IN THE COURT OF APPEALS OF IOWA

No. 3-558 / 12-2112
Filed July 24, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANDREW WILLIAM THOMAS,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, William A. Price, District Associate Judge.

A defendant contends the district court should have granted his motion to suppress evidence obtained following a traffic stop. **REVERSED AND REMANDED.**

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

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, John P. Sarcone, County Attorney, and James Hathaway, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Bower, JJ.

VAITHESWARAN, J.

Andrew Thomas appeals his judgment and sentence for operating a motor vehicle while intoxicated, second offense. He contends the district court should have granted his motion to suppress evidence obtained following a traffic stop.

I. Background Facts and Proceedings

Shortly after 2:00 a.m. one morning, a Clive police officer followed a vehicle as the driver turned left into the right lane of two south-bound lanes. He continued to follow the car at a distance of seventy-five to eighty feet. The driver merged into the left lane shortly before the lane narrowed. Soon after, the car's brake lights illuminated, and the driver returned to the right lane without signaling. The car proceeded from the right lane into a right turning lane and turned west. The officer stopped the vehicle and identified the driver as Thomas.

Suspecting Thomas was intoxicated, the officer administered field sobriety tests and a preliminary breath test (PBT). The PBT result revealed alcohol content over the legal limit. The officer arrested Thomas and administered a chemical test which revealed breath alcohol content of close to twice the legal limit.

The State charged Thomas with OWI, second offense. Thomas moved to suppress evidence obtained as a result of his traffic stop, citing the Fourth Amendment to the United States Constitution and Article I, section 8 of the Iowa Constitution. The district court denied the motion following an evidentiary hearing. Thomas agreed to a trial on the stipulated minutes of testimony. The court found him guilty as charged and imposed sentence. Thomas appealed.

II. Analysis

The Fourth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, protects citizens against unreasonable searches and seizures. The Iowa Constitution contains "nearly identical language." *See* Iowa Const. art. I, § 8; *State v*. *Kooima*, __ N.W.2d. __, __ , 2013 WL 3238574, at *3 (Iowa 2013). Because we are able to decide the case under the Fourth Amendment, we will not engage in an analysis under the Iowa Constitution. *See Kooima*, __ N.W.2d at __, 2013 WL 3238574, at *3.

"A traffic stop is unquestionably a seizure under the Fourth Amendment." *State v*. *Tyler*, 830 N.W.2d 288, 292 (Iowa 2013). The stop is reasonable if it is supported by a warrant or if it falls within an exception to the warrant requirement. *State v*. *Kinkead*, 570 N.W.2d 97, 100 (Iowa 1997). The State relies on the probable cause exception or, alternatively, on reasonable suspicion that criminal activity was afoot. Thomas responds that the district court rejected the applicability of the probable cause exception, leaving only the reasonable suspicion argument for review.

We may affirm on a ground raised before the district court, but not decided by it. *See DeVoss v*. *State*, 648 N.W.2d 56, 61 (Iowa 2002) ("We have in a number of cases upheld a district court ruling on a ground other than the one upon which the district court relied provided the ground was urged in that court."). For that reason, we will consider both arguments raised by the State. Our review of this constitutional issue is de novo. *Kinkead*, 570 N.W.2d at 99.

A. Probable Cause

"When a peace officer observes a violation of our traffic laws, however minor, the officer has probable cause to stop a motorist." *State v*. *Tague*, 676 N.W.2d 197, 201 (Iowa 2004).[1] The State asserts the officer had probable cause to believe Thomas violated Iowa Code section 321.306(1) (2011). That provision states: "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." Iowa Code § 321.306(1). "A violation [of this provision] does not occur unless the driver changes lanes before the driver ascertains that he or she could make such movement with safety." *Tague*, 676 N.W.2d at 203.

A digital video recording of the incident reveals no unsafe lane changes. The officer's testimony is equally unavailing. He admitted that, in Iowa, a person does not have to use turn signals when changing lanes and the lane change did not cause him any safety problems. Based on this record, we agree with the district court that the State failed to establish probable cause for the vehicle stop.

B. Reasonable Suspicion

An officer may also stop a moving automobile "in the absence of probable cause if the police have reasonable suspicion to believe criminal activity is taking place." *State v*. *Pals*, 805 N.W.2d 767, 774 (Iowa 2011).

> 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

[1] This opinion was decided under the Iowa Constitution, but the principles from that opinion which we cite here are co-terminus with principles governing a Fourth Amendment analysis. *See Tague*, 676 N.W.2d at 204.

> facts, which taken together with rational inferences from those facts, to reasonably believe criminal activity may have occurred.

Tague, 676 N.W.2d at 204.

The State relies on Thomas's "inexplicable" move to the left lane in the face of "brilliantly marked" signage indicating that "[t]he lane was closed for construction a short distance ahead." The State posits that this action and the return to the right lane moments later reveal "a person surprised or confused by something."

With 20/20 hindsight, one could wonder why Thomas did not heed the clear signage and simply stay in the right lane. But "[m]ere suspicion, curiosity, or hunch of criminal activity is not enough." *See id.* That is all we have here. The officer admitted the left lane was drivable for a short length after the first signs appeared. The officer also admitted that Thomas avoided the cones blocking the closed portion of the road, as well as the curbs, and never crossed a line dividing northbound from southbound traffic. Under these circumstances, the lane change did not create a reasonable suspicion of criminal activity. *Id.* at 205–06 ("[I]f failure to follow a perfect vector down the highway or keeping one's eyes on the road [was] sufficient [reason] to suspect a person of driving while impaired, a substantial portion of the public would be subject each day to an invasion of [its] privacy." (quoting *United States v. Lyons*, 7 F.3d 973, 976 (10th Cir. 1993))).

We conclude the traffic stop was an unconstitutional seizure. For that reason, all of the evidence obtained following the stop is inadmissible.

We reverse and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.