

**IN THE COURT OF APPEALS OF IOWA**

No. 9-647 / 08-2029  
Filed September 17, 2009

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**KYLE GAVIN TROGE,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Bremer County, Peter B. Newell,  
District Associate Judge.

Defendant appeals his conviction for operating while intoxicated, second  
offense. **REVERSED AND REMANDED.**

David Johnson of Brinton, Bordwell & Johnson, Clarion, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney  
General, Kasey E. Wadding, County Attorney, and Jill Dashner, Assistant 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).

**ZIMMER, S.J.**

Kevin Gavin Troge appeals from the judgment and sentence entered following his conviction for operating while intoxicated, second offense, in violation of Iowa Code section 321J.2 (2007). He contends the district court erred in denying his motion to suppress because the arresting officer did not have probable cause or reasonable suspicion to stop his vehicle. We reverse and remand.

**I. Background Facts and Proceedings**

On June 14, 2008, at about 2:00 a.m., Bremer County Deputy Sheriff Brian Bockhaus began following a pickup truck in Waverly, Iowa. He saw the pickup drift about three times within its own lane of traffic and then turned on the video camera in his patrol car.<sup>1</sup> The deputy testified the pickup drifted four or five distinct times after he turned on his video recorder. The vehicle did not cross either the center line or the fog line at any time while the deputy was following it. The deputy described the drifting which he observed as slow and gradual.

While Deputy Bockhaus was following the pickup, the road changed from a two-lane to a four-lane street. Soon after this change occurred, the deputy observed the pickup move from the left lane to the right lane. According to Bockhaus, the driver did not signal the lane change until the vehicle was halfway into the right lane. The deputy stated the failure to signal affected his decision to stop the vehicle, but he did not think it was a decisive factor. The deputy testified that he believed the failure to signal the lane change violated Iowa Code section

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<sup>1</sup> Deputy Bockhaus defined the number of drifts by direction. He testified he counted one time as drifting over to one side, then another as drifting back, and a third as drifting to the side again.

321.314.<sup>2</sup> Deputy Bockhaus filed a written incident report that states he observed an improper lane change.

The deputy continued to follow the pickup after it changed lanes. After the vehicle turned into a Wal-Mart parking lot, the deputy initiated a traffic stop. The driver of the vehicle was Kyle Troge. Troge failed a field sobriety test and submitted to a preliminary breath test, which revealed his blood alcohol level was over the legal limit. Deputy Bockhaus then arrested Troge for operating while intoxicated and transported him to jail. Troge submitted to chemical testing and was determined to have blood alcohol level of .093. The State subsequently charged Troge with operating while intoxicated, second offense.

Troge filed a motion to suppress claiming the deputy did not have probable cause to stop his vehicle. The district court denied the motion. Troge waived his right to a jury trial, and the case proceeded to a trial to the court on the minutes of testimony. The court found Troge guilty of operating while intoxicated, second offense. Troge appeals the district court's ruling on his motion to suppress.

## **II. Standard of Review**

We review *de novo* constitutional claims arising from a motion to suppress. *State v. Feregrino*, 756 N.W.2d 700, 703 (Iowa 2008). We

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<sup>2</sup> Iowa Code section 321.314 provides:

No person shall turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety and then only after giving a clearly audible signal by sounding the horn if any pedestrian may be affected by such movement or after giving an appropriate signal in the manner hereinafter provided in the event any other vehicle may be affected by such movement.

independently evaluate Troge's claims in light of the totality of the circumstances. *State v. McConnelee*, 690 N.W.2d 27, 30 (Iowa 2004).

### III. Merits

Under the Fourth Amendment, in order to stop a vehicle, a peace officer must have a reasonable suspicion that criminal activity is afoot. *State v. Corbett*, 758 N.W.2d 237, 240 (Iowa Ct. App. 2008) (citing *Terry v. Ohio*, 392 U.S. 1, 20-22, 88 S. Ct. 1868, 1879-81, 20 L. Ed. 2d 889, 905-06 (1968)). The State must show by a preponderance of the evidence that the stopping officer had specific and articulable facts, which taken together with rational inferences from those facts, lead to a reasonable belief that criminal activity may have occurred. *State v. Tague*, 676 N.W.2d 197, 204 (Iowa 2004). We consider the totality of the circumstances to determine whether the officer had an objective basis for suspecting criminal activity. *Corbett*, 758 N.W.2d at 240. Where evidence is obtained in violation of the Fourth Amendment it is inadmissible. *State v. Lloyd*, 701 N.W.2d 678, 680 (Iowa 2005). A traffic violation, however minor, gives an officer probable cause to stop a motorist. *State v. Aderholt*, 545 N.W.2d 559, 563 (Iowa 1996).

