IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,	)	ND Supreme Ct. No. 20160157
	)	
Plaintiff/Appellant,	)	District Ct. No. 52-2015-CR-00075
	)	
vs.	)	
	)	
Caren Charaye Ashby,	)	
	)	
Defendant/Appellee.	)	

BRIEF OF APPELLEE

APPEAL FROM THE DISTRICT COURT OF WELLS COUNTY
SOUTHEAST JUDICIAL DISTRICT
THE HONORABLE JAMES D. HOVEY

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STATEMENT OF CASE

[¶1] On or about August 26, 2015, Caren Charaye Ashby ("Caren") was charged, in Wells County Case No. 52-2015-CR-00075, with the following offenses: **Count 1:** Possession with Intent to Deliver a Controlled Substance (Methamphetamine); **Count 2:** Possession of a Controlled Substance (Methamphetamine); **Count 3:** Possession of a Controlled Substance (Heroin); **Count 4:** Possession of Stolen Property (Firearm); **Count 5:** Possession of Drug Paraphernalia (Methamphetamine and Heroin); **Count 6:** Driving Under the Influence (with Minor in Vehicle); **[Count 7 Dismissed]**; **Count 8:** Carrying a Concealed Weapon; **Count 9:** Possession of Drug Paraphernalia (Marijuana); and **Count 10:** Ingesting a Controlled Substance (Methamphetamine). (App. 5-9).

[¶2] On October 30, 2015, Caren filed a Motion to Suppress and Dismiss. On November 13, 2015, the State filed a Response in Opposition to the Defendant's Motion to Suppress. The suppression hearing was held on January 20, 2016.

[¶3] On April 1, 2016, the Honorable James D. Hovey, after considering the evidence submitted, issued an Order Granting Defendant's Motion to Suppress. (App. 31-40). The State filed its Notice of Appeal of said Order on or about April 28, 2016. (App. 41-42).

STATEMENT OF FACTS

[¶4] On August 26, 2015, just before 11:58 a.m., Trooper Evan Savageau (hereinafter "Savegeau") received the following teletype:

> "WELFARE CHECK ON 2 MINOR CHILDREN ... [children's names and DOBs omitted for privacy reason in this filing]... THE PARENTS ARE MATTHEW AND CAREN ASHBY AND ARE REPORTEDLY USING DRUGS HEAVILY. SOCIAL SERVICES HAS BEEN TRYING TO MAKE CONTACT REPEATEDLY BUT THEY CONTINUE TO AVOID THEM. THEY MAY BE DRIVING A 2007 WHITE CROWN VIC WITH WA/LIC ATN 6050. THE PAINT IS PEALING ON THE HOOD OR A LATE 1990'S DARK BROWN CHEVY SUBURBAN WITH NO LICENSE PLATES. IF LOCATED, PLEASE CONTACT STUTSMAN COUNTY SOCIAL SERVICES AT (LIBBY (701)269-2417) OR (STEPH (701)490-0312)."
>
> (Supp. Tr. 20-21, 76-77) (App. 12). [1]

[¶5] At approximately 1:17 p.m., while Savageau was traveling eastbound on Highway 52, near the Sykeston area, he observed a Crown Victoria heading westbound matching the vehicle description in the teletype. (Supp. Tr. 22-23).

[¶6] Savageau immediately turned around so that he could catch up to the vehicle and verify its license plates. Savageua reports that once he caught up to the vehicle, it turned into a rest area. The rest area was located "within a couple miles" of where Savageau first saw the vehicle. (Supp. Tr. 25-26) (App. 54-55).

[¶7] The State's portrayal of the level of suspicion Savageau felt when the vehicle turned into the rest area is embellished. The testimony speaks for itself, which is provided as follows:

> "Q. And you say that you thought that it immediately turned off into the rest area, in your training and experience, was there anything you thought was suspicious about the fact that they immediately turned into the Sykeston Area?

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[1] Trooper Savageau acknowledged at hearing that the teletype, or BOLO, did not request officers to detain and question Caren. (Supp. Tr. 77).

> A. Yeah. Right away I thought it was interesting that it immediately turned right off the highway. To me - - I don't necessarily call it eluding, but" ... "Almost the premise of the eluding, due to the fact that they were aware I was there, and it's not a very active rest area. So, it kind of sparked my interest and a little bit of suspicion."
>
> (Supp. Tr. 26) (App. 55).

[¶8] The trial court concluded that the State's contention that Caren was somehow trying to elude Savageau by pulling into a rest area was without merit. (App. 39).

