IN THE COURT OF APPEALS OF IOWA

No. 2-435 / 11-1464
Filed June 27, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KEVIN LAMAR BALLANGEE,
Defendant-Appellant.

Appeal from the Iowa District Court for Washington County, Crystal S. Cronk, District Associate Judge.

Kevin Ballangee appeals his conviction of operating while intoxicated. **AFFIRMED.**

Jeffrey L. Powell of the Law Office of Jeffrey L. Powell, Washington, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Larry Brock, County Attorney, and Shawn R. Showers, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Tabor and Bower, JJ.

BOWER, J.

Kevin Ballangee appeals his conviction of operating while intoxicated, in violation of Iowa Code section 321J.2 (2011). He contends the district court erred in denying his motion to suppress. Upon our review, we conclude the facts and circumstances in this case gave rise to the stopping officer's reasonable suspicion that criminal activity had occurred or was occurring and therefore justified the investigatory stop. Accordingly, we affirm Ballangee's conviction and sentence for operating while intoxicated.

I. Background Facts and Proceedings.

At approximately 11:45 p.m. on December 3, 2010, Washington Police Officer Jamie Townsend was on routine patrol driving north on Fourth Avenue when he saw a white Chevrolet truck "stopped" in the "traveled portion" of the southbound roadway near the Fourth Avenue Bar & Grill. There was no other traffic on the street. He noticed the vehicle did not have a front license plate. The vehicle started driving as Officer Townsend passed. Officer Townsend turned around and headed south to follow the vehicle. He lost sight of the vehicle momentarily but caught up "within seconds."

The vehicle stopped at a stop sign when Officer Townsend was approximately one block behind. Officer Townsend noticed the vehicle failed to use a turn signal before making a right turn onto Madison Street, but noted there was no other traffic around. Officer Townsend turned right onto Madison Street to follow. He observed the vehicle had a Georgia license plate, which explained

to him its lack of a front license plate.[1] By this time, the vehicle was following closely behind a van. It crossed the double yellow centerline and "stayed on the yellow line until it turned [left to go] south." Officer Townsend activated his emergency lights to stop the vehicle.

Officer Townsend identified Kevin Ballangee as the vehicle's driver. Ballangee showed signs of intoxication. His speech was "slurred" and "very hard to understand." He admitted to drinking "7 beers" since approximately 9:30 p.m. He stated he was on his way home from the Fourth Avenue Bar & Grill. Ballangee also failed field sobriety tests. Ballangee submitted to a preliminary breath test, which indicated his blood alcohol concentration exceeded the legal limit. Officer Townsend arrested Ballangee for operating while intoxicated and issued citations for failure to give turn signal and improper use of lanes. Officer Townsend transported Ballangee to the Washington County Jail. At 12:30 a.m., Ballangee consented to a breath test, which indicated he had a blood alcohol concentration of .188.

Ballangee filed a motion to suppress all evidence obtained as a result of the stop, alleging the stop violated his constitutional rights because Officer Townsend did not have reasonable suspicion to stop his vehicle. Following a hearing, the district court entered an order denying Ballangee's motion to suppress.

Ballangee waived his right to a jury trial. The district court found Ballangee guilty of operating while intoxicated. The court also found Ballangee

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[1] Some states, including Georgia, do not require a front license plate.

guilty of improper use of lanes and failure to give turn signal, simple misdemeanor offenses. Ballangee now appeals, alleging the district court erred in denying his motion to suppress.

II. Scope and Standard of Review.

Because Ballangee'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. Tague*, 676 N.W.2d 197, 201 (Iowa 2004). While we give considerable deference to the district court's findings regarding the credibility of witnesses, we are not bound by them. *Id.*

III. Analysis.

Ballangee contends the district court erred in overruling his motion to suppress because the record does not support a finding that Officer Townsend had reasonable suspicion to stop his vehicle. He argues Officer Townsend "completely lost visual contact" with his vehicle after initially meeting it on the roadway for a time period "long enough to cast doubt as to whether the officer had any certainty whatsoever that the vehicle he eventually stopped was in fact the same vehicle he observed on Fourth Avenue." Ballangee further contends he was not required to use a turn signal when turning right onto Madison Street, because "no vehicles were present in the intersection that would have been

affected by the turn."[2] Finally, he argues he was "being careful and very much in control" while driving on the double yellow center line and was "merely attempting to gain a better view of where the cross street was, and of any oncoming traffic, prior to making [a] turn."

