

20130116

IN THE SUPREME COURT

FILED
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CLERK OF SUPREME COURT

STATE OF NORTH DAKOTA

MAY 17 2013

Dante Pesanti,

Appellee,

v.

North Dakota Department
of Transportation,

Appellant.

STATE OF NORTH DAKOTA
Supreme Ct. No. 20130116

District Ct. No. 53-2012-CV-00388

APPEAL FROM THE DISTRICT COURT
WILLIAMS COUNTY, NORTH DAKOTA
NORTHWEST JUDICIAL DISTRICT

HONORABLE DAVID W. NELSON

BRIEF OF APPELLANT

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STATEMENT OF ISSUE

Whether Officer Schrage had a reasonable and articulable suspicion to stop Pesanti.

STATEMENT OF CASE

Tioga Police Officer Kevin Schrage ("Officer Schrage") arrested Dante Pesanti ("Pesanti") on April 7, 2012, for the offense of driving a vehicle while under the influence of intoxicating liquor. (App. to Br. of Appellant ("Department's App.") 2.) Pesanti requested a hearing in accordance with N.D.C.C. § 39-20-05. (Id. at 7-8.) At the May 17, 2012, administrative hearing, the hearing officer considered the following issues:

- (1) [w]hether 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) [w]hether the person was placed under arrest;
- (3) [w]hether the person was tested in accordance with N.D.C.C. section 39-20-01 or 39-20-03 and, if applicable, section 39-20-02; and
- (4) [w]hether the test results show the person had an alcohol concentration of at least eighteen one-hundredths of one percent by weight.

(Id. at 10.)

Following the hearing, the hearing officer issued his findings of fact, conclusions of law, and decision suspending Pesanti's driving privileges for a period of 180 days. (Id. at 11.) Pesanti requested judicial review of the hearing officer's decision. (Id. at 12-13.)

STATEMENT OF FACTS

On April 7, 2012, at approximately 1:30 a.m., Officer Schrage "was sitting in the used car lot at Tioga Motors [when he] heard a vehicle rev its engine, it sounded like it was accelerating very hard, shift gears, and then accelerate ... sounded like it was accelerating very hard again." (Tr. 4, ll. 8-18.) Officer Schrage testified he observed "a Mitsubishi Eclipse drive past the parking lot," which he believed matched the sound he heard earlier so he decided to follow the vehicle. (Tr. 4, ll. 18-21.) Officer Schrage explained he believed the vehicle matched the sound because "the sound was fairly constant as it came towards [him], and it was the only other vehicle on the road at the time." (Tr. 5, ll. 1-6.)

Officer Schrage testified that "[a]s [he] followed the vehicle south on Highway 40, it had a great deal of difficulty maintaining its lane ... It drifted from centerline to fog line several times, and seemed to have trouble just maintaining a position in its ... in its lane." (Tr. 5, ll. 7-12.) Officer Schrage believed the vehicle went from the fog line to the centerline "more than five" times. (Tr. 24, ll. 12-15.) Officer Schrage explained that although the vehicle did not cross the centerline or fog line, "[he] was surprised that it didn't." (Tr. 5, ll. 13-15; 24, ll. 19-25.)

Officer Schrage testified he observed the vehicle's behavior for "[a]bout a mile and a half" over which the swerving was continuous and gradual. (Tr. 5, ll. 16-22.) Officer Schrage characterized the path of the vehicle's travel as "a fairly continuous weave." (Tr. 30, ll. 5-7.) Officer Schrage described the vehicle as "[a] small car that was using the entirety of his lane." (Tr. 29, ll. 17-20.)

Officer Schrage testified the vehicle did not exceed the 45-mile-per hour speed limit, but rather, it "was driving a bit under." (Tr. 24, ll. 7-11; 25, ll. 8-10.) Officer Schrage explained "[h]e was a bit under the speed limit. He would accelerate toward the speed limit but then he would back off a bit. Never achieving the speed limit, but it's between you know 40 to 45." (Tr. 25, ll. 1-7.)

