

JAN - 4 2019

Morgan Lies,

Appellant,

Supreme Ct. No. 20180393

v.

District Ct. No. 36-2018-CV-00182

**North Dakota Department
of Transportation,**

Appellee.

**APPEAL FROM THE DISTRICT COURT
JUDGMENT DATED AUGUST 24, 2018
RAMSEY COUNTY, NORTH DAKOTA
NORTHEAST JUDICIAL DISTRICT**

HONORABLE DONOVAN FOUGHTY

BRIEF OF APPELLEE

State of North Dakota
Wayne Stenehjem
Attorney General

**By: Michael Pitcher
Assistant Attorney General
State Bar ID No. 06369
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
Email mtpitcher@nd.gov**

Attorneys for Appellee.

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
	<u>Paragraph</u>
Statement of Issue	1
The hearing officer did not err in finding there was reasonable and articulable suspicion to stop Lies' vehicle based on the tip from an off-duty law enforcement officer.....	1
Statement of Case	2
Statement of Facts	6
Standard of Review	9
Law and Argument	11
The tip provided by off-duty Highway Patrol Trooper Chris Laite provided law enforcement with sufficient grounds to stop Lies' vehicle	11
Conclusion	34

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Paragraphs(s)</u>
<u>Adams v. Williams,</u> 407 U.S. 143 (1972)	20
<u>Anderson v. Dir., N.D. Dep't of Transp.,</u> 2005 ND 97, 696 N.W.2d 918	15, 18, 19, 20, 22, 23, 24, 26
<u>City of Minot v. Keller,</u> 2008 ND 38, 745 N.W.2d 638	16
<u>Crawford v. Dir., N.D. Dep't of Transp.,</u> 2017 ND 103, 893 N.W.2d 770	10
<u>Gabel v. N.D. Dep't of Transp.,</u> 2006 ND 178, 720 N.W.2d 433	18
<u>Illinois v. Gates,</u> 462 U.S. 213 (1983)	20
<u>Knoll v. N.D. Dep't of Transp.,</u> 2002 ND 84, 644 N.W.2d 191	9
<u>State v. Fasteen,</u> 2007 ND 162, 740 N.W.2d 60	11, 14
<u>State v. Fields,</u> 2003 ND 81, 662 N.W.2d 242	14
<u>State v. Galgay,</u> 750 A.2d 52 (N.H. 2000).....	33
<u>State v. Loh,</u> 2000 ND 188, 618 N.W.2d 477	32
<u>State v. McLaren,</u> 2009 ND 176, 773 N.W.2d 416	14
<u>State v. Miller,</u> 510 N.W.2d 638 (N.D. 1994)	16, 18, 20, 21, 26
<u>State v. Neis,</u> 469 N.W.2d 568 (N.D. 1991)	32

<u>State v. Oliver,</u> 2006 ND 241, 724 N.W.2d 114	14
<u>State v. Olson,</u> 2007 ND 40, 729 N.W.2d 132	13
<u>State v. Sarhegyi,</u> 492 N.W.2d 284 (N.D. 1992)	13
<u>State v. Storbakken,</u> 552 N.W.2d 78 (N.D. 1996)	14
<u>State v. Turmel,</u> 838 A.2d 1279 (N.H. 2003)	33
<u>State v. Westmiller,</u> 2007 ND 52, 730 N.W.2d 134	14
<u>State of Wisconsin v. Rutzinski,</u> 623 N.W.2d 516 (Wis. 2001)	24, 25, 26
<u>Sturn v. N.D. Dep't of Transp.,</u> 2009 ND 39, 763 N.W.2d 515	14
<u>Terry v. Ohio,</u> 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968)	11, 12
<u>U.S. v. Christmas,</u> 222 F.3d 141 (4th Cir. 2000)	20
<u>United States v. Hensley,</u> 469 U.S. 221 (1985)	16
<u>Whiteley v. Warden,</u> 401 U.S. 560 (1971)	16
<u>Zimmerman v. N.D. Dep't of Transp.,</u> 543 N.W.2d 479 (N.D. 1996)	13
 <u>Statutes</u>	
N.D.C.C. ch. 28-32	9
N.D.C.C. ch. 39-20	9
N.D.C.C. § 28-32-46	9

N.D.C.C. § 39-04-11	14
N.D.C.C. § 39-20-05(2)	3
N.D.C.C. § 39-21-21	14

STATEMENT OF ISSUE

[¶1] The hearing officer did not err in finding there was reasonable and articulable suspicion to stop Lies' vehicle based on the tip from an off-duty law enforcement officer.

