

20110334

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
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Kirby Clarence Rudolph,

Plaintiff/Appellant,

v.

North Dakota Department
of Transportation,

Defendant/Appellee.

STATE OF NORTH DAKOTA

Supreme Ct. No. 20110334

District Ct. No. 08-2011-C-00787

APPEAL FROM THE DISTRICT COURT
BURLEIGH COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT

HONORABLE BRUCE B. HASKELL

BRIEF OF APPELLEE

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STATEMENT OF ISSUE

Whether Deputy Bitz had a reasonable and articulable suspicion to stop Rudolph's vehicle for a possible violation of N.D.C.C. § 39-21-04(1) when the deputy could not see taillights illuminated on Rudolph's vehicle at a distance under 1000 feet?

STATEMENT OF CASE

On February 24, 2011, Deputy Sheriff Dion Bitz (Deputy Bitz) of the Morton County Sheriff's Department arrested Kirby Clarence Rudolph (Rudolph) for driving a vehicle while under the influence of intoxicating liquor (DUI). Transcript ("Tr.") at Exhibit ("Ex.") 1b. A Report and Notice, including a temporary operator's permit, was issued to Rudolph after Rudolph refused to submit to a chemical blood test requested by the deputy. Id. The Report and Notice notified Rudolph of the Department's intent to revoke his driving privileges. Id.

In response to the Report and Notice, Rudolph requested an administrative hearing. Tr. Ex. 1c. The hearing was held on March 24, 2011. Tr. Ex. 2. In accordance with N.D.C.C. 39-20-05(3) the hearing officer considered three broad issues, as follows:

- (1) [w]hether a law enforcement officer had reasonable grounds to believe the person had been driving or was in actual physical control of a vehicle in violation of section 39-08-01 or equivalent ordinance;
- (2) [w]hether the person was placed under arrest; and
- (3) [w]hether the person refused to submit to the test or tests.

Id.

At the close of the hearing, the hearing officer issued his findings of fact, conclusions of law, and decision revoking Rudolph's driving privileges for three years. Rudolph requested judicial review of the hearing officer's decision. App. 6-7.

STATEMENT OF FACTS

On February 24, 2011, at approximately 11:43 p.m. Deputy Bitz was driving south on 6th Avenue SE, in Mandan, North Dakota when a vehicle passed him northbound without its taillights illuminated. Tr. 2. Deputy Bitz turned his patrol vehicle around to follow the vehicle. Id. After making the U-turn Deputy Bitz saw that another vehicle, a Pontiac sedan, was between him and the vehicle he originally saw. Id. Deputy Bitz saw the Pontiac stopped at the intersection of 6th Avenue SE and Main Street. Tr. 7. Deputy Bitz could see the Pontiac's brake lights were working, but as the vehicle turned right onto Main Street and deactivated the brakes he could not see the taillights illuminated. Tr. 7, 25. Deputy Bitz continued to follow the vehicle and could not see taillights illuminated. Tr. 25. As Deputy Bitz closed on Rudolph's vehicle he began to see some light being emitted from the rear of Rudolph's vehicle. Tr. 25, ll. 18-19. However, Deputy Bitz was not sure if the light he was observing was from activated tail lamps or a reflection from his headlamps. Tr. 21, ll. 15-17; Tr. 25, ll. 19-20. Deputy Bitz testified he could not see the taillights illuminated on the Pontiac while he was within a distance of one thousand feet as is required by law. Tr. 18, ll. 19-20. Deputy Bitz activated his overhead lights and stopped the Pontiac. Tr. 2, 20.

Deputy Bitz approached the Pontiac's driver's side door and informed the driver, later identified as Rudolph, of the reason for the stop. Tr. 3. Deputy Bitz recalled Rudolph responding to the effect that he knew his taillights were pretty dim. Tr. 22, ll. 16-18. At the hearing Rudolph testified, "I may have said something about them being dim." Tr. 31, ll. 8-9. A few moments later, Rudolph changed his testimony and said "I don't think I said they were pretty dim." Tr. 31, ll. 11-16. The hearing officer found Deputy Bitz's testimony more credible. Tr. 36, l. 24 – Tr. 37, l. 1.

