IN THE COURT OF APPEALS OF IOWA

No. 9-764 / 09-0377
Filed October 21, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

HOWARD SHAW, JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Mitchell County, Bryan H. McKinley, Judge.

Howard Shaw, Jr. appeals his conviction for operating while intoxicated, second offense. **AFFIRMED.**

Judith O'Donohoe of Elwood, O'Donohoe, Braun & White, New Hampton, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney General, Mark L. Walk, County Attorney, and Nicholas T. Larson, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield, J., and Miller, S.J.*

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

MILLER, S.J.

Howard Shaw, Jr. appeals 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 evidence. Because we conclude Shaw's rights against unreasonable search and seizure were not violated, we affirm.

I. Background Facts and Proceedings. In the early morning hours of May 25, 2008, Shaw was driving to a friend's house after leaving a drinking establishment in Mitchell. On the way, he drove past Deputy Sheriff Halbach, who was sitting in his vehicle while conversing with several people. As Shaw's vehicle passed, Tonya Kleckner informed the deputy that it did not have operating taillights. Deputy Halbach turned around and observed the vehicle driving away. He confirmed it did not have its taillights on, so he began to pursue it.

Shaw pulled into his friend's driveway and stopped the vehicle. Deputy Halbach pulled in behind it a short time later. The deputy asked Shaw to produce his vehicle registration and proof of insurance, which Shaw produced. Because there was light rainfall, Deputy Halbach told Shaw to sit in his patrol car while they talked. It was in the patrol car that Deputy Halbach detected the "faint odor of alcoholic beverage" emanating from Shaw. The deputy also noticed Shaw's eyes were bloodshot and watery, and his speech was slurred. Shaw admitted to consuming four drinks.

Deputy Halbach had Shaw perform field sobriety tests and marked Shaw down as failing two of the three tests. Shaw could not stand on one foot more than momentarily, and the deputy stopped the one-leg-stand test out of concern for Shaw's safety. A preliminary breath test showed Shaw's blood alcohol concentration exceeded the legal limit of .08. Accordingly, Shaw was placed under arrest and transported to the sheriff's office. A breath test showed his blood alcohol concentration was .158. After being advised of his rights, Shaw stated he had consumed approximately five or six drinks between 9:30 p.m. and 1 a.m.

Shaw was charged with operating while intoxicated, second offense. He entered a plea of not guilty and waved his speedy trial rights. Shaw then filed a motion to suppress his statements, the results of the field sobriety tests, and the results of the breath test, alleging Deputy Halbach did not have cause to stop him, to perform the field sobriety tests—including the preliminary breath test—or to administer a breath test. Following a hearing, the district court denied the motion.

Shaw waived his right to a jury trial and a bench trial was held on the minutes of evidence. The court found Shaw guilty as charged and sentenced him to a seven-day jail term and a $1875 fine. Shaw appeals.

II. Analysis. Shaw's challenge to the district court's ruling on his motion to suppress is based on his constitutional right to be free from unreasonable search and seizure, as guaranteed by the Fourth Amendment to the United

States Constitution[1] and article 1, section 8 of the Iowa Constitution. *State v. Otto*, 566 N.W.2d 509, 510 (Iowa 1997). We review this alleged constitutional violation 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.* In reviewing a trial court's denial of a motion to suppress custodial statements, or physical evidence obtained through a search or seizure, we may consider not only evidence admitted at the suppression hearing but also evidence admitted at trial. *State v. Brooks*, 760 N.W.2d 197, 203-04 (Iowa 2009); *State v. Washburne*, 574 N.W.2d 261, 263-64 (Iowa 1997).

Because the search and seizure provisions of article I, section 8 of the Iowa Constitution and the Fourth Amendment contain identical language, the two provisions are generally "deemed to be identical in scope, import, and purpose." *State v. Bishop*, 387 N.W.2d 554, 557 (Iowa 1986). Therefore, while our discussion focuses on the Fourth Amendment, it is equally applicable to the similar provision in the Iowa Constitution.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

---

[1] The rights guaranteed in the Fourth Amendment apply to the states through the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655-81 S. Ct. 1684, 1694, 6 L. Ed. 2d 1081, 1090 (1961).