STATEMENT OF CASE

[¶2] Officer Samantha Rodriguez (Officer Rodriguez) of the Devils Lake Police Department arrested Morgan Lies (Lies) on April 6, 2018, for the offense of driving or being in actual physical control of a vehicle while under the influence of intoxicating liquor. Transcript (Tr.) at Exhibit (Ex.) 1b. A Report and Notice, including a temporary operator's permit, was issued to Lies after chemical Intoxilyzer test results indicated that Lies' alcohol concentration was .12 percent by weight. Id. The Report and Notice notified Lies of the Department's intent to suspend his driving privileges. Id.

[¶3] In response to the Report and Notice, Lies requested an administrative hearing. Tr. Ex. 1e. The hearing was held on May 2, 2018. Tr. 1; Ex. 2. In accordance with N.D.C.C. § 39-20-05(2) the hearing officer considered four broad issues, as follows:

- (1) Whether the arresting officer had reasonable grounds to believe the person had been driving or was in actual physical control of a vehicle while under the influence of intoxicating liquor in violation of N.D.C.C. section 39-08-01 or equivalent ordinance;
- (2) Whether the person was placed under arrest;
- (3) Whether the person was tested in accordance with N.D.C.C. section 39-20-01 and, if applicable, section 39-20-02; and;
- (4) Whether the test results show the person had an alcohol

concentration of at least eight one-hundredths of one percent but less than eighteen one-hundredths of one percent by weight.

Tr. 1; Tr. Ex. 2.

[¶4] Following the hearing, the hearing officer issued his findings of fact, conclusions of law, and decision suspending Lies' driving privileges for a period of 91 days. Tr. 35, line (l.) 19 – Tr. 40, l. 24. Lies requested judicial review of the hearing officer's decision. App. 3-4.

[¶5] Judge Donovan Foughty issued an Order Affirming the hearing officer's decision on August 21, 2018. App. 29. Judgment was entered on August 24, 2018. App. 30. Lies appealed from the Judgment to this Court. App. 31. The Department asks this Court to affirm the judgment of the Ramsey County District Court and the administrative suspension of Lies' driving privileges for 91 days.

STATEMENT OF FACTS

[¶6] Officer Rodriguez met with North Dakota Highway Patrol Trooper Brett Mlynar (Trooper Mlynar) at 7:30 p.m. on April 6, 2018, in the parking lot of the Glass Shop near the corner of 4th Street SE and College Drive (Highway 20) about ten minutes after Trooper Mlynar relayed a report from off-duty Highway Patrol trooper, Chris Laite, that a white Chevy HHR had nearly struck a gas pump and almost drove into a ditch when leaving Ed's Bar and Bait Shop on Highway 20, south of Highway 2. Tr. 6, l. 4 – Tr. 8, l. 20.

[¶7] Trooper Mlynar was surveilling a white Chevy HHR at the McDonald's restaurant west of the intersection. Tr. 8, ll. 4-5. Officer Rodriguez left the area but continued to monitor the radio. Tr. 8, l. 22 – Tr. 9, l. 1. After hearing that

Trooper Mlynar lost sight of the HHR on Highway 2 near the Bjornson gas station, Officer Rodriguez continued eastbound on Highway 2 catching up to the HHR. Tr. 9, ll. 3-15. Trooper Mlynar directed Officer Rodriguez to stop the HHR. Tr. 13, ll. 1-6.

