IN THE COURT OF APPEALS OF IOWA

No. 9-765 / 09-0415
Filed October 21, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ERIK JOHN RAVE,
Defendant-Appellant.

Appeal from the Iowa District Court for Story County, Thomas R. Hronek, District Associate Judge.

Defendant appeals his conviction for operating while intoxicated. **AFFIRMED.**

Brandon Brown of Parrish, Kruidenier, Dunn, Boles, Gribble, Parrish, Gentry & Fisher, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Mary E. Tabor, Assistant Attorney General, Allen Best, Law Clerk, Stephen Holmes, County Attorney, and Jessica Reynolds, Assistant County Attorney, for appellee.

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

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

HUITINK, S.J.

I. Background Facts & Proceedings

On August 28, 2008, there was an evening football game at Iowa State University in Ames, Iowa. Lieutenant Darren Vanryswyk and Officer Sara Jensen of the Iowa State University Police Division were working on foot patrol in two parking lots near the football stadium where people had gathered for socializing, or tailgating. These parking lots had gravel roads for travel and large grassy areas meant for parking. A fifteen-dollar fee was charged to park in the lots.

There were many people tailgating in these parking lots, with people walking everywhere. Many of the people had been drinking alcohol. The officers considered it a high-crime area during a football game due to the use of alcohol. As the game went on, the level of intoxication increased. Lieutenant Vanryswyk stated that people in the parking lots after the game started tended to be more intoxicated than those who attended the game.

At 8:42 p.m., when it was dark and after the football game had started, the officers noticed a vehicle driving very slowly through one of the parking lots without its headlights on. The officers flashed their flashlights at the vehicle to get it to turn on its headlights or stop.[1] Officer Jensen testified she was concerned the vehicle did not have its headlights on due to the number of people in the area and the condition of the people, namely that some were intoxicated.

[1] Portable overhead lights, described as stadium-style lights, had been brought to the parking lot. These lights were brighter than regular parking lot lights, but while "they light up the lot a little bit if you're near them, . . . they don't light the entire lot." Officer Jensen testified the lighting in the area required her to use her flashlight. Lieutenant Vanryswyk also testified that on the date in question it was dark enough that he needed to use a flashlight.

She stated that generally when she saw a vehicle without its headlights on in the area, she would flag it down and ask the driver to turn on the headlights. She testified it was not safe to drive in that area without using headlights. Lieutenant Vanryswyk testified that with the headlights off it was less likely an intoxicated person would notice the vehicle and such a person could possibly stumble in front of the vehicle. Also, the driver would be less likely to see a pedestrian. He stated he was concerned for the safety of pedestrians and other vehicles in the area. He testified the basis for the stop was a safety concern.

Officer Jensen walked up to the vehicle and tapped on the window. The driver, Erik Rave, stopped the vehicle and rolled down his window. Both officers immediately noticed that Rave showed signs of intoxication. Rave failed field sobriety tests. He refused a breath test at the police station. Rave was arrested and charged with operating while intoxicated, in violation of Iowa Code section 321J.2 (2007).

Rave filed a motion to suppress, claiming there was no lawful basis to stop his vehicle. In particular, he pointed out that the statute requiring the use of headlights from sunrise to sunset, section 321.384, applied only to vehicles upon a highway. Rave argued that because he was driving in a parking lot that was not open to the public unless a fee was paid, the statute did not apply. He claimed officers did not have probable cause to stop his vehicle. *See State v. Aderholt*, 545 N.W.2d 559, 563 (Iowa 1996) (finding the violation of a traffic offense, however minor, provides probable cause to stop a vehicle).

At the suppression hearing, the State conceded there was no traffic violation because Rave was not driving on a highway. The State's position was

that there was a valid investigatory stop under *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 asserted the officers had reasonable suspicion to make the stop based on the time and location of the stop (among football game tailgaters where many people had been drinking), the fact Rave did not have his headlights on, he partially drove off the gravel driveway when making a turn, and there was evidence he did not immediately stop for the officers.

The court denied the motion to suppress. The court found the State had established the officers had probable cause to approach the vehicle because they had a reasonable suspicion he was operating while intoxicated based on the fact he was driving in the vicinity of numerous pedestrians well after dark but without his headlights and he drove off the roadway in making a turn. The court additionally found the officers could legitimately stop the vehicle as part of their community caretaking function. Defendant was driving in an area well-populated with intoxicated persons, after dark, without having his headlights on.

