IN THE COURT OF APPEALS OF IOWA

No. 8-715 / 07-1834
Filed December 17, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DILLON MICHAEL KEIFER,
Defendant-Appellant.

Appeal from the Iowa District Court for Sac County, Gary L. McMinimee (motion to suppress) and William C. Ostlund (judgment and sentence), Judges.

Defendant appeals his conviction of operating while intoxicated, second offense. **REVERSED AND REMANDED**.

Mark C. Smith, State Appellate Defender, and Jason B. Shaw, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, and Earl Hardisty, County Attorney, for appellee.

Considered by Huitink, P.J., and Vogel and Eisenhauer, JJ.

EISENHAUER, J.

Dillon Keifer appeals from his conviction for operating while intoxicated, second offense. Keifer asserts the district court erred in denying his motion to suppress and raises a claim of ineffective assistance of counsel. Because we find the stop of Keifer's vehicle was not supported by reasonable suspicion, we reverse. Therefore, it is unnecessary to resolve Keifer's second claim.

At approximately 12:35 a.m. on April 7, 2007, Sac County Sheriff Kenneth McClure was traveling on a highway when he observed a vehicle on a gravel road with its headlights on and either stopped or moving very slowly. Sheriff McClure turned onto the gravel road and, upon meeting the vehicle, noted it was a small pickup truck carrying two people. The truck had out-of-county license plates. Sheriff McClure radioed to check whether there were any warrants on the vehicle and was told there were none. The sheriff testified he was curious as to what an out-of-county vehicle was doing on the gravel road. Sheriff McClure then turned around and followed the truck for the next mile and one-half while the truck went twenty miles per hour and was "somewhat weaving," but was not driving erratically. The sheriff did not observe any equipment deficiencies. The sheriff did not observe anything unusual when the truck stopped at a stop sign and continued forward. The sheriff had a good view into the back of the truck and did not observe the occupants doing anything unusual, making any quick movements, or attempting to hide anything.

While not aware of a posted speed on the gravel road, Sheriff McClure testified that the normal speed on this road was fifty miles per hour and the truck's slow speed was "very odd." He stated that generally, when a slower-

moving vehicle is approached from behind, it will either speed up or pull over to allow a faster-moving vehicle to pass; however, this truck did neither. When asked to describe the weather conditions, the sheriff stated: "When we were over there it was blowing snow and . . . the wind was blowing hard and the snow was coming down relatively hard and you had to use your wipers at some points."

Additionally, Sheriff McClure testified there had been thefts at hog confinement facilities within the county in recent months, there was a hog lot in the vicinity, and a hog lot to the north had experienced a theft.

Sheriff McClure decided to stop Keifer's vehicle. Subsequently, Sheriff McClure asked Keifer, the driver, to perform sobriety tests. Keifer failed several preliminary tests. The sheriff testified: "When we were out in the field, it was cold and snow was starting to blow. It was actually snowing a little bit and it was windy, so I did not do the one leg stand test." Keifer was transported to the sheriff's office where he refused some further testing.

The State charged Keifer with operating while intoxicated, second offense in violation of Iowa Code section 321J.2 (2005). Keifer moved to suppress the evidence resulting from the stop asserting the warrantless stop of his vehicle was not supported by reasonable suspicion. Following a hearing, the district court denied Kiefer's motion and eventually found him guilty as charged. On appeal, Keifer argues the district court erroneously denied his motion to suppress.

Because this case concerns the constitutional right to be free of unreasonable searches and seizures; our review of the district court's suppression ruling is de novo. *State v. Kreps*, 650 N.W.2d 636, 640 (Iowa 2002).

We independently evaluate the totality of the circumstances shown by the entire record. *Id.* The stop of an automobile for investigatory purposes is upheld if supported by reasonable suspicion that criminal activity has occurred or is occurring. *State v. Kinkead*, 570 N.W.2d 97, 100 (Iowa 1997).

> 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. *Mere suspicion, curiosity, or hunch of criminal activity is not enough*.