[¶8] At about 8:00 p.m., Officer Rodriguez stopped the HHR near Wal-Mart on Highway 2, in Devils Lake. Tr. 10, ll. 2-4; Ex. 1b. Officer Rodriguez approached the vehicle and identified the driver, and lone occupant, as Lies. Tr. 10, ll. 16-17. After detecting the odor of an alcoholic beverage coming from Lies, and observing indicia of impairment, Officer Rodriguez had Lies perform field sobriety tests. Tr. 10, l. 17 – Tr. 15. Lies showed impairment on all three standardized field sobriety tests – the horizontal gaze nystagmus, one leg stand, and walk-and-turn. Tr. 13, l. 18 – Tr. 16, l. 20. Lies was subsequently placed under arrest for driving under the influence at 8:14 p.m. Tr. 18, ll. 13-14; Ex. 1b. Thereafter, Lies was transported to the county jail where he submitted to a chemical breath test on the Intoxilyzer 8000. Tr. 18, l. 18 – Tr. 21, l. 4. The test was administered in accordance with the approved method and the results showed that Lies' alcohol concentration was 0.12 percent by weight. Tr. Ex. 1c.

STANDARD OF REVIEW

[¶9] The Administrative Agencies Practices Act governs an appeal from an administrative hearing officer's decision suspending a license. N.D.C.C. ch. 28-32; N.D.C.C. ch. 39-20. The appeal is civil in nature. Knoll v. N.D. Dep't of Transp., 2002 ND 84, ¶ 16, 644 N.W.2d 191. And it is separate and distinct from any criminal matter that may ensue. Id. The North Dakota Century Code provides, in relevant

part, that a court must affirm an agency's order except in the event of any of the following:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

N.D.C.C. § 28-32-46.

[¶10] In reviewing an agency's findings of fact, this Court does not make independent findings of fact or substitute its judgment for that of the agency; rather, the court determines only whether a reasoning mind reasonably could have concluded the agency's findings were supported by the weight of the evidence from the entire record. Crawford v. Dir., N.D. Dep't of Transp., 2017 ND 103, ¶ 4, 893 N.W.2d 770.

LAW AND ARGUMENT

The tip provided by off-duty Highway Patrol Trooper Chris Laite provided law enforcement with sufficient grounds to stop Lies' vehicle.

[¶11] “Unreasonable search and seizures are prohibited by the Fourth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, and by Article I, § 8 of the North Dakota Constitution.” State v. Fasteen, 2007 ND 162, ¶ 6, 740 N.W.2d 60. “Under the doctrine announced by the United States Supreme Court in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), police may, in appropriate circumstances, detain an individual for investigative purposes when there is no probable cause to make an arrest if the police have a reasonable and articulable suspicion that criminal activity is afoot.” Id.

[¶12] “For a valid investigative stop of a vehicle under the Terry doctrine, an officer must have a reasonable and articulable suspicion the motorist has violated or is violating the law.” Id. “Probable cause to believe a motorist has violated a traffic law renders the stop reasonable and the evidence obtained from the stop admissible.” Id.

[¶13] In State v. Olson, the North Dakota Supreme Court explained:

In reviewing whether an investigative stop is valid, we use an objective standard and look to the ‘totality of the circumstances.’ [State v.] Parizek, 2004 ND 78, ¶ 9, 678 N.W.2d 154. ‘The question is whether a reasonable person in the officer’s position would be justified by some objective manifestation to suspect the defendant was, or was about to be, engaged in unlawful activity.’ Id. In City of Devils Lake v. Lawrence, 2002 ND 31, ¶ 8, 639 N.W.2d 466 (quoting City of Fargo v. Ovind, 1998 ND 69, ¶ 9, 575 N.W.2d 901(citations omitted)), this Court explained:

We do not require an officer to isolate single factors which signal a potential violation of the law; but instead,

'officers are to assess the situation as it unfolds and, based upon inferences and deductions drawn from their experience and training, make the determination whether all of the circumstances viewed together create a reasonable suspicion of potential criminal activity.' When assessing reasonableness, we consider inferences and deductions an investigating officer would make which may elude a layperson.

