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STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff/Appellee, v. Bo Tyler James, Defendant/Appellant.	Supreme Court No.: 2050111 District Court No.: 27-2014-CR-00935

Appeal from the Criminal Judgment Entered on April 9, 2015 and the Order Denying Motion to Suppress entered on October 3, 2014 in McKenzie County District Court

BRIEF OF APPELLANT

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[¶ 1]. Did the trial court err in denying the Motion to Suppress Evidence?

STATEMENT OF THE CASE

[¶ 2]. On April 9, 2014, Bo James was charged with Driving Under the Influence. See district court Doc ID# 1. On August 13, 2014 he filed his Notice of Motion, Motion to Suppress, and Brief in Support. See Appellant's Appendix ("App.", pp. 4-15. On October 27, 2014, a hearing was held on the Motion to Suppress. On November 3, 2014, the McKenzie County District Court entered its Order Denying Motion to Suppress. App. pp. 16.

[¶ 3]. On April 9, 2015, the McKenzie County District Court accepted Bo James' Conditional Plea of Guilty to the charge of Driving Under the Influence, wherein he reserved his right to appeal the district court's ruling on his Motion to Suppress. See district court Doc ID# 29-30. The Notice of Appeal was filed on April 17, 2014. App. p. 17.

STATEMENT OF THE FACTS

[¶ 4]. On or about June 9, 2014, Sergeant Ficken was on duty in Watford City, North Dakota at approximately 2:00 a.m. See Transcript of Hearing on Motion to Suppress ("Tr."), p. 4, ln. 3-5; p. 5, ln. 14-16. When he finished fueling his patrol vehicle at the One-Stop Truck Stop, he heard a semi truck continuously honking or blowing its horn. Tr., p. 4, ln. 10-14. Sgt. Ficken observed a Dodge pick-up pulling a stock trailer, driving in front of a semi that continued to blow its horn, traveling westbound. Tr., p. 4, ln. 15-16. He stopped the driver of the semi to investigate. Tr., p. 4, ln. 19-20.

[¶ 5]. The semi driver reported that the driver of the pick-up had cut him off, and was "possibly" drunk. Tr., p. 4, ln. 22-24. He provided no basis for his contention other than that the vehicle had cut him off, and driving conduct was "similar to someone that would be drunk," but did not provide any details. Tr., p. 8, ln. 24 to p. 9, ln. 2.

[¶ 6]. Sgt. Ficken contacted Deputy Travis Bateman via radio, and told him to be on the lookout for a Dodge pick-up pulling a stock trailer, westbound on Highway 85, west of Watford City. Tr., p. 5, ln. 7-14. Deputy Bateman was not provided with a license plate number, or any other identifying information about the pick-up or its trailer. Tr., p. 8, ln. 6-10. Sgt. Ficken did not testify that he ever advised Deputy Bateman that the driver of the pick-up might be intoxicated.

[¶ 7]. Approximately 10-15 minutes later, Deputy Bateman notified Sgt. Ficken that he stopped a Dodge pick-up pulling a stock trailer in the Arnegard area. Tr., p. 5, ln. 19 to p. 6, ln. 1; p. 7, ln. 16. Arnegard is approximately 10 to 15 minutes from Watford City. Tr., p. 6, ln. 2-5.

[¶ 8]. The vehicle stopped by Deputy Bateman was driven by Bo James. Deputy

Bateman allegedly observed James' vehicle swerve right and left, and come in contact with center and fog lines. Tr., p. 6, ln. 8-10. However, James did not ever cross the center or fog lines. Tr., p. 9, ln. 6-9. Deputy Bateman stopped James after he passed through a construction zone, and there was no report that he struck any cones on the center or fog lines. Tr., p. 9, ln. 10 to p. 10, ln. 10.