U.S. Const. amend. IV. Evidence obtained in violation of this provision is inadmissible in a prosecution, no matter how relevant or probative the evidence may be. *State v. Manna*, 534 N.W.2d 642, 643-44 (Iowa 1995).

Warrantless searches and seizures are per se unreasonable unless they fall within one of the carefully drawn exceptions to the warrant requirement. *State v. Simmons*, 714 N.W.2d 264, 271 (Iowa 2006). The State has the burden of proving by a preponderance of the evidence that a warrantless search falls within one of the exceptions to the warrant requirement. *State v. Naujoks*, 637 N.W.2d 101, 107-08 (Iowa 2001).

> One of the well-established exceptions to the warrant requirement is that formulated in *Terry v. Ohio*, which allows an officer to stop an individual or vehicle for investigatory purposes based on a reasonable suspicion, supported by specific and articulable facts, that a criminal act has occurred or is occurring.

State v. Kinkead, 570 N.W.2d 97, 100 (Iowa 1997) (citing *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968)).

A. Traffic Stop. Shaw first contends the trial court erred in finding that Deputy Halbach had a reasonable belief criminal activity had occurred to justify the initial traffic stop. Iowa Code section 321.387 requires every motor vehicle to be equipped with a lighted rear lamp or lamps. A traffic violation, no matter how minor, gives a police officer probable cause to stop a motorist. *State v. Hoskins*, 711 N.W.2d 720, 726 (Iowa 2006).

Shaw argues his taillights were operational on the night in question. In support of his argument, he cites the fact Deputy Halbach was told by Tonya Kleckner that the taillights were out. He also argues Deputy Halback was, in his

estimation, thirty seconds behind his vehicle, which was too far to make a personal observation as to the functionality of the taillights. Shaw claims the deputy had no real knowledge as to whether his taillights were working and therefore he did not have cause to stop him.

Deputy Halbach's own testimony contradicts Shaw's version of events. The deputy did admit his attention was drawn to Shaw's vehicle when Kleckner told him the taillights were out. However, Deputy Halbach then turned and verified for himself that the taillights were not operating. Deputy Halbach also testified that he pulled into the driveway approximately five seconds after Shaw, placing him within ample distance to observe whether the taillights worked.[2]

The district court specifically found, "As to the various versions of events which were testified to by Deputy Sheriff Halbach, the Defendant and his witnesses, the Court finds the testimony of Deputy Sheriff Halbach to be the most credible." Giving this finding its due deference, we conclude Deputy Halbach had not only reasonable suspicion that a criminal act was occurring, but had probable cause sufficient to stop Shaw.

B. Investigation. Shaw next contends the trial court erred in finding that the deputy had cause to tell him to get in the patrol car.

In regard to the investigation a peace officer may conduct following a lawful stop, our supreme court has said:

> Once a lawful stop is made, an officer may conduct an investigation reasonably related in scope to the circumstances which justified the interference in the first place. This reasonable

---

[2] The deputy also testified that Shaw admitted he'd been having problems with his taillights.

> investigation includes asking for the driver's license and registration, *requesting that the driver sit in the patrol car*, and asking the driver about his destination and purpose. If, as here, the detainee's responses or actions raise suspicions unrelated to the traffic offense, the officer's inquiry may be broadened to satisfy those suspicions.

State v. Aderholdt, 545 N.W.2d 559, 563-64 (Iowa 1996) (internal quotations and citations omitted). Because the deputy's action in placing Shaw in his patrol car was permissible as part of a reasonable investigation, we conclude it did not constitute an unreasonable seizure of his person.

C. Preliminary Breath Test. Shaw contends the trial court erred in finding that Deputy Halbach had reasonable grounds[3] to require him to submit to a preliminary breath test. He argues the results of the field sobriety tests are invalid because the tests were flawed and therefore the results should not be considered. Shaw asserts that if the results of the tests are set aside, the officer did not have reasonable grounds to request a preliminary breath test.

Iowa Code section 321J.5 allows a peace officer to request a breath sample for a preliminary breath test when the officer has "reasonable grounds to believe" a driver has operated a motor vehicle while under the influence of an alcoholic beverage or while having an alcohol concentration of .08 or more. The reasonable grounds test is met when the facts and circumstances known to the officer at the time action was required would have warranted a prudent person's belief that an offense had been committed. *State v. Owens*, 418 N.W.2d 340, 342 (Iowa 1988).