2007 ND 40, ¶ 11, 729 N.W.2d 132. "The trier of fact must use an objective standard and determine whether or not a reasonable person in the officer's position would be justified by some objective manifestation to suspect the defendant was, or was about to be, engaged in criminal activity." Zimmerman v. N.D. Dep't of Transp., 543 N.W.2d 479, 481 (N.D. 1996) (citing State v. Sarhegyi, 492 N.W.2d 284, 286 (N.D. 1992)).

[¶14] "Traffic violations, even if pretextual, provide a lawful basis to conduct an investigatory vehicle stop." State v. Oliver, 2006 ND 241, ¶ 6, 724 N.W.2d 114. "A police officer's subjective intentions in making a stop are not important as long as a traffic violation has occurred." Id. In addition, "traffic violations, even if considered common or minor, constitute prohibited conduct and, therefore, provide officers with requisite suspicion for conducting investigatory stops." State v. Fields, 2003 ND 81, ¶ 7, 662 N.W.2d 242 (quoting State v. Storbakken, 552 N.W.2d 78, 80-81 (N.D. 1996)). See, e.g., State v. McLaren, 2009 ND 176, ¶ 12, 773 N.W.2d 416 ("deputy had an objectively reasonable basis to stop McLaren for violating N.D.C.C. § 39-04-11 because . . . her vehicle displayed expired registration tabs."); Sturn v. N.D. Dep't of Transp., 2009 ND 39, ¶ 10, 763 N.W.2d 515, 518 ("Speeding violations constitute sufficient reason for an officer to stop a vehicle."); Fasteen, 2007 ND 162 at ¶ 11 ("We conclude the officer had the

requisite grounds to make a valid investigative stop of Fasteen's vehicle, because Fasteen had violated the law by failing to signal his turn."); State v. Westmiller, 2007 ND 52, ¶ 14, 730 N.W.2d 134 ("Because N.D.C.C. § 39-21-21 prohibits any use of high-beam headlights within 500 feet of an oncoming vehicle, Deputy Kapp had reasonable suspicion to stop Westmiller for violating the statute.").

[¶15] This Court "[has] discussed three situations that provide an officer reasonable and articulable suspicion to stop a vehicle: (1) when the officer relied on a directive or request for action from another officer; (2) when the officer received tips from other police officers or informants, which were then corroborated by the officer's own observations; and (3) when the officer directly observed illegal activity." Anderson v. Dir., N.D. Dep't of Transp., 2005 ND 97, ¶ 9, 696 N.W.2d 918 (emphasis added).

[¶16] "Where one officer relays a directive or request for action to another officer without relaying the underlying facts and circumstances, the directing officer's knowledge is imputed to the acting officer." State v. Miller, 510 N.W.2d 638, 643 (N.D. 1994); Whiteley v. Warden, 401 U.S. 560 (1971). See also City of Minot v. Keller, 2008 ND 38, 745 N.W.2d 638 ("The Whiteley rule, also known as the collective knowledge doctrine, allows law enforcement officers to rely on information from other officers to establish probable cause."). Information from other officers can also be used to establish reasonable and articulable suspicion. United State v. Hensley, 469 U.S. 221, 231 (1985); Miller, 510 N.W.2d at 643.

[¶17] Here it is uncontested that Officer Rodriguez was acting on a directive from Trooper Mlynar to stop Lies' vehicle. Appellant's Br. ¶ 13. It is further uncontested

that Trooper Mlynar received a tip directly from off-duty Highway Patrol Trooper Chris Laite (Laite) regarding erratic driving by a white Chevy HHR leaving Ed's Bait Shop and Bar (ED's). Appellant's Br. ¶ 5. Specifically, Laite had witnessed the white Chevy HHR almost striking a gas pump and almost driving into the ditch. Tr. 6, ll. 6-8. Trooper Mlynar relayed the information provided by Laite to Officer Rodriguez. Appellant's Br. ¶ 5. Since Trooper Mlynar directed Officer Rodriguez to stop Lies' vehicle, the question then is whether Trooper Mlynar had reasonable suspicion to stop Lies' vehicle. The Department does not dispute that neither Trooper Mlynar nor Officer Rodriguez independently observed any erratic driving prior to the stop of Lies' vehicle. The sole basis for the stop was the information conveyed in the tip from Laite to Trooper Mlynar and then to Officer Rodriguez. Tr. 10, ll. 10-13.

