

**IN THE COURT OF APPEALS OF IOWA**

No. 9-1007 / 09-0420  
Filed January 22, 2010

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**CHRISTY ANN HOTZE,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Dubuque County, Randal Nigg,  
District Associate Judge.

Christy Hotze appeals her conviction for operating while intoxicated, first  
offense. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Martha Lucey, Assistant  
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney  
General, and Mark Hostager, County Attorney, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Danilson, JJ.

**DANILSON, J.**

Christy Hotze appeals following conviction and sentence for operating while intoxicated, first offense, in violation of Iowa Code section 321J.2 (2007). She contends the State failed to prove the police officer had the requisite probable cause or reasonable suspicion to stop her vehicle. We affirm.

**I. Background Facts and Proceedings.**

On July 31, 2008, at approximately 2:00 a.m., Dubuque police officer Sabrina Kreyer was on routine patrol when she observed Hotze travelling ahead of her in the right lane on Bluff Street, a one-way street near downtown Dubuque. Officer Kreyer noticed Hotze driving close to the dividing line, even though there was no traffic or cars parked on the right side of the road that Hotze was attempting to avoid, and activated the video camera in her patrol car to record Hotze's driving. As shown by the video recording, Officer Kreyer then observed Hotze change from the right lane to the left lane and slowly drift into the parallel parking area on the left side of the street, and continue to travel in the parking area rather than the left lane of the street.

Officer Kreyer followed Hotze as Hotze made a left turn onto First Street. Hotze turned left into the right lane of First Street. At that point, First Street is also a one-way street that has two lanes of traffic in the direction Hotze was turning. Hotze stayed in the right lane, and then slowed down to make a right turn onto Locust Street. At this intersection, drivers are required to yield to oncoming traffic. Officer Kreyer indicated that this intersection has a clear view and drivers usually just yield once, unless something is distracting them or there

is a problem. Although there was no other traffic on the road, Officer Kreyer observed Hotze yield twice before turning onto Locust Street. All this occurred within the time span of a minute and within the distance of approximately one half mile.

Officer Kreyer stopped Hotze and approached her vehicle.<sup>1</sup> Officer Kreyer noticed a strong odor of an alcoholic beverage coming from Hotze's breath and person, and that Hotze had red, watery eyes and low, slurred, and mumbled speech. Hotze admitted she had been drinking and failed field sobriety testing. Officer Kreyer arrested Hotze for operating while intoxicated and transported her to the Dubuque County Jail. At 2:49 a.m. at the jail, Hotze took a breathalyzer test, which depicted a blood alcohol level of .186.

On August 7, 2008, the State filed a trial information charging Hotze with operating while intoxicated, first offense. Hotze pled not guilty. On September 9, 2008, Hotze filed a motion to suppress all evidence obtained as a result of the stop. Hotze alleged the stop of her vehicle violated her rights under the Fourth Amendment and Article 1, Section 8 of the Iowa Constitution because Officer Kreyer did not have probable cause or reasonable suspicion to stop her vehicle. Following a hearing, the district court entered an order denying Hotze's motion to suppress.

Hotze waived her right to a jury trial. The district court found Hotze guilty of operating while intoxicated, first offense, and imposed sentence. Hotze now appeals, alleging the district court erred in denying her motion to suppress.

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<sup>1</sup> After Officer Kreyer activated her emergency lights, the video recording showed Hotze veer to the right side of the road and throw a small white package out the passenger side window before coming to a stop.

## II. Scope and Standard of Review.

Because Hotze contends her constitutional rights under the Fourth Amendment of the United States Constitution (and the comparable provision of the Iowa Constitution) were violated, our review is de novo. *State v. Naujoks*, 637 N.W.2d 101, 106 (Iowa 2001). Our task is to independently evaluate Hotze's claim under the totality of the circumstances as shown by the entire record. *State v. Tague*, 676 N.W.2d 197, 201 (Iowa 2004). "We give considerable deference to the trial court's findings regarding the credibility of the witnesses, but are not bound by them." *Id.*

## III. Merits.

Hotze contends the district court erred in overruling her motion to suppress because the record does not show that Officer Kreyer had probable cause or reasonable suspicion to stop her vehicle. Upon a defendant's challenge to a stop on the basis that proper cause for an investigatory stop did not exist, the State must show by a preponderance of the evidence that the stopping officer had specific and articulable facts, taken together with rational inferences from those facts, to reasonably believe criminal activity had occurred or was occurring. *See id.* at 204; *State v. Kinkead*, 570 N.W.2d 97, 100 (Iowa 1997). Any evidence obtained through an unjustified investigatory stop must be suppressed. *State v. Jones*, 586 N.W.2d 379, 382 (Iowa 1998).

