

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

| | | |
|-----------------------------------|---|---------------------------------|
| The State of North Dakota, |) | |
| |) | |
| |) | Supreme Court Nos. 20060082, |
| |) | 20060083, 20060084, 20060085 |
| |) | |
| Plaintiff and Appellee, |) | |
| |) | District Court Nos. 05-K-02195, |
| |) | 05-K-02196, 05-K-02198, |
| |) | 05-K-02199 |
| vs. |) | |
| |) | |
| Kenneth Wayne Oliver, |) | |
| |) | |
| Defendant and Appellant. |) | |

ON APPEAL FROM CRIMINAL JUDGMENT
FROM THE DISTRICT COURT
FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY, NORTH DAKOTA
THE HONORABLE LAWRENCE JAHNKE, PRESIDING.

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUES

- I. Whether the trial court's dismissal of the defendant's Motion to Suppress and Dismiss was proper?

STATEMENT OF THE CASE

[¶1] The defendant's statement of the case is correct and therefore will not be repeated.

STATEMENT OF THE FACTS

[¶2] On July 6, 2005, at approximately 9:55 a.m., Detective Senechal of the Grand Forks Narcotics Task Force, received information from Lieutenant Eggebraaten about suspicious drug related activity at the Cleanerama, located on Stanford Road, in the City of Grand Forks. (Tr. of Preliminary Hr'g at 23.) The information stated that a black Lincoln, driven by an African American male, and another vehicle had pulled into the car wash bays. (Id. at 24.) Once in the car wash bays, the witness observed an exchange between the drivers of the two vehicles, and that both vehicles left without having their cars washed. (Id. at 30-31.) Detective Senechal went to the Cleanerama to follow up on the reported suspicious activity. (Id. at 24.)

[¶3] Detective Senechal observed the black Lincoln, driven by an African American male return to the Cleanerama at approximately 10:36 a.m. (Id. at 24.) The vehicle pulled into a car wash bay and the driver went into the building. (Id. at 25, Tr. of Suppression Hr'g at 9.) The driver returned to the vehicle over a half hour later and began digging in the trunk of the Lincoln. (Tr. of Preliminary Hr'g at 25.) The suspect appeared to throw away a few paper items and then returned to the building with some clothes. (Id.) A short time later the suspect left the building and began washing his vehicle. (Id. at 26.) The suspect then left the Cleanerama in the Black Lincoln at which time Detective Senechal noticed that the vehicle lacked plates and that its temporary notary sticker was faded and illegible. (Id., Tr. of Suppression Hr'g at 12.) She called out the Lincoln's direction of travel to Officers Beck and Rowan and suggested that if they had a reason to stop the vehicle they should. (Tr. of Preliminary Hr'g at 27-28.)

[¶4] As Officer Beck caught up to the black Lincoln, he could see that there was no rear license plate on it. (Id. at 35.) There was what appeared to be a temporary notary sticker otherwise known as a drive-out sticker on the back window, but it was so faded that neither the printing nor the writing on the form was readable. (Tr. of Suppression Hr'g at 14.) Officer Beck decided to initiate a traffic stop to determine if the vehicle had proper registration. (Id.) Officers Beck and Rowan both activated their red emergency lights; the Lincoln turned into the Mini Mart parking lot, pulled up to the storefront and stopped. (Tr. of Preliminary Hr'g at 8) An African American male exited the vehicle, looked directly at the officers and continued to enter the Mini Mart store while the officers sounded their horn and yelled for him to "Stop." (Id.) The Defendant did not stop, entered the store, bolted toward the back of the store and was seen entering the restroom. (Id. at 9.) Officers Beck and Rowan followed the defendant into the restroom, where they found him sitting on the toilet with his pants up and his right hand in the trashcan. (Id. at 10-11.) The officers ordered him to the ground. When the defendant refused, Officer Beck grabbed his right wrist and with the help of Officer Rowan handcuffed him. (Id. at 10.) The defendant was then placed under arrest for fleeing a police officer, and was escorted out of the store while a Mini Mart employee secured the restroom behind them. (Id.) Once outside the defendant was placed in Officer Beck's police car, where Officer Rowan performed a search of the defendant's person, and discovered \$403 in cash. (Id. at 11.) Officer Beck returned to the restroom, and discovered a glass pipe used for smoking methamphetamine in the garbage can and a small baggy of white powder floating in the toilet. (Id.) Back in the parking lot, Officer Rowan, a trained K-9 officer, let his dog Taz search the outside of the vehicle. (Id. at 12.) The dog signaled a "hit" and the vehicle was searched, whereupon two baggies containing a white

