

IN THE COURT OF APPEALS OF IOWA

No. 3-770 / 13-0045
Filed October 2, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KIET M. NGUYEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Odell G. McGhee II (suppression) and William A. Price (trial and sentencing), District Associate Judges.

A defendant appeals the district court's denial of his motion to suppress.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

Matthew T. Lindholm of Gourley, Rehkemper & Lindholm, P.L.C., West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Jacob Marshall, Legal Intern, John Sarcone, County Attorney, and Maurice W.B. Curry, Assistant County Attorney, for appellee.

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

DANILSON, J.

Kiet Nguyen appeals the district court's denial of his motion to suppress evidence obtained following the stop of his vehicle. He maintains the trooper did not have probable cause or reasonable suspicion to stop his vehicle and asks that all evidence following the seizure be suppressed. Because we agree the trooper did not have the requisite level of suspicion to stop Nguyen, we reverse and remand for further proceedings.

I. Background Facts and Proceedings.

On August 29, 2012, Iowa State Patrol Trooper Tyson Underwood noticed two vehicle registration stickers on the rear license plate of a vehicle traveling on I-235 in Des Moines. The current 2013 registration sticker was placed in the bottom, left corner of the license plate. The registration sticker from 2012 was placed directly above it. The trooper also observed Nguyen's vehicle weave within its own lane of travel, noting two occasions where he saw the vehicle "come near a line marker." Trooper Underwood, narrating what he is observing on video from his patrol car, can be heard saying, "The vehicle, as you can see, is kind of riding on the solid fog line. It's not really crossing over any lanes, but just kind of weaving a little bit from lane marking to lane marking." At one point, Nguyen did change traffic lanes, but only after signaling. Trooper Underwood initiated a traffic stop based on his observations. Nguyen was eventually arrested and charged with operating while intoxicated (OWI).

Nguyen filed a motion to suppress the evidence alleging the trooper did not have reasonable suspicion or probable cause to stop his vehicle. He maintained that he had the current valid registration sticker in the lower left hand

corner of the rear license plate, as required by Iowa Administrative Code rule 761–400.53. He claimed there is no rule requiring expired stickers to be removed from the rear license plate, and while he had the prior year’s registration sticker placed immediately above the current year’s sticker in the lower left quadrant of his license plate, this fact does not justify a stop of his vehicle. He also asserted the weaving observed on the trooper’s dashboard camera was minor, and he never crossed over a lane divider without properly signaling.

At the hearing on the motion to suppress, the district court observed the video and heard the trooper’s testimony. The court denied the motion, finding the trooper had reasonable suspicion to pull Nguyen over based on the totality of the circumstances. Following the court’s denial, Nguyen waived his right to a jury trial and proceeded to a bench trial on the stipulated minutes of testimony. The court found him guilty of OWI, first offense, in violation of Iowa Code section 321J.2 (2011). He was sentenced to one year in jail with all but three days suspended. Nguyen was placed on probation for one year, assessed the applicable fines, and directed to complete a substance abuse evaluation and treatment. He appeals.

II. Standard of Review.

Nguyen contends his vehicle was stopped in violation of the federal and state constitutions, although he has not proposed a different standard under the search and seizure provisions under the Iowa Constitution. See *State v Tyler*, 830 N.W.2d 288, 291 (Iowa 2013). (“Because [the defendant] has not proposed a standard for interpreting our search and seizure provisions under the Iowa Constitution differently from its federal counterpart, we will apply the general

standards as outlined by the United States Supreme Court for addressing a search and seizure challenge under the Iowa Constitution.”). We review claims regarding constitutional rights de novo. *Id.* We make “an independent evaluation of the totality of the circumstances as shown by the entire record.” *State v. Kinkead*, 570 N.W.2d 97, 99 (Iowa 1997).¹

III. Discussion.

The Fourth Amendment of the United States Constitution prohibits “unreasonable search and seizures.” “[S]topping an automobile and detaining its occupants constitute a ‘seizure’ . . . even though the purpose of the stop is limited and the resulting detention quite brief.” *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). Stopping a vehicle and detaining the occupant is not an *unreasonable* seizure when the officer has either (1) probable cause due to observation of a traffic violation or (2) reasonable suspicion, supported by articulable facts, that a criminal act has occurred or is occurring. *State v. Tague*, 676 N.W.2d 197, 201-04 (Iowa 2004). If we find the trooper had either probable cause or reasonable suspicion to initiate the stop, we will affirm the ruling of the district court.

