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APRIL 14, 2010
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA,	)	
	)	
Plaintiff/Appellee,	)	
	)	
v.	)	Supreme Court No. 20100009
	)	
COREY MOHL,	)	
	)	Morton Co. No. 30-09-K-391
Defendant/Appellant.	)	

REPLY BRIEF OF APPELLANT

Appeal from Criminal Judgment

dated and filed December 11, 2009

and the adverse determination within the September 2, 2009, Order

denying the Defendant's Motion to Suppress Evidence

Morton County District Court

South Central Judicial District

The Honorable Robert O. Wefald

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TABLE OF CONTENTS

[¶1] TABLE OF AUTHORITIES

[¶2] LAW AND ARGUMENT

[¶3] "The number of times that a vehicle touches the centerline or drifts within a lane is not dispositive of the issue" of reasonable suspicion. *See State v. Binette*, 33 S.W.3d 215, 219 (Tenn. 2000) (emphasis added). In our case, the deputy's testimony that Mr. Mohl's pickup tires touched the fogline and the centerline does not indicate that Mohl's pickup was bouncing back-and-forth taking turns touching the centerline then touching the fogline. Indeed, this is not what the record indicates. Had that been the case, the deputy would have stopped Mr. Mohl's pickup immediately, instead of three miles later. Therefore, the State's suggestion that Mohl was "taking up the whole lane of traffic" is exaggeration. *See* Brief of the Appellee at 1 & 5.

[¶4] In fact, the State's description of the movement of Mohl's pickup evidences that its movement was slight. The State describes that movement as follows: "Mohl's vehicle never crossed into the other lane but drifted;" and "Mohl's vehicle floated." *See id* at 1 and 5, respectively (emphasis added). These characterizations suggest slight movement.

[¶5] Despite the fact that the deputy characterized Mohl's driving as "erratic driving," he really could not articulate what was erratic about the driving and his description of the driving shows that any weaving was of a slight nature. (Tr. at 4, L. 12-14). The deputy testified that Mr. Mohl's vehicle was "no[t] speeding that night," it "wasn't driving at varying speeds" or with "extreme fluctuations of the speed," there was "no tire squealing," there were "no equipment problems or equipment violations with [Mohl's] pickup," his vehicle "did not drive on the shoulder of the road," it "never veered onto the shoulder" and there "was not … hard swerving." (Tr. at 9, L. 19, 10, L. 13).

Also, the deputy testified that the alleged "weaving was within its own lane, not outside of its lane" and he acknowledged that "[t]here were not" any "sharp jerking movements" of Mohl's vehicle. (Tr. at 11, L. 12-18). Here, like in *Salter*, "[i]t is clear that the characterization of [Mohl's] driving as 'erratic' was a mere conclusory statement of the officer, and did not add to the mix any new fact supporting the stop." *See Salter v. ND Dept. of Transportation*, 505 N.W.2d 111, 114 (N.D. 1993) (emphasis added).

[¶6] Additionally, the deputy testified that Mr. Mohl did not "violate any particular statute." (Tr. at 7, L. 3-7). Deputy Carlson testified:

> "During this three miles I kept waiting for it to cross the line, but it never did, … … like I said, I kept waiting for it to cross the line … but it never did. So I stopped it … "

(Tr. at 4, L. 6-12). The deputy kept waiting for Mohl to commit a traffic violation, but he never did. In fact, the deputy admitted that "[t]he reason for the stop was [Mohl] coming close" to committing a violation. (Tr. at 4, L. 19-21).

[¶7] Furthermore, the deputy did not testify that, based upon his 6 years of employment with the sheriff's department, he suspected the driver was under the influence prior to the stop and he did not testify that he has in the past made investigatory stops based on circumstances similar to those presented in the instant case. *Compare State v. Dorendorf*, 359 N.W.2d 115, 117 (N.D. 1984) (holding that suspicion was reasonable when two officers with 16 years of collective experience "both" observed continuous weaving from both an oncoming and a following perspective and "[b]oth officers have in the past made investigatory stops based on circumstances similar to those presented in [that] case"). Moreover, there is no evidence in the record to show how much patrol experienced the deputy possessed.

[¶8] Finally, the State, for the first time, argues that time of day may be a relevant consideration in determining reasonable suspicion. *See* Brief of the Appellee 5. The State, having not made this argument below, cites from a dissenting opinion of this Court for this proposition of law. The State argues that weaving and time of day lead to an "inference that Mohl might be under the influence." *See* Brief of the Appellee 6. First, the deputy never testified that he suspected the driver was under the influence. Second, the State's argument sounds like the deputy possessed "no more than a vague hunch of illegal activity." *See City of Minot v. Johnson*, 1999 ND 241, ¶11, 603 N.W.2d 485. "Reasonable suspicion requires more than a 'mere hunch.'" *See State v. Smith*, 2005 ND 21, ¶15, 691 N.W.2d 203.

[¶9] Because the deputy was possessed with only a mere hunch of illegal activity, the stop of Mr. Mohl's pickup was therefore unconstitutional under both the Fourth Amendment to the United States Constitution and Article I, Section 8 of the North Dakota Constitution. Accordingly, any evidence obtained after the unlawful stop and seizure should have been suppressed.

[¶10] CONCLUSION

[¶11] For the foregoing reasons, Mr. Mohl respectfully requests that this Court vacate the Criminal Judgment in this matter, reverse the district court's denial of his Motion to Suppress Evidence, remand to the district court for withdrawal of Mr. Mohl's conditional guilty plea, and order the suppression of all evidence obtained after the unlawful stop.

Respectfully submitted
this 14th day of April, 2010.

/s/ *Dan Herbel*

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[¶12] CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on April 14, 2010, the REPLY BRIEF OF APPELLANT was electronically filed with the Clerk of the North Dakota Supreme Court and were also electronically transmitted to Jackson Lofgren, counsel for Appellee, at the following:

Electronic filing TO: "Jackson Lofgren" <Jackson.Lofgren@mortonnd.org >

Dated this 14th day of April, 2010.

/s/ *Dan Herbel*

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Dan Herbel