

IN THE COURT OF APPEALS OF IOWA

No. 8-485 / 07-2002
Filed June 25, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SCOTT CHARLES ETTER,
Defendant-Appellant.

Appeal from the Iowa District Court for Wright County, Steven J. Oeth,
District Associate Judge.

The defendant appeals following his conviction for operating while
intoxicated. **AFFIRMED.**

Dani Eisentrager of Eisentrager Law Office, Eagle Grove, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney
General, Eric Simonson, County Attorney, and Barbara J. Westphal, Assistant
County Attorney, for appellee.

Considered by Vogel, P.J., and Mahan and Zimmer, JJ.

VOGEL, P.J.

Scott Etter appeals from his conviction for operating while intoxicated (OWI), in violation of Iowa Code section 321J.2(1) and 321J.2(2)(a) (2005). We affirm.

Background Facts and Proceedings.

On June 17, 2007 at around 1:42 a.m., Etter was traveling west on Central Avenue in Clarion while Clarion police officer Bret Thompson was traveling in the opposite direction. As their vehicles passed, Thompson heard the sound of gravel striking the underbelly of Etter's truck. Thompson looked in his driver's side mirror and observed the truck driving on the gravel shoulder. He then turned his patrol car around, activated his video recorder, and began following Etter. Thompson claimed that he observed Etter's truck drive on or cross the fog line three to four times; however, because he had zoomed in too far, the video recorder did not capture this tire movement. Because of this, Thompson later measured the width of Etter's truck and took sample measurements of the distance between the fog line and the tar line. With these measurements he was able to compare the distance between the axle and the tar line attempting to confirm the vehicle had crossed the fog line.

Based on this incident, the State charged Etter with OWI. Etter subsequently moved to suppress all evidence obtained following the stop of his vehicle, claiming he had been subject to an unreasonable traffic stop "as there were no specific and articulable facts to support a reasonable belief that criminal activity may have occurred." The court denied the motion, finding the videotape supported Officer Thompson's testimony and that there was a reasonable basis

for the stop. It then found him guilty based on the minutes of testimony and imposed a fine and sentenced Etter to thirty days in jail, with all but two days suspended. Etter appeals, claiming the court erred in finding the traffic stop constitutionally valid.

Scope and Standards of Review.

Our review is de novo. *State v. Heminover*, 619 N.W.2d 353, 356 (Iowa 2000), *rev'd in part on other grounds by State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001). We independently evaluate Etter's claim under the totality of the circumstances. *State v. Kinkead*, 570 N.W.2d 97, 99 (Iowa 1997). Although we give deference to the district court's credibility assessments and fact findings, we are not bound by those findings. *Turner*, 630 N.W.2d at 606. If any evidence was obtained in violation of Etter's Fourth Amendment rights, it is inadmissible and must be suppressed regardless of its probative value or relevance. *State v. Schrier*, 283 N.W.2d 338, 342 (Iowa 1979).

Discussion.

In order to justify the officer's stop of Etter's vehicle, the State must prove the officer had reasonable suspicion to believe criminal activity had occurred or was occurring. *State v. Tague*, 676 N.W.2d 197, 204 (Iowa 2004). Unparticularized suspicion is insufficient to meet the reasonable suspicion standard, but the threshold for reasonable suspicion is considerably less than the standard for probable cause. *State v. Kreps*, 650 N.W.2d 636, 641-42 (Iowa 2002). We gauge the reasonableness of the stop based on whether or not the facts available to the officer at the moment of the stop would cause a reasonably

cautious individual to deem the action taken by the officer appropriate. *State v. Wiese*, 525 N.W.2d 412, 414 (Iowa 1994).

Upon our de novo review of the record, we conclude Officer Thompson was armed with reasonable suspicion when he stopped Etter's vehicle. Thompson's auditory and visual observations establish that when their two vehicles first met, both right-side tires of Etter's vehicle were driving on the gravel shoulder. Then, after he began following Etter, Thompson observed the right tires of the truck cross the fog line three to four times. While the videotape does not clearly show the tires crossing this line, it is sufficiently detailed to support Thompson's claimed observation by indicating that Etter's vehicle did swerve to the right several times and come very close to, if not, over the fog line. The video further shows that Etter veered over towards the center line twice. Moreover, the early-morning hour of the stop added to the reasonable suspicion determination. See *State v. Rosenstiel*, 473 N.W.2d 59, 62 (Iowa 1991) ("[T]he observation was made in the wee hours of a weekend morning, a time notorious for drunken driving.").

Etter argues any driving irregularities were just an "isolated incident," similar to the single swerve of the vehicle as found in *Tague*, 676 N.W.2d at 205. However, as the State details, Officer Thompson's observations of the three or four times Etter's vehicle crossed the fog line along with his initial observations of Etter driving partly on the gravel shoulder, provided a much stronger and indeed reasonable suspicion of an impaired driver. Considered in the totality, these facts support the district court's determination that Officer Thompson possessed reasonable suspicion to believe that Etter was operating while intoxicated,

justifying an investigatory stop. The court therefore properly denied the motion to suppress and we affirm.

AFFIRMED.