¹ The district court articulated an improper standard of review when it stated it was “looking at the evidence in the light most favorable to the State.” This is the standard that is applied in a sufficiency-of-the-evidence challenge. See *State v. Romer*, 832 N.W.2d 169, 174 (Iowa 2013). While in some cases the application of the wrong standard by the district court requires a reversal and remand to apply the correct standard, due to our standard of review on appeal, we need not remand this case. See *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998) (reversing and remanding a case to the district court for the application of the proper standard on a motion for a new trial); see also *In re A.K.*, 825 N.W.2d 46, 51 (Iowa 2013) (noting that under a de novo standard of review the court can review the evidence anew without the need for a remand). On appeal, Nguyen acknowledges the proper standard of review, and does not seek a remand.

A. Probable Cause.

When a peace officer observes a traffic violation, however minor, the officer has probable cause to stop the vehicle. *Tyler*, 830 N.W.2d at 293. “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.” *State v. Bumpus*, 459 N.W.2d 619, 624 (Iowa 1990). “[T]he purpose of a probable cause stop is to seize someone who has already committed a crime.” *Tyler*, 830 N.W.2d at 293. The State has the burden to prove by a preponderance of the evidence that the officer had probable cause to stop the vehicle. *State v. Predka*, 555 N.W.2d 202, 206 (Iowa 1996). While a mistake of fact may justify a traffic stop, a mistake of law will not and any evidence obtained following such a mistake will be suppressed. *Tyler*, 830 N.W.2d at 294.

1. Administrative Rule 761–400.53.

At the suppression hearing, Trooper Underwood testified at least part of the reason he pulled Nguyen over was because the registration stickers on his rear license plate were placed in violation of Iowa Administrative Code rule 761-400.53. The rule states, in pertinent part, “*Placement of validation sticker*. The validation sticker shall be affixed to the lower left corner of the rear registration plate.” Iowa Admin. Code r. 761–400.53(1).

Nguyen’s valid 2013 registration sticker was affixed to the bottom left corner of the license plate. Although he did have a formerly valid registration sticker affixed to the license plate as well, nothing in the rule requires past stickers to be removed. See *id.* There is also nothing that requires the only

visible sticker on the license plate to be the current registration sticker.² *Id.* The wording of the rule is very simple and we decline to assume any additional requirements were intended. See *Franklin Mfg. Co. v. Iowa Civil Rights Comm'n*, 270 N.W.2d 829, 832 (“Where language is clear and plain, there is no room for construction.”). In his belief Nguyen was in violation of the law for having an old sticker on his plate, Trooper Underwood made a mistake of law. See *Tyler*, 830 N.W.2d at 294 (“[A] mistake of law is not sufficient to justify a stop. Evidence derived from a stop based on a law enforcement officer’s mistake of law must be suppressed.”) (internal quotations omitted). Thus, Trooper Underwood did not have probable cause to initiate a traffic stop based on a violation of rule 761–400.53.

2. Section 321.306

Trooper Underwood also testified he decided to initiate a traffic stop based on his belief Nguyen’s actions violated Iowa code section 321.306. At the suppression hearing, Trooper Underwood testified he had noticed Nguyen’s vehicle weaving within his own lane three times and crossing the outer fog line once before initiating a traffic stop. The video from his squad car shows Nguyen touching the outer fog line, but never crossing it. Trooper Underwood can be heard narrating his observation—two times—that Nguyen’s vehicle is weaving. Iowa Code section 321.306 states, in pertinent part, “A vehicle shall be driven as nearly as practical entirely within a single lane and shall not be moved from such

² We acknowledge that Iowa Code section 321.38 requires, in part, the license plate to be “maintained free from foreign material,” but we do not interpret “foreign material” to be a prior year’s validation sticker.

lane until the driver has first ascertained that such movement can be made with safety.”

We find the present facts analogous to those in *State v. Tague*, 676 N.W.2d at 197. In *Tague*, the defendant’s vehicle “just barely crossed the . . . edge line for a brief period.” *Id.* at 203. He did not cross into another traffic lane, there was no other traffic on the roadway at the time, and “the State failed to prove by a preponderance of the evidence any objective basis to believe [the defendant’s] movement was done without first ascertaining that he could make such movement with safety.” See *id.* at 203-04. On these facts, our supreme court found the defendant’s “crossing the edge line for a brief moment . . . did not give the police probable cause to stop [the defendant] for a traffic violation under section 321.306.” See *id.* at 204. Applying the same rationale to Nguyen’s circumstances, we find Trooper Underwood did not have probable cause to initiate a traffic stop based on a violation of section 321.306.

