IN THE COURT OF APPEALS OF IOWA

No. 3-099 / 12-0214
Filed February 27, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BENJAMIN J. VESELY,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Gregory D. Brandt, District Associate Judge.

Benjamin Vesely appeals from his conviction for operating while intoxicated, second offense. **AFFIRMED.**

Eric Eshelman, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, John P. Sarcone, County Attorney, and Brendan E. Greiner, Assistant County Attorney, for appellee.

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

DOYLE, J.

Benjamin Vesely appeals following his conviction and sentence for operating while intoxicated (OWI), second offense, in violation of Iowa Code section 321J.2 (2011). He contends the district court erred in denying his motion to suppress evidence because the arresting officer did not have reasonable suspicion to stop his vehicle. Upon our review, we affirm.

***I. Background Facts and Proceedings*.**

Ankeny police officer Davis was on patrol on August 25, 2011, at about 2:00 a.m. He was at the intersection of Northwest 18th and Northwest State Street when he observed a vehicle travelling westbound on Northwest 18th turn left onto Northwest State Street. As the vehicle made its turn, Officer Davis observed it "cross through all three traffic portions of the lanes facing northbound on Northwest State." The vehicle then continued southbound on Northwest State in the southbound lane.

Officer Davis followed the vehicle for about a block and into the parking lot of an apartment complex. As the vehicle parked, Officer Davis initiated a traffic stop by activating his patrol car's emergency lights. He approached the vehicle and made the standard request for information from the driver, Vesely. Officer Davis explained to Vesely that he was being stopped for making an unsafe turn. Officer Davis smelled the odor of alcohol coming from Vesely, and Vesely admitted to drinking a couple of shots much earlier in the day. Vesely performed field sobriety tests and was then arrested for OWI. Later testing confirmed Vesely's blood alcohol content was above the legal limit.

The State filed a trial information charging Vesely with OWI, second offense. Vesely filed a motion to suppress all the evidence obtained as a result of the stop. His motion contended Officer Davis did not have "probable cause or any other legally recognized basis to stop and detain" Vesely. He asserted the stop of his vehicle was in violation of his federal and state constitutional rights. After a suppression hearing, the district court denied the motion. Later, a bench trial was held on the minutes of testimony. The district court found Vesely guilty as charged.

Vesely now appeals, contending the district court erred in denying his motion to suppress.

***II. Scope and Standards of Review*.**

Vesely invokes both the federal and state constitutional prohibitions against unreasonable searches and seizures, which contain identical language and are generally "deemed to be identical in scope, import, and purpose." *See* U.S. Const. amend. IV; Iowa Const. art. I, § 8; *see also State v. Bishop*, 387 N.W.2d 554, 557 (Iowa 1986). He has not argued that the interpretation of the two provisions should differ. We will therefore construe them together. *See State v. Jones*, 666 N.W.2d 142, 145 (Iowa 2003).

Because Vesely contends the stop violated his rights under the Fourth Amendment of the United States Constitution and article I, section 8 of the Iowa Constitution, we review his claim de novo. *See State v. Fleming*, 790 N.W.2d 560, 563 (Iowa 2010). "This review requires an independent evaluation of the totality of the circumstances as shown by the entire record." *State v. Pals*, 805 N.W.2d 767, 771 (2011) (internal quotation marks and citation omitted).

Although we defer to the factual findings of the district court because of its greater ability to evaluate the credibility of witnesses, we are not bound by that court's findings. *See id.*