While conversing with Rudolph, Deputy Bitz smelled the odor of an alcoholic beverage coming from Rudolph. Tr. 3. Rudolph admitted consuming three drinks that evening. Id. Rudolph performed several field sobriety tests. Tr. 3-4. He passed the alphabet test but had an error on the counting backwards test and exhibited all six clues on the horizontal gaze nystagmus (HGN) test. Id. Deputy Bitz recited the implied consent advisory and asked Rudolph to submit to an onsite screening test. Tr. 4. Rudolph refused. Tr. 5.

Deputy Bitz placed Rudolph under arrest for driving under the influence. Tr. 5. Deputy Bitz again recited the implied consent advisory and requested Rudolph submit to a blood test. Id. Rudolph refused. Id.

PROCEEDINGS ON APPEAL TO DISTRICT COURT

Rudolph appealed the administrative decision to the Burleigh County District Court. App. 6-7. In the Appellant's Notice of Appeal and Specifications of Error, Rudolph alleged that "[t]he order is in violation of Mr. Rudolph's constitutional rights, as guaranteed under the North Dakota and United States

Constitutions; specifically, Deputy Bitz did not have a reasonable and articulable suspicion to stop the vehicle operated by Mr. Rudolph, in violation of the Fourth Amendment to the United States Constitution and Article I, Section 8 of the North Dakota Constitution." App. 7.

With respect to Rudolph's contention that there was no reasonable and articulable suspicion for the officer to stop his vehicle, the hearing officer found as follows:

On February 24, 2011 at 11:43 p.m., Morton County deputy Dion Bitz was southbound on 6th Avenue in Mandan, North Dakota when a vehicle northbound passed him. That vehicle did not have taillights illuminated. Deputy Bitz turned around to follow and now saw another vehicle, a Pontiac sedan, between his squad car and the vehicle he saw earlier. The deputy could not see taillights illuminated on the Pontiac. He was within 1000 feet of the Pontiac at that time. The deputy testified he was faced with a decision of which vehicle to stop and chose the one closest to him. Deputy Bitz stopped the Pontiac and approached the driver, later identified as Kirby Rudolph. The deputy's first words to Rudolph were, "Good evening. The reason I stopped you is you didn't have any taillights." On the video of the stop, Exhibit 4, Rudolph responds but his words are inaudible. Deputy Bitz then said, "Well, when I was following you back there, you didn't."

. . .

Deputy Bitz recalled Rudolph saying words to the effect that he knew his taillights were pretty dim. When asked about that Rudolph testified, "I may have said something about them being dim." Seconds later, Rudolph testified, "I don't think I said they were pretty dim." In answer to a question from the hearing officer, Rudolph said he did not check his taillights that night but did check his headlights. Seconds later, in response to questions from his attorney, Rudolph said he stood behind his vehicle while next to the deputy and specifically noticed his taillights were illuminated. He testified he always had his headlights and taillights illuminated that night.

A video of the stop was reviewed. Rudolph's taillights, if they are visible at all, appear very dim. His brake lights are easily

discernable on the video. While watching the video at a point where Rudolph's vehicle had been stopped, the deputy said he could not tell if the taillights were on or were merely reflecting the light from the deputy's headlights. He did not check out the taillights specifically after the stop because, he said, it didn't matter as the taillights were not visible for 1000 feet at the time he initiated the stop. Rudolph purchased the Pontiac three months before the stop. Rudolph testified that when Deputy Bitz told him the reason for the stop, he responded, "I had NO taillights?"

Deputy Bitz has been a law enforcement officer for 12 years. During that time, he had made thousands of stops and more than 100 of those stops were for faulty lighting equipment. He was certain he could not see taillights illuminated on Rudolph's vehicle when he was within 1000 feet of it before making the stop.