Officer Schrage testified he initially followed the vehicle because "[he] thought perhaps it ... might be somebody with exhibition driving." (Tr. 28, ll. 20-23.) Officer Schrage stated, however, "[he] didn't have enough to cite him for that" and "[he] wanted to observe him to see if that was what he was doing. And then [he] noticed the weaving behavior and [he] stopped him for DUI." (Tr. 28, l. 24 – 29, l. 4.) Officer Schrage testified that based upon his training and experience, he believed "the driver may be impaired." (Tr. 5, ll. 23-25.) Officer Schrage explained "[he] was going to stop to further investigate the possibility of a DUI." (Tr. 30, ll. 8-11.) Officer Schrage stated that when he first observed the vehicle he thought:

That it was a possible DUI and I wanted to follow and collect a little more information ... a bit more reasonable decision ... a reasonable suspicion before I stopped him.

(Tr. 29, l. 21 – 30, l. 1.)

Officer Schrage initiated a traffic stop of the vehicle for weaving in its lane of traffic. (Tr. 6, ll. 9-11; 25, l. 23 – 26, l. 1.) After he approached the vehicle, Officer Schrage observed "[t]he odor of intoxicating beverages was emanating from the vehicle" and that the driver, who was identified as Pesanti, had slurred speech and bloodshot and watery eyes. (Tr. 7, ll. 1-5.) Officer Schrage testified Pesanti "had a great deal of difficulty maintaining focus on tasks that split his attention," including producing his driver's license and proof of insurance for his vehicle. (Tr. 7, ll. 5-12.)

Officer Schrage requested "Pesanti to step out of the vehicle, and so [he] could perform field sobriety tests on him." (Tr. 7, ll. 15-17.) Officer Schrage observed Pesanti "had some difficulty exiting the vehicle and he was stumbling." (Tr. 7, ll. 21-23.) Pesanti failed the horizontal gaze nystagmus test, the walk-and-turn test, and the one-legged stand test. (Tr. 8, l. 4 – 11, l. 9.)

Officer Schrage placed Pesanti under arrest at 1:53 a.m. for the offense of driving a vehicle while under the influence of intoxicating liquor. (Tr. 11, ll. 10-12.) The results of Pesanti's blood test established he had a blood alcohol concentration of 0.230% by weight. (Tr. 23, ll. 15-17; Department App. 5.)

PROCEEDINGS ON APPEAL TO DISTRICT COURT

At the administrative hearing, Pesanti argued the nature and extent of his weaving within his lane of travel was not sufficient to provide Officer Schrage a reasonable and articulable suspicion to stop his vehicle. (Tr. 31, l. 14 – 32, l. 21.) The hearing officer found:

On April 7, 2012 at approximately 1:45 AM, Tioga Police Officer Kevin Schrage was stationary in the Tioga Motors parking lot when he heard a vehicle revving its engine, accelerate very hard, shift gears and again accelerate very hard. He observed the vehicle, driven by Dante R. Pesanti, go past on 2nd Street NE and followed. The vehicle turned south on Highway 40 and began to swerve from the center line to the fog line without crossing the lines. This vehicle behavior was continuous, back and forth, for approximately 1 1/2 miles. Officer Schrage initiated a traffic stop within his jurisdiction in the 6500 block of Highway 40 and approached on foot.

(Department's App. 11.) The hearing officer concluded:

Officer Schrage had a reasonable and articulable basis to stop the vehicle driven by Mr. Pesanti. . . . The weaving that Officer Schrage observed was significantly more pronounced than the "slight" weaving described in Salter v. North Dakota Dept. of

Transp., 505 N.W.2d 111, 114 (N.D. 1993). Based upon Officer Schrage's training and experience, this type of vehicle behavior provided reasonable suspicion that the driver was impaired justifying a stop. See Hanson v. Director, N.D. Dep't of Transportation, 2003 ND 175.

(Id.) The hearing officer issued his findings of fact, conclusions of law, and decision suspending Pesanti's driving privileges for a period of 180 days. (Id.)

