

20090323

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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FEB 18 2010

State of North Dakota,

Plaintiff-Appellee,

-vs-

Christian Wolfer,

Defendant-Appellant,

.....

FILED
IN THE OFFICE OF THE
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FEB 18 2010

STATE OF NORTH DAKOTA

Supreme Ct. No. 20090323

District Ct. No. 08-09-K-0798

SA File No. M534-09-05

BRIEF OF PLAINTIFF-APPELLEE

APPEAL FROM AMENDED CRIMINAL JUDGMENT DATED AND
FILED JANUARY 4, 2010, AND THE ADVERSE DETERMINATION
WITHIN THE AUGUST 31, 2009, ORDER DENYING THE
DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

Burleigh County District Court
South Central Judicial District
The Honorable Bruce A. Romanick, Presiding

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STATEMENT OF THE ISSUES

Whether the District Court's Order Denying Motion to Suppress was supported by the manifest weight of the evidence?

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ARGUMENT

In City of Bismarck v. Bullinger, 2010 ND 15, ____ N.W.2d ____
this Court recently articulated the well-established standard to be applied
when reviewing a district court's decision on a motion to suppress:

[T]his Court defers to the district court's findings of
fact and resolves conflicts in testimony in favor of affirmance.
This Court will affirm a district court decision regarding a
motion to suppress if there is sufficient competent evidence
fairly capable of supporting the district court's findings, and
the decision is not contrary to the manifest weight of the
evidence. Questions of law are fully reviewable on appeal, and
whether a finding of fact meets a legal standard is a question of
law.

The district court denied the Appellant's (Wolfer's) motion to
suppress the evidence resulting from the arresting officer's (Iverson's)
traffic stop of his vehicle. Officers must have a reasonable suspicion
that a motorist has violated the law or probable cause to believe the
motorist has done so in order to conduct a traffic stop. State v.
Washington, 2007 ND 138, ¶ 11, 737 N.W.2d 586. An officer will
have reasonable suspicion to conduct a stop when, under the totality of
the circumstances, a reasonable person in the officer's position would
be justified by some objective manifestation to suspect potential
criminal activity is occurring. Johnson v. Sprynczynatyk, 2006 ND
137, ¶ 9, 717 N.W.2d 586.

Here, there were two critical pieces of evidence presented
during the hearing that Wolfer had crossed over the fog line on the

1 right side of the road in violation of law. First, under direct
2 examination, Iverson testified that while travelling behind Wolfer's
3 pickup at approximately 1:17 a.m. he saw it "veer over the right fog
4 line crossing over onto the shoulder of the roadway back onto the lane
5 of travel". (Trans. p. 7, lines 8-21). He specified that he saw the
6 outside tires travel over the fog line where it continued to drive for ten
7 to twenty feet (Trans. p. 7, lines 25; p. 8, lines 1-7).

8
9 Second, and perhaps more significantly, the district court had
10 the opportunity to review the law enforcement video recording of the
11 driving, as a copy of the same was received into evidence by
12 stipulation of the parties. (Trans. p. 3, lines 15-18). This video was,
13 arguably, the most compelling evidence the district court could hope to
14 have before it when reviewing the legalities of Wolfer's driving.
15

16 Iverson's testimony and the video (which speaks for itself)
17 clearly establish, from a factual standpoint, that Wolfer crossed the
18 right hand side fog line. Such driving violates N.D.C.C. § 39-10-17.
19

20 North Dakota Century Code section 39-10-17(1) provides as
21 follows whenever any roadway has been divided into two or more
22 clearly marked lanes for traffic:

23 A vehicle must be driven as nearly as practicable *entirely*
24 within a single lane and may not be moved from such lane until
25 the driver has first ascertained that such movement can be
made with safety. (Emphasis added)

26 North Dakota Century Code section 39-01-01(66) defines the
27

1 term "roadway" in relevant part as "[t]hat portion of a highway
2 improved, designed, or ordinarily used for vehicular travel, *exclusive*
3 *of the berm or shoulder*" (Emphasis added).
4

5 In crossing the fog line, which the evidence clearly establishes
6 he did, Wolfer failed to remain entirely within his lane and traveled
7 onto the shoulder, which by definition is not part of the roadway. This
8 is a violation of section 39-10-17 and would justify a law enforcement
9 stop.
10

11 Wolfer disputes that the evidence establishes he crossed over
12 or drove on the fog line. He relies primarily on Iverson's apparent
13 testimony during a previous hearing that it was possible Wolfer's tires
14 only drove on or touched the fog line, but did not actually drive onto
15 the other side of it. (Trans. p. 12, lines 12-18). Wolfer's reliance on
16 this prior testimony is misplaced for two reasons.
17

18 First, Iverson qualified that his testimony at the time of the
19 previous hearing was without the benefit of reviewing the video
20 recording of the stop prior thereto. (Trans. p. 12, lines 18-20).
21 Secondly, as previously noted, the district court viewed the video. The
22 video speaks for itself and makes Iverson's testimony from a previous
23 hearing of further questionable relevance.
24

