory stop.

This purpose is to "confirm or dispel suspicions of criminal activity through reasonable questioning." *State v. Kreps*, 650 N.W.2d 636, 641 (Iowa 2002) (citing *United States v. Hickman*, 523 F.2d 323, 327 (9th Cir. 1975)).

> 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.

State v. Tague, 676 N.W.2d 197, 204 (Iowa 2004).

Further, "reasonable cause may exist to investigate conduct which is subject to a legitimate explanation and turns out to be wholly lawful." *State v. Richardson*, 501 N.W.2d 495, 497 (Iowa 1993) (citation omitted). In *Richardson*, our supreme court found reasonable suspicion for a stop existed where a car was parked in a nonresidential area known for frequent burglaries when all the businesses were closed and which furtively was driven away when the officer approached. *Id*.; *cf. State v. Haviland*, 532 N.W.2d 767, 768 (Iowa 1995) (finding parking in a remote location and driving past police officers insufficient for reasonable suspicion). The motivation of the officer at the time is not controlling, rather the test is whether objectively such reasonable suspicion exists. *Kreps*, 650 N.W.2d at 641 ("[T]he State is not limited to the reasons stated by the investigating officer in justifying the stop.").

Here, the State points to Abbey's unzipped pants, the presence of several females approaching the vehicle and shortly thereafter leaving, and his location in an elevated crime area, as supporting reasonable suspicion for criminal activity. Considering the circumstances as a whole, we find reasonable suspicion existed to request Abbey exit the car and produce his license.

For the foregoing reasons, we affirm Abbey's conviction and sentence.

AFFIRMED.