IN THE COURT OF APPEALS OF IOWA

No. 3-674 / 12-1904
Filed September 5, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL DAVID LEER JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Gerald Magee, Judge.

Defendant appeals the district court's ruling denying his motion to suppress and the ruling denying his motion for reconsideration. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS.**

Brandon Brown of Parrish, Kruidenier, Dunn, Boles, Gribble, Gentry & Fisher, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Bridget Chambers, Assistant Attorney General, Carlyle D. Dalen, County Attorney, and Steven Tynan, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Danilson and Tabor, JJ.

DANILSON, J.

Michael Leer, Jr. appeals the district court's ruling denying his motion to suppress and the ruling denying his motion for reconsideration. He was subsequently convicted for operating while under the influence of alcohol or a controlled substance, second offense, in violation of Iowa Code section 321J.2 (2011). Leer contends the district court erred in determining the arresting officer had the requisite reasonable suspicion to stop and detain him and asks that all evidence following the seizure be suppressed. In the alternative, he contends even if the stop was proper, the district court erred by failing to suppress his breath sample. We conclude the stop was proper, but the district court applied an incorrect legal standard regarding the suppression of the breath test results. We affirm in part, reverse in part, and remand with directions.

I. Background Facts and Proceedings.

After New Year's Eve on January 1, 2012, about 3:00 a.m., Officer Stiles observed Leer's truck stopped at a red light. A second vehicle was stopped behind his truck. Officer Stiles witnessed the driver of the second vehicle approach Leer's truck on the driver's side. As the second driver approached, Leer's truck door opened. The second driver reached into the truck and retrieved a silver can. After noticing the police car, he tried to hand the can back to Leer. When Leer refused to take the can back, the second driver placed it in Leer's truck bed and returned to his own vehicle. Based on the careful way the second driver carried the can, Officer Stiles believed it was open at the time.

Suspecting Leer had violated the open container statute,[1] Officer Stiles followed his vehicle a short distance and initiated a traffic stop. Once Leer stopped the vehicle, Officer Stiles checked the bed of the truck and found an open can of beer, as suspected.

During the stop Leer admitted he had consumed "a few" beers. He then submitted to sobriety tests but refused the preliminary breath test (PBT). The time of the refusal is in dispute. The two police cameras that were recording show the refusal at either 3:08:03 a.m. or 3:09:26 a.m. However, the log of the refusal entered by the dispatcher shows a time stamp of 3:15 a.m. Following the refusal Officer Stiles placed Leer under arrest and transported him to the police station.

At the station Officer Stiles read Leer the implied consent advisory[2] before requesting his written consent to submit to a breath test. Officer Stiles testified he checked his watch as he gave the advisory and saw it was 5:05 a.m. Just "ten, fifteen seconds" later, he activated the DataMaster DMT, the machine used to administer the breath test. However, the machine's log showed it was

---

[1] *See* Iowa Code § 321.284(1) which states, in pertinent part:

> A driver of a motor vehicle upon a public street or highway shall not possess in the passenger area of the motor vehicle an open or unsealed bottle, can, jar, or other receptacle containing an alcoholic beverage. "Passenger area" means the area designed to seat the driver and passengers while the motor vehicle is in operation and any area that is readily accessible to the driver or a passenger while in their seating positions, including the glove compartment.

[2] The implied consent advisory is codified in Iowa Code section 321J.8.

activated at 5:16:31 a.m.[3] The test results showed Leer's blood alcohol content to be .129.

On February 7, 2012, the State filed a trial information charging Leer with operating while under the influence of alcohol or with a controlled substance in his body, second offense. Leer filed a motion to suppress, arguing the traffic stop was in violation of his constitutional rights and his breath specimen was improperly obtained. After a hearing, the district court denied the motion. Leer then filed a motion to reconsider which was also denied by the district court. He sought interlocutory review of the district court's suppression ruling and was denied discretionary review by the Iowa Supreme Court.

Subsequently, Leer waived his right to a jury trial. On August 28, 2012, the district court held a trial on the stipulated minutes of testimony. Leer was found guilty and sentenced. He appeals.

