

IN THE COURT OF APPEALS OF IOWA

No. 3-295 / 12-0876
Filed April 24, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LARRY HERGERT,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Christine Dalton,
District Associate Judge.

Larry Hergert appeals his conviction for operating while intoxicated,
second offense. **AFFIRMED.**

John O. Moeller, Davenport, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant
Attorney General, Michael J. Walton, County Attorney, and Alan Havercamp,
Assistant County Attorney, for appellee.

Considered by Doyle, P.J., and Danilson and Mullins, JJ.

DOYLE, P.J.

Larry Hergert appeals following his conviction and sentence for operating while intoxicated (OWI), second offense, in violation of Iowa Code section 321J.2 (2011). He contends the district court erred in denying his motion to suppress evidence because the arresting officer did not have reasonable suspicion to stop his vehicle. Upon our review, we affirm.

I. Background Facts and Proceedings.

The district court found as follows:

On September 25, 2011, at approximately 22:26, Trooper Smith was stopped on the south shoulder of Hickory Grove Road in Davenport, Iowa, on a traffic stop of another vehicle. Trooper Smith was inside his patrol car with his traffic lights activated when a silver 1992 Dodge Caravan came up behind his patrol car travelling eastbound on Hickory Grove Road. As the Dodge Caravan drove past Trooper Smith's patrol car it made no attempt to slow down or move away from his patrol car and just missed striking the patrol car's driver's side mirror. Trooper Smith could hear a loud and rattled exhaust noise coming from the Dodge Caravan.

Trooper Smith pulled out onto Hickory Grove road and turned his traffic lights off. He caught up with the Dodge Caravan and observed the Caravan driving astraddle of the right hand white fog line and was encroaching an area that appeared to be lined off for bicycle traffic. Trooper Smith activated his traffic lights and the Caravan pulled over to the side of the road.

The driver of the Caravan, Larry Hergert, slurred his words when he spoke, his walk was unsteady and his eyes were bloodshot and watery. Trooper Smith could smell a strong odor of alcoholic beverage coming from inside the Caravan. Hergert admitted to consuming alcohol. Hergert consented to a HGN eye examination and Trooper Smith observed sustained and distinct nystagmas present in each of Hergert's eyes. Hergert refused to perform the walk and turn and one leg test. He was placed under arrest and transported to the Scott County jail where he submitted to a breath test which showed his [blood alcohol content] to be .183.

The State filed a trial information charging Hergert with OWI, second offense. Hergert filed a motion to suppress all the evidence obtained as a result of the stop. His motion contended Trooper Smith “initiated the stop without a warrant, without probable cause and without exigent circumstances.” He asserted the stop of his vehicle was in violation of his federal and state constitutional rights. After a suppression hearing, the district court denied the motion. Hergert waived a jury trial and stipulated to the minutes of testimony.

Later, a bench trial was held on the minutes of testimony. The district court found Hergert guilty as charged. Hergert now appeals, contending the district court erred in denying his motion to suppress.

II. Scope and Standards of Review.

Hergert invokes both the federal and 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; *State v. Fremont*, 749 N.W.2d 234, 236 (Iowa 2008). He has not argued that the interpretation of the two provisions should differ. We will therefore construe them together. See *Fremont*, 749 N.W.2d at 236..

Because Hergert contends the stop violated his rights under the Fourth Amendment of the United States Constitution and article I, section 8 of the Iowa Constitution, we review his claim de novo. See *State v. Fleming*, 790 N.W.2d 560, 563 (Iowa 2010). “This review requires an independent evaluation of the totality of the circumstances as shown by the entire record.” *State v. Pals*, 805 N.W.2d 767, 771 (2011) (internal quotation marks and citation omitted).