25 Wolfer further argues that even if the evidence does establish
26 that he crossed the fog line, the same does not constitute a violation of
27 section 39-10-17. He cites a number of cases from other jurisdictions

1 interpreting statutes very similar in wording to N.D.C.C. § 39-10-17
2 for the proposition that driving on, touching, or crossing the fog line
3 does not violate such “practicable/practical lane” statutes. However,
4 for two reasons Wolfer’s reliance on those cases is misplaced.
5

6 First, the cases cited by Wolfer seem to treat crossing or
7 driving on the fog line one time as an insufficiently minor driving
8 violation so that without more, a stop is not justified. However, it is
9 well settled in North Dakota that traffic violations, even if considered
10 common or minor, provide the requisite suspicion for an officer to
11 conduct an investigatory stop. Zimmerman v. N.D. Dep’t of Transp.,
12 543 N.W.2d 479, 482 (N.D. 1996). Crossing the fog line, even if only
13 once, and even if considered minor, constitutes a traffic violation for
14 which an officer may conduct a stop.
15

16 Second, it appears the trial courts in almost all of those cases
17 cited by Wolfer were forced to review the driving in question without
18 the benefit of video evidence thereof. See U.S. v. Colin, 314 F. 3d 439
19 (9th Cir. 2002) (no video); U.S. v. Guevara-Martinez, 2000 WL
20 33593291 (no video); U.S. v. Freeman, 209 F. 3d 464 (6th Cir. 2000)
21 (no video); Rowe v. State, 769 A.2d 879 (Md. 2001)(no video); U.S. v.
22 Ochoa, 4 F. Supp. 2d 1007 (D. Kan. 1998) (video of stop existed but
23 no reference of it capturing driving in question); U.S. v. Gregory, 79
24 F.3d 973 (10th Cir. 1996)(video of stop existed but no reference of it
25 capturing driving in question).
26
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1 In only one of the cases Wolfer cites was video evidence of the
2 actual driving in question apparently presented to the trial court. See
3 State v. Lafferty, 967 P.2d 363 (Mont. 1998). The court in Lafferty,
4 characterized the defendant's driving as "barely" crossing over the fog
5 line. 967 P.2d at 366. As previously discussed, this focus on the
6 degree of a violation is contrary to the position taken in North Dakota
7 that even minor driving violations may justify a stop. Accordingly, the
8 Lafferty case is of questionable persuasive value.
9

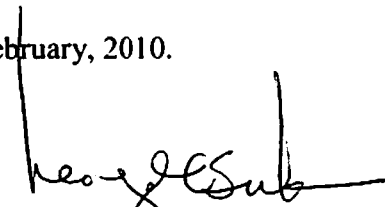
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11 Wolfer also suggests that to the extent the evidence supports a
12 finding that N.D.C.C. § 39-10-17 was violated, distractions created by
13 other vehicles on the road accounted for the violation. However, this
14 argument overlooks both the video evidence and Iverson's testimony
15 that there were no obstructions in the roadway to explain Wolfer's
16 driving. (Trans. p. 8, lines 19-22). Even if there had been a possible n
17 obstruction present, the reasonable suspicion standard does not require
18 law enforcement to rule out every possible innocent explanation for
19 the driving in question before stopping a vehicle. State v. Skarsgard,
20 2007 ND 160, ¶ 7, 739 N.W.2d 786.
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CONCLUSION

In conclusion, the manifest weight of the evidence from Iverson's testimony and the video provided support the district court's finding of a violation of N.D.C.C. § 39-10-17 and resulting Order Denying Motion to Suppress. The State respectfully requests that the Order, Criminal Judgment and amendments thereto be affirmed in their entirety.

Dated this 17th day of February, 2010.



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STATE OF NORTH DAKOTA

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State of North Dakota,)
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Plaintiff-Appellee,)
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-vs-)
)
Christian Wolfer,) Supreme Ct. No. 20090323
)
Defendant-Appellant,) District Ct. No. 08-09-K-0798
) SA File No. M534-09-05
.....)
STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

Michelle Dresser-Ternes, being first duly sworn, depose and say that I
am a United States citizen over 21 years old, and on the 18th day of February,
2010, I deposited in a sealed envelope a true copy of the attached:

1. Brief of Plaintiff-Appellee
2. Affidavit of Mailing

in the United States mail at Bismarck, North Dakota, postage prepaid,
addressed to:

DAN HERBEL
ATTORNEY AT LAW
3333 E BROADWAY AVE, STE 1205
BISMARCK, ND 58501

which address is the last known address of the addressee.

Michelle Dresser-Ternes
Michelle Dresser-Ternes

Subscribed and sworn to before me this 18th day of February, 2010.

KIMBERLY S BLESS
Notary Public
State of North Dakota
My Commission Expires February 24, 2010

Kimberly S. Bless
Kimberly S. Bless, Notary Public
Burleigh County, North Dakota
My Commission Expires: 2-24-2010.