IN THE COURT OF APPEALS OF IOWA

No. 2-503 / 11-1336
Filed August 8, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

EMETERIO ANGEL SILVA,
Defendant-Appellant.

Appeal from the Iowa District Court for Cedar County, Mark J. Smith, Judge.

Emeterio Silva appeals his convictions for reckless driving and possession of marijuana. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Calynn M. Walters, Legal Intern, and Jeff Renander, County Attorney, for appellee.

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

TABOR, J.

Emeterio Silva appeals his convictions for reckless driving and possession of marijuana, challenging the state trooper's basis for stopping his car and the sufficiency of the evidence establishing his guilt on both counts. Because we find the trooper had probable cause to believe Silva violated Iowa Code section 321.306 (2009), neither the Fourth Amendment nor Article I, Section 8 of the Iowa Constitution mandate suppression of the evidence obtained from the stop. In addition, when we view the stipulated minutes of evidence in the light most favorable to the State, we find substantial support for the district court's verdicts.[1]

I. Factual and Procedural History

On the afternoon of June 16, 2010, Silva was driving his Cadillac Fleetwood east on Interstate 80 in Cedar County. He was traveling with two friends from Washington, Iowa, to Davenport, and "on the way" they smoked marijuana. Silva testified at the suppression hearing that he was "minding [his] own business," when Iowa State Patrol Lieutenant Neil Wellner pulled alongside him in the left lane.

As Lieutenant Wellner tried to pass Silva, he watched the Cadillac drift into the left lane, coming within one foot of striking the patrol car. The trooper testified he had to brake hard to avoid a collision. Silva corrected his lane position as the trooper pulled in behind him. The Cadillac slowed to about fifty-five miles per hour in the seventy-mile-per-hour zone. As the trooper followed him, Silva again drifted out of his lane of traffic, allowing both of his left tires to

[1] Because Silva preserved error on both of his appellate claims, we do not need to reach his alternative argument that his trial attorney provided ineffective assistance.

cross the center dividing line by about six to eight inches. Lieutenant Wellner activated his emergency lights, and Silva pulled onto the shoulder of the interstate.

When the trooper approached the Cadillac he detected a strong odor of burnt marijuana. The trooper asked Silva "how much marijuana he had on him." Silva replied: "I don't have anything on me; we just smoked it." Lieutenant Wellner saw "remnants of raw marijuana" on the floorboard of the car but did not collect any of the flakes as evidence. The trooper recounted that Silva had "red watery eyes, mumbled speech and gave inconsistent answers to questions." Based on his training as a drug recognition expert, Lieutenant Wellner believed Silva was under the influence of a controlled substance. Silva performed field sobriety tests, scoring five clues of impairment on the walk-and-turn test and three clues of impairment on the one-legged stand. Silva refused a preliminary breath test and refused to provide a urine sample for chemical testing.

The trooper transported Silva to the Cedar County jail and monitored him while he changed into a jail uniform. While disrobing, Silva said to the trooper: "You know I have something don't you." The trooper replied that he suspected Silva had marijuana on his person. Silva responded: "I do" and removed from his underwear a clear plastic baggie containing a green leafy substance. The trooper asked Silva what it was and Silva said: "It's marijuana, you know that."

On June 26, 2010, the trooper filed complaints and affidavits accusing Silva of operating while under the influence of a controlled substance and possession of marijuana. On July 27, 2010, the State filed a trial information

charging Silva with reckless driving, in violation of Iowa Code section 321.277, and possession of marijuana, in violation of section 124.401(5). Silva filed a motion to suppress, alleging the traffic stop was unconstitutional. The court held a suppression hearing on May 24, 2011, and denied the motion on May 25, 2011. Following a trial on the minutes of evidence, the court found Silva guilty on both counts. The court imposed a sentence of 180 days with all but four days suspended. Silva now appeals from both the suppression ruling and the verdicts.[2]

II. Standards of Review

This controversy arises from an alleged violation of the Fourth Amendment of the Federal cconstitution and Article I, Section 8 of our state constitution, making our review de novo. *State v. Tague*, 676 N.W.2d 197, 201 (Iowa 2004). We independently evaluate the totality of the circumstances as shown by the entire record. *Id*. We give considerable deference to the trial court's credibility findings, but are not bound by them. *Id*.