Pesanti appealed the administrative decision to the Williams County District Court. (Id. at 12-13.) Pesanti alleged Officer Schrage lacked a reasonable and articulable suspicion to stop his vehicle. (Id.) Judge David W. Nelson issued the Court's Order October 1, 2012, reversing the hearing officer's decision. (Id. at 15-16.) Judge Nelson ruled:

. . . The stop was not authorized on an officer's hunch. While his observations were certainly grounds to follow the Appellant and look at his driving, the Appellant broke no traffic laws that would justify the stop.

(Id. at 16.)

Judgment was entered on March 22, 2013. (Id. at 19.) The Department appealed the Judgment to the North Dakota Supreme Court. (Id. at 22.) The Department requests this Court reverse the judgment of the Williams County District Court and reinstate the hearing officer's decision suspending Pesanti's driving privileges for a period of 180 days.

STANDARD OF REVIEW

"The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, governs the review of administrative license suspensions." Ringsaker v. Dir., N.D. Dep't of Transp., 1999 ND 127, ¶ 5, 596 N.W.2d 328. "On appeal from a district court's review of an administrative agency's decision, [the North Dakota Supreme Court]

review[s] the agency decision.” Elshaug v. Workforce Safety & Ins., 2003 ND 177, ¶ 12, 671 N.W.2d 784. The Court reviews “the agency’s findings and decisions, and not those of the district court, though the district court’s analysis is entitled to respect if its reasoning is sound.” Hawes v. N.D. Dep’t of Transp., 2007 ND 177, ¶ 13, 741 N.W.2d 202.

Section 28-32-46, N.D.C.C., provides the Court must affirm an administrative agency’s order unless one of the following is present:

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.

“When reviewing the agency’s factual findings, [the Court] do[es] not make independent findings of fact or substitute [its] judgment for that agency, but

determine[s] only whether a reasoning mind reasonably could have determined the factual conclusions were proven by the weight of the evidence from the entire record.” Ringsaker, at ¶ 5.

LAW AND ARGUMENT

Officer Schrage had a reasonable and articulable suspicion to stop Pesanti.

“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.

“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.

“In determining whether an investigative stop is valid, [the Court] use[s] an objective standard and look[s] 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. The Court has 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.

City of Fargo v. Ovind, 1998 ND 69, ¶ 9, 575 N.W.2d 901 (citations omitted).

“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)).

This Court has “held that a vehicle weaving within its own lane may be enough to justify the stop of that vehicle.” Kappel v. Dir., N.D. Dep’t of Transp., 1999 ND 213, ¶ 13, 602 N.W.2d 718 (citing State v. Dorendorf, 359 N.W.2d 115, 117 (N.D. 1984)). The Court also has “held that weaving in one’s own lane combined with a minor infraction or other suspicious activity may justify the stop of a vehicle.” Id. (citing State v. Goeman, 431 N.W.2d 290 (N.D. 1988); Neset v. N.D. Highway Comm’r, 388 N.W.2d 860 (N.D. 1986)). Furthermore, the weaving, in and of itself, need not constitute a violation of the law. See Hanson v. Dir., N.D. Dep’t of Transp., 2003 ND 175, ¶ 16, 671 N.W.2d 780 (“Ruud observed Hanson’s vehicle weaving on the roadway and observed her cross onto the dividing line twice. Even if these circumstances do not amount to any traffic

violations, Ruud made a common-sense conclusion that Hanson was impaired, sufficiently justifying his suspicion that criminal activity was afoot.”).

The Court has stated “no two cases are exactly alike.” Kappal at ¶ 15. However, the Court’s decisions in Dorendorf, supra, State v. VandeHoven, 388 N.W.2d 857 (N.D. 1986), and Salter vs. N.D. Dep’t of Transp., 505 N.W.2d 111 (N.D. 1993), provide guidance on the nature of weaving that constitutes a sufficient basis to warrant a stop of a vehicle. In Dorendorf, two experienced law enforcement officers observed an approaching vehicle weaving within its lane of traffic. 359 N.W.2d at 116. After turning their patrol car around and following the vehicle “for approximately one-eighth to a quarter of a mile,” the officers “again observed the vehicle weaving within its own lane of traffic” and then stopped the vehicle to investigate the cause of the weaving. Id.

