IN THE COURT OF APPEALS OF IOWA

No. 9-1063 / 09-1013
Filed January 22, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RYAN ALAN DANLY,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Odell G. McGhee, District Associate Judge.

Ryan Alan Danly appeals from a district court order denying his motion to suppress evidence. **REVERSED AND REMANDED.**

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

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, John P. Sarcone, County Attorney, and David Porter, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ.

MANSFIELD, J.

This case presents the question whether the district court may summarily deny a motion to suppress in a misdemeanor case as a sanction for the defendant's failure to appear personally at the hearing. Because we conclude the district court may not do so, we reverse and remand.

I. FACTS AND PROCEDURAL BACKGROUND.

Some time after 1:00 a.m. on February 28, 2009, two Ankeny police officers checked the license plate of a vehicle parked at a convenience store. They determined the vehicle's registration had been revoked and the plate was supposed to have been removed. The officers waited for the vehicle's male driver and male passenger to return from inside the convenience store. Instead of entering the car, however, the two men started walking down the sidewalk, although they were not dressed for the cold weather. The officers found this activity suspicious and decided to get in their respective patrol cars and wait for the men to return to their vehicle. Subsequently, after the men reentered the vehicle and drove away, the officers conducted a traffic stop.

Ryan Danly, the vehicle's driver, was informed the only reason he was stopped was because his registration and license plates had been revoked. However, one of the officers noticed that his eyes were watery and bloodshot. The officer could smell an odor of alcoholic beverage. Under questioning, Danly admitted to having had a couple of drinks earlier in the evening and said he had had his last drink about two hours before. Danly refused to perform any field sobriety tests or a preliminary breath test. The officers thereupon arrested him. At the holding facility, the Data Master test was administered that showed Danly

had a blood alcohol content of .122 percent. Danly was subsequently charged with operating while intoxicated in violation of Iowa Code section 321J.2 (2009).

On April 8, 2009, Danly waived speedy trial. On May 19, 2009, Danly filed a motion to suppress. He asserted, among other things, that the officers lacked sufficient grounds for the initial stop, that the officer failed to read him an accurate implied consent advisory before obtaining his consent to the chemical testing, and that he was not allowed a reasonable opportunity to make a telephone call prior to the administration of the chemical test. The motion was initially set for hearing on June 9, 2009. On May 29, 2009, the district court rescheduled the hearing on the motion to suppress for 10:30 a.m. on June 23, 2009, and rescheduled trial for July 15, 2009. Danly contends, and the State does not dispute, that the State had requested the continuance of the suppression hearing. The district court's order rescheduling the suppression hearing had the box checked indicating the defendant was to appear for trial on July 15, but did *not* have the box checked indicating the defendant was to appear for the motion to suppress on June 23.

Late on the afternoon of June 22, the assistant county attorney contacted Danly's attorney and requested a further continuance of the suppression hearing, explaining that the officer involved had training on the 23rd. Danly's attorney contacted his client, who declined to agree to the continuance and indicated to his attorney that he planned to be present the next day. The officer therefore changed plans so he could be at the suppression hearing. Danly, however, did not appear at the suppression hearing, allegedly because his boss told him that morning he could not get the time off and/or because he did not have a ride.

When Danly did not appear on June 23, his attorney asked the district court either (1) to continue the suppression hearing again or (2) to proceed with the suppression hearing in Danly's absence. The district court instead summarily denied the motion. Danly filed a motion to reconsider, which was also denied. On July 13, 2009, the supreme court granted Danly's application for discretionary review. Subsequently, his appeal was transferred to this court.

II. ANALYSIS.

We review a district court's application and interpretation of the rules of criminal procedure for correction of errors at law. *State v. Sanders*, 623 N.W.2d 858, 859 (Iowa 2001).

On appeal, Danly argues that the district court erred in summarily denying Danly's motion to suppress because he did not personally appear at the hearing. We agree. Iowa Rule of Criminal Procedure 2.27(1) specifically provides that misdemeanor defendants "may appear by counsel" during pretrial proceedings. Furthermore, the district court's order, by implication, indicated Danly did not need to appear in person at the June 23 suppression hearing. In the absence of any rule or order requiring Danly's presence, it was error for the district court to summarily deny the motion to suppress on this ground.

The district court appears to have concluded that it was unfair for the defendant to have refused a continuance to accommodate the Ankeny police officer's scheduling conflict, to have represented through counsel that he was going to be present at the suppression hearing, and then not to have appeared. These considerations would have supported a decision to proceed with the

hearing on June 23 in the defendant's absence. However, none of them justified a decision to deny summarily the motion to suppress.

The State argues that the suppression hearing was a "critical stage" of the case at which the defendant had a constitutional right to be personally present. The implication of the State's argument, of course, is that rule 2.27 is constitutionally defective—a path that we are not certain the State really wants to travel. In any event, we believe the State's argument is creative, but logically flawed. In effect, the State wants to us to recognize a new constitutional right (i.e., the right of a defendant to be present at the suppression hearing in a misdemeanor case) so we can take a right away (i.e., the right to have a timely filed motion to suppress decided on its merits). This court-giveth-and-court-taketh-away reasoning does not make sense to us.

Assuming for the sake of argument that Danly had a right to be personally present, he either did or did not waive that right. If he did not waive that right, then the motion should have been decided at a later date in his presence. If he waived that right, then the court was empowered to decide the motion in his absence. Either way, the court should not have just summarily denied his motion based on his nonappearance. Indeed, the State, with commendable candor, points out that several jurisdictions have held that a defendant's failure to appear does *not* operate as a waiver of his or her right to have the motion heard on its merits. *See People v. Dashner*, 77 P.3d 787, 791 (Colo. Ct. App. 2003) ("Courts in other jurisdictions have held that even where a defendant unjustifiably fails to appear at a suppression hearing, he or she does not thereby abandon the right to object to the admission of evidence unconstitutionally obtained . . . . We agree

with that analysis and those holdings."); *State v. Ruperd*, 202 P.3d 1288, 1290-91 (Idaho Ct. App. 2009) (holding that a court may not refuse to hear a motion to suppress as a sanction for the defendant's failure to appear); *State v. Canty*, 650 A.2d 391, 393 (N.J. Super. 1994) (same); *State v. Desirey*, 782 P.2d 429, 429 (Or. Ct. App. 1989) (same).

The State only offers us two Georgia Court of Appeals decisions in support of its claim that a defendant's failure to appear may justify denial of a motion to suppress. *See Edwards v. State,* 638 S.E.2d 347, 348 (Ga. Ct. App. 2006); *Cayruth v. State*, 614 S.E.2d 809, 810 (Ga. Ct. App. 2005). We decline to follow those cases here for several reasons. First, as noted above, other courts have held to the contrary and we think their reasoning is more sound. Second, the Georgia cases were both felony cases, but this is a misdemeanor case, where the Iowa Rules of Criminal Procedure specifically provide that the defendant's personal presence at a suppression hearing is not required. Third, even if rule 2.27 had some constitutional flaw such that Danly's personal presence was required, the May 29, 2009 order indicated (at least by implication) that his presence was not necessary. Danly's motion to suppress should not have been denied as a sanction for conduct that appeared to be permitted by the district court's prior order.

III. CONCLUSION.

We reverse and remand for the district court to hold a new hearing on Danly's motion to suppress. If Danly does not appear, the district court may proceed to the merits of the motion in his absence.

REVERSED AND REMANDED.