ARGUMENT

I. Standard of Review

[¶ 9]. The North Dakota Supreme Court's standard of review for a district court's denial of a motion to suppress evidence is well-established:

> When reviewing a district court's ruling on a motion to suppress, [the North Dakota Supreme Court] defer[s] to the district court's findings of fact and resolve conflicts in testimony in favor of affirmance. We recognize that the district court is in a superior position to assess the credibility of witnesses and weigh the evidence. Generally, a district court's decision to deny a motion to suppress will not be reversed if there is sufficient competent evidence capable of supporting the district court's findings, and if its 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.

State v. Demars, 2007 ND 145, ¶ 7, 738 N.W.2d 486, 487-88 (internal citations omitted).

[¶ 10]. "In other words, [the North Dakota Supreme Court] will reverse the district court's denial of a suppression motion where the decision lacks sufficient competent evidence fairly capable of supporting its findings, and the decision is contrary to the manifest weight of the evidence." Id.

II. The trial court erred in denying the Motion to Suppress Evidence.

[¶ 11]. In the present matter, the McKenzie County District Court erred when it denied Bo James' Motion to Suppress. The decision lacked sufficient competent evidence to establish that the investigating officers had a proper reasonable and articulable suspicion to make a traffic stop of James' vehicle.

[¶ 12]. "The Fourth Amendment of the United States Constitution guarantees 'the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.'" City of Jamestown v. Jerome, 2002 ND 34, ¶ 5,

639 N.W.2d 478. "Automobile stops constitute 'seizures' under the Fourth Amendment." City of Grand Forks v. Mitchell, 2008 ND 5, ¶ 7, 743 N.W.2d 800 (quoting Whren v. United States, 517 U.S. 806, 809-10 (1996)). An investigative stop must be supported by an officer's reasonable and articulable suspicion. Mitchell, at ¶ 7. "The reasonable suspicion standard is less stringent than probable cause" but it does require more than a "mere hunch." State v. Corum, 2003 ND 89, ¶ 10, 663 N.W.2d 151. "To justify the stop of a moving vehicle for investigation, an officer must have a reasonable and articulable suspicion the motorist has violated or is violating the law." Gabel v. North Dakota Dep't. of Transp., 2006 ND 178, ¶ 9. "Reasonable suspicion exists 'when a reasonable person in the officer's position would be justified by some objective manifestation to suspect potential criminal activity.'" State v. McLaren, 2009 ND 176, ¶ 9, 773 N.W.2d 416, 418 (quoting Johnson v. Sprynczynatyk, 2006 ND 137, ¶ 9, 717 N.W.2d 586).

[¶ 13]. To justify a traffic stop for investigative purposes, a law enforcement officer must have a reasonable and articulable suspicion that the motorist has violated or is violating the law. Gabel at ¶ 9; City of Fargo v. Ovind, 1998 ND 69, ¶ 8, 575 N.W.2d 901. The North Dakota Supreme 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. In re T.J.K., 1999 ND 152, ¶ 8, 598 N.W.2d 781. In the present case, Deputy Bateman was acting on a tip relayed to him by Sergeant Ficken through an informant.

[¶ 14]. The North Dakota Supreme Court in State v. Miller, 510 N.W.2d 638 (N.D. 1994), discussed the reliability of informants tips and the amount of independent verification an officer must do before a stop is considered reasonable under the 4th Amendment. The Court in Miller stated:

> To make a legal investigative stop of a vehicle, an officer must have a reasonable and articulable suspicion that the motorist has violated or is violating the law. Information from a tip may provide the factual basis for a stop. In evaluating the factual basis for a stop, we consider the totality of the circumstances. This includes the quantity, or content, and quality, or degree of reliability, of the information available to the officer. Although the totality-of-the-circumstances approach makes categorization difficult, our cases involving reasonable suspicion arising from an informant's tip demonstrate the inverse relationship between quantity and quality, and may be analyzed generally according to the type of tip and, hence, its reliability. 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.
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> Miller, at 640.

