IN THE COURT OF APPEALS OF IOWA

No. 9-586 / 08-1429
Filed December 17, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAN JOE GUSTAFSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Guthrie County, Darrell Goodhue, Judge.

The State seeks reversal of the district court's ruling granting the defendant's motion to suppress all evidence garnered after the stop of his vehicle. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor and Kyle Hanson, Assistant Attorneys General, and Mary Benton, County Attorney for appellee.

Considered by Vaitheswaran, P.J., Mansfield, J., and Zimmer, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

PER CURIAM

Following the granting of discretionary review, the State seeks reversal of the district court's ruling granting the defendant's motion to suppress all evidence garnered after the stop of his vehicle. Because we conclude the stopping officer had reasonable suspicion a criminal act was occurring, we reverse and remand.

I. Background Facts and Proceedings. On the evening of March 14, 2007, Iowa State Trooper Thomas Williams observed Dan Gustafson's truck heading north on McPherson Street in the town of Casey. It appeared to Trooper Williams that the rear license plate of the truck was not illuminated as required by Iowa Code section 321.388 (2007) (requiring the rear license plate to be illuminated so as to render it legible from a distance of fifty feet to the rear). Because the area was well-lit, Trooper Williams decided to follow the vehicle into a darker area to verify the license plate lamp was out.

After following Gustafson's vehicle for a time, Trooper Williams confirmed the license plate lamp was not functioning. Trooper Williams estimated the closest distance he was traveling behind Gustafson's vehicle was three to five car lengths. He defined a car length as a distance between twelve and fifteen feet.

Upon verifying Gustafson's license-plate light was not working, Trooper Williams initiated a traffic stop. Because the wires running to the truck's license plate lamp were disconnected, the trooper decided to issue Gustafson a repair order or "fix-it ticket." While explaining the fix-it ticket, Trooper Williams smelled the odor of an alcoholic beverage coming from Gustafson and observed that his eyes were bloodshot and watery. Gustafson admitted to having just left a bar,

and he stated that he had consumed three beers during the course of that evening.

Trooper Williams administered field sobriety tests to Gustafson, which he failed. A preliminary breath test showed Gustafson had a blood alcohol content of .105 which is in excess of the legal limit. At that point, Trooper Williams placed Gustafson under arrest and transported him to the county jail.

Gustafson was charged with second offense operating while intoxicated in violation of Iowa Code section 321J.2. He pled not guilty and filed a motion to suppress, in which he alleged the stop of his vehicle "was not supported by reasonable suspicion or probable cause." Following a hearing, the district court granted the motion based on this court's decision in *State v. Reisetter*, 747 N.W.2d 792 (Iowa Ct. App. 2008). *Reisetter* holds that in order to form a reasonable suspicion that section 321.388 has been violated, an officer must be within fifty feet, or something that "reasonably approximates" fifty feet of the vehicle being viewed. *Reisetter*, 747 N.W.2d at 795. The district court expressed skepticism with the result in *Reisetter*, but was unable to draw any meaningful distinction between the factual situation presented there and the facts presented by this case.

The State filed an application for discretionary review of the district court's ruling granting the motion to suppress. The application asserted that the *Reisetter* decision did not require invalidation of the stop and further urged that discretionary review should be granted "because the analysis in *State v. Reisetter* is causing confusion for the bench and bar." Our supreme court granted discretionary review and transferred the case to this court.

II. Scope and Standard of Review. Gustafson challenged the vehicle stop based on his constitutional right to be free from unreasonable search and seizure, as guaranteed by the Fourth Amendment of the United States Constitution and article I, section 8 of the Iowa Constitution. We review alleged constitutional violations de novo in light of the totality of the circumstances as shown by the entire record. *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001). "We give deference to the district court's fact findings due to its opportunity to assess the credibility of witnesses, but we are not bound by those findings." *Id.*

III. Discussion. In its brief on appeal, the State contends that the *Reisetter* decision was in error and should be overruled. However, the State contends that even under the *Reisetter* standard, Trooper Williams had sufficient grounds to stop the defendant's truck. For the reasons which follow, we agree that the stop was proper even under *Reisetter*.