We first address the deputy's claim that Troge violated section 321.314 by failing to properly signal a lane change. We note that section 321.314 regulates turn signals at corners, not lane changes.<sup>3</sup> Moreover, under section 321.314 drivers are only required to use turn signals when another vehicle may be affected by the turn. *State v. Kinkead*, 570 N.W.2d 97, 102 (Iowa 1997); *State v.*

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<sup>3</sup> The State's brief on appeal concedes that section 321.314 may not apply to defendant's conduct, but argues that the defendant's failure to use his turn signal until he had almost completed the lane change is indicative of impaired judgment.

*Malloy*, 453 N.W.2d 243, 244 (Iowa Ct. App. 1990). We do not believe section 321.314 has any application to this case.

Changing lanes in a roadway that has three or more lanes is actually regulated by section 321.306.<sup>4</sup> That section does not require a turn signal to make a lane change when traveling on a road with two or more lanes in the same direction. Our supreme court discussed section 321.306 in *Tague*, 676 N.W.2d at 203-04. The court stated: “A violation does not occur unless the driver changes lanes before the driver ascertains that he or she could make such movement with safety.” *Tague*, 676 N.W.2d at 203. As the district court acknowledged in its ruling on Troge’s motion to suppress, “The failure to use a turn signal while changing lanes may not be a violation of the Iowa Code.”

In this case, the video shot from the patrol car shows that Troge’s pickup truck changed lanes in a safe and unremarkable manner, without any indication that the driver did not ascertain that it was safe to make a lane change. The video recording does not show that the deputy’s vehicle was adversely affected by the lane change, whether or not a signal was used by the defendant. The record in this case does not support the conclusion that section 321.306 was violated in any way by Troge’s conduct. We conclude Troge’s lane change did not provide probable cause for the stop and did not give rise to a reasonable

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<sup>4</sup> Section 321.306 provides in relevant part:

Whenever any roadway has been divided into three or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:

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.

suspicion criminal activity was afoot. See *Corbett*, 758 N.W.2d at 240. We now consider Deputy Bockhaus's other observations.

In Iowa, the observation that a vehicle is weaving within its own lane may give rise to reasonable cause to believe the driver is operating while intoxicated. *State v. Tompkins*, 507 N.W.2d 736, 739 (Iowa Ct. App. 1993). On the other hand, observation of a vehicle weaving within its own lane of traffic does not always give rise to reasonable suspicion permitting officers to stop the vehicle. *State v. Otto*, 566 N.W.2d 509, 511 (Iowa 1997). "Rather, the facts and circumstances of each case dictate whether or not probable cause exists to justify stopping a vehicle for investigation." *Id.*

Here, there was no evidence that Troge was "changing [his] speed erratically, veering left and right at sharp angles, and consistently going back and forth from left to right." See *Tague*, 676 N.W.2d at 205. A review of the videotape reveals that the pickup moved slowly near the center median once, and moved slowly near the center white line once.<sup>5</sup> The videotape does not support the assertion that the pickup drifted four or five distinct times. The Troge vehicle never crossed the center lines or shoulder lines, and the videotape does not reveal any violations of the rules of the road. The videotape shows the truck changed lanes in a safe and unremarkable manner. The vehicle proceeded

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<sup>5</sup> The trial court described the videotape in the following manner:

[T]he defendant's vehicle can be observed drifting slowly and gradually toward the center line and then back towards the middle of his lane. The vehicle can be seen traveling into the right hand lane and not signaling until the vehicle is largely in that lane.

The court acknowledged that the "driving observed on the videotape is not severe" but concluded that the totality of the circumstances confronting the officer provided reasonable suspicion which would justify a stop. The court described Troge's failure to use a turn signal as an "example of poor driving behavior which would be consistent with indecision, fatigue or impairment."

through several controlled intersections, moved into a right-turn-only lane, and executed a right turn at a controlled intersection without incident. The videotape reveals no weaving or erratic driving. We do not believe an objective person watching the videotape for the first time would have a reasonable suspicion that the driver of the pickup was under the influence.

On our de novo review, and considering the totality of the circumstances, we determine the facts available to the officer at the moment of the stop would not “warrant a man of reasonable caution in the belief” that the action taken was appropriate. See *Terry*, 392 U.S. at 21-22, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906. There was no “particularized and objective basis for suspecting legal wrongdoing.” See *Corbett*, 758 N.W.2d at 240 (citation omitted). Because we find the deputy did not have reasonable suspicion to stop the vehicle, we reverse the decision of the district court denying Troge’s motion to suppress. We reverse Troge’s conviction and remand the case to the district court for further proceedings not inconsistent with this opinion.

**REVERSED AND REMANDED.**