IN THE COURT OF APPEALS OF IOWA

No. 1-622 / 10-1319
Filed September 8, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANTHONY BRUCE DEXTER,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Christine Dalton (motion to suppress) and Thomas H. Preacher (trial and sentencing), Judges.

Anthony Bruce Dexter appeals his conviction of operating while intoxicated, first offense. **REVERSED AND REMANDED.**

Lauren M. Phelps, Davenport, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, Michael J. Walton, County Attorney, and Will Ripley, Assistant County Attorney, for appellee.

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

TABOR, J.

Anthony Bruce Dexter appeals from his conviction of operating while intoxicated (OWI), first offense. Dexter argues the State did not show reasonable suspicion to justify an investigatory stop. Because we conclude the videotape of Dexter's driving—without any testimony from the stopping officer—does not raise a reasonable suspicion of criminal activity, we reverse.

I. Background Facts and Proceedings

On November 21, 2009, at approximately 2:39 a.m., Officer Thomas Leonard began following Dexter's vehicle. Officer Leonard followed the vehicle approximately one mile, for a period of three and one-half minutes. Officer Leonard's incident report stated: "I observed this vehicle going from fog line to center line multiple times. At times it appeared that the vehicle was going to go into the ditch, but each time the driver corrected the vehicle."

In response to the weaving, Officer Leonard stopped Dexter. Officer Leonard's report stated Dexter "had very blood shot watery eyes, slurred speech, and a strong smell of alcoholic beverage coming from him as he spoke." Officer Leonard asked Dexter to perform field sobriety tests. Although Dexter told Officer Leonard he did not want to take any tests, Dexter allowed the officer to conduct a horizontal gaze nystagmus (HGN) test. The HGN test indicated Dexter was intoxicated. Officer Leonard then transported Dexter to the Scott County Jail. A camera mounted in Officer Leonard's patrol car recorded the encounter from the time Officer Leonard began following Dexter until the time Dexter arrived at the jail.

As a result of the incident, the State charged Dexter with OWI, first offense, in violation of Iowa Code section 321J.2(2)(a) (2009) and driving while revoked, in violation of section 321J.21.

On January 20, 2010, Dexter filed a motion to suppress, alleging: (1) no reasonable cause existed to justify the stop and (2) Officer Leonard "tricked" Dexter into submitting to the HGN test. The court scheduled a suppression hearing for March 19, 2010, but the issues Dexter raised were submitted on a stipulated record. The suppression record was composed of only the videotape of the stop. No other testimony or evidence was offered.

After considering the videotape, the district court denied Dexter's motion to suppress. The court found that Dexter's weaving provided reasonable suspicion to justify a stop. The court also held that, because Dexter did not specify which sobriety tests he did not want to do and because Dexter did not resist the HGN test, Officer Leonard did not violate Dexter's rights by conducting the HGN test. Therefore, the court did not exclude the HGN test results.

Dexter waived his right to a jury trial. Based on the police videotape, the minutes of testimony, and Officer Leonard's incident report, the district court found Dexter guilty of OWI and driving while revoked. Dexter now appeals.

II. Scope and Standard of Review

Dexter appeals the district court's denial of his motion to suppress. His motion to suppress challenged the existence of reasonable suspicion for his

traffic stop, which implicates his Fourth Amendment rights.[1] *See State v. Kreps*, 650 N.W.2d 636, 641 (Iowa 2002). "We review constitutional issues de novo." *State v. Otto*, 566 N.W.2d 509, 510 (Iowa 1997). In conducting our review, we independently evaluate the totality of the circumstances, as shown by the entire record. *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001).

III. Analysis

Dexter first argues the district court erred in overruling his motion to suppress because the record does not support a finding that Officer Leonard had reasonable cause to stop his vehicle. "The Fourth Amendment imposes a general reasonableness standard upon all searches and seizures" and a traffic stop is a seizure within the meaning of the Fourth Amendment. *See Kreps*, 650 N.W.2d at 641. To justify a stop on the basis of intoxication, "police need only have reasonable suspicion, not probable cause, to believe criminal activity has occurred or is occurring." *State v. Tague*, 676 N.W.2d 192, 204 (Iowa 2004). To meet the standard of reasonable suspicion, "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." *Id.* If the State fails to carry its burden, the court must suppress any evidence obtained through the stop. *State v. Kinkead*, 570 N.W.2d 97, 100 (Iowa 1997).

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[1] Article I, section 8 of the Iowa Constitution also protects a motorist's right to be free from unreasonable investigatory stops. *See State v. Tague*, 676 N.W.2d 197, 201 (Iowa 2004). Dexter does not make a separate argument concerning the state constitutional provision in his brief.

We have held that an officer's observation of a vehicle weaving within its own lane may provide reasonable cause for a stop. *State v. Tompkins*, 507 N.W.2d 736, 740 (Iowa Ct. App. 1993). In *Otto*, our supreme court considered the reasonableness of a stop when a police officer pulled a motorist over based on conduct that fell short of violating a traffic law. 566 N.W.2d at 510. The *Otto* court clarified the *Tompkins* holding, stating:

> 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.