Although we defer to the factual findings of the district court because of its greater ability to evaluate the credibility of witnesses, we are not bound by that court's findings. *See id.*

III. Discussion.

On appeal, Hergert claims the district court erred in overruling his motion to suppress because the record does not show that Trooper Smith had reasonable suspicion to stop the vehicle. “[A] law enforcement officer [may] stop a vehicle when the officer observes a traffic violation, no matter how minor.” *State v. Louwrens*, 792 N.W.2d 649, 651 (Iowa 2010). The State was required to demonstrate Trooper Smith had a reasonable suspicion criminal activity was occurring or had occurred to justify stopping Hergert’s vehicle. *See State v. Tague*, 676 N.W.2d 197, 204 (Iowa 2004). The evidence justifying a stop for reasonable suspicion does not need to rise to the level of probable cause. *Id.* 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. *See id.*; *see also State v. Kreps*, 650 N.W.2d 636, 641-42 (Iowa 2002). Unparticularized suspicion is not an acceptable reason for a stop. *Vance*, 790 N.W.2d at 781.

The gist of Hergert’s argument is that he committed no traffic violation, so Trooper Smith had no basis to make the stop. His argument is fatally flawed. Iowa Code section 321.323A(1) provides:

The operator of a motor vehicle approaching a stationary authorized emergency vehicle that is displaying flashing yellow, amber, white, red, or red and blue lights shall approach the authorized emergency vehicle with due caution and shall proceed in one of the following manners, absent any other direction by a peace officer:

a. Make a lane change into a lane not adjacent to the authorized emergency vehicle if possible in the existing safety and traffic conditions.

b. If a lane change under paragraph “a” would be impossible, prohibited by law, or unsafe, reduce the speed of the motor vehicle to a reasonable and proper speed for the existing road and traffic conditions, which speed shall be less than the posted speed limit, and be prepared to stop.

Trooper Smith’s patrol car was parked on the shoulder of the road behind a Camaro he had pulled over for a traffic violation when Hergert drove past the trooper’s car. Hergert drove so close to Trooper Smith’s patrol car that he “just narrowly missed taking off the mirror” of the patrol car; so close that Trooper Smith was startled and exclaimed, “Jesus!”; so close that it “scared the living daylights” out of Trooper Smith. As soon as Hergert passed by, the trooper tore a ticket from his pad, gave it to the driver, and told him to get out of the patrol car. The trooper then pulled onto the road in hot pursuit of Hergert’s van. After a careful review of Trooper Smith’s dashboard camera video, we find the video evidence to be consistent with Trooper Smith’s testimony.

It is clear from the trooper’s video that Hergert drove his van mere inches from the edge of the pavement—and the stopped patrol car and Camaro—and made no effort to move into the opposing lane of traffic. Further, it is apparent from the video that it was neither impossible nor unsafe for Hergert to have made a lane change. There was no indication that there were any other road or traffic conditions that would have interfered with Hergert’s ability to make a lane

change. Trooper Smith had a reasonable basis for believing Hergert violated section 321.323A(1) and, having observed a traffic violation, had reasonable suspicion or probable cause to stop the van. See *Louwrens*, 792 N.W.2d at 651; see also *U.S. v. Luna*, 368 F.3d 876, 878 (8th Cir. 2004) (holding an officer had reasonable basis for stopping vehicle upon observation of violation of Iowa code section 321.323A).

Hergert asserts that because he followed the lane use requirements of Iowa Code section 321.297, “and slowed and remained in his own lane of traffic, ready to stop,” he committed no traffic violation, and therefore Trooper Smith had no cause to make the stop. As noted above, section 321.323A(1)(b) provides that if a lane change under section 321.323A(1)(a) is “impossible, prohibited by law, or unsafe,” a driver has a duty to slow down and be prepared to stop. As we found above, a lane change by Hergert was possible and could have been done safely. Further, a lane change was not prohibited by law, i.e., by section 321.297, as Hergert seems to suggest. Although section 321.297 requires drivers to drive on the right half of two-lane roadways, the statute does contain several exceptions. The lane change required under section 321.323A(1)(a) is consistent with the enumerated exceptions under section 321.297. We conclude section 321.323A is not trumped by section 321.297, for if it was, the legislature’s intent to protect and promote the safety of officers, emergency workers, highway maintenance workers, and others working on the side of the road would be negated. Furthermore, Hergert’s suggested application of section 321.297 under the circumstances would render section 321.323A superfluous.

IV. Conclusion.

Because we agree with the district court that the totality of the circumstances supported a reasonable suspicion that Hergert was committing a traffic offense, we conclude the district court did not err in denying Hergert's motion to suppress. Accordingly, we affirm Hergert's conviction and sentence for OWI, second offense.

AFFIRMED.