[¶ 15]. At the low end of the reliability scale are tips from anonymous callers. Miller, at 641. "Because anonymous telephone tips are of lesser quality, i.e., reliability, than face-to-face tips or tips from named callers, a larger quantity of information is required to raise a reasonable suspicion." Id. "The investigating officer must corroborate an anonymous, and therefore presumably unreliable, tip in some other way." Id. An impaired driver case that involves a tip with only a description and location of the vehicle is insufficient to justify a stop, for these are considered easily obtained facts and conditions existing at the time of the tip. Corroboration of this type of information does not increase the reliability of the tip. Id. See also State v. Thompson, 369 N.W.2d 363 (N.D. 1985) (holding that corroboration of facts available to general public was insufficient to establish probable cause.)

[¶ 16]. Although the informant in the present matter may not have been truly "anonymous" as he was subject to a traffic stop by Sgt. Ficken, the tip he provided was still on the low end of quantity, quality, and reliability. The informant reported that the driver of the pick-up had cut him off, and was "possibly" drunk, although he could provide no basis for that contention, nor did he report observing any traffic violations. Tr., p. 4, ln. 22-24; p. 8, ln. 24 to p. 9, ln. 2. While Sgt. Ficken observed a Dodge pick-up pulling a stock trailer driving in front of the semi (Tr., p. 4, ln. 15-16), the informant provided no additional identifying details regarding the vehicle. Furthermore, Sgt. Ficken did not personally observe any traffic violations or other illegal conduct by the pick-up.

[¶ 17]. Even when an informant is not anonymous, corroboration of illegal activity can be required to uphold a stop. In Anderson v. Director, North Dakota Department of Transportation, 2005 ND 97, 696 N.W.2d 918, the court held that the officer lacked a reasonable and articulable suspicion to justify traffic stop of driver, even though informant was following driver and notified the dispatcher that driver was possibly a reckless driver or a drunk driver and also provided descriptions of the vehicles and license plate numbers, the officer did not observe any erratic driving by driver and the police dispatcher did not relay specific facts concerning informant's observations of driver's driving to officer, and dispatcher only informed officer of a "possible reckless or drunk driver." Anderson at ¶ 19-21. See also Gabel, 2006 ND 178 (holding that when the officer did not independently observe or corroborate the driver speeding up and slowing down nor did she view him impeding the ability of others to pass his vehicle, there was only a possibility that a violation had occurred, and was insufficient to establish

a reasonable and articulable suspicion).

> "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." "Thus, an officer who is unaware of the factual basis for probable cause, may make an arrest upon a directive. The rationale for the Whiteley rule is that the arresting officer is entitled to assume that whoever issued the directive had probable cause." The question then becomes whether the directing officer had probable cause.

State v. Kenner, 1997 ND 1, ¶ 11, 559 N.W.2d 538, 541 (internal citations omitted) (emphasis in original).

> 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.

State v. Torkelsen, 2006 ND 152, ¶ 13, 718 N.W.2d 22, 26 (citations omitted).

[¶ 18]. While the North Dakota Supreme Court has upheld investigatory stops of vehicles when the stopping officer received a tip from another police officer or informant and then corroborated the information by personal observations, when the stopping officer testifies that he did not observe any violations before he stopped the car, the Court looks at the context in which the directing officer obtained the information and analyze it to see whether it constitutes reasonable and articulable suspicion. State v. Smith, 2005 ND 21, ¶ 14, 691 N.W.2d 203, 208.

[¶ 19]. In the present matter, Sgt. Ficken – the directing officer – did not have reasonable and articulable suspicion to support a traffic stop. Sgt. Ficken only provided the bare minimum of a description of a vehicle, which is information available to the

general public that does not increase the reliability of the tip, nor does corroboration of those details provide reasonable basis for a stop. On a highway in rural western North Dakota, the sight of a pickup truck pulling a stock trailer is a common enough occurrence that some other identifying information is needed in order to establish whether officers have encountered the right vehicle. Sgt. Ficken did not personally observe any traffic violations or other illegal conduct by the pick-up. He testified that he told Deputy Bateman to "be on the lookout for a Dodge pick-up pulling a stock trailer," (Tr., p. 5, ln. 7-14) but did not testify that he ever notified Deputy Bateman that the pick-up driver was alleged to be intoxicated.