Id. at 511 (citing *State v. Dorendorf*, 359 N.W.2d 115, 117 (N.D. 1984) (upholding a stop based on "the police officers' experience and their testimony that the defendant's driving was erratic as compared to other driving observed at the time")). The *Otto* court concluded the defendant's overall driving provided the officer with reasonable suspicion when the defendant was driving forty in a fifty-five mile per hour speed zone, fluctuating speed, weaving constantly down the road over a three and one-half mile distance, veering left and right at a sharp angle, and closely following the vehicle in front of her. *Id.*

Our supreme court considered the reasonable cause standard again in *Tague*. The court determined that an officer did not have reasonable cause for a traffic stop when the defendant's tires barely crossed the edge line once for a very brief period. *Tague*, 676 N.W.2d at 205–06. The court noted, "any vehicle could be subject to an isolated incident of briefly crossing an edge line of a divided roadway without giving rise to the suspicion of intoxication or fatigue." *Id.*

at 205. The *Tague* court ultimately determined the stop violated the motorist's rights as guaranteed by article I, section 8 of the Iowa Constitution. *Id.* at 206.

Our task in this appeal is to apply the reasoning from *Tompkins*, *Otto*, and *Tague* to Officer Leonard's stop of Dexter's car. Unlike those cases, here we do not have the officer's articulation of his reasons for initiating the traffic stop. The stipulated suppression record includes only the officer's dashboard video. Without testimony based on the officer's experience and expertise concerning what he deduced from his observations, we are left to draw our own conclusions. We recognize that in certain circumstances a videotape can "speak for itself." *See Scott v. Harris*, 550 U.S. 372, 378 n.5, 127 S. Ct. 1769, 1775 n.5, 167 L. Ed. 2d 686, 693 n.5 (2007). But in this instance, we find the videotape speaks fairly softly.

After careful review of the police videotape of Dexter's driving, we conclude the recording does not objectively demonstrate reasonable cause for a stop. Over the course of the approximately two minutes between the time Officer Leonard began following Dexter and the time Officer Leonard turned on his lights, we observed four to five instances where Dexter weaved slowly and gently from right to left. At a couple of points Dexter's tires hugged the center line. In none of those instances did Dexter correct his course in a manner we would classify as erratic, though he did make two obvious corrections. From our view of the videotape, we did not see what the officer described in his incident report—that "[a]t times it appeared that the vehicle was going to go into the ditch." The angle and depth of view afforded by the videotape did not show

Dexter's car dangerously approaching the ditch. Although the vehicle hugged the center and left fog lines, it never crossed either line. For significant portions of the video, Dexter drove normally in the middle of the lane.

An officer using his naked eye may well be in a better position than we are, watching videotape from a dashboard camera, to evaluate whether intra-lane weaving is so pronounced that it indicates the driver is impaired. Officer Leonard, in his training and experience, may have recognized indicators of intoxication. But because the district court ruled based on a stipulated record, which did not include testimony from Officer Leonard, we are unable to consider such possibilities in our review. Without testimony from Officer Leonard, we do not have information regarding his training and experience, or details as to his logic in stopping Dexter. *See Tague*, 676 N.W.2d at 205 (finding testimony did not support a reasonable suspicion that the defendant was intoxicated or fatigued); *Otto*, 566 N.W.2d at 511 (citing the officer's testimony to find reasonable suspicion for a stop); *Tompkins*, 507 N.W.2d at 737, 740 (citing the officer's testimony to find reasonable suspicion for a stop).

Courts from other jurisdictions have emphasized the importance of the officer's testimony in determining whether intra-lane weaving created reasonable and articulable suspicion for an investigatory stop. For instance, the Vermont Supreme Court invalidated a stop because

> the officer testified to his observations, but he never stated why those observations led him to a reasonable and articulable suspicion that a crime was being committed. The officer testified that he encountered defendant at approximately two o'clock on Christmas morning. He described her vehicle touching the center line and gliding onto the fog line at least twice before he turned on

> his mobile video recorder, and then continuing this pattern at least two more times after he began to record. However, beyond this brief description of defendant's driving, the officer never testified that the intra-lane weaving supported a suspicion that defendant might be driving while under the influence.

State v. Davis, 933 A.2d 224, 226 (Vt. 2007).

By contrast, the Kansas Supreme Court found reasonable suspicion for a stop when the officer testified:

> It has been my training that given the hour of day—and this was approximately . . . 2:13 in the morning—and if the driver, regardless whether they make a traffic infraction or not, if they are weaving within their lane a number of times, they may be impaired to some degree.

State v. Field, 847 P.2d 1280, 1282 (Kan. 1993). The Kansas court stated, "that under the facts of this case including the training and experience of the arresting officer, [the officer] has clearly shown articulable facts sufficient to constitute reasonable suspicion." *Id*. at 1285.

The North Dakota Supreme Court similarly affirmed the trial court's denial of a motion to suppress evidence obtained from a traffic stop, based on the reasons given by the officer in court:

> According to the officer's testimony, he is a deputy sheriff who has worked for the Morton County Sheriff's Office for six years. At approximately 1:27 a.m., the officer observed Mohl's vehicle weaving. He observed Mohl's vehicle touching the fog line approximately sixteen times and the center line approximately eight times in three miles "[s]o [he] stopped it . . . for the erratic driving within the lane and touching the lines." The officer also testified that, while it was normal for a vehicle to move within its lane and touch the lines, "this vehicle was touching the lines a lot more than a vehicle normally does."

State v. Mohl, 784 N.W.2d 128, 131 (N.D. 2010).

In our case we have nothing more than the videotape of Dexter's driving to supply reasonable suspicion. Without the officer's testimony to provide context, we are unable to draw inferences from the early morning hour or the other conditions present at the time of the stop. Based solely on the videotape, we find the intra-lane weaving, without more, insufficient to raise reasonable suspicion.

Therefore, all evidence flowing from the stop is inadmissible. Accordingly, we reverse Dexter's conviction and remand for further proceedings consistent with this opinion. Because we resolve Dexter's appeal on this issue, we do not consider the remainder of his claims.

REVERSED AND REMANDED.