Whether reasonable suspicion existed must be determined under the totality of the circumstances confronting the officer at the time of the stop. *State v. Kreps*, 650 N.W.2d 636, 641-42 (Iowa 2002). In this case, therefore, we are to

gauge the reasonableness of Officer Kreyer's stop based on whether or not the facts available to Officer Kreyer at the moment of the stop would cause a reasonably cautious individual to deem the action taken by the officer appropriate. See *Tague*, 676 N.W.2d at 204; *Kreps*, 650 N.W.2d at 641-42. The State argues the stop was permissible because (1) Officer Kreyer could have reasonably suspected that Hotze was intoxicated due to her inability to maintain a safe driving path or stay in her lane, and considering the totality of the circumstances, and (2) Officer Kreyer had probable cause that the driver violated City of Dubuque Code of Ordinances, Section 32-165(3).<sup>2</sup>

Iowa appellate courts have had numerous opportunities in recent years to evaluate whether an officer's observations of a vehicle being driven dangerously or erratically were indeed sufficient to give rise to a reasonable suspicion that the driver was intoxicated or fatigued. See, e.g., *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 and return to its lane); *State v. Otto*, 566 N.W.2d 509, 510-11 (Iowa 1997) (determining officer had reasonable suspicion to stop defendant who was changing speed erratically, veering left and right at sharp angles, and

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<sup>2</sup> This section provides, in pertinent part:

[A]t any intersection where traffic is restricted to one direction on one or more of the intersecting streets, the driver of a vehicle intending to turn left at any such intersection shall approach the intersection in the extreme left hand lane lawfully available to traffic moving in the direction of travel of such vehicle, and after entering the intersection the left turn shall be made so as to leave the intersection as nearly as practicable in the left hand lane lawfully available to traffic moving in such direction upon the roadway being entered.

City of Dubuque Code of Ordinances, Section 32-165(3).

constantly going back and forth from left to right over a distance of more than three miles); *State v. Tompkins*, 507 N.W.2d 736, 740 (Iowa Ct. App. 1993) (finding officer had reasonable suspicion after observing defendant's car weaving from the center line to the right side boundary several times).<sup>3</sup>

In its order denying Hotze's motion to suppress, the district court stated in part:

The facts are not greatly disputed and where they are disputed the Court believes the officer's in-car video system supports the officer's testimony regarding the Defendant's manner of driving. . . .

Officer Kreyer testified that based upon her training and experience she is more suspicious of unusual vehicle movement at 2:00 in the morning than she is during daylight hours. She has found in her experience that there is a greater potential for the driver's movements being caused by impairment of the driver at that hour than other explanations that would explain the movements during the daytime. She specifically was trained to observe movements such as driving on lane markings or straddling them or weaving within the driver's own lane of traffic as indicators that the operator may be impaired. This would include the hesitation movements as observed the Defendant as she started to turn right onto Locust Street.

The Court finds that the State's argument that the facts of this case are distinguishable from *State v. Tague*, 676 N.W.2d 197 (Iowa 2004) is correct. *Tague* involved a vehicle crossing over the left edge line of the roadway one time and for a brief period. In this case, the officer observed several occasions in which the Defendant's vehicle moved to the left and straddled the or at least drove upon the lane markings in addition to her two hesitations on turning right onto Locust when there was no traffic in the vicinity. This, coupled with the officer's experience with vehicles operated in such a fashion in the early morning hours, gave sufficient reason and articulable cause to stop the Defendant's vehicle.

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<sup>3</sup> Our supreme court discussed the *Tompkins* holding in *Otto*, 566 N.W.2d at 511, and indicated *Tompkins* should not be read to hold that observation of a vehicle weaving within one's own lane of traffic will always give rise to reasonable suspicion justifying a stop of the vehicle. The court went on to state that the facts and circumstances of each case should dictate whether or not reasonable suspicion exists for police to execute an investigative stop. *Id.*

Additionally, the Court finds that the State is correct that the Defendant violated Section 32-165(3) of the City of Dubuque Code of Ordinances in that she did not turn directly into the left lane when turning onto First Street from Bluff. Thus, this traffic violation would also constitute cause to stop the Defendant's vehicle independent of her other manner of driving.

Upon our de novo review, we conclude the facts and circumstances in this case gave rise to Officer Kreyer's reasonable suspicion that criminal activity had occurred or was occurring, and therefore justified the investigatory stop. See *Kinkead*, 570 N.W.2d at 100. Officer Kreyer first noticed Hotze's vehicle because it was driving close to the dividing line on a one-way street near downtown while she was on routine patrol just after bar close. Officer Kreyer became concerned about the vehicle and activated the video camera in her patrol car to record Hotze's driving. Within the next minute or so, Officer Kreyer observed Hotze change lanes and drift into the parallel parking area on the other side of the street. Hotze continued to travel in the parking area and then turned left into the right lane of another two-lane one-way street. Hotze then unnecessarily yielded twice upon making a right hand turn.<sup>4</sup>

Hotze was driving at 2:00 a.m., a time an officer could reasonably expect that people would be driving home from bars. See *Kreps*, 650 N.W.2d at 647 (noting that late-night activity, when combined with other specific and articulable facts, may be a factor giving rise to reasonable suspicion that criminal activity was afoot). Hotze was travelling at a moderate in-city speed, and no

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<sup>4</sup> We defer to the district court's findings with regard to Officer Kreyer's credibility. See *Tague*, 676 N.W.2d at 201. We acknowledge the video does not depict Officer Kreyer's observations as well as we would hope, but rely upon the officer's testimony to buttress the video.

precipitation or noticeably windy weather conditions were present that may have otherwise caused her driving to be erratic.

We certainly do not find overwhelming evidence in this case. However, after a careful review of the record and Officer Kreyer's testimony, we conclude the investigatory stop was reasonable. See *Otto*, 565 N.W.2d at 511; *Tompkins*, 507 N.W.2d at 738. We affirm the district court's denial of Hotze's motion to suppress, conviction, and sentence for operating while intoxicated, first offense.

**AFFIRMED.**