[¶ 20]. Although James' vehicle was spotted on Highway 85 near Arnegard, approximately 10-15 minutes away from the scene of the alleged driving dispute, that does not provide reasonable suspicion for a traffic stop. "Just as mere presence at the scene of a crime is insufficient to support a warrantless search, '[i]t is axiomatic that presence at or near the scene of a crime, without more, does not give rise to a reasonable suspicion of criminal activity.'" Torkelsen at ¶ 15 (citations omitted). See also Smith at ¶ 23 (finding that a stop of a vehicle some distance away from the scene was without reasonable suspicion, and holding that an officer is not justified in ordering a "freeze" of an illimitable area to conduct a search of the scene of a recent crime).

[¶ 21]. Deputy Bateman relied on a directive from Sgt. Ficken to make a traffic stop of James' vehicle. However, Sgt. Ficken's directive was based on an unreliable informant's tip, containing a lack of descriptive information to identify the vehicle in question, and was not based on Sgt. Ficken's observation of any illegal activity. Sgt. Ficken lacked reasonable suspicion of criminal activity by to support a traffic stop.

Therefore, the stop made upon Sgt. Ficken's directive was improper and without a reasonable basis.

[¶ 22]. Furthermore, Deputy Bateman did not observe any traffic violations, erratic driving or any other illegal activity which would independently provide a reasonable and articulable suspicion for a traffic stop. Deputy Bateman was not present to testify regarding his observations at the motion hearing. However, testimony was received that indicated Deputy Bateman allegedly observed James' vehicle swerve right and left, and come in contact with center and fog lines. Tr., p. 6, ln. 8-10. However, James did not ever cross the center or fog lines. Tr., p. 9, ln. 6-9. Deputy Bateman stopped James after he passed through a construction zone, and there was no report that he struck any cones on the center or fog lines. Tr., p. 9, ln. 10 to p. 10, ln. 10. Deputy Bateman did not observe any other traffic or driving violations.

[¶ 23]. The North Dakota Supreme Court has consistently held that slight weaving without any other violation is not sufficient to justify a stop. Specifically, the Court in Salter v. North Dakota Dept. of Transp., 505 N.W.2d 111,113 (N.D. 1993) (quoting State v. VandeHoven, 388 N.W.2d 857 (N.D. 1986) (footnotes omitted)), stated:

> "VandeHoven argues that the initial erratic movement, or weaving, was not sufficient to justify a stop. We disagree. Perhaps VandeHoven's observed behavior is not so cumulative as the behavior that justified the stopping of the vehicles in Dorendorf [initial weaving, subsequent weaving], State v. Lange, 255 N.W.2d 59 (N.D. 1977) [officers responding to report of unidentified DWI suspect, weaving], State v. Kolb, 239 N.W.2d 815 (N.D. 1976) [slight weaving, extreme fluctuations in speed, veering onto shoulder of road, crossing over center line], or Borman v. Tschida, 171 N.W.2d 757 (N.D. 1969) [sharp veering in one direction, squealing of tires, weaving within own lane]. Although 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. See Dorendorf, supra."

> **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.** See also Warrick v. Commissioner of Public Safety, 374 N.W.2d 585, 586 (Minn.Ct.App. 1985).
>
> Salter, 505 N.W.2d at 113 (emphasis added).

[¶ 24]. In a similar case, State v. Prado, 145 Wash. App. 646, the Court of Appeals of Washington recognized that brief incursions over the lane lines will happen. In that case, the Defendant's car crossed the white line by two tire widths. The superior court held that after an analysis of the totality of the circumstances "there was nothing more than a brief incursion across the white lane line with no erratic driving or safety problems." Id. The Prado court held that defendant's single, one-second crossing over lane marker by approximately two tire widths did not constitute traffic violation for failure to maintain lane, as justification for traffic stop.