[¶18] This Court has addressed when is it permissible for law enforcement to stop a vehicle based on information obtained from an informant. Information obtained through a tip may provide a factual basis for a traffic stop. Anderson, 2005 ND 97 at ¶ 10 (citing Miller, 510 N.W.2d at 640). The North Dakota Supreme Court more recently stated:

An officer can use information received from other officers with his or her personal observations to form the factual basis needed for a legal investigatory stop. We have upheld investigatory stops of vehicles when the stopping officer received information of illegal activity from other officers and the officer corroborated the tip with personal observations. If the surrounding facts and circumstances verify an informant's reliability, a known informant's tip can provide a sufficient basis to justify a stop.

Gabel v. N.D. Dep't of Transp., 2006 ND 178, ¶ 11, 720 N.W.2d 433 (internal citations omitted).

[¶19] The totality of the circumstances must be considered. Anderson, 2005 ND 97 at ¶ 10. This analysis includes the “quantity, or content, and quality, or degree of reliability, of the information available to the officer.” Id. Generally, as the reliability of the informant’s tip increases, the amount of information required to raise a reasonable suspicion decreases. Id. at ¶ 18. The converse is also true: if an informant’s reliability is low, then a greater amount of information is required to raise a reasonable suspicion. Id. at ¶ 10. The reliability of a known informant “has a higher indicia of reliability than information obtained from a purely anonymous informant.” Id. at ¶ 15. “As 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. at ¶ 10.

[¶20] “The most reliable tip is the one relayed personally to the officer” – i.e., face-to-face informants. Miller, 510 N.W.2d at 640. In Anderson the North Dakota Supreme Court stated that “[i]nformation from an informant whose identity is easily ascertainable has a higher indicia of reliability than information obtained from a purely anonymous informant.” 2005 ND 97 at ¶ 15. The underlying rationale for the reliability of tips from face-to-face informants is that “[u]nlike the anonymous tipster, a witness who directly approaches a police officer can also be held accountable for false statements.” U.S. v. Christmas, 222 F.3d 141, 144 (4th Cir. 2000). “As the Supreme Court has observed, citizens who personally report crimes to the police thereby make themselves accountable for lodging false complaints.” Id. (citing Illinois v. Gates, 462 U.S. 213, 233-34 (1983); Adams v. Williams, 407 U.S. 143, 147 & n.2 (1972)).

[¶21] In Miller, the court held the stop invalid because the informant was not reliable and the amount of information provided was insufficient. There the police department received a phone call from a person identified as “Jody with Wendy’s.” Miller, 510 N.W.2d at 639. She reported a possible drunk driver in the drive-thru lane at Wendy’s restaurant who “could barely hold his head up.” Id. The informant provided the driver’s license plate number. Id. The police dispatcher relayed this information to the officer, but failed to tell the officer the identity of the informant. Id. The officer arrived at the restaurant, and confirmed the vehicle matched the informant’s description. Id. But he did not observe any erratic driving before stopping the vehicle. Id. The court concluded the stop was invalid because the combination of an anonymous tip, which lacked reliability, and the officer’s observation of innocent facts failed to raise a reasonable and articulable suspicion. Id. at 644-45.

[¶22] In Anderson, the informant was not truly anonymous. The court found that the informant was reliable, but the information he conveyed to the police was inadequate to allow the police officer to make a valid investigatory stop. The identity of the informant was unknown to the officer at the time of the stop, however, it was easily ascertainable because the informant was following the suspect’s vehicle and pulled over at the time of the stop. Anderson, 2005 ND 97, ¶ 14, 696 N.W.2d at 918.