Tr. 34, l. 21 – Tr. 36, l. 23. The hearing officer concluded:

I found the testimony of Deputy Bitz credible. Rudolph's testimony was less credible as he seemed to contradict himself at least twice. But even if Rudolph's testimony is accepted as accurate, his taillights may have been operational yet not visible for a distance of 1000 feet as required by law. See NDCC Section 39-20-04[1]. The video is of poor quality. It does not and cannot serve as a substitute for what is seen by the human eye. Overall, it corroborates the deputy's testimony.

I conclude Deputy Bitz had reasonable grounds to stop Rudolph for driving a vehicle with lamps that were not clearly visible from a distance of 1000 feet. Deputy Bitz had reasonable grounds to believe Rudolph committed a traffic violation at a time when his body contained alcohol based on Rudolph's odor and admission to drinking.

Tr. 36, l. 24 – Tr. 37, l. 13.

Judge Haskell affirmed the hearing officer's decision revoking Rudolph's driving privileges for three years. App. 25-26. In regards to whether Deputy Bitz had reasonable and articulable suspicion to stop Rudolph, Judge Haskell ruled:

This Court will not substitute its judgment for that of the hearing officer. In this case there is contradictory evidence. The hearing officer determined which of the witnesses he found more credible and explained why he found the witness more credible. There is

evidence in the record to support the hearing officer's Findings of Fact on the issue of the officer's reasonable grounds to make the stop, and those Findings of Fact support the hearing officer's Conclusions of Law.

The decision of the administrative hearing officer is AFFIRMED.

App. 25-26.

Judgment was entered on September 16, 2011. App. 28. Rudolph appealed from the Judgment to this Court. App. 30. The Department requests this Court affirm the judgment of the Burleigh County District Court and the administrative revocation of Rudolph's driving privileges for a period of three years.

STANDARD OF REVIEW

"An appeal from a district court decision reviewing an administrative license suspension is governed by the Administrative Agencies Practice Act, Chapter 28-32, N.D.C.C." McPeak v. Moore, 545 N.W.2d 761, 762 (N.D. 1996). "This Court reviews the record of the administrative agency as a basis for its decision rather than the district court decision." Lamb v. Moore, 539 N.W.2d 862, 863 (N.D. 1995) (citing Erickson v. Dir., N.D. Dep't of Transp., 507 N.W.2d 537, 539 (N.D. 1993). "However, the district court's analysis is entitled to respect if its reasoning is sound." Kraft v. State Bd. of Nursing, 2001 ND 131, ¶ 10, 631 N.W.2d 572.

This Court's review "is limited to whether (1) the findings of fact are supported by a preponderance of the evidence; (2) the conclusions of law are sustained by the findings of fact; and (3) the agency's decision is supported by

the conclusions of law.” McPeak, 545 N.W.2d at 762 (citing Zimmerman v. N.D. Dep’t of Transp. Dir., 543 N.W.2d 479, 481 (N.D. 1996)).

Findings by an administrative agency are sufficient if the reviewing court is able to understand the basis of the fact finder’s decision. In re Boschee, 347 N.W.2d 331, 336 (N.D. 1984). A court must not make independent findings of fact or substitute its judgment for that of the agency. Bryl v. Backes, 477 N.W.2d 809, 811 (N.D. 1991). Rather, a reviewing court determines only “whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record.” Id. (citation omitted).

LAW AND ARGUMENT

Deputy Bitz had sufficient grounds to stop Rudolph’s vehicle.

When law enforcement stops a vehicle and temporarily detains an individual, the temporary detention is a “seizure” within the Fourth Amendment. Whren v. United States, 517 U.S. 806, 809-10 (1996). For this reason, “[a]n automobile stop is . . . subject to the constitutional imperative that it not be ‘unreasonable’ under the circumstances.” Id. at 810.