---

[3] Although Shaw in fact claims the trial court erred in finding the deputy had "probable cause" to require him to submit to a preliminary breath test, the statute in question requires only "reasonable grounds." *See* Iowa Code § 321J.5.

We conclude Deputy Halbach had reasonable grounds to believe Shaw was operating his vehicle while under the influence of an alcoholic beverage or while having an alcohol concentration of .08 or more. The deputy smelled the odor of alcoholic beverage emanating from Shaw and Shaw admitted to consuming four mixed drinks in the hours leading up to the traffic stop. He also observed Shaw's eyes to be bloodshot and watery, and Shaw's speech was slurred. In his opinion Shaw also failed two of the three field sobriety tests that were administered. He in fact terminated one of the tests because Shaw was so unsteady that Halbach was concerned for Shaw's safety.

Shaw alleges the results were invalid because the tests were not properly administered. However, testimony by a properly trained police officer concerning the administration and results of a field sobriety test is admissible without the need for further scientific evidence. *State v. Edman*, 452 N.W.2d 169, 170 (Iowa 1990). We conclude that generally any deficiencies in administering a field sobriety test affects the weight to be given to the results, rather than affecting admissibility. *See State v. Murphy*, 451 N.W.2d 154, 157-58 (Iowa 1990) (quoting a statement from *State v. Nagel*, 506 N.E.2d 285, 286 (Ohio 1986), that "[o]bjective manifestations of insobriety, personally observed by the officer, are always relevant where, as here, the defendant's physical condition is in issue"). Even if the results of those tests are given diminished weight, or no weight, the remaining evidence nevertheless gives rise to a reasonable suspicion that Shaw was under the influence of an alcoholic beverage or had an alcohol concentration of .08 or more.

Shaw also argues there was no evidence presented to show the preliminary breath test device was properly calibrated, and therefore the test results are invalid. Shaw did not raise this issue in his motion to suppress and did not raise a foundational objection at trial. Accordingly, he has not preserved this issue for our review. *See State v. Binkley*, 201 N.W.2d 917, 919 (Iowa 1972) (holding the defendant did not make a timely objection to foundational basis for admission of blood test results and, therefore, error was not preserved for appeal).

D. Implied Consent. Finally, Shaw contends the court erred in concluding the deputy had reasonable grounds[4] to invoke implied consent.

Under Iowa Code section 321J.6, an officer is authorized to request a blood, breath, or urine sample for testing if the officer has reasonable grounds to believe the driver was operating while intoxicated.[5] As stated above, an officer has reasonable grounds where the facts and circumstances known at the time implied consent was invoked would have warranted a prudent person to believe the offense had been committed. *Owens*, 418 N.W.2d at 342.

As previously stated, Deputy Halbach had reasonable grounds to believe Shaw had driven while intoxicated. Shaw admitted to drinking several mixed drinks at a local drinking establishment, his last drink having been consumed as

---

[4] Shaw once again casts the issue in terms of "probable cause," although the relevant part of the statute requires only "reasonable grounds." *See* Iowa Code § 321J.6(1).

[5] In addition, one of seven conditions enumerated in Iowa Code section 321J.6(1) must be met. Because it is undisputed that Shaw was administered a preliminary breath test that indicated a blood alcohol concentration in excess of .08, this part of the implied consent requirement was met. *See* Iowa Code § 321J.6(1)(d). (We do note that another of the seven conditions had also been met, as the deputy had lawfully placed Shaw under arrest. *See id.* § 321J.6(1)(a)).

recently as an hour before the traffic stop. Shaw smelled of the odor of alcoholic beverage, had bloodshot, watery eyes, and his speech was slurred. One of the field sobriety tests had to be terminated because of his unsteadiness. A preliminary breath test revealed a blood alcohol concentration nearly twice the legal limit.

III. Conclusion. We have carefully considered all issues and arguments raised by Shaw, and find any not expressly addressed herein are not preserved for our review, are without merit, or both. Based on our de novo review, and for the reasons set forth above, we conclude the district court did not err in denying Shaw's motion to suppress evidence. Accordingly, we affirm his conviction.

AFFIRMED.