II. Standard of Review.

Leer contends his vehicle was stopped in violation of the federal and state constitutions although he has not proposed a different standard under the search and seizure provisions under the Iowa Constitution. We review claims regarding constitutional rights de novo. *State v Tyler*, 830 N.W.2d 288, 291 (Iowa 2013). We make "an independent evaluation of the totality of the circumstances as

---

[3] At the suppression hearing Officer Stiles testified he was not sure if the time of 5:16:31 a.m. was the time the machine was activated or when the process was completed, but he had testified at a prior administrative hearing the time was when the time he turned the machine on. Furthermore, the district court found the test print-out showed a "blank test, diagnostic check, internal standard, external standard" at 5:17 a.m., a "blank test" at 5:18 a.m., and "subject samples" at 5:20 a.m. followed by a "blank test" at 5:21 a.m. We believe the informational output following the first time stamp of 5:16:31 a.m. shows that was the time the machine was first activated.

shown by the entire record." *State v. Kinkead*, 570 N.W.2d 97, 99 (Iowa 1997). In conducting our review, we may consider evidence presented at the suppression hearing as well as evidence presented at trial. *Id*.

Our review where an incorrect legal standard is applied is for legal error. Iowa R. App. P. 6.907; *State v. Robinson*, 506 N.W.2d 769, 770 (Iowa 1993).

"When a defendant who has submitted to chemical testing asserts that the submission was involuntary, we evaluate the totality of the circumstances to determine whether or not the decision was made voluntarily." *State v. Garcia*, 756 N.W.2d 216, 219 (Iowa 2008). Our review of the issue is de novo. *Id*.

III. Discussion.

A. Traffic Stop.

On appeal, Leer argues Officer Stiles did not have the necessary suspicion to initiate a traffic stop of his vehicle. He further argues that without the appropriate level of suspicion, the stop was in violation of his Fourth Amendment rights and all evidence obtained from it must be suppressed.

The Fourth Amendment of the United States Constitution prohibits "unreasonable search and seizures." "[S]topping an automobile and detaining its occupants constitute a 'seizure' . . . even though the purpose of the stop is limited and the resulting detention quite brief." *Delaware v. Prous*, 440 U.S. 648, 653 (1979). However, stopping a vehicle and detaining the occupant is not an *unreasonable* seizure when the officer has an "articulable and reasonable suspicion" the occupant has violated or is currently violating the law. *See id*. In other words, "the officer must be able to articulate something more than an

inchoate and unparticularized suspicion or hunch" in order to properly initiate a traffic stop. *Alabama v. White*, 496 U.W. 325, 329 (1990) (internal citations omitted). The requisite level of suspicion "is considerably less than proof of wrongdoing by a preponderance of the evidence." *Id*. As reiterated in *State v. Tyler*, 830 N.W.2d 288, 298 (Iowa 2013), "[t]he principal function of an investigatory stop is to resolve the ambiguity as to whether criminal activity is afoot."

In this case, Officer Stiles possessed the requisite level of reasonable suspicion to initiate the traffic stop. Based on the prevalence of silver beer cans and the reaction of the second driver after he noticed the police car, Officer Stiles believed the silver can was in fact a can of beer. The officer testified, "When he observed me, he stopped dead in his tracks, and did kind of a stutter step back to the truck, which led me to believe that what he was holding was not a pop can." Because the second driver appeared to be carefully carrying the can, as if he was concerned it would spill, Officer Stiles believed it was open. These observations provided him with a reasonable suspicion he had just observed Leer violating the open container statute. And in fact, Officer Stiles did find an open can of beer in the back of Leer's truck after he initiated the traffic stop.

Moreover, the stop permitted the officer to verify if the can was a beer can and if it was open, a minimal intrusion upon Leer. Since the officer's investigation proved both facts to be true, the offense of open container was committed in his presence. *See State v Tyler*, 830 N.W.2d at 298 (concluding the State's reliance upon reasonable suspicion as justification for the stop

requires the officer to be actively investigating whether a crime was occurring and requires the seizure of the defendant to be necessary to accomplish that purpose). There was also a need for the officer to act promptly as otherwise the evidence, the can in the bed of the pickup, may have been lost. *See* Sameer Bajaj, *Policing the Fourth Amendment: The Constitutionality of Warrantless Investigatory Stops for Past Misdemeanors*, 109 Colum. L. Rev. 309, 319 (2009) (concluding warrantless investigatory stops are generally reasonable "when the need to act promptly necessitates immediate action").

The government's interest in preventing open container violations outweighs the minimal intrusion to stop Leer and inspect the can in the bed of the pickup, as an operator of a motor vehicle with an open container of alcohol could lead to the more serious offense of operating while intoxicated. *See State v. Tyler*, 830 N.W.2d at 297 ("In deciding whether a stop is appropriate based on reasonable suspicion, a court must engage in a balancing test—balancing the governmental interest advanced by the seizure against the intrusion upon the constitutionally protected interests of the private citizen to be free from unnecessary seizure."). We conclude Officer Stile's initiation of the traffic stop was not unreasonable.