B. Reasonable Suspicion.

Nguyen challenges the constitutionality of the traffic stop, asserting the trooper did not have reasonable suspicion to justify the warrantless stop. Stopping a vehicle and detaining the occupant is not an unconstitutional seizure when the officer has an “articulable and reasonable suspicion” the occupant is involved in criminal activity. See *Prou*, 440 U.S. at 663. “Mere suspicion, curiosity, or hunch of criminal activity is not enough.” *Tague*, 676 N.W.2d at 204. “[I]f reasonable suspicion exists, but a stop cannot further the purpose behind allowing the stop, the investigative goal as it were, it cannot be a valid stop.” *Tyler*, 830 N.W.2d at 298.

To determine whether a stop is appropriate based on reasonable suspicion, “a court must engage in a balancing test—balancing the governmental interest advanced by the seizure against the ‘intrusion upon the constitutionally protected interests of the private citizen’ to be free from unnecessary seizure.” *Id.* at 297.

In *State v. Tompkins*, 507 N.W.2d 736, 737, 740 (Iowa Ct. App. 1993), our court held that reasonable suspicion supported the stop of a vehicle after the officer observed the driver weaving within his own lane “several times” even though the car never crossed a boundary line. However, in a later ruling, our supreme court expressed its reservations about the wide applicability of the *Tompkins* holding:

We do not believe *Tompkins* should be read to hold that observation of a vehicle weaving within one’s own lane of traffic will always give rise to reasonable suspicion for police to execute a stop of the vehicle. Rather, the facts and circumstances of each case dictate whether or not probable cause exists to justify stopping a vehicle for investigation.

State v. Otto, 566 N.W.2d 509, 511 (Iowa 1997).

In *Otto*, the court held an officer did have reasonable suspicion to stop the defendant who was changing speed erratically, “turning sharp, like a jerk of the driver,” and veering “left and right at a sharp angle.” *Id.* at 510. Although the State argues Nguyen’s facts are similar to those in *Otto*, we disagree.

As the trooper observed, Nguyen did not drive in a perfectly straight line within his own lane. The video reflects Nguyen’s vehicle moved from one side of his lane to the other two times over a period of about ninety seconds. He also touched the outer fog line once for approximately two seconds. However, we do

not believe these actions give rise to the requisite reasonable suspicion. The State never claimed Nguyen altered his speed. Also, Nguyen never crossed into another lane of traffic except when he made a proper lane change with the use of his turn signal. The video also recorded the officer's narration of his observations of Nguyen's movement after the one-time contact with the fog line, "he is kind of weaving a little bit from lane marking to lane marking, he's having a hard time maintaining a straight line if you will, now he is veering to the inside."

Although Nguyen did move from side to side within his own lane, the supreme court has noted this can be expected and explained of drivers who are neither intoxicated nor fatigued. See *Tague*, 676 N.W.2d at 205 ("Drivers talking on their cell phone, looking at a map, adjusting the radio, adjusting the heater, defroster or air conditioner, or checking on a child restrained in the back seat can lead a driver to momentarily cross an edge line, without giving rise to a reasonable suspicion of intoxication or fatigue."). It is true that "reasonable cause may exist to investigate conduct which is subject to a legitimate explanation and turns out to be wholly lawful." *State v. Kreps*, 650 N.W.2d 636, 642 (Iowa 2002). However, "if failure to follow a perfect vector down the highway or keeping one's eyes on the road was sufficient reason to suspect a person of driving while impaired, a substantial portion of the public would be subject each day to an invasion of its privacy." *Tague*, 676 N.W.2d at 205–06. Here there was no aggravated, continual, or pronounced weaving, only "a little bit" of weaving as described by the officer and as reflected by the video. Such minimal movement in the lane and a momentary touching of the fog line is insufficient.

We believe the “constitutionally protected interests of the private citizen” outweighs the “governmental interest advanced by the seizure” in this case. See *Tyler*, 830 N.W.2d at 297; see also *State v. Rosensteil*, 473 N.W.2d 59, 62 (Iowa 1991), *reversed on other grounds by State v. Cline*, 617 N.W.2d 277 (Iowa 2000) (stating reasonable suspicion requires more than officers’ reliance “just on circumstances which describe a very broad category of predominantly innocent persons”). We find Trooper Underwood did not have the reasonable suspicion necessary to initiate the traffic stop of Nguyen’s vehicle.

IV. Conclusion.

We find Trooper Underwood did not possess the probable cause or reasonable suspicion necessary to properly initiate a traffic stop of Nguyen’s vehicle. Without the requisite suspicion the traffic stop was a violation of Nguyen’s Fourth Amendment rights. As such, we reverse the ruling of the district court and suppress all evidence obtained following the illegal stop. See *Kinkead*, 570 N.W.2d at 100 (“If the State fails to carry its burden, the evidence obtained through the investigatory stop must be suppressed.”). We remand for further proceedings consistent with this decision.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

Tabor, J., concurs; Vogel, P.J., dissents.