[¶ 25]. The court in State v. Post, 733 N.W.2d 634 (Wis. 2007) determined that weaving within a single traffic lane does not alone give rise to the reasonable suspicion necessary to conduct an investigative stop of a vehicle, stating:

> [T]he rule that weaving within a single lane may alone give rise to reasonable suspicion fails to strike the appropriate balance between the State's interest in detecting, preventing, and investigating crime with the individual's interest in being free from unreasonable intrusions. "[R]epeated weaving within a single lane" is a malleable enough standard that it can be interpreted to cover much innocent conduct. In *U.S. v. Lyons*, a police officer made an investigatory stop after having seen the defendant's vehicle weave three to four times within a single lane. The court recognized "the universality of drivers' 'weaving' in their lanes." It therefore cautioned that allowing weaving to justify a vehicle stop may

> subject many innocent people to an investigation. "Indeed, if failure to follow a perfect vector down the highway or keeping one's eyes on the road were sufficient reasons to suspect a person of driving while impaired, a substantial portion of the public would be subject each day to an invasion of their privacy."

Post at 639-40 (internal citations omitted). See also State v. Binette, 33 S.W.3d 215, 220 (Tenn. 2000) (multiple lateral movements including touching, but not crossing, the center line, which were "not pronounced" were insufficient to support reasonable suspicion); Warrick, 374 N.W.2d at 585-86 ("subtle" weaving within lane that did not cross over the fog or center lines was insufficient to support reasonable suspicion).

[¶ 26]. As discussed in detail above, courts in North Dakota as well as other jurisdictions have held that a vehicle's weaving within its own lanes, even touching the center and/or fog lines, does not support reasonable suspicion for a traffic stop. Deputy Bateman only observed James' vehicle weave within its own lane, touching but not crossing the center or fog lines. Deputy Bateman did not observe James' vehicle knock over any of the multiple construction cones that lined the side of the road, nor did he observe any sharp veering, erratic movements, extreme fluctuations in speed, or other traffic violations before turning on his squad car lights to make a traffic stop of James' vehicle.

[¶ 27]. Deputy Bateman lacked a reasonable and articulable suspicion before making a stop of James' vehicle, in violation of James' Fourth Amendment right to be free of unreasonable seizure. Therefore, any information gathered as a result of the improper stop should have been suppressed. "[E]vidence illegally seized in violation of the Fourth Amendment must be suppressed under the exclusionary rule." State v. Oien, 2006 ND 138, ¶ 8, 717 N.W.2d 593, 596.

CONCLUSION

[¶ 28]. Based on the above, Appellant respectfully requests that this Court REVERSE the district court's denial of the Motion to Suppress, and REMAND the matter to allow Bo James to withdraw his guilty plea.

Dated this 24th day of August, 2015.

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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff/Appellee, v. Bo Tyler James, Defendant/Appellant.	Supreme Court No.:20150111 District Court No.: 27-2014-CR-00935 **AFFIDAVIT OF ELECTRONIC SERVICE**

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

The undersigned, being of legal age, being first duly sworn deposes and says that on the 24th day of August, 2015, she served a true and correct copy of the attached:

APPELLANT'S BRIEF AND APPELLANT'S APPENDIX

Electronically through the Court Electronic Filing System to:

Charles Neff mcsa@co.mckenzie.nd.us

MANDY SEIGEL

Subscribed and sworn to before me this 24th day of August, 2015.

KAYLA J. PETERSON
Notary Public
State of North Dakota
My Commission Expires Nov. 6, 2018

(SEAL)

KAYLA J. PETERSON, Notary Public
Cass County, North Dakota
My Commission Expires: 11/06/2018