[¶9] Savageau did not follow the vehicle into the rest area because he had not witnessed any traffic or moving violations. (Supp. Tr. 78) (Appellee App. 15). Instead, Savageau pulled off on a field approach and continued to monitor the vehicle and its occupants. Savageau had a clear view of the vehicle and its occupants who exited the vehicle why Savageau was observing from the approach. Savageau saw two adults, Caren and her husband Matthew Ashby (hereinafter "Matthew"), and their two (2) children. (Supp. Tr. 28-29) (App. 57-58).

[¶10] Savageau watched the Ashbys at the rest stop for approximately five (5) minutes. (Supp. Tr. 30) (App. 59). During that time, Savageau did not observe any suspicious activity. He did not observe any drugs or see anything that would cause a reasonable person to believe that criminal activity was afoot. Caren and Matthew were not acting erratically. The children did not appear to be in distress or otherwise in need of assistance. Further, despite the nature of the teletype, Savageau made no attempt to engage the Ashbys in a casual encounter so to check the welfare of the children, even though there was ample time for him to do so. (Supp. Tr. 79-80) (Prelim. Tr. 34) (App. p. 31) (Appellee App. 16-17).

[¶11] While at the field approach, Savageau called State Radio to confirm the teletype information. (Supp. Tr. 30) (App. 32, 59). Thereafter, he formed the opinion that the individuals he was observing were Caren and Matthew, and their two minor children.

(Supp. Tr. 80) (Appellee App. 17).

[¶12] Savageau then called Libby from Stutsman County Social Services. Libby indicated that Caren and Matthew were heavy drug users. (Supp. Tr. 31) (App. 60). Libby's conclusion about Caren and Matthew being heavy drug users was based upon an isolated report, from someone claiming to be Caren's grandmother, that Caren was high on heroin. [2] (Supp. Tr. 39-40, 83) (Appellee App. 20). There was no credible evidence presented at hearing which established that the teletype and traffic stop were based upon anything other than an isolated report alleging that Caren was high on heroin. (Supp. Tr. 73) (Appellee App. 11).

[¶13] The grandmother did not provide any facts to support her general accusation of Caren being high on heroin. According to Savageau, the grandmother did not state that Caren or Matthew were in possession of controlled substances or that there were drugs in their vehicle or vehicles. She did not allege that she had actually witnessed Caren or Matthew use controlled substances on the day in question or at any other time. (Supp. Tr. 73-74) (Appellee App. 11-12).

[¶14] Libby also told Savageau that Caren and Matthew were eluding social services. By "eluding", Savageau merely meant that social services "had been trying to make contact and hadn't been able to make contact with them." Libby did not describe the number of efforts made by social services to contact the Ashbys or the types of efforts made. (Supp. Tr. 34, 74) (App. 63) (Appellee App. 12). Savageau testified that he was

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[2] While the informant in this case was referred to by Savageau as Caren's grandmother, said informant was never identified by name or other means - *i.e.*, her identity was never confirmed. This individual was not named in discovery materials or listed as a witness for the prosecution. Therefore, while the Appellee denies that this informant was established as being a relative of Caren, she is still being identified as Caren's grandmother herein so to avoid confusion when discussing this person. (Supp. Tr. 88) (Doc. 2, 29).

not aware of any court order or other directive that would have required Caren and Matthew to contact social services. (Supp. Tr. 75) (Appellee App. 13).

[¶15] Libby mentioned that the Ward County Task Force was investigating Caren and Matthew. However, no details about said investigation were provided to Savageau and he was not able to confirm, through other law enforcement personnel, the accuracy of this information from this social worker. (Supp. Tr. 33, 74-76) (App. 62) (Appellee App. 12-14).

[¶16] After speaking with Libby, Savageau called Officer Ackland (hereinafter "Ackland") at the Jamestown Police Department. (Supp. Tr. 34) (App. 63). [3] Ackland was the officer that issued the teletype. (Supp. Tr. 40) (App. 69). [4]

[¶17] Ackland reported that he spoke with Libby and then contacted Caren's grandmother. (Supp. Tr. 36) (App. 65). Ackland relayed to Savageau that the grandmother stated that she was supposed to be watching the Ashby children on August 26, 2015; that Caren and Matthew picked up their children from her; and that Caren was high on heroin. (Supp. Tr. 36) (App. 65). That is literally the full extent of the grandmother's report and the only information for which the teletype was issued.

