IN THE COURT OF APPEALS OF IOWA

No. 9-852 / 09-0305
Filed December 17, 2009

STATE OF IOWA,
Plaintiff-Appellant,

vs.

MARK PAUL KOLLASCH,
Defendant-Appellee.

Appeal from the Iowa District Court for Kossuth County, Don E. Courtney, Judge.

The State appeals from the order granting the motion to suppress. **AFFIRMED.**

Thomas J. Miller, Attorney General, Kyle Hanson and Mary Tabor, Assistant Attorneys General, and Todd Holmes, County Attorney, for appellant.

Joseph Straub, Algona, for appellee.

Considered by Sackett, C.J., Vaitheswaran and Danilson, JJ.

SACKETT, C.J.

The State appeals from district court order granting Mark Kollasch's motion to suppress evidence from a traffic stop. It contends the court failed to perform its fact-finding duty when it concluded (1) the evidence from directly contradicting accounts of the same events was in equipoise and, therefore, (2) the State failed to meet its burden of proof the officer had a reasonable suspicion that a criminal act had occurred or was occurring in order to justify the traffic stop. We affirm.

BACKGROUND FACTS AND PROCEEDINGS. Kollasch, while driving a gold pickup, was stopped in the early morning hours of December 23, 2007, just outside the city limits of Algona, by Officer Gatton, an Algona police officer. The officer had Kollasch perform sobriety tests, arrested him, and took him to the Kossuth County Law Enforcement Center where he provided a breath sample. Kollasch subsequently filed a motion to suppress any evidence subsequent to the officer requesting a preliminary breath test and any evidence of chemical testing.

A hearing was held and three witnesses testified. Officer Gatton, testifying for the State, related that he had been with the Algona police department for two years, had training at the Iowa Law Enforcement Academy and had state certification. He indicated he had been involved in the investigations of nine or ten operating-while-intoxicated charges.

He said he was driving north on North Main Street in Algona near Poplar when he noticed a gold-colored pickup in front of the north Casey's store. He

said it appeared the pickup had crossed the centerline and he decided to drive up behind it to see how the driver was driving. Gatton was about four blocks behind the pickup as it turned east on Highway 18 and he caught up with it just inside the city limits. Gatton observed the pickup and a white car that appeared to be traveling with it and followed for two miles. Gatton said the pickup was "weaving quite heavily within its own lane," "started to drift to the white line toward the shoulder, then sharply turned back to the centerline, touched the centerline, drift back to the right line." As to the pickup's movement he testified:

> Q. The vehicle in your observation weaved from the white line to the centerline? A. Correct. And it would drift back to the white centerline and repeatedly back to the white line.
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> Q. When you say the white line, would that also be known as the fog line? A. Correct.
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> Q. And the centerline would be the center dashed line? A. Correct, yes.
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> Q. I believe your testimony also was that in your opinion the vehicle was weaving heavily were the words that you used? A. Correct. It was not, the drifting wasn't slow, the drifting was rather quick, it was almost a sharp drift. Not so much a drift almost, but rather a kind of turn, gets to the white line, quickly gets back to the centerline, quickly goes back to the white line again. It wasn't a slow drift at all. It was kind of a quick drift.

The officer further related that the drifting happened about three times in the two miles he followed the pickup before he made the stop. He also said he could see the pickup because it was larger than the white car following it. He said the pickup was not speeding but he suspected the driver of the pickup was under the influence of alcohol. Just outside of town the officer pulled between the white car and the pickup and pulled the pickup over. Officer Gatton described the night as cold and windy and the roadway was dry. He said he followed the white car by one to two car lengths and that car drove straight.

On cross-examination the officer acknowledged he was four and a half blocks away from the pickup when he first saw it, there was no centerline on the pavement near the Casey's, and it was only his perception that the pickup crossed it. He also testified that in the two miles he followed the pickup it was going back and forth in its own lane and would drift from the fog to the center line but never go back to true. The State presented no further evidence.

Defendant called two witnesses. The first witness, Heather Hoover, a twenty-four-year-old resident of Algona, was driving the white car. Hoover testified she was driving the white car and was following Kollasch because she was headed to his place. She said the pickup was in front of her and she did not in her opinion notice the pickup doing anything erratic or unusual.

The defendant's second witness was Kevin Kollasch, an underwriter for Farmers Mutual Insurance. Kevin was thirty-two and his father and defendant's father are first cousins. Kevin was a police reserve officer in Algona for about two years and for four years was in the Marine Corps as a military policeman. He testified his training caused him to be observant. He had listened to the officer's description of the defendant's driving. He said he was in the front passenger seat of the white car following the gold pickup and he saw the defendant driving but not in the manner described by the officer. He testified he would have noticed if the defendant had driven in the manner described. He further testified he had experience with intoxicated drivers when he was in the military and he would not have pulled defendant over based on what he observed

that evening. He did not learn of what happened to defendant until the next day and he was shocked.

Upon cross-examination Kevin admitted he had been in a bar three or four hours that evening and had a few drinks. He said when he worked in law enforcement in the military he did not have alcohol in his system when he made observations. He said he and Heather were visiting during the drive. He would have stopped the defendant had he observed the driving the officer described. He said it was a windy night and the pickup could have blown across the road. He further testified he did not recall seeing the pickup weave at all and he was right behind the entire time.