hard rock like substance was found, along with a black scale. (Id. at 12-14.) Detective Senechal who had arrived on the scene field-tested one of the bags and it tested positive for methamphetamine. (Id. at 14-15.) Shortly thereafter, Office Beck went back out to the Lincoln and tried to read the temporary notary sticker, but could not discern any of the writing, even after putting light on it. (Tr. of Suppression Hr'g at 14-15.) Officer Beck then asked the defendant what was on the sticker and who owned the vehicle, to which the defendant responded by saying that the vehicle did not belong to him. (Id. at 15.)

STANDARD OF REVIEW

[¶5] When reviewing a district court's ruling on a motion to suppress, a reviewing court will defer to the district court's findings of fact and resolve conflicts in testimony in favor of affirmance. City of Fargo v. Ovind, 1998 ND 69 ¶6, 575 N.W.2d 901. The North Dakota Supreme Court will affirm a trial court's decision on a motion to suppress if there is sufficient competent evidence capable of supporting the trial court's findings, and if its decision is not contrary to the manifest weight of the evidence. City of Devil's Lake v. Lawrence, 2002 ND 31, 639 N.W.2d 466. The North Dakota Supreme Court will not make independent findings or substitute its judgment for that of the district court. State v. Kitchen, 1997 ND 241 ¶11, 572 N.W.2d 106. The North Dakota Supreme Court's review also defers to the district judge's opportunity to hear the witnesses' testimony and to judge their credibility. State v. Ova, 539 N.W.2d 857, 858 (N.D. 1995). The decision of whether the facts support a reasonable and articulable suspicion, however, is a question of law, fully reviewable on appeal. Salter v. N.D. Dep't of Transp., 505 N.W.2d 111, 112 (N.D. 1993). While the North Dakota Supreme Court's review is limited to the record before the district

court, the district court's analysis is entitled to respect if its reasoning is sound." Hanson v. N.D. Dep't of Transp., 2003 ND 175 ¶7, 671 N.W.2d 780.

ARGUMENT

II. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS

A. A Police Officer's Subjective Intention Does Not Impact A Valid Traffic Stop, For Which There Is A Reasonable And Articulate Suspicion

¶6] The defendant argues that the initial stop of the defendant's car was unconstitutional because it was a pretextual stop or because the stop was unreasonable. Grand Forks Police Department Officer Don Beck initiated a traffic stop on the defendant's car for an unreadable temporary notary (drive-out) sticker. Prior to initiating the stop, Officer Beck had been contacted by Detective Orié Senechal regarding a dark colored Lincoln that was heading westbound on Gateway Drive that had been reported to be involved in suspicious activity. Due to the reported suspicious activity, Officer Beck was asked to trail the Defendant to see if Defendant could be stopped and identified.

¶7] In order to make a legal investigative stop of a motor vehicle, an officer must have a reasonable and articulable suspicion that the motorist has violated or is violating the law. State v. Stradsvold, 456 N.W.2d 295, 296 (N.D. 1990). Traffic violations, even common or minor violations constitute prohibited conduct and, therefore provide law enforcement officers with the requisite suspicion for conducting such stops. State v. Fields, 2003 ND 81 ¶7, 662 N.W.2d 242, State v. Storbakken, 552 N.W.2d 78, 80-81 (N.D. 1996).

¶8] Driving a motor vehicle without a valid display of number plates and tabs is a traffic violation. N.D. Cent. Code § 39-04-11 (2005) reads:

Except as otherwise specifically provided, a person may not operate or drive a vehicle on the public highways of this state unless the vehicle has a distinctive number assigned to it by the department, and two number plates, bearing the distinctive number conspicuously displayed, horizontally and in an upright position, one on the front and one on the rear of the vehicle, each securely fastened An annual registration tab or sticker for the current registration year must be displayed on each number plate, in the area designated by the department for the tab or sticker.

