IN THE COURT OF APPEALS OF IOWA

No. 3-645 / 12-1901
Filed August 7, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT FRANCIS MARION,
Defendant-Appellant.

Appeal from the Iowa District Court for Chickasaw County, Richard D. Stochl, Judge.

A defendant appeals from his operating-while-intoxicated judgment and sentence. **AFFIRMED.**

Roger L. Sutton of Sutton Law Office, Charles City, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, and W. Patrick Wegman, County Attorney, for appellee.

Considered by Doyle, P.J., and Danilson and Mullins, JJ.

MULLINS, J.

Robert Francis Marion appeals from his operating-while-intoxicated judgment and sentence. Marion contends the district court erred in overruling his motion to suppress because a state trooper improperly seized and detained him in violation of the Fourth Amendment. Marion also argues there is insufficient evidence to support the district court's finding that he was operating while intoxicated. In this memorandum opinion, we affirm.

First, at issue is whether a state trooper "seized" Marion prior to reasonably suspecting Marion was driving a motor vehicle while intoxicated. We review motions to suppress implicating a defendant's constitutional rights de novo. *State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998). To trigger Fourth Amendment protections, there must first be a "seizure." *See State v. Wilkes*, 756 N.W.2d 838, 842 (Iowa 2008). We determine whether a seizure occurred based on the totality of the circumstances, including "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* at 842–43.

Here, Marion had parked his pick-up truck on a public access road leading to an old cemetery where there had been recent instances of vandalism. Only one state trooper approached and parked behind Marion's truck. The trooper did not activate his emergency lights nor did he block Marion's exit. As the trooper exited his squad car and approached Marion's truck, he noticed a beer can on the ground near the bed of the truck. The trooper also noticed the driver "moving

around" inside the cab of the truck. As the trooper neared the truck, he noticed numerous empty beer cans inside the bed of the truck. The trooper then greeted Marion and "asked him how he was doing." At that time, the keys were in the ignition and the radio was on. There was an open beer can in the center console. While talking to Marion, the trooper noticed a strong odor of alcohol coming from inside the truck, Marion's eyes were bloodshot and watery, and his speech was slurred. When the trooper asked Marion if he had had too much to drink, Marion said, "No, not too much." At that point, the trooper asked Marion to come sit in his patrol car. The trooper then called for assistance. Marion failed subsequent field sobriety tests. Marion provided a preliminary breath test, which revealed a blood alcohol level of .175, more than twice the legal limit. The trooper also caught Marion trying to hide a wooden "dugout," a baggie of marijuana, and a metal pipe with burnt residue. Marion eventually admitted to drinking alcohol and smoking marijuana inside the truck.

We find the Iowa Supreme Court's decision in *State v. Wilkes* controlling precedent on the issue of whether a seizure occurred in this case. 756 N.W.2d 838, 841–45 (Iowa 2008). Under the totality of the facts and circumstances of this case, and in accordance with *Wilkes*, we find it clear that no seizure occurred until the trooper had reasonable suspicion that Marion was operating a motor vehicle while intoxicated. *See id.* Therefore, we find no error in the district court's decision to overrule Marion's motion to suppress. *See id.*

Next, we consider whether substantial evidence supports Marion's conviction for operating while intoxicated. Marion contends there was not

sufficient evidence that he was operating the vehicle because, although the keys were in the ignition, the engine was off when the trooper approached his vehicle. We review sufficiency of the evidence claims for correction of errors at law. *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011). A guilty verdict is binding on appeal if it is supported by substantial evidence. *See id.* We define "operate" for purposes of operating while intoxicated as "the immediate, actual physical control over a motor vehicle that is in motion and/or has its engine running." *Munson v. Iowa Dep't of Transp.*, 513 N.W.2d 722, 724 (Iowa 1994).

Both the complaint and the accompanying affidavit establish that, as the trooper approached Marion's vehicle, he could "hear the engine running." By the time the trooper arrived at Marion's vehicle, the engine was off, but the radio was on, and the keys were still in the ignition. Marion agreed to a bench trial on a stipulated record, including the minutes of testimony and the suppression hearing evidence. Based on the trooper's uncontroverted testimony, we find substantial evidence supports the district court's finding the Marion was operating a motor vehicle while intoxicated. Accordingly, we affirm without further opinion pursuant to Iowa Court Rule 21.26(1)(a), (b), (c), and (e).

AFFIRMED.