Rave filed a motion to reconsider, asserting the State had waived any reliance on the community caretaking function by not raising it during the suppression hearing. The court denied the motion to reconsider.

Rave waived his right to a jury trial, and the case proceeded on a trial to the court. Rave stipulated the matter could be submitted on the minutes of testimony. The court found Rave guilty of operating while intoxicated. He was sentenced to serve two days in jail, pay a fine, and obtain a substance abuse evaluation. Rave appeals the 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). Our review is de novo in light of the totality of the circumstances. *State v. McConnelee*, 690 N.W.2d 27, 30 (Iowa 2004). While we are not bound by the district court's factual determinations, we may give deference to the court's credibility findings. *State v. Lovig*, 675 N.W.2d 557, 562 (Iowa 2004).

III. Waiver of Issue

Rave contends the court improperly relied upon the community caretaking function when that issue was not raised by the parties at the suppression hearing. He asserts the State waived this argument by not raising it at the hearing. Rave claims the court engaged in a partisan role by raising the issue of the community caretaking function on its own volition.

For evidentiary rulings, there is an exception to the rules of error preservation. *DeVoss v. State*, 648 N.W.2d 56, 62 (Iowa 2002). "[W]e will uphold a ruling of the court on the admissibility of evidence on any ground appearing in the record, whether urged below or not." *State v. Parker*, 747 N.W.2d 196, 208 (Iowa 2008) (quoting *State v. McCowen*, 297 N.W.2d 226, 227 (Iowa 1980)).

A motion to suppress raises a Fourth Amendment challenge to the admissibility of evidence seized from a defendant. *State v. Merrill*, 538 N.W.2d 300, 301 (Iowa 1995). "In ruling on a motion to suppress, the trial court must determine the facts upon which the admissibility of evidence depends." *State v. Frake*, 450 N.W.2d 817, 818 (Iowa 1990); *see also State v. Scott*, 405 N.W.2d

829, 830 (Iowa 1987) (listing the denial of a motion to suppress as one of two evidentiary rulings being appealed); *State v. Campbell*, 326 N.W.2d 350, 351 (Iowa 1982) (listing a ruling on a motion to suppress as a pretrial evidentiary ruling under appellate review).

We conclude the court's ruling on the motion to suppress was an evidentiary ruling. For this reason we may affirm on any ground appearing in the record, whether urged by the parties or not. *See Parker*, 747 N.W.2d at 208. Therefore, whether or not the issue of the community caretaking function was raised by the State, we may affirm if the record supports a denial of the motion to suppress on this issue.[2]

IV. Community Caretaking Function

We turn to the issue of whether the record supports a finding that the officer's conduct was permissible under the community caretaking function. Under the Fourth Amendment, a search conducted without a search warrant is per se unreasonable unless the circumstances come within an exception to the warrant requirement. *State v. Christopher*, 757 N.W.2d 247, 249 (Iowa 2008). The applicability of an exception must be proved by a preponderance of the evidence by the State. *State v. Naujoks*, 637 N.W.2d 101, 107 (Iowa 2001). If

[2] There is a constitutional right to a neutral and detached judge. *State v. Biddle*, 652 N.W.2d 191, 198 (Iowa 2002). Because we have determined that on appellate review we may address an issue not raised by the parties at the suppression hearing, we do not need to address whether the trial court assumed a partisan rule by ruling on an issue not raised by the parties. As an aside, however, we note that problems in impartiality arise when a judge comments on the facts, or directs one of the parties in how to conduct a case. *See State v. Larmond*, 244 N.W.2d 233, 236 (Iowa 1976); *State v. Glanton*, 231 N.W.2d 31, 34 (Iowa 1975). A judge does not exhibit a partisan position by ruling on the facts presented in a case. *See Williams v. State*, 967 So. 2d 735, 750 (Fla. 2007) ("With regard to the determination that [evidence was] admissible on a ground not advanced by the State, we conclude that the trial court did not depart from a stance of neutrality and assume the role of prosecutor.").

evidence is obtained in violation of the Fourth Amendment, it is inadmissible. *State v. Lloyd*, 701 N.W.2d 678, 680 (Iowa 2005).

