

**IN THE SUPREME COURT**  
**STATE OF NORTH DAKOTA**  
**Supreme Court No. 20060235**

|                        |   |  |
|------------------------|---|--|
| State of North Dakota, | ) |  |
|                        | ) |  |
| Plaintiff-Appellee.    | ) |  |
|                        | ) |  |
| vs.                    | ) |  |
|                        | ) |  |
| Darren Lee Bachmeier,  | ) |  |
|                        | ) |  |
| Defendant-Appellant.   | ) |  |

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Appeal of Order dated May 3<sup>rd</sup>, 2006. the Honorable Gary H. Lee presiding

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**BRIEF OF DEFENDANT-APPELLANT**

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### **III. STATEMENT OF ISSUES**

- I. The trial court erred by not applying the exclusionary rule and denying the defendant's motion to suppress where the arresting officer did not have a reasonable and articulable basis for the stop and subsequently created one through his own illegal conduct.**

#### IV. STATEMENT OF THE CASE

Darren Bachmeier was stopped in the early morning hours of November 13<sup>th</sup>, 2005, by North Dakota Highway Patrol Officer Ryan Hoffner. The stop occurred on North Dakota Highway 28, between Carpio and Berthold. He was arrested and charged with driving under the influence.

Mr. Bachmeier filed a motion to suppress evidence obtained in the stop and a hearing was held on that motion on April 21<sup>st</sup>, 2006. Judge Gary H. Lee issued an order dated May 3<sup>rd</sup>, 2006, denying the motion to suppress and finding that a reasonable and articulable basis existed for the stop and also that improper conduct by the officer was not an appropriate basis for the suppression of evidence in the instant case. Mr. Bachmeier was found guilty of driving under the influence at a jury trial held on July 18<sup>th</sup>, 2006, and has appealed the decision denying his motion to suppress evidence.

## V. STATEMENT OF THE FACTS

Darren Bachmeier was driving home to Berthold, North Dakota, from Carpio, North Dakota, with two friends shortly before 12:50 a.m. on November 13<sup>th</sup>, 2005. Highway Patrol Officer Ryan Hoffner saw his vehicle leave the town of Carpio on North Dakota Highway 28 and head south. Mr. Bachmeier's vehicle was approximately three-quarters of a mile away when Trooper Hoffner first saw it. T1-37.

Trooper Hoffner did not witness any traffic violation by Mr. Bachmeier at that point. Trooper Hoffner testified that "I had no reason to stop him at that time". T1-40. However, Trooper Hoffner was convinced that Mr. Bachmeier was a DUI suspect because "the statistics" show that drivers driving after midnight are DUI suspects. He was asked "since it was after midnight and he was driving you just simply had a hunch that therefore he was a DUI driver, didn't you?". His response was "Yes, I did, correct". T1-42. Judge Lee even then incredulously asked "So everybody on the road after say midnight is a suspected violator?". His affirmative response was "There is a better percentage for violation of driving under the influence of alcohol". T1-42 and 43.

Trooper Hoffner then, based on no observation of any traffic violation whatsoever, but only on this "hunch", initiated a high speed pursuit of Darren Bachmeier's vehicle. He did not activate his emergency lights when exceeding the speed limit, in direct violation of N.D.C.C. §39-10-03(1) and (2). He justifies his blatant violation of the law when asked the question "the Highway Patrol is training you to exceed the speed limit without your emergency lights on?". by simply stating "Yes". T1-43. Trooper Hoffner actually testified under oath that the Highway Patrol is training their officers to break the law in order to make DUI stops.

Trooper Hoffner then drove at speeds around 100 mph in order to catch Darren Bachmeier's

vehicle. He repeatedly and vehemently denied driving that fast but agreed that Mr. Bachmeier's vehicle was a mile ahead of him, driving 65 mph, and he caught up with it within three miles. T1-44. He did NOT activate his on board video camera during his high speed pursuit. Only after he came flying up behind Darren Bachmeier's vehicle did he activate the video camera in his unit. Darren Bachmeier's vehicle then drifted to the center line once and the fog line once on the video. Trooper Hoffner, seeing nothing more than an obvious reaction to his own driving, activated his emergency lights to stop the vehicle. Darren Bachmeier immediately stopped his vehicle without incident. Trooper Hoffner then administered field sobriety tests and placed Mr. Bachmeier under arrest. Mr. Bachmeier consented to a blood test as requested and was eventually convicted at a jury trial of driving under the influence.

## VI. ARGUMENT

Temporary detentions of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitute a “seizure” of “persons” within the meaning of the Fourth Amendment. An automobile stop is thus subject to the constitutional imperative that it not be “unreasonable” under the circumstances. As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. Whren v. United States, 517 U.S. 806, 809-10(1996). Trooper Hoffner freely admitted that he *did not* have any probable cause or reasonable and articulable suspicion to stop Darren Bachmeier’s vehicle when he initially commenced his high speed pursuit. All he had initially was a hunch that Darren Bachmeier was a DUI violator based on his driving after midnight. In Yousef v. United States, 308 F.3d 820, 828 (8<sup>th</sup> Cir. 2002), the Court stated that “General profiles that fit large numbers of innocent people do not establish reasonable suspicion”. It is hard to imagine a more general profile that fits large numbers of innocent people than “anyone driving after midnight”. A law enforcement officer’s “mere hunch illegal activity is taking place is not enough to justify that detention of a motorist”. Kappel v. Dir., N.D. Dep’t of Transp., 1999 ND 213, 602 N.W.2d 718. That is all Trooper Hoffner had when he launched his high speed chase of Darren Bachmeier’s vehicle; a mere hunch. For a traffic stop of a citizen to be valid, it must be valid from its inception. Terry v. Ohio, 392 U.S. 1.