B. Breath Test.

Leer also contends the district court erred by failing to suppress his breath sample results. He argues the district court improperly viewed the evidence in the light most favorable to the State when determining whether to suppress the results of his breath test. He contends Officer Stiles offered him the breath test

outside the two-hour limitation after his refusal of the PBT as required to invoke his implied consent under section 321J.6.[4] Because Leer was given the implied consent advisory, he argues that his "consent" was involuntary and cites *State v. Kjos*, 524 N.W.2d 195 (Iowa 1994) for support.

In *Kjos*, the defendant was arrested for operating a motor vehicle while under the influence of alcohol. 524 N.W.2d at 196. More than two hours later, he was asked to give a breath test and told his refusal would result in revocation of his driver's license. *Id*. The court determined the false information given to the defendant to obtain his consent made the test results inadmissible. *Id*. The court held, "if the [chemical] test is offered more than two hours after the defendant's arrest *and* the defendant's consent is obtained by the false threat of license revocation, then the test results must be excluded."[5] *Id*. at 197.

In determining if the peace officer offered the breath test to Leer within the two hour limitation established in Iowa Code section 321J.6, the district court stated, "[v]iewing the evidence most favorably on behalf of the State it appears

---

[4] The pertinent language of section 321J.6 states:

> (1) A person who operates a motor vehicle in this state under circumstances which give reasonable grounds to believe that the person has been operating a motor vehicle in violation of section 321J.2 or 321J.2A is deemed to have given consent to the withdrawal of specimens of the person's blood, breath, or urine and to a chemical test or tests of the specimens for the purpose of determining the alcohol concentration . . . .
>
> (2) . . . If the peace officer fails to offer a test within two hours after the preliminary screen test . . . is refused . . . a test is not required, and there shall be no revocation under section 321J.9.

[5] The "false threat" arises when the officer reads the implied consent advisory to a defendant without explaining that the revocation of license privileges is only applicable if the breath test is offered within the two-hour period. *Kjos*, 524 N.W.2d at 197; Iowa Code section 321J.6(2).

that the refusal to preliminary breath testing was at 3:15 a.m. and request under implied consent was made at 5:05 (as testified to by Officer Stiles)."

The two-hour limit in section 321J.6 is not a foundational requirement for the admission of the test results in the prosecution of operating while intoxicated. *State v Kelly*, 430 N.W.2d 427,431 (Iowa 1988). However, the question of whether the defendant's consent was voluntary was not at issue in *Kelly. Id*. Our supreme court has recently reaffirmed the principle that "the State has the burden to prove a consent to testing was voluntary." *State v. Overbay*, 810 N.W.2d 871, 879–80 (Iowa 2012). The court has instructed, "a driver's consent to testing may be considered involuntary, and therefore invalid, if it is coerced or if the driver is not reasonably informed of the consequences of refusal to submit to the test or failure of the test." *State v. Garcia*, 756 N.W.2d 216, 220 (Iowa 2008). As noted, the court has also concluded consent is involuntary if procured on the basis of a false threat of license revocation. *Kjos*, 524 N.W.2d at 197.

Here, Leer contends his consent was not voluntary.[6] The district court addressed the issue in its ruling on Leer's motion to reconsider. Inasmuch as the voluntariness of Leer's consent was at issue, the burden was upon the State to prove Leer's consent was "freely made, uncoerced, reasoned, and informed." *Garcia*, 756 N.W.2d at 220. In the circumstances of this case, the State's burden

---

[6] The State contends Leer did not preserve the consent issue for review. Although Leer's motion to suppress did not specifically articulate that his consent was involuntary, it did claim the test was offered outside of the two hour period and cited the *Kjos* decision. Leer's motion to reconsider further illuminated the issue by contending his consent was procured by a false threat of license revocation. The court's ruling on the motion to reconsider included a resolution of the issue by ruling Leer was not coerced. Accordingly, we conclude the issue was properly preserved.

would have entailed either proving the test was offered within two hours or, if it was not, the consent was not procured by a false threat of license revocation.[7] Accordingly, the district court erred in viewing the evidence most favorably to the State in determining whether the two-hour period had lapsed. Because the district court applied an incorrect legal standard, we reverse and remand for application of the correct legal standard, placing the burden upon the State.

IV. Conclusion.

We affirm the district court's ruling the officer had a reasonable suspicion to stop Leer's vehicle. Because we conclude the district court applied an incorrect legal standard in denying Leer's motion to suppress in respect to the breath test results, we reverse in part and remand for application of the correct standard. We express no opinion as to the ultimate outcome on remand.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS.

[7] In this appeal the State acknowledges that the two-hour period began when Leer refused the PBT and the State did not dispute that the officer read Leer the implied consent advisory.