An exception to the warrant requirement was enunciated by the United States Supreme Court in *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S. Ct. 2523, 2528, 37 L. Ed. 2d 706, 714-15 (1973), where the Court found police officers frequently "engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." "Where evidence is discovered in the course of performing legitimate community caretaking or public safety functions, the exclusionary rule is simply not applicable." *State v. Mitchell*, 498 N.W.2d 691, 694 (Iowa 1993).

In determining whether police officers' conduct comes within the community caretaking function, we consider a three-step analysis: (1) whether there was a seizure within the meaning of the Fourth Amendment; (2) if so, whether the police were engaged in bona fide community caretaker activity; and (3) if the first two factors were met, then whether the public's needs and interests outweighed the intrusion upon the person's privacy. *State v. Crawford*, 659 N.W.2d 537, 543 (Iowa 2003).

We address each of these three factors in turn. The first issue is whether there was a "seizure" within the meaning of the Fourth Amendment. An investigatory stop of a vehicle, even though it is temporary and for a limited purpose, is a seizure for purposes of the Fourth Amendment. *State v. Kreps*, 650 N.W.2d 636, 641 (Iowa 2002). In this case we will assume, without deciding,

there was a "seizure" when officers stopped Rave's vehicle to tell him to turn on his headlights.

The next factor is whether the officers were engaged in a bona fide community caretaking activity when they stopped Rave's vehicle to tell him to turn on his headlights. There are three types of community caretaking activities: (1) emergency aid; (2) automobile impoundment/inventory; and (3) acting as a public servant. *Crawford*, 659 N.W.2d at 541. An officer may be acting as a public servant in assisting a motorist with a flat tire, for example. *Id.* (citation omitted).

We note that in *Mitchell*, 498 N.W.2d at 694, the officer was found to be engaged in a legitimate public safety activity when he stopped the defendant to inform him of a burned-out taillight. Also, in *State v. Fuller*, 556 A.2d 224, 224 Me. 1989), an officer properly stopped a vehicle after he noticed the headlights were blinking on and off, and advised the defendant "to fix the headlights before getting stranded in the dark." On the other hand, in *State v. Joe*, 69 P.3d 251, 254-55 (N.M. Ct. App. 2003), the court found there was not a valid public safety concern justifying the stop of a vehicle driving without the headlights on when it was not yet sunset and the officer could see the vehicle at least 500 yards away.

"[A]n officer must have a reasonable and articulable basis for a stop, even for public safety issues." *Id.* at 254. Officer Jensen testified that due to the number of people in the area and that some were intoxicated she was concerned the vehicle did not have its headlights on. She testified it was not safe to drive in that area without the headlights on. Lieutenant Vanryswyk testified that with the headlights off it was more likely a pedestrian would not see the vehicle and walk

in front of it, and also the driver would be less likely to see a pedestrian. He testified the basis for the stop was a safety concern.

We conclude the officers had specific and articulable public safety concerns which created a sufficient reason for the stop. The officers were properly acting as public servants when they stopped Rave, who was driving after dark with his headlights off in an area full of pedestrians, some of whom might be intoxicated, to tell him to turn his headlights on.

Having met the first two elements, we turn to the third element, whether the public's needs and interests outweighed the intrusion upon Rave's privacy. The last element "requires an objective analysis of the circumstances confronting the police officer." *Crawford*, 659 N.W.2d at 542.

Here, the intrusion on Rave's privacy was minimal. The officers walked up to Rave's vehicle as he was driving slowly, tapped on his window, and after he rolled the window down told him to turn on his headlights. If Rave had not exhibited obvious signs of intoxication, that would have been the end of the incident. This intrusion is balanced against the public safety concerns presented by Rave driving without headlights after dark in an area filled with pedestrians, many of whom were intoxicated. As noted above, there were concerns a pedestrian might not see the vehicle and walk in front of it, and there were also concerns Rave would be unable to see a pedestrian. We conclude the public's needs and interests outweighed the intrusion on Rave's privacy.

We conclude the court properly denied Rave's motion to suppress based on a finding that the officers were legitimately engaged in a community caretaking function at the time of the stop. Because we have affirmed on this

ground, we do not need to address the other issues raised by Rave in this appeal.

We affirm Rave's conviction for operating while intoxicated.

AFFIRMED.