We review Silva's sufficiency-of-the-evidence challenge for the correction of errors at law. *State v. Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2008).

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[2] Silva filed a notice of appeal from the July 29, 2011 judgment on both the indictable count of possession of marijuana and the simple misdemeanor count of reckless driving. The State does not challenge his right to directly appeal from the simple misdemeanor conviction. *See* Iowa Code § 814.6(1)(a) (granting defendants right to appeal from final judgments except in cases of simple misdemeanors). In any regard, we have discretion to treat Silva's notice of appeal as an application for discretionary review for the reckless driving count and grant review in this action.

III. Discussion of the Merits

A. Did the State Trooper Have Probable Cause to Stop Silva for a Traffic Violation?

A traffic violation, however minor, justifies stopping a motorist. *Tague*, 676 N.W.2d at 201. In the instant case, the trooper testified that he pulled Silva over for "improper use of lanes"—a violation of Iowa Code section 321.306. Under that provision: "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." Our supreme court extrapolated a "dual purpose" behind section 321.306: (1) to promote the integrity of the lane markings on the highway and (2) to ensure the safe movement of vehicles on laned roadways. *Tague*, 676 N.W.2d at 203. The *Tague* court explained: "A violation does not occur unless the driver changes lanes before the driver ascertains that he or she could make such movement with safety." *Id.*

Silva relies on *Tague* to assert the stop was unjustified. In *Tague*, the supreme court was not convinced a motorist's single and slight drift across the fog line in the absence of any nearby cars violated section 321.306. *See id.* at 203–04. We are faced with a different set of facts here. Silva's Cadillac veered out of his lane and came within one foot of colliding with a state patrol vehicle while both of them were traveling around seventy miles per hour down the interstate. The trooper was forced to brake hard to avoid a collision. After the trooper pulled in behind Silva, Silva slowed his car down to fifty-five miles per hour and, despite still being observed by the trooper, again "drifted out toward

the center line so the left-side tires were over the center." At that point, Lieutenant Wellner signaled for Silva to stop his car. In contrast to Tague, Silva moved out of the right lane before he ascertained that he could do so safely and in fact, almost caused an accident when his car drifted into the left lane.

Silva suggests on appeal that Lieutenant Wellner was exaggerating the closeness of the Cadillac to his cruiser. We reject Silva's suggestion in light of the district court's specific finding that the trooper was reliable in his observations "because the officer was specifically focused on Silva's driving pattern, and is well-trained in doing so." *See State v. Reinders*, 690 N.W.2d 78, 82 (Iowa 2004) (explaining appellate courts give deference to credibility findings of the district court due to the trial judge's opportunity to assess the witnesses).

Viewing the totality of the circumstances, we find the trooper had probable cause to stop Silva for a violation of section 321.306. We also agree with the district court that the trooper had reasonable suspicion to pull over Silva to investigate the possibility he was driving while impaired. Silva's car crossed the lane dividing line while traveling at interstate speeds and while the trooper was trying to pass him, then Silva reduced his speed by fifteen miles per hour and drifted across the dividing line for a second time. Silva's overall erratic driving provided the trooper reasonable suspicion to initiate an investigatory stop. *See Tague*, 676 N.W.2d at 205 (discussing with favor *State v. Slater*, 32 P.3d 685, 688 (Idaho Ct. App. 2001) where act of driving ten to thirty-five miles per hour below lawful speed coupled with crossing edge line gave police reasonable

suspicion for stop). Because the trooper was justified in stopping Silva, the suppression ruling should stand.