[¶23] Though reliable, the informant merely reported to the police dispatcher the “bare assertion” that he had observed a “possible reckless driver or drunk driver.” Id. at ¶ 21. The officer did not observe Anderson’s vehicle perform any illegal or

erratic driving before the stop. Id. at ¶ 3. Notably, there was no evidence presented indicating that the informant told the dispatcher that the suspect hit cones in a construction zone and that the dispatcher relayed this information to the officer. Id. at ¶ 19. The only information relayed to the officer from the dispatcher were the descriptions of the informant and suspect's vehicles and that the informant had witnessed a "possible reckless driver or drunk driver." Id. The court concluded that because the information relayed to the officer from the dispatcher only contained a "bare assertion" that the suspect was "possibl[y] [a] reckless driver or [a] drunk driver" the officer lacked a reasonable and articulable suspicion to justify the stop. Id. at ¶ 21.

[¶24] In State of Wisconsin v. Rutzinski, 623 N.W.2d 516 (Wis. 2001) as outlined in Anderson, the Wisconsin Supreme Court held an investigatory stop premised on an informant's tip valid. The informant called into the police department to report a vehicle "weaving within its lane, varying its speed from too fast to too slow, and 'tailgating.'" Rutzinski, 623 N.W.2d at 519. The informant was not truly anonymous. Id. at 525-26. The informant was identifiable. Id. at 527. The informant provided the police dispatcher with verifiable information that formed the basis of his knowledge. Id. at 525-26. The informant's report was relayed to the officer. Id. at 519. The informant gave a description of the vehicle, its direction, and periodic updates of its location as it passed recognizable markers on the road. Id. at 525-26. The Rutzinski court also noted that the tip from the informant reported Rutzinski was driving erratically (slowing and speeding up, tailgating, and weaving), which is a possible sign of intoxicated use of a motor vehicle. Id. at 519,

525-26.

[¶25] Yet the officer in Rutzinski did not observe any traffic violations when he located the vehicle. The court, however, concluded the “inside information” that had been conveyed gave the informant reliability and allowed the officer to reasonably infer that the informant had a reliable basis of knowledge. Id. at 525-26. Because of the reliability and content of the informant’s tip, the officer had a reasonable suspicion to justify the investigative stop. Id. at 527-28.

[¶26] The facts here are more similar to Rutzinski than Anderson or Miller. The information conveyed to Trooper Mlynar was more descriptive than that of the information received by the officer in Anderson. Here, the informant was not anonymous. The informant was off-duty Highway Patrol Trooper Chris Laite. Tr. 6, ll. 6-8. Further, the information conveyed to Trooper Mlynar by Laite was more descriptive than that of the information received by the officer in Anderson. In Anderson, though the informant may have known the vehicle had hit cones in a construction zone, the only information relayed to the officer who made the stop was the suspect was a “possible reckless or drunk driver.” Here, Laite conveyed his observations of what Lies was doing and this information was relayed to Trooper Mlynar and then subsequently to Officer Rodriguez. Specifically, Laite indicated the white Chevy HHR had nearly struck a gas pump and almost went into the ditch when leaving Ed’s. Tr. 6, ll. 6-8. These factors are more than a “bare assertion.” This description is similar, if not better, than the information conveyed by the tipster in Rutzinski, where the Wisconsin Supreme Court found the stop valid. The specific information provided by Laite to Trooper Mlynar and

subsequently to Officer Rodriguez regarding the white Chevy HHR nearly striking a gas pump and almost going into the ditch when leaving Ed's was sufficient inside information to support a stop of Lies' vehicle. In fact, as previously noted, Lies concedes that Laite observed a white Chevy HHR which he believed to be driving erratically as it left the gas pump at Ed's. Appellant's Br. ¶ 16.