This Court has summarized the reasonableness standard:

Unlike the probable cause standard where it is necessary that a prudent person believe that the suspect had committed or was committing an offense, a stop of a person or vehicle requires only suspicion that a law has been violated or is being violated. However, this suspicion must be ‘articulable and reasonable.’ The articulable aspect requires that the stop be justified with more than just a vague ‘hunch’ or other non-objective facts; and the reasonable aspect means that the articulable facts must produce, by reasonable inference, a reasonable suspicion of unlawful conduct.

State v. VandeHoven, 388 N.W.2d 857, 858 (N.D. 1986) (internal citations omitted).

Deputy Bitz stopped Rudolph's vehicle for driving without having his vehicle's taillights illuminated. Tr. 9. N.D.C.C. § 39-21-04(1) provides, in part, that "[e]very motor vehicle . . . must be equipped with at least one taillamp mounted on the rear, which, when lighted as hereinbefore required, must emit a red light plainly visible from a distance of one thousand feet [304.8 meters] to the rear . . ." (Emphasis added).

Deputy Bitz testified he pulled over Rudolph's vehicle "for not being able to see the taillights." Tr. 9, ll. 13-14. Deputy Bitz indicated he first saw Rudolph's vehicle at the intersection of Main Street and 6th Avenue SE stopped at a red light. Tr. 7, ll. 16-18; Tr. 25, ll. 13-14. Deputy Bitz could see the brake lights activated on Rudolph's vehicle, but when it turned the corner and deactivated its brakes he could not see the taillights. Tr. 7, l. 25 – Tr. 8, l. 3; Tr. 20, ll. 2-7; Tr. 25, ll. 13-17. Deputy Bitz followed the vehicle and could not see taillights illuminated. Tr. 25, ll. 17-18. As Deputy Bitz closed on Rudolph's vehicle he began to see some light being emitted from the rear of Rudolph's vehicle. Tr. 25, ll. 18-19. However, Deputy Bitz was not sure if the light he was observing was from activated tail lamps or a reflection from his headlamps. Tr. 21, ll. 15-17; Tr. 25, ll. 19-20. Deputy Bitz did not check Rudolph's taillights after stopping him to see if they were operational because he could barely see them while parked directly behind Rudolph's vehicle. Tr. 26, ll. 19-21.

The video of the incident was introduced into evidence and reviewed at the hearing. Tr. 13; Tr. Ex. 4. While reviewing the video, Deputy Bitz testified, he could not see taillights on Rudolph's vehicle when he first came upon it. Tr. 16, ll. 22-24. At frame 23:43:03 Deputy Bitz explained it is difficult to discern from the video whether Rudolph's taillights were on or off at that point. Tr. 17, ll. 2-9. He explained that it is difficult to tell if what is being shown is the reflection from the patrol car's headlights or Rudolph's taillights. Id. Deputy Bitz further explained that Rudolph may have activated his taillights while he was approaching the vehicle, but could not say for certain. Tr. 18, ll. 18-20; Tr. 22, ll. 9-10; Tr. 25, ll. 18-20. Deputy Bitz, however, was certain he could not see taillights illuminated on Rudolph's vehicle from a distance of one thousand feet as is required by law. Tr. 18, ll. 19-20; Tr. 27, ll. 3-4.

In regards to the legal requirement for taillights to be illuminated for up to one thousand feet, the following exchange took place between Deputy Bitz and the hearing officer:

MR. VUKELIC: Okay. So were you within a 1,000 feet of the Pontiac?

DEPUTY BITZ: Absolutely.

MR. VUKELIC: When you turned on your emergency lights?

DEPUTY BITZ: I would say I was within 1,000 feet for sure.

MR. VUKELIC: And at that point could you see the taillights?

DEPUTY BITZ: I don't know. I ... like I said, I don't know if I seen the reflection from my headlights, or if I was seeing taillights.

MR. VUKELIC: So why did you stop it, if you weren't sure?

DEPUTY BITZ: Because prior to that I couldn't see taillights.