Id.

The United State’s Supreme Court in Whren v. United States, 517 U.S. 806, 116 S. Ct. 1769, 135 L.Ed 2d 89 (1996) held that as long as law enforcement have a reasonable and articulable suspicion to believe that a traffic violation has occurred, the resulting stop is lawful and does not violate the Fourth Amendment irrespective of the subjective motives of the officers. A traffic stop is reasonable if there was probable cause for the traffic stop, and it is irrelevant what else the officer intended to investigate at the time of the stop. United States v. Wellman, 185 F.3d 651, 655 (6th Cir. 1999). The Eighth Circuit Court of Appeals states “The Supreme Court has made it clear that the subjective motivations of an officer in making a traffic stop are irrelevant to the determination of whether that stop was appropriate.” United States v. Chatman, 119 F.3d 1335, 1339-40 (8th Cir. 1997). In addition, “A police officer’s decision to stop an automobile will be considered reasonable . . . if the officer had probable cause to believe a traffic violation occurred . . . [t]hat is the case even if it can be shown that the officer actually made the stop for some other reason – for example, a hunch that the vehicle’s driver was engaged in drug trafficking After Whren, the officer’s subjective intentions ‘play no role’ in our probable cause inquiry.” Valance v. Wisel, 110 F.3d 1269, 1275 (7th Cir 1997). The North Dakota Supreme Court has also cited Whren v. Untied States. In State v. Loh, 2000 ND 188 ¶10, 618 N.W.2d 477, this court held that pretextual stops are valid so long as the officer observed a traffic violation.

[¶9] Officer Beck's stated reason for stopping the defendant's car was for a traffic violation, the registration violation, despite the fact he had received information from Detective Senechal that a dark colored Lincoln was involved in suspicious drug related activity. N.D. Cent. Code § 39-04-17 (2005) allows for a temporary paper certificate to be displayed on a vehicle while the Department is processing a title application, and it is only valid for 30 days from the date of application. The statute reads:

The possession of a certificate made out by a notary public or an authorized agent of a licensed vehicle dealer who took the acknowledgment of the application when the vehicle was first registered or required to be registered under the laws of this state, where such certificate shows the date of application, the make, registered weight, and year model of the motor vehicle, the manufacturer's number of the motor vehicle, which such application describes, and further shows that such notary public or authorized agent of a vehicle dealer, personally mailed the application with the remittance fee, is prima facie evidence of compliance with motor vehicle law with reference to the vehicle therein described, for a period of thirty days from the date of such application. Any violation of this section is an infraction punishable by a fine of not less than fifty dollars.

Id.

The defense argues that having a notary sticker is prima facie evidence that the vehicle is properly registered. However, according to N.D. Cent. Code § 39-04-17 (2005), the notary sticker becomes prima facie evidence only upon being in full compliance with a proper registration. When someone is unable to read anything on the temporary notary sticker then this prima facie case is not met. A temporary drive out sticker needs to properly show the date of the application, the make of the vehicle, the model of the vehicle, the weight of the vehicle, the manufacturers number, and a further showing of the name of the notary public or authorized agent of a vehicle dealer.

[¶10] At the time of the stop, Officer Beck observed the registration violation, by following directly behind defendant's vehicle. (Tr. of Preliminary Hr'g at 35.) It is also common practice among police officers to pull vehicles over when the temporary drive out

sticker is unreadable or illegible, so that the driver's registration can be verified. Officer Beck explained in his 30-year career, he has stopped lots of people for unreadable temporary notary stickers. Id. Additionally, Detective Senechal testified that she would have pulled over the Defendant's vehicle herself, for its lack of plates, had she been in a marked police vehicle. (Tr. of Suppression Hr'g at 7-8.) Under these circumstances, the stop was valid even though the defense argues that it was a pretextual stop.

B. There Was A Reasonable And Articulate Suspicion To Stop The Defendant's Vehicle And There Was Further Reasonable Suspicion For Believing That Criminal Activity Was Afoot.