State v. Tague, 676 N.W.2d 197, 204 (Iowa 2004) (emphasis added). An objective standard is used to judge whether the facts known to the officer at the time of the stop would lead a reasonable person to believe the stop was appropriate. *Kinkead*, 570 N.W.2d at 100. If the State fails to carry its burden, any evidence obtained through the investigatory stop is inadmissible. *Id.*

Applying an objective standard to the facts available to the sheriff when he stopped Keifer would not lead a reasonable person to believe the stop was appropriate. Even the State's brief merely suggests an "ambiguity surrounding the vehicle's presence in the area." An out-of-county truck travelling slowly at night for a short distance on a gravel road during "terribly windy" conditions with blowing snow does not provide sufficient grounds for a stop. "In general, slow driving in the absence of erratic driving, interference with traffic, or a posted minimum speed limit, does not alone constitute reasonable cause" for a stop. *State v. Wiese,* 525 N.W.2d 412, 416 (Iowa 1994), *overruled on other grounds by State v. Cline,* 617 N.W.2d 277, 281 (Iowa 2000). The sheriff observed the vehicle for a very short time and 12:32 a.m. on a Friday night/Saturday morning

is not an unreasonable time to be out and about. *See State v. Haviland*, 532 N.W.2d 767, 769 (Iowa 1995). Keifer's driving did not amount to the significant weaving or the erratic speeds observed by the officers in cases where reasonable suspicion was found to exist. *See State v. Otto*, 566 N.W.2d 509, 510-11 (Iowa 1997); *State v. Tompkins*, 507 N.W.2d 736, 740 (Iowa Ct. App. 1993). Keifer was not driving in an illegal manner. *See Haviland*, 532 N.W.2d at 769. Further, the sheriff "was not investigating a crime or responding to an 'in-process' crime," and "the area was not a particularly 'high crime' spot." *Id.* Therefore, the combination of facts observed by the sheriff can, at most, objectively support a generalized "mere suspicion, curiosity, or hunch of criminal activity." This was insufficient justification for a stop under Iowa law. The totality of the circumstances did not support a reasonable suspicion that criminal activity had occurred or was occurring.

An objective view of the facts requires us to find the stop violated Keifer's right to be free of arbitrary intrusion by the police. *See Tague*, 676 N.W.2d at 206. Because the officer did not have reasonable suspicion to stop Keifer's vehicle, all evidence flowing from the stop is inadmissible. We reverse the trial court's denial of Keifer's motion to suppress and remand the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

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

VOGEL, J. (dissents)

I respectfully dissent and would affirm the district court. It was after midnight when Sheriff McClure observed Keifer driving well below the normal speed, and yet Keifer was having difficulty maneuvering his vehicle. Once Sheriff McClure positioned his vehicle behind Keifer's vehicle, Keifer continued at his very slow speed for more than one mile, rather than accelerating to a normal speed or pulling over. Aware of recent thefts in the area, Sheriff McClure became increasingly suspicious of this slow-moving pickup truck bearing out-of-county license plates, traveling with some noticeable difficulty on a gravel road in the middle of the night.

While the majority emphasizes the weather conditions, the testimony did not indicate that this would necessarily cause Keifer's slow speed. Sheriff McClure testified that "it was cold and snow was starting to blow. It was actually snowing a little bit and it was windy." However, there was nothing peculiar about the road conditions. While each of the facts viewed in isolation may have innocent explanations, "[t]he principal function of an investigatory stop is to resolve the ambiguity as to whether criminal activity is afoot." *State v. Kreps*, 650 N.W.2d 636, 642 (Iowa 2002). I would conclude that under the totality of the circumstances confronting Sheriff McClure at the time the decision to stop Keifer was made, Sheriff McClure had reasonable suspicion to stop Keifer's vehicle and briefly investigate the circumstances. *State v. Teague*, 676 N.W.2d 197, 204 (Iowa 2004) (stating that we determine whether reasonable suspicion exists in the "light of the totality of the circumstances confronting the officer, including all information available to the officer at the time the officer makes the decision to

stop the vehicle"). Thus, I would affirm the district court's ruling denying Keifer's motion to suppress.