IN THE COURT OF APPEALS OF IOWA

No. 9-056 / 08-1072
Filed February 19, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ADAM CORY SISSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Nathan A. Callahan, District Associate Judge.

Adam Cory Sisson appeals following his conviction and sentence for operating while intoxicated, first offense. **AFFIRMED.**

Barry S. Kaplan of Kaplan, Frese & Nine, L.L.P., Marshalltown, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brook Jacobsen, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Miller and Doyle, JJ.

DOYLE, J.

Adam Cory Sisson appeals following his conviction and sentence for operating while intoxicated (OWI), first offense, in violation of Iowa Code section 321J.2 (2007). He contends the district court erred in denying his motion to suppress evidence because the arresting officer did not have reasonable suspicion to stop the vehicle. Upon our review, we affirm.

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

At approximately 2:00 a.m. on February 22, 2007, Cedar Falls Police Officer Kimm Froning was patrolling University Avenue, a four-lane highway, in Cedar Falls, Iowa. Officer Froning observed a red vehicle heading westbound on University Avenue that she described as "going back and forth between the lines within its lane," more so than a normal vehicle. Officer Froning did not initiate a traffic stop of the vehicle after her first observations. Instead, she activated the video camera in her patrol car and continued to follow the vehicle. Thereafter, Officer Froning observed the vehicle swerve between the lanes again and then observed the car make a wide southbound turn onto the ramp of Highway 58.[1] Officer Froning continued following the vehicle and once more observed the vehicle swerve within its lane and then cross the white portion of the emergency line on the right side.[2] Officer Froning then pulled the vehicle over. In total,

[1] Officer Froning testified that she began videotaping the vehicle after she first observed its swerving; however, because it takes a while for the camera to begin recording, the video begins while the vehicle is making the turn onto the Highway 58 ramp and Officer Froning's earlier observations were not captured on the video.

[2] The videotape was played at the suppression hearing. When asked if the videotape showed what she observed that day, Officer Froning testified that "the quality of our video system, our videotapes, are not as good as what you can see in real life" and that it is "easier to see the swerving in the lanes in real life than it is on the videotape." Upon our review, we find the tape to be inconclusive.

Officer Froning followed the vehicle for approximately two minutes, covering about two miles. The vehicle never exceeded the speed limit, and Officer Froning did not observe any other traffic violations while she was following the vehicle.

After Officer Froning pulled the vehicle over, she identified the driver as Sisson. Sisson consented to perform some field sobriety tests. Officer Froning's report noted that the wind for the sobriety tests was "slight to gusts," and that "Sisson swayed with the wind gusts" while performing the one leg stand sobriety test. Officer Froning concluded that Sisson failed the tests. Sisson also consented to a preliminary breath test, which revealed that he was over the legal limit. Officer Froning subsequently arrested Sisson for OWI.

On March 29, 2007, the State filed a trial information charging Sisson with OWI, first offense. Sisson filed a motion to suppress all the evidence obtained as a result of the stop. His motion contended Officer Froning did not have probable or reasonable cause to stop the vehicle, violating his constitutional rights. The district court denied his motion. Following a bench trial on the minutes of testimony, the district court found Sisson guilty as charged. Sisson appeals, contending the district court erred in denying his motion to suppress.

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

Because Sisson asserts that his constitutional rights under the Fourth Amendment were violated, our review is de novo. *State v. Heminover*, 619 N.W.2d 353, 356 (Iowa 2000), *reversed in part on other grounds by State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001). We independently evaluate Sisson's claim under the totality of the circumstances. *State v. Kinkead*, 570 N.W.2d 97,

99 (Iowa 1997). Although we give deference to the district court's credibility assessments and fact findings, we are not bound by those findings. *Turner*, 630 N.W.2d at 606. If any evidence was obtained in violation of Sisson's Fourth Amendment rights, it is inadmissible and must be suppressed regardless of its probative value or relevance. *State v. Schrier*, 283 N.W.2d 338, 342 (Iowa 1979).

***III. Discussion*.**

On appeal, Sisson claims the district court erred in overruling his motion to suppress because the record does not show that Officer Froning had reasonable suspicion to stop the vehicle. In order to justify Officer Froning's stop of the vehicle, the State must prove the officer had reasonable suspicion to believe criminal activity had occurred or was occurring. *State v. Tague*, 676 N.W.2d 197, 204 (Iowa 2004). Unparticularized suspicion is insufficient to meet the reasonable suspicion standard, but the threshold for reasonable suspicion is considerably less than the standard for probable cause. *State v. Kreps*, 650 N.W.2d 636, 641-42 (Iowa 2002). We gauge the reasonableness of Officer Froning's stop based on whether or not the facts available to the officer at the moment of the stop would cause a reasonably cautious individual to deem the action taken by the officer appropriate. *State v. Wiese*, 525 N.W.2d 412, 414 (Iowa 1994), *overruled on other grounds by State v. Cline*, 617 N.W.2d 277, 281 (Iowa 2000).

In *State v. Tompkins*, 507 N.W.2d 736, 740 (Iowa Ct. App. 1993), we found that when a police officer observed a defendant weave "from the center line to the right side boundary several times," this gave rise to the officer's

reasonable suspicion for stopping the defendant. Our supreme court discussed the *Tompkins* holding in *State v. Otto*, 566 N.W.2d 509, 511 (Iowa 1997), stating:

> We do not believe *Tompkins* should be read to hold that observation of a vehicle weaving within one's own lane of traffic will always give rise to reasonable suspicion for police to execute a stop of the vehicle. Rather, the facts and circumstances of each case dictate whether or not probable cause exists to justify stopping a vehicle for investigation.

More recently, our supreme court has held that an officer's observation of a vehicle crossing over the line of a painted median dividing a four-lane road for a brief period was not sufficient to give rise to a reasonable suspicion that the driver was intoxicated or fatigued. *Tague*, 676 N.W.2d at 205.

The district court found this to be a close case, and we agree. Here, Officer Froning observed, at approximately 2:00 a.m., multiple instances of swerving, a wide turn, and the crossing of the emergency line. Although Officer Froning's report indicated that the wind during the sobriety tests was "slight to gusts," she also testified that Sisson was swerving more than normal traffic. Upon our review of the record and applicable case law, we conclude the totality of the circumstances supported a reasonable suspicion that criminal activity had occurred or was occurring. Accordingly, we affirm the ruling of the district court.

IV. Conclusion.

Because we conclude the totality of the circumstances supported a reasonable suspicion that criminal activity had occurred or was occurring, we affirm the ruling of the district court.

AFFIRMED.