[¶27] Lies' argument is that Trooper Mlynar lacked reasonable suspicion to believe the white Chevy HHR operated by Lies was the same vehicle observed by Laite. Appellant's Br. ¶¶ 19-20. The basis for Lies' argument is his assertion that the white Chevy HHR which Trooper Mlynar was surveilling at the McDonald's drive-thru occurred approximately 25 minutes after Laite had observed a white Chevy HHR leaving Ed's at around 7:05 p.m. and therefore was not likely the same vehicle Appellant's Br. ¶ 17. However, it is apparent from the record that Trooper Mlynar was surveilling Lies' white Chevy HHR prior to 7:30 p.m. In fact, it was Officer Rodriguez who testified she stopped and spoke with Trooper Mlynar at the Glass Shop, across the street from the McDonald's, at 7:30 p.m. while Trooper Mlynar was watching Lies' vehicle. Tr. 22, ll. 7-13. Therefore, Trooper Mlynar was already at the Glass Shop surveilling Lies' vehicle prior to 7:30 p.m. Additionally, Officer Rodriguez explained that approximately 10 minutes prior to her face-to-face conversation with Trooper Mlynar at 7:30 p.m. is when she heard the radio report from Trooper Mlynar about the white Chevy HHR. Tr. 8, ll. 15-20.

[¶28] After speaking with Trooper Mlynar Officer Rodriguez left the Glass Shop and Trooper Mlynar continued to watch the white Chevy HHR. Tr. 8, ll. 22-23. The HHR eventually exited the McDonald's restaurant and Trooper Mlynar followed but

lost sight of it on Highway 2 near the Bjornson's gas station. Tr. 8, l. 23 – Tr. 9, l. 11. Officer Rodriguez ended up seeing the vehicle further east on Highway 2. Tr. 9, ll. 11-15. Trooper Mlynar directed Officer Rodriguez to stop the HHR. Tr. 12, l. 25 – Tr. 13, l. 2. Officer Rodriguez did so at approximately 8:00 p.m. near the Walmart and the Cenex East. Tr. 10, ll. 2-4. Therefore, while it may have been, at most, 55 minutes from the time the white Chevy HHR was observed leaving Ed's at 7:05 p.m. until Officer Rodriguez stopped Lies' vehicle at 8:00 p.m., Lies' vehicle had been under almost constant observation sometime prior to 7:30 p.m.

[¶29] The question then is whether it was reasonable for Trooper Mlynar to believe Lies' vehicle which he began surveilling before 7:30 p.m. was the same vehicle observed leaving Ed's around 7:05 a.m. The hearing officer found:

Here Mlynar had located a white HHR in the general vicinity of the driving reported by Laite within a half of an hour of the report. There is no evidence the sighting of white HHRs is a common occurrence, such as seeing a white pickup would be.

Tr. 40, ll. 8-11. These findings are supported by the preponderance of the evidence.

[¶30] Trooper Mlynar was surveilling a white Chevy HHR in the McDonald's drive thru from the Glass Shop, located on College Drive or Highway 20, North of US Highway 2. Tr. 8, ll. 4-5. Ed's is also located on Highway 20 but south of US Highway 2, and according to Officer Rodriguez was not very far away. Tr. 7, ll. 10-23. In fact, the distance from Ed's to the McDonald's is approximately one mile. Therefore, the hearing officer's finding that Trooper Mlynar located a white HHR in the "general vicinity" of the driving reported by Laite is supported by the evidence. As is the hearing officer's finding that Lies' vehicle was observed within a half hour

of the report. In fact, the evidence suggests that it was much less than 25 minutes, because Trooper Mlynar had Lies' vehicle under surveillance at the McDonald's prior to 7:30 p.m. Further, the hearing officer's finding regarding the uniqueness of the vehicle – a white Chevy HHR - observed by Laite and later found being operated by Lies as not being a common occurrence cannot be reasonably questioned. A reasoning mind therefore could reasonably determine that Lies' vehicle was more likely than not the same vehicle observed by off-duty officer Laite driving erratically as it left Ed's.

[¶31] Lies, however, claims the continued surveillance of his vehicle by Trooper Mlynar without any additional observations of erratic driving negates any reasonable suspicion that may have existed at the time of Laite's initial report. Appellant's Br. ¶ 20. Yet, other than raising the issue, Lies fails to provide any analysis or case law to support this argument.