MR. VUKELIC: So you get up closer, and now you're not sure if they're on or off?

DEPUTY BITZ: That's correct.

MR. VUKELIC: But when you had been farther back, you're certain that you could not see taillights?

DEPUTY BITZ: That's correct.

MR. VUKELIC: Did it appear to you to be due to some ... something covering the lamps?

DEPUTY BITZ: There are dark lenses covering the lamps, yes.

MR. VUKELIC: Any snow or mud?

DEPUTY BITZ: There might be dust, I ... there was not snow on them, no.

MR. VUKELIC: So you couldn't see the taillights. Then you get up closer, and now you're not sure if you can see taillights?

DEPUTY BITZ: Well, I'm not sure if it was the illumination from my headlights, or if he'd turned them on.

MR. VUKELIC: I see. So you made the stop?

DEPUTY BITZ: Yes.

Tr. 21, l. 9 – Tr. 22, l. 12. From this testimony Rudolph claims Deputy Bitz was beyond one thousand feet when he could not see taillights. Rudolph Br. 5. Rudolph's assertion is factually incorrect.

Deputy Bitz did not explicitly point out at what distance he could not see taillights or from what distance he initially began to see either illuminated taillights or the reflection from his headlights. What is clear is that Deputy Bitz testified he could not see taillights illuminated after Rudolph took his foot off the brakes and turned the corner from 6th Avenue onto Main Street. See Tr. 7, l. 12 – Tr. 8, l. 3; Tr. 20, ll. 2-6. Deputy Bitz estimated he was possibly 2 to 3 blocks away at that point. Tr. 20, ll. 6-7. In response to a separate question from counsel later in the hearing Deputy Bitz guessed that a city block may be 400 to 500 feet in length. Tr. 24, ll. 1-5.

Rudolph's whole argument is based off these estimations and taking them to the furthest extreme. According to Deputy Bitz's approximations, Rudolph's vehicle was anywhere from 2 to 3 blocks or 800 to 1,500 feet ahead of the deputy's patrol car when first observed. If Rudolph's vehicle was only 800 to 1000 feet in front of the patrol car when it turned the corner onto Main Street it is undisputed that Deputy Bitz would have had sufficient grounds to stop Rudolph's vehicle. Deputy Bitz also testified he activated his emergency lights to stop Rudolph when he was approximately one block behind Rudolph. Tr. 20, ll. 21-25. It was at this point, as described by the above quoted testimony, that Deputy Bitz was unclear whether he was seeing lighted taillamps or reflection from his headlights. Therefore, even if Deputy Bitz was more than one thousand feet behind Rudolph's vehicle when he first observed him, it was not until around 400 or 500 feet (one block) when Deputy Bitz indicated he could see light illuminating

from the rear of Rudolph's vehicle. And, even then, it was not clear to Deputy Bitz if the light was a reflection from his headlights.

Simply put, Deputy Bitz's testimony regarding distances was an estimation and a review of the video suggests he was much closer to Rudolph's vehicle than 2 to 3 blocks when he first observed Rudolph's Pontiac. See Ex. 4, at 23:42-33. The video then shows the deputy proceeding to get closer to Rudolph's vehicle. Tr. Ex. 4, at 23:42-34 to 23:43-03. This portion of the video corroborates Deputy Bitz's testimony that Rudolph's vehicle's taillights are not easily visible or discernable. Not until 23:43:34 can it be argued that taillights are illuminated, and as Deputy Bitz indicated it is difficult to tell if it is the Pontiac's lights being independently lit or if Deputy Bitz headlights are simply reflecting off the taillights.

"The ultimate conclusion of whether those facts meet the legal standard, rising to the level of a reasonable and articulable suspicion, is a question of law which is fully reviewable on appeal." Salter v. N.D. Dep't of Transp., 505 N.W.2d 111, 112 (N.D. 1993). It is, however, "well settled," that traffic violations, even "common or minor" ones "constitute prohibited conduct which provide officers with requisite suspicion for conducting investigatory stops." Zimmerman v. N.D. Dept. of Transp., 543 N.W.2d 479, 482 (N.D. 1996).