III. Discussion.

On appeal, Vesely claims the district court erred in overruling his motion to suppress because the record does not show that Officer Davis had reasonable suspicion to stop the vehicle. "[A] law enforcement officer [may] stop a vehicle when the officer observes a traffic violation, no matter how minor." *State v. Louwrens*, 792 N.W.2d 649, 651-52 (Iowa 2010). The State must demonstrate Officer Davis had a reasonable suspicion criminal activity was occurring or had occurred to justify stopping Vesely's vehicle. *See State v. Tague*, 676 N.W.2d 197, 204 (Iowa 2004). The evidence justifying a stop for reasonable suspicion does not need to rise to the level of probable cause. *State v. Scott*, 409 N.W.2d 465, 468 (Iowa 1987). The stopping officer must have specific and articulable facts that, along with rational inferences, demonstrate that he or she reasonably believed criminal activity was occurring or imminent. *State v. Vance*, 790 N.W.2d 775, 781 (Iowa 2010). Reasonable suspicion is determined by an objective standard: whether a reasonable person would deem the officer's actions appropriate given the totality of the circumstances confronting the officer at the time of the stop. *See State v. Kreps*, 650 N.W.2d 636, 641-42 (Iowa 2002). Unparticularized suspicion is not an acceptable reason for a stop. *See id.* at 641.

Vesely's position on appeal is founded upon his assertion that "the officer in the present case did not observe him commit a traffic violation." His assertion is belied by the video evidence and therefore fatally flawed. After a careful

review of Officer Davis's dashboard camera video, we find the video evidence to be consistent with Officer Davis's testimony. The video confirms that Vesely drove through the northbound lanes before finally coming to travel in the southbound lane of Northwest State Street. He did not "depart from the intersection to the right of the center line of the roadway being entered," in violation of Iowa Code section 321.311, "Turning at intersections":

> 1. The driver of a vehicle intending to turn at an intersection shall do so as follows:
>
> . . . .
>
> b. Approach for a left turn shall be made in that portion of the right half of the roadway nearest the center line thereof and after entering the intersection the left turn shall be made so as to depart from the intersection to the right of the center line of the roadway being entered.

Therefore, we agree with the district court's astute conclusion that "there [was] probable cause to believe that Mr. Vesely violated Iowa Code section 321.311."

At the scene of the stop, Officer Davis explained to Vesely that he was being stopped for making an unsafe turn, and he issued Vesely a traffic citation for "unsafe turn/or failure to give signal," in violation of Ankeny City Ordinance 62.01(64) (2011).[1] The ordinance mirrors Iowa Code section 321.314, which states:

> No person shall turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety and then only after giving a clearly audible signal by sounding the horn if any pedestrian may be affected by such movement or after giving an appropriate signal in the manner hereinafter provided in the event any other vehicle may be affected by such movement.

[1] Vesely's traffic citation was dismissed following his sentencing on the OWI second conviction.

There is no question that Vesely was using his left turn signal, so this does not provide a valid basis for the stop.

At the suppression hearing the State argued Vesely made improper use of lanes in violation of section 321.306(1), which provides in relevant part: "A vehicle shall be driven as nearly as practical entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." We agree with the district court that section 321.311 seems to more appropriately cover this issue.

It matters not that Officer Davis erroneously cited Vesely with a failure to signal violation, or that he explained to Vesely he was being stopped for making an "unsafe turn." *See State v. Cline*, 617 N.W.2d 277, 280-81 (Iowa 2000) (stating the reasonableness of a seizure is determined by an objective standard, not the motivation or stated reasons by the officers involved), *overruled in part on other grounds by State v. Turner*, 630 N.W.2d 601, 606 n.2 (Iowa 2001). What does matter is consideration of the record as a whole to determine what facts were known to the officer. *State v. Heminover*, 619 N.W.2d 353, 361 (Iowa 2000), *overruled in part on other grounds by Turner*, 630 N.W.2d at 606 n.2. In reviewing that record, we are not limited to the citation Officer Davis issued; instead we consider whether a reasonable officer in those circumstances would have reasonably believed Vesely was committing a traffic offense. *Id.* Upon our review of the record and applicable case law, we conclude the totality of the circumstances supported a reasonable suspicion that Vesely was committing a traffic offense, i.e. a violation of section 321.311. Accordingly, we affirm the

district court's denial of Vesely's motion to suppress, as well as Vesely's conviction and sentence for operating while intoxicated, second offense.

***IV. Conclusion*.**

Because we agree with the district court that the totality of the circumstances supported a reasonable suspicion that Vesely was committing a traffic offense, we conclude the district court did not err in denying Vesely's motion to suppress. Accordingly, we affirm Vesely's conviction and sentence for operating while intoxicated, second offense.

AFFIRMED.