[¶11] The defendant also argues that the stop was unconstitutionally expanded. He argues that Officers Beck and Rowan could and should have, upon stopping defendant's vehicle, quickly determined if the temporary permit was valid prior to confronting the defendant in the mini-mart. This Court has explained that for traffic stops, "a reasonable period of detention includes the amount of time necessary for the officer to complete his duties resulting from the traffic stop." State v. Mertz, 362 N.W.2d 410, 412 (N.D. 1985).

Those duties according to the Court of Appeals for the Eighth Circuit, may include:

Request[ing] the driver's license and registration, request[ing] that the driver step out of the vehicle, request[ing] that the driver wait in the patrol car, conduct[ing] computer inquiries to determine the validity of the license and registration, conduct[ing] computer searches to investigate the driver's criminal history and to determine if the driver has outstanding warrants, and mak[ing] inquires as to the motorist's destination and purpose.

United States v. Jones, 269 F.3d 919, 924 (8th Cir. 2001).

[¶12] In the case of an illegible temporary notary sticker, the detention may require only the length of time necessary to verify if the sticker and registration are valid. See State v. Hickman, 491 N.W.2d 673 (Minn.App. 1992) (explaining that once a temporary notary sticker has been verified as having a proper registration, a continued stop and investigation is

unlawful). However, if the notary sticker cannot be read, an investigating officer has been allowed to question a driver to determine if the registration is valid. See Minnesota v. Stensrud, C8-96-1752 (Minn.App. February 25, 1997) (unpublished opinion) (describing that the officer's suspicion - of a violation of improper registration - continues until he has an opportunity to check the temporary notary from inside the vehicle). The law is also clear that a stop can be extended beyond the initial scope of the stop if probable cause for another offense is found. State v. Fields, 2003 ND 81 ¶10, 662 N.W.2d 242, 246, see also U.S. v. Jones, 269 F.3d 919 (8th Cir. 2001) (quoting, U.S. v. Mesa, 62 F.3d 159, 162 (6th Cir.1995) "unless something that occurred during the traffic stop generated the necessary reasonable suspicion to justify a further detention").

[¶13] Here, the traffic stop of Mr. Oliver is a fourth Amendment seizure, and under established precedent could only last as long as it takes to determine that the registration on the temporary notary sticker was valid, unless other facts point to reasonable suspicion for other charges. Like the Stensrud case, Officers Beck and Rowan could initiate a conversation with the defendant because it was previously determined that the registration was illegible. However, unlike Stensrud, after being pulled over, the defendant, instead of remaining in his vehicle for the police to verify his vehicle registration, decided to exit his vehicle and disobey a visual and verbal command from properly identified officers, to stop. Upon the disobeying of this order, there was probable cause to believe that other illegal activity was afoot, namely a violation of N.D. Cent. Code § 12.1-08-11 (2005) for fleeing a peace officer. This new observation gave the officers probable cause to expand their seizure beyond that normally required for a traffic stop.

C. Officers Corroborated The Information Provided By A Tip, And Found A Reasonable And Articulable Suspicion To Stop The Defendant

[¶14] To make a legal investigative stop of a vehicle, an officer must have a reasonable and articulable suspicion that the motorist has violated or is violating the law. Stradsvold, 456 N.W.2d at 296. In State v. Miller, the North Dakota Supreme Court explained that information from a tip may provide a factual basis for the stop. 510 N.W.2d 638, 640 (N.D. 1994). Furthermore, when evaluating the factual basis the totality of the circumstances should be considered. Id. This evaluation includes the quantity, or content, and quality, or degree of reliability, or the information available to the officer. Id. (citing Alabama v. White, 496 U.S. 325 (1990)). The Miller court went on to say that, “[a]s a general rule, the lesser the quality or reliability of the tip, the greater the quantity of information required to raise a reasonable suspicion. Id. This means that “some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized.” Id. 640-641. However, the reliableness from a tip need not rise to “the more exacting standard of probable cause.” Wibben v. North Dakota Highway Comm’r, 413 N.W.2d 329, 331 (N.D. 1987).