An officer may stop a vehicle for investigatory purposes when there is a reasonable suspicion that a criminal act has occurred or is occurring. *State v. Kreps*, 650 N.W.2d 636, 641 (Iowa 2002). The purpose of such a stop is to allow the officer to confirm or dispel suspicions of criminal activity through reasonable questioning. *Id*. A traffic violation, however minor, gives an officer probable cause to stop a motorist. *State v. Aderholdt*, 545 N.W.2d 559, 563 (Iowa 1996).

The State contends the district court erred in granting Gustafson's motion to suppress because Trooper Williams had reasonable suspicion to make a traffic stop after observing the rear license plate of Gustafson's truck was not illuminated as required by section 321.388. This section requires a vehicle's rear

license plate to be illuminated so as to render it visible from a distance of fifty feet at all times the head lamps are lighted. Iowa Code § 321.388.

In *State v. Reisetter*, the defendant was stopped for failing to have his rear license plate illuminated. *Reisetter*, 747 N.W.2d at 793. Following the stop, the officer suspected the defendant was intoxicated. *Id.* A breath test revealed his blood alcohol content to be .119. *Id.* The defendant filed a motion to suppress the evidence following the traffic stop, which the district court denied. *Id.* On appeal, this court determined the defendant's motion to suppress should have been granted because the officer did not have a reasonable belief criminal activity was afoot. *Id.* at 795. The majority opinion turned on the fact the statute requires a license plate be visible at a distance of fifty feet and the officer was no closer than one hundred feet behind the defendant at the time the stop was initiated. *Id.* at 794-95.

> [A]t the time of this stop, [the officer] was more than twice the statutory distance from [the defendant]'s vehicle. Therefore, he was not close enough to justify a stop to "resolve the ambiguity" as to whether "criminal activity [was] afoot." Without the facts that would support reasonable suspicion that the statutory requirement of fifty feet was being violated, an officer could claim at any distance, that a license plate was not illuminated and therefore justify a stop.

Id. (citation omitted).

In granting Gustafson's motion to suppress, the district court found it could not draw any meaningful distinctions between the factual situation in *Reisetter* and the case at bar. We conclude the facts of the two cases are distinguishable, and thus, we conclude Gustafson's motion to suppress should have been denied.

In *Reisetter*, the officer was following the defendant's vehicle at a distance of over one hundred feet. *Id.* at 793. Although the officer testified he was three to four car lengths behind the defendant's vehicle, "there was no follow-up as to how [the officer] would measure these lengths." *Id.* at 794. The opinion goes on to state:

> That is not to say that reasonable suspicion only arises if an officer is within fifty feet and questions compliance with the statute. For example, if the deputy had testified that he observed the plate from something that would approximate fifty feet, and it did not appear to be illuminated so as to be legible, we would likely find the stop reasonable, as it is impossible to measure the precise distance between two moving vehicles. Then, after a legitimate stop, a more accurate measurement could be made to confirm the officer's reasonable suspicion that the vehicle was not in compliance with the statutory length of fifty feet.

Id. at 794-95.

Here, Trooper Williams testified he was following Gustafson's vehicle at a distance of three to five car lengths. He estimated a car length to be between twelve and fifteen feet. Therefore, the trooper was following Gustafson from a minimum distance of thirty-six feet to a maximum distance of seventy-five feet. This is a distance that would "approximate" fifty feet, and it is closer than the deputy was to the defendant in *Reisetter*. The record also reveals Trooper Williams followed the truck from a street that was illuminated into a darker area and then "backed away" from the truck to be sure the headlights of his patrol car were not illuminating the license plate of the truck. He followed the truck up a hill to an intersection where the truck turned left. The trooper followed the truck around the corner where he was relatively close to the truck again. Turning the

corner helped the trooper confirm that the light was out. Trooper Williams then stopped Gustafson's truck.