The district court, after hearing the evidence, concluded:

> It appears to this court that the evidence is in equipoise. No testimony is more convincing than any other. All the testimony appears reasonable and all witnesses to the events of that evening appear credible. No witness has made inconsistent statements, all witnesses' appearances, conduct, age, intelligence, memory and knowledge of the facts were good. The court has considered that [witness] Kevin Kollasch is a second cousin of the defendant and therefore may have an interest in this hearing, but this alone does not diminish his testimony and allow the court to find that because of this relationship his testimony is less credible. The court has considered the witnesses' motive, candor, bias and prejudice and believes all of the testimony to be truthful in recalling what they believed they observed.
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> The result is that this court does not find one side more persuasive than the other. Therefore, with the State having the burden of proof, the court finds that the movements observed by Officer Gatton do not rise to the level of reasonable suspicion that criminal activity has occurred or is occurring. Therefore, the stop was in violation of both the United States and Iowa Constitutions, which protect people from unreasonable searches and seizures and evidence accruing from the stop should be ordered suppressed.

Our review of constitutional claims, such as this search-and-seizure claim, is de novo. *State v. Willard*, 756 N.W.2d 207, 211 (Iowa 2008).

The State argues that "[w]hen judges are presented with competing direct evidence on a historical fact, they must decide which version is true or they have failed to perform their function as fact finder." *See United States v. Lockett,* 303 F.App'x 373, 373-4 (8th Cir. 2008) (unpublished opinion) ("Because Lockett's testimony and counsel's testimony were directly contradictory, and the district court merely ruled against the party with the burden of proof without making an essential factual determination, we conclude that the court committed a procedural error."); *Collier v. Turpin*, 177 F.3d 1184, 1193 (11th Cir. 1999) ("The evidence offered by both sides constituted direct, not circumstantial, evidence, and a fact finding required a choice between the two contradictory versions of events."). We are not persuaded by this argument. As the State acknowledges, the Oregon Supreme Court came to an opposite conclusion in *State v. James*, 123 P.3d 251, 255 (Or. 2005), holding that "a determination that evidence about a disputed factual issue is in equipoise permissibly conveys a factfinder's view that conflicting evidence fails to preponderate in favor of or against a particular resolution of the factual dispute," and was binding on the court. *See also Jones v. State*, 775 A.2d 421, 429 (Md. Ct. Spec. App. 2001) (noting that when court finds "evidence on each side of the issue to be equally persuasive," court would need to consider which party had burden of proof to reach disposition on motion to suppress); *State v. Evans*, 944 P.2d 1120, 1126 (Wyo. 1997) ("Because the prosecutor had the burden of proof, evidentiary equipoise necessitated the

court's ruling that the prosecutor had failed in his burden of proof."); *Loomer v. State*, 768 P.2d 1042, 1046 (Wyo. 1989) ("Allocation of the burden of proof will be significant, in theory at least, only in the rare case when, assuming the evidence is weighed by the preponderance of evidence standard, the conflicting evidence is in equipoise in the mind of the fact finder." (citation omitted)). Additionally, as Kollasch points out, it is well established that direct and circumstantial evidence are equally probative, leaving doubts about the State's reliance on "the important distinction between direct and circumstantial evidence."

The State asks that we should either remand to the district court to fulfill its duty of weighing the credibility of the witnesses and decide which version of events is correct or that without giving any deference to the district court we should analyze the record and reverse based on what the State contends is the credible testimony of Officer Gatton.

Kollasch argues the district court correctly determined the State did not meet its burden of proof by a preponderance of the evidence, so the court correctly concluded the traffic stop was improper and the evidence from the stop should be suppressed.

"The Fourth Amendment of the Federal Constitution as applied to the states through the Fourteenth Amendment requires that an officer have reasonable cause to stop a vehicle for investigatory purposes." *State v. Wiese*, 525 N.W.2d 412, 414 (Iowa 1994) *overruled on other grounds by State v. Cline*, 617 N.W.2d 277, 281 (Iowa 2000). "[T]he 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, to reasonably believe criminal activity may have occurred." *State v. Tague*, 676 N.W.2d 197, 204 (Iowa 2004).

As to preponderance of evidence 32A C.J.S. *Evidence* § 1627, at 713-14 (2008), states:

> A preponderance of evidence means evidence that is of greater weight, or is more convincing, than that offered in opposition; the term does not mean a preponderance in amount, and the weight or preponderance of the evidence in a civil case is not necessarily dependent on, or determined by, the number of witnesses.
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> Before the preponderance-of-the-evidence standard of proof can be satisfied, the factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty. A preponderance of evidence is evidence that is of greater weight, or is more convincing, than that offered in opposition to it. The term does not mean preponderance in amount, but implies an overbalancing in weight, and it means, in the last analysis, "probability of the truth."
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> A preponderance is such proof as leads the trier of fact to find that it is more probable than not, or more likely than not, that a contested fact exists. A preponderance is attained where the evidence in its quality of credibility destroys and overbalances the equilibrium.
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> The existence of a fact is not established by evidence that does not render its existence more likely than its nonexistence; the probabilities must be such that the conclusion is acceptable to the judgment of the court or jury applied to the evidence in the particular case. Mere proof of a possibility, or possibilities, or even a preponderance of possibilities or a majority of chances, or a choice among different possibilities, cannot alone suffice to establish a proposition of fact by a preponderance of the evidence.

"If the State does not carry its burden, the underlying constitutional principles require that we suppress evidence and statements the State acquired as a result of the improper stop." *Wiese*, 525 N.W.2d at 415. Giving the required deference to the district court's credibility findings we, like the district court,

conclude the State did not carry its burden to prove, by a preponderance of the evidence, it had a reasonable cause to stop Kollasch's truck. We find no merit in the State's argument that the district court did not properly perform its fact-finding duty. We affirm the ruling suppressing the evidence obtained as a result of the traffic stop.

AFFIRMED.