The Court referred to the nature of Dorendorf’s driving behavior as being a “smooth, continuous weave within his own lane of traffic.” Id. at 117. One of the officers “characterized Dorendorf’s driving as ‘erratic’ compared to other driving he observed” on the date of the stop of Dorendorf. Id. The Court rejected Dorendorf’s argument “the officers lacked probable cause to stop him because the officers were unable to articulate at trial the exact type of weaving which prompted them to stop him for investigation.” Id. The Court “conclude[d] that the circumstances in the instant case justified the initial stop of Dorendorf.” Id.

In VandeHoven, the law enforcement officer observed that “VandeHoven’s vehicle veered sharply to his right, and then sharply back to the left, crossing over the unmarked center of the roadway.” 388 N.W.2d at 857. “According to

[the officer], the vehicle turned abruptly enough to shine the headlights beyond the fence line and 'out across the field to the west side of the roadway.'" Id. at 858. The Court stated "[a]lthough there may be situations where slight weaving cannot serve as a basis for a valid stop, the erratic movement of the vehicle in this case provided sufficient basis to create an articulable and reasonable suspicion that VandeHoven was violating the law." Id. at 859.

By contrast, in Salter the law enforcement officer stopped a vehicle after observing "there was a 'slight movement back and forth' within the lane, the vehicle was traveling 30-35 miles per hour in a no-passing zone, and other vehicles were coming up from behind." 505 N.W.2d at 112. The hearing officer, in turn, concluded there were reasonable grounds to stop Salter's vehicle based upon the findings "Salter was traveling 30 miles per hour in a 55 mile-per-hour zone, that Salter's vehicle weaved slightly within its own lane, and that traffic was 'backing up' behind Salter and [the officer's] vehicles." Id. The Court, however, stated:

In this case there is no evidence of erratic movement, sharp veering, or any of the other factors noted in prior cases. Officer Polasky specifically testified that Salter did not cross the center line or the frost line. In fact, Officer Polasky repeatedly characterized the weaving as "slight" or "minimum," and he apparently did not consider it significant enough to include in his initial written report of the incident. This is precisely the type of "slight weaving" which we cautioned in VandeHoven would not serve as a valid basis for a vehicle stop.

Id. at 113 (citation omitted). The Court concluded "[t]he facts in this record suggest a 'mere hunch' of illegal activity; they do not support the hearing officer's

conclusion that Officer Polasky had a reasonable and articulable suspicion that Salter had committed a violation.” Id. at 114.

In this case, Officer Schrage’s attention was first drawn to Pesanti’s vehicle at approximately 1:30 a.m., after “[he] heard a vehicle rev its engine, it sounded like it was accelerating very hard, shift gears, and then accelerate ... sounded like it was accelerating very hard again.” (Tr. 4, ll. 8-18.) Officer Schrage testified the vehicle “had a great deal of difficulty maintaining its lane ... It drifted from centerline to fog line several times, and seemed to have trouble just maintaining a position in its ... in its lane.” (Tr. 5, ll. 7-12.) Officer Schrage believed the vehicle went from the fog line to the centerline “more than five” times. (Tr. 24, ll. 12-15.) Officer Schrage explained that although the vehicle did not cross the centerline or fog line, “[he] was surprised that it didn’t.” (Tr. 5, ll. 13-15; 24, ll. 19-25.) Officer Schrage characterized the path of the vehicle’s travel as “a fairly continuous weave” and described the vehicle as “[a] small car that was using the entirety of his lane.” (Tr. 29, ll. 17-20; 30, ll. 5-7.)

Officer Schrage also testified the vehicle did not exceed the 45-mile-per hour speed limit, but rather, it “was driving a bit under.” (Tr. 24, ll. 7-11; 25, ll. 8-10.) Officer Schrage explained “[h]e was a bit under the speed limit. He would accelerate toward the speed limit but then he would back off a bit.” (Tr. 25, ll. 1-7.) Officer Schrage testified that based upon his training and experience, he believed “the driver may be impaired.” (Tr. 5, ll. 23-25.)