We believe the facts we have just described show Trooper Williams observed Gustafson's license plate did not appear to be illuminated so as to be legible from a distance that would "approximate fifty feet." Accordingly, the benchmark established in *Reisetter* has been met. Because the trooper was justified in stopping Gustafson's vehicle, the motion to suppress all evidence garnered from the stop of his vehicle should have been denied. We reverse the ruling granting the motion to suppress and remand for further proceedings not inconsistent with this opinion.[1]

REVERSED AND REMANDED.

Zimmer, S.J., concurs specially.

[1] The members of the court who join this per curiam opinion believe that the points raised by Judge Zimmer in his special concurrence have some merit. However, we need not address these matters at this time because we conclude that the stop of Gustafson's vehicle was proper even under *Reisetter*.

ZIMMER, S.J. (concurring specially)

I concur in the result. I agree with the conclusion that Trooper Williams had reasonable suspicion to stop the defendant even under the standard set forth in *State v. Reisetter*. I write specially because I have some concerns that the majority opinion in *Reisetter* will continue to cause some confusion as the State suggests.

As my dissent in *Reisetter* points out, I believe the traffic stop in that case was objectively reasonable. A deputy sheriff followed Reisetter's vehicle for a distance of one mile at 2:00 a.m. on a county road. From his vantage point behind the vehicle, he was able to observe that the license plate light was out. After making that observation, the deputy stopped the vehicle and confirmed the license light was not working at all. The defendant did not contend the light was working, and the trial court affirmatively found the deputy's observation was correct.[2]

At the hearing held on Reisseter's motion to suppress, the deputy was asked how far his vehicle was behind the defendant's at the time he decided to initiate a stop. He replied: "Well let me see. I'll try to give you an estimate distance, but I'd say, you know, three—three or four car lengths, so probably under a hundred feet or close to it I suppose." In my view, it is not surprising that the deputy was not sure of the precise distance between two moving vehicles. I believe the record in *Reisetter* established that the deputy made his observations from no more than one-hundred feet and likely considerably closer. As I said in

[2] I recognize that information gathered after the stop cannot be considered in evaluating whether the trooper had reasonable suspicion to initiate a stop. *State v. Kreps*, 650 N.W.2d 636, 642 (Iowa 2002).

my dissent: "Whatever the exact distance, it is clear that the deputy was close enough to the defendant's vehicle to observe that the registration plate light was not working." I continue to believe that the stop in *Reisetter* did not violate the United States and Iowa Constitutions.

I agree with the State's contention that the *Reisetter* decision places a higher burden on officers than is constitutionally required. In essence, *Reisetter* holds that in order to form even reasonable suspicion that section 321.388 has been violated, an officer must be within fifty feet or something that "reasonably approximates" fifty feet of the vehicle being observed. Thus, an officer cannot have reasonable suspicion until he has affirmatively established a violation of section 321.388. In my view, this does not comport with the general standard of reasonableness required in all automobile stops. *State v. Heminover*, 619 N.W.2d 353, 357 (Iowa 2000), *overruled on other grounds by State v. Turner*, 630 N.W.2d 601, 606 n.2 (Iowa 2001) (citing *Whren v. United States*, 517 U.S. 806, 810, 116 S. Ct. 1769, 1772, 135 L. Ed. 2d 89, 95 (1996)).

I also respectfully submit that the majority's analysis in *Reisetter* confuses the distinct requirements of section 321.388. I read that section as imposing two separate requirements. First, a vehicle must have an illuminated license plate. Second, the statute requires the light to make the plate "legible" from fifty feet away. While an officer may arguably need to be within fifty feet to form a reasonable suspicion for an unlawfully dim tag light, the failure to illuminate a plate at all can be detected from farther away. In my view, the majority opinion *Reisetter* does not recognize this difference. In the present case, the district court recognized and commented on this inconsistency. The court stated:

"Common experience tells one that a light or absence of a light can be observed at a far more distance point the fifty feet at which illumination can be said to be adequate to read a license plate." I agree.

I respectfully submit that, at a minimum, this court's published opinion in *State v. Reisetter* requires some clarification.