B. Did the State Present Substantial Evidence of Silva's Guilt?

1. Reckless Driving

Our legislature has defined reckless driving as operating a vehicle "in such manner as to indicate either a willful or a wanton disregard for the safety of persons or property." Iowa Code § 321.277. The offense breaks down into three elements: "(1) the conscious and intentional operation of a motor vehicle, (2) in a manner which creates an unreasonable risk of harm to others, (3) where such risk is or should be known to the driver." *State v. Conyers*, 506 N.W.2d 442, 444 (Iowa 1993).

Silva first argues his act of crossing the dividing line was "unintentional." Assuming the truth of that argument, it does not preclude his conviction for reckless driving, which "is not an intentional wrong." *See State v. Miskell*, 73 N.W.2d 36, 41 (Iowa 1956). The simple misdemeanor statute is violated by "conscious and intentional driving which the driver knows, or should know, creates an unreasonable risk of harm to others." *Id*.

Silva next contends by "merely drifting across the dividing line by a matter of 6 to 8 inches," he was not aware he was committing an "egregious act that would likely result in harm." We noted in the previous section that Silva's driving—as described by the state trooper—constituted an improper use of lanes, in violation of Iowa Code section 321.306. But we recognize violating an ordinary rule of the road is not proof, by itself, of reckless driving. *See, e.g.*, *State v. Cox*,

500 N.W.2d 23, 26 (Iowa 1993) (concluding stop sign violation did not rise to recklessness without speeding or erratic operation of vehicle); *State v. Klatt*, 544 N.W.2d 461, 463 (Iowa Ct. App. 1995) (holding that passing vehicles in no-passing zone does not constitute reckless driving absent evidence of excessive speed, erratic operation, or conscious disregard for safety of others).

The district court did not commit an error of law in finding Silva willfully or wantonly disregarded the safety of persons or property when driving through Cedar County on June 26, 2010. While driving his Cadillac at highway speeds, Silva nearly caused an accident by drifting into the left lane of traffic; after slowing considerably, he was still unable to keep his car within the lane dividers. His erratic driving, coupled with his decision to smoke marijuana while en route to Davenport, demonstrated a wanton disregard for the safety of other interstate travelers. *See State v. Epperson*, 264 N.W.2d 753, 757 (Iowa 1978) (finding driving under the influence of alcohol showed a "reckless indifference to the safety and property of others"); *State v. Davis*, 196 N.W.2d 885, 891 (Iowa 1972) (holding that even if jurors were not persuaded that defendant was intoxicated, they could consider his drinking as proof of his recklessness). We affirm his reckless driving conviction.

2. Possession of Marijuana

Silva also claims the minutes of evidence did not support the district court's finding that the baggie he pulled from his underwear contained marijuana. He notes the record does not reveal any chemical testing to verify the green leafy substance met the statutory definition for the controlled substance. *See* Iowa

Code § 124.101(19). Silva relies on our supreme court's discussion of prescription drugs in *State v. Brubaker,* 805 N.W.2d 164, 172-73 (Iowa 2011) to support his argument scientific testing was necessary to establish the substance he possessed was truly marijuana.

Brubaker does not aid Silva's appeal. That case reiterates that "for a person to be convicted of a drug offense, the State is not required to test the purported drug." *Brubaker*, 805 N.W.2d at 172 (citing *In re C.T.*, 521 N.W.2d 754, 757 (Iowa 1994)). The fact finder may look to circumstantial evidence to find a substance was an illegal drug. *Id.*; *see State v. Nothrup*, 825 P.2d 174, 177–78 (Kan. Ct. App. 1992) (collecting cases from other jurisdictions).

The trouble in *Brubaker* was that the State's witness testified only that the pills were "consistent with the appearance of a pharmaceutical, Clonazepam, a Schedule IV controlled substance." *See Brubaker*, 805 N.W.2d at 172. By contrast, the minutes in this case showed Silva acknowledged the substance he was hiding in his underwear was marijuana. In addition, Lieutenant Wellner recognized the smell of burnt marijuana emanating from Silva's car and—"based on his education and training"—recognized the green leafy substance in the baggie as raw marijuana. This circumstantial evidence was sufficient for the fact finder to convict Silva of possession of marijuana.

AFFIRMED.