

**IN THE COURT OF APPEALS OF IOWA**

No. 9-761 / 09-0254  
Filed October 21, 2009

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

**vs.**

**KYLE RYAN BYRNE,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Muscatine County, Gary P. Strausser, District Associate Judge.

Kyle Byrne appeals from his conviction and sentence for operating while intoxicated, second offense, following the district court's denial of his motion to suppress evidence obtained following a traffic stop. **AFFIRMED.**

David Scieszinski, Wilton, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, Scott Wadding, Student Legal Intern, Gary Allison, County Attorney, and Korie Shippee, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., Mansfield, J., and Mahan, S.J.\*

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

**MAHAN, S.J.**

Kyle Byrne appeals following his conviction and sentence for operating while intoxicated, second offense, in violation of Iowa Code section 321J.2 (2009). He contends the district court erred in denying his motion to suppress because the arresting officer did not have reasonable suspicion to stop his vehicle. We affirm.

**I. Background Facts and Proceedings.**

On July 27, 2008, at approximately 12:46 a.m., Muscatine deputy Dustin Brooks observed Byrne travelling on Park Avenue, a four-lane road with two northbound lanes and two southbound lanes. Deputy Brooks was on routine patrol travelling in the left northbound lane of Park Avenue when he first observed Byrne travelling ahead of him in the right northbound lane. Byrnes was not speeding. Deputy Brooks noticed, however, that Byrne's "vehicle seemed to be having problems staying within its lane," and activated the video camera in his patrol car to record Byrne's driving.

As shown by the video recording, Deputy Brooks observed Byrne's left tires touch the center white line dividing the left and right northbound lanes several times, and then completely cross the center white line. Deputy Brooks then saw Byrne swerve back into the right lane and nearly hit the curb on the right side of the road. Just before Deputy Brooks activated his emergency lights, Byrne again crossed the center white line and was straddling both lanes as he entered an intersection. All this occurred within the time span of a minute and within the distance of approximately one-half mile.

Deputy Brooks stopped Byrne and approached his vehicle. Byrne admitted he had been drinking and failed field sobriety testing. Byrne refused to take a breath test. Deputy Brooks arrested Byrne for operating while intoxicated and transported him to the Muscatine County Jail. On August 7, 2008, the State filed a trial information charging Byrne with operating while intoxicated, second offense. Byrne pled not guilty. On September 23, 2008, Byrne filed a motion to suppress all evidence obtained as a result of the stop. Following a hearing, the district court entered an order denying Byrne's motion to suppress, finding in part:

The Court finds Deputy Dustin Brooks credible. His description of the operation of the defendant's vehicle is generally consistent with what can be observed when viewing the recording. This Court concludes a reasonable suspicion existed for an investigatory stop. This case can be distinguished from *State v. Tague*, 676 N.W.2d 197 (Iowa 2004). In *Tague* the left tires of Tague's vehicle momentarily crossed over the left edge line. The Court in *Tague* recognized that individuals are not required to drive a perfect vector on the highway and that momentarily crossing an edge line does not support a reasonable suspicion that an individual is intoxicated or fatigued. In this case, the left side tires of the vehicle operated by the defendant cross the white lines dividing the northbound lanes of traffic on two separate occasions. In addition, the left side tires of the vehicle operated by the defendant touch the white lines dividing the two northbound lanes of traffic on two occasions. These occasions are separated by both time and distance. Thus, this is not an isolated incident of momentarily crossing a line upon a roadway. The totality of the above-described conduct causes the Court to conclude that a reasonable suspicion existed justifying a stop of the vehicle driven by the defendant; therefore, the defendant's Motion to Suppress is denied.

Byrne waived his right to a jury trial. On December 15, 2008, following a trial on the minutes of testimony, the court found Byrne guilty of operating while

intoxicated, second offense, and imposed sentence. Byrne now appeals, alleging the district court erred in denying his motion to suppress.

## **II. Scope and Standard of Review.**

Because Byrne contends his constitutional rights under the Fourth Amendment of the United States Constitution (and the comparable provision of the Iowa Constitution) were violated, our review is de novo. *State v. Naujoks*, 637 N.W.2d 101, 106 (Iowa 2001). Our task is to independently evaluate Byrne's claim under the totality of the circumstances as shown by the entire record. *State v. Tague*, 676 N.W.2d 197, 201 (Iowa 2004). "We give considerable deference to the trial court's findings regarding the credibility of the witnesses, but are not bound by them." *Id.*

## **III. Merits.**

Byrne contends the district court erred in overruling his motion to suppress because the record does not show Deputy Brooks had reasonable suspicion to stop his vehicle. Upon a defendant's challenge to a stop on the basis that reasonable suspicion for an investigatory stop did not exist, the State must show by a preponderance of the evidence that the stopping officer had specific and articulable facts, taken together with rational inferences from those facts, to reasonably believe criminal activity had occurred or was occurring. See *id.* at 204; *State v. Kinkead*, 570 N.W.2d 97, 100 (Iowa 1997). Any evidence obtained through an unjustified investigatory stop must be suppressed. *State v. Jones*, 586 N.W.2d 379, 382 (Iowa 1998).