[¶32] This Court has observed that, reasonable and articulable suspicion of unlawful activity does not necessarily dissipate even when an officer does not observe any further unlawful activity upon following a vehicle for a significant distance after observing an initial traffic violation. Specifically, the Court has explained as follows:

In VandeHoven, we also considered subsequent non-suspicious behavior. 'Once a reasonable suspicion has been formed, subsequent actions which do not enhance the suspicion are irrelevant to a reasonably prompt stop of a vehicle. 388 N.W.2d at 859. Even experienced officers may need time to absorb information and to reflect on its implications. See Geiger v. Backes, 444 N.W.2d 692, 693 (N.D. 1989). The fact that an officer followed a driver for a few miles before stopping him does not always negate suspicion, although it may be an evidentiary consideration in some cases. In the totality of these circumstances, we believe the trial court fairly

found that [Highway Patrol Officer] Haga had an articulable and reasonable suspicion to stop Neis.

State v. Neis, 469 N.W.2d 568, 570-71 (N.D. 1991). In another case, this Court stated:

We have previously declined to hold unreasonable, as a matter of law, an officer following a suspect driver for nearly five miles before stopping the vehicle. Johnson v. North Dakota Dep't of Transp., 530 N.W.2d 359, 361 (N.D. 1995). We conceded an officer may show poor judgment in permitting a suspected drunk driver to continue driving once the officer has formed a reasonable and articulable suspicion the driver is violating the law, yet we concluded it would be 'equally unwise . . . to craft a bright-line rule limiting the distance an officer may follow a driver, suspected of violating the law, before initiating a stop.' Id.

State v. Loh, 2000 ND 188, ¶ 13, 618 N.W.2d 477.

[¶33] Other courts have made similar decisions regarding reasonable suspicion and the passage of time before a stop is conducted. For example, in State v. Galgay, an informant observed a man driving his car erratically and reported it to the police. 750 A.2d 52, 53-54 (N.H. 2000). Almost an hour later, after the driver had entered a restaurant and then returned to his car, a police officer pulled him over after observing the man enter his car and drive it out of the parking lot. Id. at 54. The court held that the passage of time of almost an hour and the "defendant's ability for a brief span of time to competently enter his car and drive it out of [a] parking lot . . . [did] not negate the officer's reasonable suspicion" necessary to perform an investigatory stop. Id. at 56; see also State v. Turmel, 838 A.2d 1279, 1284 (N.H. 2003) ("the passage of approximately ten minutes and [law enforcement's] observation of the defendant driving in a competent manner does not diminish the reasonable suspicion that existed for the officers to perform an

investigatory stop . . .").

CONCLUSION

[¶34] The Department respectfully requests that this Court affirm the judgment of the Ramsey County District Court and the Department's decision suspending Lies' driving privileges for a period of 91 days.

Dated this 4th day of January, 2019.

State of North Dakota
Wayne Stenehjem
Attorney General

By:



Michael Pitcher
Assistant Attorney General
State Bar ID No. 06369
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
Email mtpitcher@nd.gov

Attorneys for Appellee.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Morgan Lies,

Appellant,

v.

North Dakota Department
of Transportation,

Appellee.

Supreme Ct. No. 20180393

District Ct. No. 36-2018-CV-00182

**AFFIDAVIT OF SERVICE
BY ELECTRONIC MAIL**

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

[¶1] Melissa Castillo states under oath as follows:

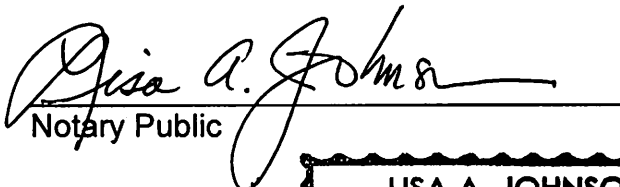
[¶2] I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

[¶3] I am of legal age and on the 4th day of January, 2019, I served the attached **BRIEF OF APPELLEE** upon Morgan Lies, by and through his attorney Joseph R. Vetsch, by electronic mail as follows:

Joseph R. Vetsch
Attorney at Law
Joevetsch@yahoo.com


Melissa Castillo

Subscribed and sworn to before me
this 4th day of January, 2019.


Notary Public