A law enforcement officer's reasonable belief that a person may be committing a traffic violation is sufficient to make a traffic stop. See State v. Oliver, 2006 ND 241, ¶¶ 7-10, 724 N.W.2d 114. Oliver provides that reasonable suspicion of even a "possible" violation provides sufficient grounds for a lawful stop. Similarly, a lawful stop, under the Fourth Amendment merely "requires

'some minimal level of objective justification.'" City of Fargo v. Ovind, 1998 ND 69, ¶ 7, 575 N.W.2d 901 (quoting State v. Robertsdahl, 512 N.W.2d 427 (N.D. 1994) (emphasis added.))

It follows that the reasonable suspicion standard is easier to satisfy than the standard for an arrest or conviction. See City of Grand Forks v. Egley, 542 N.W.2d 104, 106 (N.D. 1996) ("Reasonable and articulable suspicion is less stringent than probable cause.") In fact, "[p]robable cause is a much more exacting standard" than the reasonable-and-articulable suspicion standard. State v. Ova, 539 N.W.2d 857, 859 (N.D. 1995) (emphasis added.) "The reasonable suspicion standard does not require an officer to see a motorist violating a traffic law or to rule out every potential innocent excuse for the behavior in question before stopping a vehicle for investigation." Kappel v. N.D. Dep't of Transp., 1999 ND 213, 602 N.W.2d 718, 721 (N.D. 1999).

Applying these rules to the facts in this case, Deputy Bitz was following Rudolph's vehicle and could not see any visible taillights. Deputy Bitz did testify that he could see the vehicle's brake lights when activated but not the taillights. Deputy Bitz clarified that he was not testifying that Rudolph's vehicle did not have his tail lights activated but only that he could not see them illuminated from the distance required by law where he was observing them from. The video corroborates Deputy Bitz's testimony. The objective fact that Rudolph drove without taillights visible from one thousand feet resulted in a reasonable indication of a possible violation of law. This fact satisfied the reasonable and articulable suspicion standard, which permitted Deputy Bitz to lawfully stop

Rudolph. Rudolph's position apparently is that law enforcement must be sure that a law is being violated before a stop is justified. Appellant's Br. ¶ 24. Rudolph, however, misapplies the law. It is not whether by proof beyond a reasonable doubt that a person is breaking the law, or even that the officer had probable cause that a law is being violated, it is only that the officer have a reasonable and articulable suspicion that a law may be being violated. See State v. Loh, 2000 ND 188 ¶ 5, 618 N.W.2d 477 (Reasonable suspicion necessary to support investigatory stop of vehicle is a less stringent standard than probable cause).

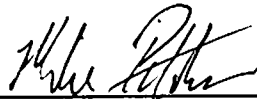
It is worth reviewing this Court's decision in State v. Smith, 452 N.W.2d 86 (N.D. 1990). The law enforcement officer in Smith stopped a vehicle based on the officer's suspicion that the driver had violated the open-bottle law. Id. at 87. The prosecutor dismissed the open-bottle charge due to "insufficient evidence." Id. Nonetheless, this Court upheld the validity of the stop on two independent grounds, including that, even though there was not proof beyond a reasonable doubt of an open bottle violation, the officer had reasonable and articulable suspicion of the open-bottle violation. Id. at 88. In this case, likewise, the record on appeal may not contain proof beyond a reasonable doubt that Rudolph's taillights were not illuminated after sunset or at least were not plainly visible from a distance of one thousand feet. However, Deputy Bitz's testimony was sufficient to provide at least the minimal level of objective justification necessary to stop Rudolph's vehicle.

CONCLUSION

The Department respectfully requests this Court affirm judgment of the Burleigh County District Court and affirm the hearing officer's decision revoking Rudolph's driving privileges for three years.

Dated this 9th day of February, 2012.

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