Whether reasonable suspicion existed must be determined under the totality of the circumstances confronting the officer at the time of the stop. *State*

*v. Kreps*, 650 N.W.2d 636, 641-42 (Iowa 2002). In this case, therefore, we are to gauge the reasonableness of Deputy Brooks's stop based on whether or not the facts available to Deputy Brooks at the moment of the stop would cause a reasonably cautious individual to deem the action taken by the officer appropriate. See *Tague*, 676 N.W.2d at 204; *Kreps*, 650 N.W.2d at 641-42. The State argues the stop was permissible because Byrne's abrupt weaving gave Deputy Brooks reasonable suspicion (1) that Byrne was operating the motor vehicle while intoxicated, (2) that Byrne had violated Iowa Code section 321.306,<sup>1</sup> and (3) to stop Byrne's vehicle out of concern for the public safety under the community caretaking function.

Iowa appellate courts have had numerous opportunities in recent years to evaluate whether an officer's observations of a vehicle being driven dangerously or erratically were indeed sufficient to give rise to a reasonable suspicion that the driver was intoxicated or fatigued. See, e.g., *Tague*, 676 N.W.2d at 204-05 (concluding officer lacked reasonable suspicion to stop defendant's vehicle when officer observed the vehicle's left tires cross briefly over the left edge line of divided highway and return to its lane); *State v. Otto*, 566 N.W.2d 509, 510-11 (Iowa 1997) (determining officer had reasonable suspicion to stop defendant who was changing speed erratically, veering left and right at sharp angles, and constantly going back and forth from left to right over a distance of more than three miles); *State v. Tompkins*, 507 N.W.2d 736, 740 (Iowa Ct. App. 1993)

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<sup>1</sup> A person violates this section of chapter 321 if the person changes lanes without first ascertaining that the movement can be done safely.

(finding officer had reasonable suspicion after observing defendant's car weaving from the center line to the right side boundary several times).<sup>2</sup>

Upon our de novo review, we conclude the facts and circumstances in this case gave rise to Deputy Brooks's reasonable suspicion that criminal activity had occurred or was occurring, and therefore justified the investigatory stop. See *Kinkead*, 570 N.W.2d at 100. Deputy Brooks first noticed Byrne's vehicle because it "seemed to be having problems staying within its lane." Deputy Brooks became concerned about the vehicle and activated the video camera in his patrol car to record Byrne's driving. Within the next minute or so, Deputy Brooks observed Byrne's left tires touch the center white line dividing the left and right northbound lanes several times, swerve back into the right lane and nearly hit the curb on the right side of the road, and completely cross the center white line two times.<sup>3</sup>

Byrne was driving at nearly 1:00 a.m., a time an officer could reasonably expect that people would be driving home from bars. See *Kreps*, 650 N.W.2d at 647 (noting that late-night activity, when combined with other specific and articulable facts, may be a factor giving rise to reasonable suspicion that criminal activity was afoot). Furthermore, Byrne was travelling at a moderate in-city speed, and no precipitation or noticeably windy weather conditions were present

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<sup>2</sup> Our supreme court discussed the *Tompkins* holding in *Otto*, 566 N.W.2d at 511, and indicated that *Tompkins* should not be read to hold that observation of a vehicle weaving within one's own lane of traffic will always give rise to reasonable suspicion justifying a stop of the vehicle. The court went on to state that the facts and circumstances of each case should dictate whether or not reasonable suspicion exists for police to execute an investigative stop. *Id.*

<sup>3</sup> We defer to the district court's findings with regard to Deputy Brooks's credibility, see *Tague*, 676 N.W.2d at 201, as we have viewed the video recording and it verifies the observations Deputy Brooks testified to.

that may have otherwise caused his driving to be erratic. When Deputy Brooks activated his emergency lights, Byrne's vehicle was straddling both lanes as he entered an intersection.

Based on an "objective appraisal" of the circumstances in this case, we would be critical of Deputy Brooks if he had *not* stopped Byrne's vehicle to investigate the cause of the erratic driving he observed and recorded. See *id.* at 642-43. Because we conclude the investigatory stop of Byrne was reasonable, we affirm the district court's denial of his motion to suppress. See *Otto*, 565 N.W.2d at 511; *Tompkins*, 507 N.W.2d at 738. We affirm Byrne's conviction and sentence for operating while intoxicated, second offense.

**AFFIRMED.**