The State must demonstrate Officer Townsend had a reasonable suspicion criminal activity was occurring or had occurred to justify stopping Ballangee'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. *Kinkead*, 570 N.W.2d at 100; *see 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

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[2] We do not consider evidence of Ballangee's failure to use his turn signal in determining whether reasonable suspicion existed to stop him. *State v. Kinkead*, 570 N.W.2d 97, 102 (Iowa 1997); *State v. Malloy*, 453 N.W.2d 243, 245 (Iowa Ct. App. 1990) ("When the facts giving rise to an arrest do not constitute an offense, no reasonable cause exists to stop the defendant.").

supreme court has clarified that *Tompkins* does not hold weaving within one's own lane always provides reasonable suspicion for a stop. *Otto*, 566 N.W.2d at 511. In *Otto*, our supreme court concluded reasonable suspicion existed where the vehicle was constantly weaving within its own lane and fluctuated in speed. *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. The court has also noted the time of day, when combined with other specific and articulable facts, may also be a factor giving rise to reasonable suspicion that criminal activity was afoot. *See Kreps,* 650 N.W.2d at 647. The facts and circumstances of each individual case determine the reasonable suspicion analysis. *Otto*, 566 N.W.2d at 511.

A review of the videotape from Officer Townsend's dashboard camera is not quite as helpful as we would hope. From the video, it is difficult to see Ballangee's vehicle at the time Officer Townsend initially observed it in the roadway, aside from a view of its headlights. Only when Officer Townsend's patrol car passes directly by the vehicle are we able to observe it is a white pick-up truck and the vehicle is moving. In addition, from the video, at least thirty seconds pass before Ballangee's vehicle comes clearly back into view. Although we are unable to evaluate whether the vehicle fully *crossed* the lines into the oncoming lane, we can certainly see the vehicle driving *on* both center lines for a considerable amount of time.

From the details of Officer Townsend's testimony, however, we are convinced his naked eye was in a better position to evaluate the vehicle's position and movements. For instance, at the time we are able to see the vehicle's headlights, Officer Townsend was in a position to observe the vehicle was not moving and was stopped in the roadway outside the bar and grill. Similarly, Officer Townsend's testimony that he spotted "the same truck" again "within seconds" is credible, considering the clear weather conditions and the lack of other traffic on the road. The fact that the vehicle had a Georgia license plate is consistent with Officer Townsend's initial observation that the vehicle had no front license plate and corroborates his testimony that it was the same truck.

The video supports Officer Townsend's testimony that as he closely followed the vehicle, he observed it go "over both yellow lines; not extremely far, but . . . on yellow," and "stay[] on the yellow line until it turned south." We disagree with Ballangee's contention that these movements were done carefully as a mere attempt to gain a view of oncoming traffic. Rather, Ballangee appeared to be following very closely behind a van, on a hilly road, and that Ballangee's vehicle spent considerable time on the center lines.

Upon our de novo review, we conclude the facts and circumstances in this case gave rise to Officer Townsend's reasonable suspicion that criminal activity had occurred or was occurring and therefore justified the investigatory stop. The facts here, as described by Officer Townsend, do not reflect a single momentary weave or slight mishap as noted in *Tague*, 676 N.W.2d at 204–05 (concluding officer lacked reasonable suspicion to stop defendant's vehicle when officer

observed the vehicle's left tires cross briefly over the left edge line of divided highway one time and return to its lane), especially considering the fact Officer Townsend initially became "concerned" about the vehicle after he observed it stopped in the roadway in front of a bar, late on a Friday evening—a time when he could anticipate the driver to have been drinking.

After a careful review of the record, we conclude the facts available at the time of the stop would cause a reasonably cautious individual to deem the action taken by Officer Townsend appropriate. *See Otto*, 566 N.W.2d at 511; *Tompkins*, 507 N.W.2d at 738. The investigatory stop in this case was reasonable. Accordingly, we affirm the district court's denial of Ballangee's motion to suppress, as well as Ballangee's conviction and sentence for operating while intoxicated.[3]

IV. Conclusion.

We affirm the district court's denial of Ballangee's motion to suppress, as well as Ballangee's conviction and sentence for operating while intoxicated.

AFFIRMED.

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[3] Ballangee also contends his citation for failure to give turn signal should be reversed. A defendant convicted of a simple misdemeanor in district court may not appeal as a matter of right, but may apply for discretionary review. Iowa Code § 814.6(2)(d); *see Tyrell v. Iowa Dist. Ct.*, 413 N.W.2d 674, 675–76 (Iowa 1987). Ballangee failed to make an application for discretionary review as required by Iowa Rule of Appellate Procedure 6.106(1). Our court may treat a notice of appeal as an application for discretionary review. *See* Iowa R. App. P. 6.108. However, Ballangee also failed to file a notice of appeal for his failure to give turn signal charge as required by Iowa Rule of Criminal Procedure 2.73(1). Because the appeal and the application for discretionary review are both untimely, we decline to consider the merits of his appeal in regard to the failure to give turn signal conviction.