VOGEL, P.J. (dissenting)

I respectfully disagree with the majority's conclusion the stop was not supported by reasonable suspicion.

To determine whether a stop is appropriate based on reasonable suspicion, "a court must engage in a balancing test—balancing the governmental interest advanced by the seizure against the 'intrusion upon the constitutionally protected interests of the private citizen' to be free from unnecessary seizure." *Tyler*, 830 N.W.2d at 297 (citing *Terry v. Ohio*, 392 U.S.1, 21 (1968)). The purpose of a stop based on reasonable suspicion "is to allow immediate investigation through temporarily maintaining the *status quo*." *Id.* at 298 (internal citations omitted). If the officer can resolve the ambiguity as to whether criminal activity is afoot through an investigatory stop, the stop is properly based on reasonable suspicion. *Id.*

When the video camera is first activated, Nguyen's vehicle is seen in the middle lane of a divided highway. It is hugging the right dotted line, then veers momentarily to the left, back to the right, and back to the left, before it moves to the center of the lane. When the audio is turned on, the trooper narrates at least three more times when he notices the driver weaving or coming close to the lane markers. The vehicle is seen moving from the far left of the lane to the far right of the lane over a period of about five seconds while it is traveling at highway speeds. The vehicle then changes lanes to the far right lane while using its turn signal. Once the vehicle moves into the right hand lane of travel, it applies its brakes momentarily as it approaches a marked exit. The vehicle also rides on the right fog lane for a few seconds before moving back toward the left and

eventually touching the left lane divider line. The officer testified the weaving caused him to be concerned “the driver may be tired, obviously may be intoxicated, had some type of medical issue, may be distracted, [or] something like that.”

In refining *State v. Tompkins*, 507 N.W.2d 736, 737, 740 (Iowa Ct. App. 1993), our supreme court in *State v. Otto* held that reasonable suspicion to justify stopping a vehicle must be considered on a case by case basis. 566 N.W.2d at 511. The *Otto* court cited a case from North Dakota that found reasonable suspicion existed to justify stopping a vehicle after the officers observed the driver’s “smooth, continuous weave within his own lane of traffic” that the officer characterized as “erratic,” as compared to other driving observed on the night in question. See *State v. Dorendorf*, 359 N.W.2d 115, 117 (N.D. 1984).

The weaving in this case was not “sharp, like a jerk of the driver” nor was there veering at “sharp angle[s]” to the left and right like that observed in *Otto*, 566 N.W.2d at 511. However, the weaving was the smooth continuous weave described in *Dorendorf*, 359 N.W.2d at 117. In addition, the weaving was not a single isolated instance of crossing over the lane dividing line as in *Tague*, 676 N.W.2d at 205–06, but occurred multiple times over the course of a minute while traveling at highway speeds, as in *Tompkins*, 507 N.W.2d at 737. As the State urges: “Faced with weaving, a late time of night, and multiple drifts over lane dividers, a prudent officer could and should briefly stop a motorist to confirm or dispel suspicions of impaired driving through reasonable inquiry.” I agree, and would find the trooper’s stop of Nguyen was based on a reasonable suspicion he was intoxicated.

Furthermore, I believe this result better comports with the public policy behind Iowa Code section 321J. As our case law has long noted, the underlying purpose of this section has been “to help reduce the appalling number of highway deaths resulting in part at least from intoxicated drivers.” *State v. Wallin*, 195 N.W.2d 95, 96 (Iowa 1972); see also *Severson v. Sueppel*, 152 N.W.2d 281, 284 (Iowa 1967) (“It is obvious the purpose of the Implied Consent Law is to reduce the holocaust on our highways part of which is due to the driver who imbibes too freely of intoxicating liquor.”). The decision to stop a vehicle must often be quickly made to dispel any notion that the driver may be intoxicated. Otherwise, law enforcement risks ignoring a troubling driving pattern, which could potentially put other travelers on our roadways in grave danger.

A review of the video in this case demonstrates the trooper’s concern when observing the repetitive movements of a weaving vehicle. The investigatory stop was “to confirm or dispel suspicions of criminal activity through reasonable questioning.” *State v. Kreps*, 650 N.W.2d 636, 641 (Iowa 2002). Consequently, I would find the stop was made in furtherance of the underlying purpose of section 321J, and would therefore affirm the district court’s denial of Nguyen’s motion to suppress and affirm his conviction.