[¶15] In State v. Guthmiller, 499 N.W.2d 590 (N.D.1993), an anonymous caller reported “a DUI driver.” The caller gave the general type, color, direction, and license number of the vehicle, but did not describe any erratic driving or suspicious behavior. The investigating officer saw the vehicle stop for an unusually long time at a stop sign, and the officer confirmed the information given in the tip before making the stop. This Court held that the combination of the tip and “Guthmiller’s ‘hesitation’ at the stop sign,” which was a potential violation of N.D. Cent. Code § 39-10-47(1), was sufficient to raise a reasonable and articulable suspicion. Id. at 592. Similarly, in Wibben, an officer received an anonymous tip

stating that a girl sitting in a running vehicle in a nearby parking lot appeared to be either “sick or intoxicated.” 413 N.W.2d at 330. The other details given by the informant were the location and description of the vehicle. An officer was sent to the parking lot and observed the vehicle as described, however, the vehicle was not running. The officer proceeded to do an investigatory stop and arrested the suspect for driving under the influence. *Id.* at 330. The issue in the case was whether the fairly vague anonymous tip constituted reasonable and articulable suspicion to warrant an investigatory stop. The Court found there was reasonable and articulable suspicion and therefore the stop was valid. The Court reasoned that the state’s interest in investigating the officer’s reasonable suspicion outweighed the person’s Fourth Amendment rights. *Id.* at 332.

[¶16] As in Guthmiller and Wibben, in the case at hand, the officers received a reliable tip from a person named to Lieutenant Eggebraaten who saw, what the person believed to be, suspicious drug related activity. See (Tr. of Preliminary Hr’g at 24.) Additionally, Detective Senechal testified at the preliminary hearing that she was made aware by the tip that the vehicle in question was also lacking plates. See (Tr. of Preliminary Hr’g at 29.) In the Detective’s professional opinion the information provided by the informant through Lieutenant Eggebraaten was credible considering that when she arrived to surveille the Cleanerama, she observed the black Lincoln being driven by an African American male, as described. She also observed that the vehicle lacked plates as indicated by the informant. Through binoculars about a quarter block away, Detective Senechal, noticed that the vehicle had what appeared to be a temporary notary sticker, but it was faded and unreadable. This information was subsequently forwarded to Officer Beck, who made the stop on the vehicle.

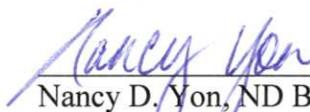
[¶17] To make the valid investigatory stop of the Defendant's vehicle, the officers had a reasonable and articulable suspicion that a crime had occurred or would be occurring, which in the case at hand did not come from the informant's tip but came from the independent observation by officers of a registration violation. The Defendant argues at length that the tip reported to Detective Senechal, prompting the surveillance at the car wash, went uncorroborated, and as such there was no justification to stop defendant's vehicle. However, this argument only goes to show that the officers understood that the tip they received, as explained in Miller, "required further investigation before a forcible stop of the suspect would be authorized." The tip indicated potential drug related activity, which was not seen directly by the task force officers. But, the tip also explained that there was no license plate on the car, and Detective Senechal corroborated this fact, as the Defendant was leaving the car wash. Detective Senechal testified that she observed the faded temporary drive-out sticker, and that had she been in a vehicle with proper markings and emergency lights she would have pulled over the defendant's vehicle herself. (Tr. of Suppression Hearing at 7-8.) Instead, Detective Senechal radioed ahead to Officer Beck and informed him that the vehicle lacked plates. Officer Beck tailed the defendant's vehicle; he observed that it did not have plates. He observed at a close range that the notary sticker in the window was illegible. Id. at 14. Even after the defendant was taken into custody, Officer Beck walked right up to the window and with the help of a light could still not read the notary sticker. Id. at 15.

[¶18] Given the fact that the defendant's vehicle had no plates, nor a legible sticker, and that it is common for officers to initiate traffic stops on vehicles in this situation, there is more than a reasonable and articulable suspicion that an offense is taking place. Thus, the district court's determination ruling on this matter should be affirmed.

CONCLUSION

[¶19] Based on the foregoing law and conclusion, the State respectfully request that this Court affirm the District Court's ruling and the criminal judgments in this case.

DATED this 30th day of June, 2006.

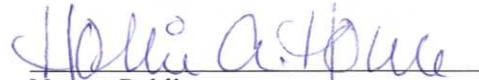


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Subscribed and sworn to before me this 30th day of June, 2006.


Notary Public