Trooper Hoffner eventually witnessed Darren Bachmeier’s vehicle drift to the center line and the fog line after approaching him at a high rate of speed. A reasonable inference can be made that the drift of the vehicle on the road was the direct result of Trooper Hoffner’s patrol car approaching from the rear at speeds around 100 mph. Any driver is going to experience a serious distraction to

his attention to the road when being approached, especially from behind, at that kind of speed. His attention was naturally split between watching the highway and his rear view mirror. If Trooper Hoffner had activated his emergency lights in compliance with the law, it would not have been as great a distraction as Mr. Bachmeier would have known it was an emergency vehicle. He undoubtedly would have pulled his vehicle over much sooner than he did. Trooper Hoffner basically manufactured the reasonable and articulable suspicion for the stop of the vehicle by his own violation of the law. This is the exact conclusion arrived at by Mr. Peter Halbach at the DOT hearing in this matter. As the hearing officer, he refused to suspend Mr. Bachmeier's driving privileges, correctly stating that Trooper Hoffner did not have a reasonable and articulable suspicion to stop the vehicle. If Trooper Hoffner had not violated the law by initiating a high speed chase without his emergency lights on and without a reasonable and articulable basis for doing so in the first place, he never would have been in a position to distract Mr. Bachmeier's attention from the road and the stop would never have occurred.

Even if one ignores Trooper Hoffner's illegal conduct creating the basis for the entire stop, he still did not have a reasonable and articulable basis upon which to base it upon. The number of times that a vehicle touches a center line or drifts within a lane is not dispositive of whether reasonable suspicion existed to validate a traffic stop; rather, a court must consider the totality of the circumstances in determining whether reasonable suspicion was present at the time a stop was initiated. State v. Binette, 33 S.W.2d 215 (Tenn. 2000). The Court improperly found a reasonable and articulable basis for the stop when it based its decision solely on the drifting of the vehicle onto the fog line and center line. Had the Court looked at the totality of the circumstances, it would have found that the drifting of the vehicle was appropriate under the circumstances that were present at

the scene.

The Court's order of May 3<sup>rd</sup>, 2006, discusses the testimony and illegal actions of both Trooper Hoffner and the Ward County State's Attorney's office as well. The Court was incredulous, and understandably so, both as to Trooper Hoffner's attitudes and methods of law enforcement, and even more so by the complete lack of caring exhibited by the State. The only response given by the Ward County State's Attorney's office during argument regarding Trooper Hoffner breaking the law in order to effectuate an arrest was literally "So What?!". The public policy ramifications presented by this case are obvious. If this arrest and conviction are allowed to stand, the end result and lesson for law enforcement is that they are literally above the law and the end will justify any means of getting there. That proposition flies directly in the face of Mapp v. Ohio and the long litany of cases following it in which the exclusionary rule has been applied to the states to exclude evidence contained as the direct result of the illegal conduct of police officers.

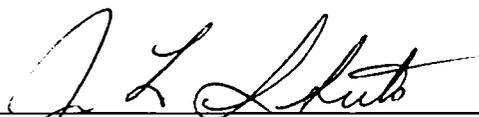
This Court dealt with illegal police conduct, as well as other issues, in the case of State v. Kummer, 481 N.W.2d 481. (ND 1992). There Justice VandeWalle, concurring specially, wrote "The conduct of the law enforcement officers was unauthorized and illegal. I agree with the majority opinion that as a result of that unauthorized and illegal conduct, the conviction of Kummer .....should be reversed.....the actions of the law enforcement officers were contrary to public policy and perhaps violated the due process right of Kummer". Id, at 491. The exact same public policy ramifications are present in this case. The State of North Dakota does NOT have such an extraordinary problem with DUI drivers that law enforcement officers should be allowed to break the law themselves just to make DUI arrests. The "So what?!" argument advanced by the State at hearing in this matter is simply preposterous.

The citizens of our fine state will undoubtedly appreciate the much more eloquent and appropriate view espoused by the Court in Jones v. State, 745 A.2d 856, where when weighing the arguments on both sides of excluding evidence, it stated “The balance ought to be struck on the side of the freedom of the citizen from governmental intrusion. To conclude otherwise would be to elevate society’s interest in apprehending offenders above the right of citizens to be free from unreasonable stops”.

## CONCLUSION

For the reasons that the arresting officer did not have any reasonable suspicion upon which to base a stop of Mr. Bachmeier's vehicle until he himself created that suspicion by his own unlawful conduct, and also that both the exclusionary rule as well as public policy dictate that the evidence against Mr. Bachmeier should have been suppressed, Darren Lee Bachmeier respectfully requests that this Court reverse the decision by Judge Lee and remand the case with instructions that all evidence seized in the stop of Darren Bachmeier be suppressed.

Dated at Minot, North Dakota, this 5<sup>th</sup> day of December, 2006.



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| State of North Dakota, | ) |                               |
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| Plaintiff-Appellee,    | ) |                               |
|                        | ) |                               |
| vs.                    | ) | <b>CERTIFICATE OF SERVICE</b> |
|                        | ) |                               |
| Darren Lee Bachmeier,  | ) |                               |
|                        | ) |                               |
| Defendant-Appellant.   | ) |                               |

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The following documents:

- 1) Defendant-Appellant Brief; and
- 2) Appellant's Appendix.

were served upon the above named Plaintiff-Appellee a true and correct copy to:

Ward County State's Attorney  
Ward County Courthouse  
PO Box 5005  
Minot, ND 58701-5005

via U.S. Mail postage prepaid thereon this 05<sup>th</sup> day of December, 2006.

  
\_\_\_\_\_  
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