Officer Schrage’s description of Pesanti’s driving behavior is much more significant than the “slight weaving” described in Salter. Unlike the officer in

Salter, Officer Schrage noted Pesanti's driving behavior on the Report and Notice as "[t]rouble maintaining lane position." (Department's App. 2.) The time of day, the "revving" of the vehicle's engine, and the variation in the speed of the vehicle added to Officer Schrage's suspicion Pesanti was engaged in an illegal activity. Under the totality of the circumstances, Officer Schrage had a reasonable and articulable suspicion to stop Pesanti.

CONCLUSION

The Department respectfully requests this Court reverse the judgment of the Williams County District Court and reinstate the hearing officer's decision suspending Dante Pesanti's driving privileges for a period of 180 days.

Dated this 17th day of May, 2013.

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)	
Appellant.)	

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

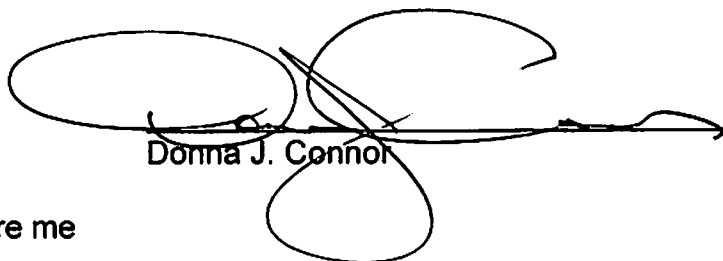
Donna J. Connor states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

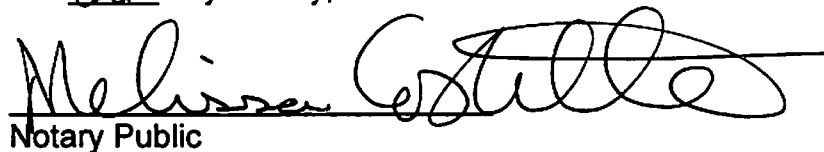
2. I am of legal age and on the 22nd day of May, 2013, I served the attached **BLUE COVER SHEET FOR THE BRIEF OF APPELLANT; 2ND PAGE OF TABLE OF CONTENTS**, along with the **CLERK'S CERTIFICATE ON APPEAL, AMENDED CLERK'S CERTIFICATE ON APPEAL** and the **ADMINISTRATIVE DOCKET SHEET** for the **APPENDIX TO BRIEF OF APPELLANT** upon the appellee by placing true and correct copies thereof in an envelope addressed as follows:

Jeff L. Nehring
Nehring Law Office, PLLC
716 2nd St. W.
Williston, ND 58801

and depositing the same, with postage prepaid, in the United States mail at
Bismarck, North Dakota.


Donna J. Connor

Subscribed and sworn to before me
this 22nd day of May, 2013.


Notary Public



IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Dante Pesanti,)	
)	
Appellee,)	Supreme Ct. No. 20130116
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v.)	District Ct. No. 53-2012-CV-00388
)	
North Dakota Department)	AFFIDAVIT OF SERVICE BY MAIL
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)	
Appellant.)	
)	

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


Donna J. Connor states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

2. I am of legal age and on the 17th day of May, 2013, I served the attached **BRIEF OF APPELLANT** and **APPENDIX TO BRIEF OF APPELLANT** upon the appellee by placing true and correct copies thereof in an envelope addressed as follows:

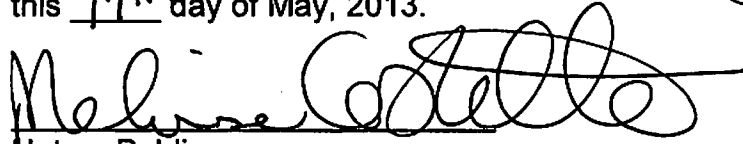
Jeff L. Nehring
Nehring Law Office, PLLC
716 2nd St. W.
Williston, ND 58801

and depositing the same, with postage prepaid, in the United States mail at
Bismarck, North Dakota.



Donna J. Connor

Subscribed and sworn to before me
this 17th day of May, 2013.



Notary Public