[¶18] Savageau does not know whether Ackland contacted the grandmother by phone or in-person and the State failed to present any evidence at hearing to clarify the nature of that contact. (Supp. Tr. 36, 88) (App. 65) (Appellee App. 24). No evidence was presented to establish the specific time or duration of the contact between Ackland and the grandmother. (Supp. Tr. 37, 88) (App. 66) (Appellee App. 24). The grandmother

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[3] Savageau's conversation with Libby could not have been more than 5 minutes long as he testified that he was at the field approach for 5 minutes and during that time, he had called both Libby and Ackland. (Supp. Tr. 35) (App. 64).

[4] Ackland did not testify at hearing.

was never identified by law enforcement by name or address. (Supp. Tr. 88). (Appellee App. 24). The grandmother's criminal history was never checked by law enforcement. (Supp. Tr. 89) (Appellee App. 25).

[¶19] The grandmother did not provide Ackland with any specific information as to why she believed Caren was high on heroin. She did not report observing actual use or possession of controlled substances. (Supp. Tr. 38, 74) (Appellee App. 12). She made no indication as to when she believed Caren had ingested heroin nor did the grandmother assert that Caren was planning on using heroin in the very near future. The grandmother never alleged that drugs were in Caren's vehicles. The grandmother's entire report consisted of an untrained and unqualified belief that Caren was high on heroin. (Supp. Tr. 73-74) (Appellee App. 11-12).

[¶20] Ackland relayed to Savageau that Libby had provided some information about Caren and Matthew "eluding" social services. (Supp. Tr. 40) (App. 69). However, Libby did not provide Ackland with specific examples of when or how the Ashbys had eluded social services. (Supp. Tr. 74) (Appellee App. 12).

[¶21] Ackland relayed to Savageau that Libby had stated that the Ward County Task Force was investigating Caren and Matthew. (Supp. Tr. 40) (App. 69). This information was provided exclusively by Libby and was never confirmed. (Supp. Tr. 75) (Appellee App. 13). Neither Ackland or Savageau were ever provided with a case number or a name of task force officers reportedly investigating the Ashbys. (Supp. Tr. 75-76) (Appellee App. 13-14). It should be noted however that Caren and Matthew were not the subject of a Jamestown Police Department criminal investigation. (Supp. Tr. 40) (App. 69).

[¶22] While Savageau was on the phone with Ackland, the Ashbys exited the rest area and headed westbound on Highway 52 towards Fessenden, North Dakota. Savageau

immediately got behind the vehicle. Savageau then followed the vehicle for approximately 25 miles. During his pursuit, Savageau did not observe any traffic violations or other illegal or suspicious activity. Caren was not weaving or otherwise driving erratically. Also, while following the vehicle, Savageau confirmed that there were no issues with Caren's license or registration. (Supp. Tr. 42-46, 80) (Appellee App. 1-5). Savageau testified that, based on his training and experience, it is "a little uncommon" for someone to drive flawlessly for 25 miles while under the influence. (Supp. Tr. 82) (Appellee App. 19).

[¶23] During his 25 mile pursuit of Caren, Savageau contacted Sergeant Kennedy (hereinafter "Kennedy") of the North Dakota Highway Patrol to get Kennedy's opinion as to whether it would be appropriate to stop the vehicle. [5] According to Savageau, Kennedy agreed that a traffic stop would be appropriate, but recommended that Savageau call for backup before initiating the stop. (Supp. Tr. 44-45) (Appellee App. 3-4).

[¶24] Savageau contacted the Wells County Sheriff's Office to request assistance in seizing the suspect vehicle and its occupants. (Supp. Tr. 45) (Appellee App. 4). Then, after Caren turned on a frontage road which leads to the Cenex Gas Station in Fessenden, Savageau activated his emergency lights and conducted a traffic stop. (Supp. Tr. 46) (Appellee App. 5).

[¶25] The State accuses Caren of not using her turn signal prior to being stopped by Savageau. However, Savageau testified that, at the time of the stop, he did not notice a signal violation and, likewise, that he did not stop Caren for not using her blinker. (Supp. Tr. 46-49, 81) (Appellee App. 5-8, 18). The trial court found that the State's arguments

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[5] Kennedy was not otherwise involved in the Ashby investigation. He had not received any information on the case from other officers or informants prior to speaking with Savageau.

concerning a possible after-the-fact signal violation had no merit. (App. 39).

[¶26] After the vehicle had pulled over, Savageau approached the driver's side and identified Caren as the driver. (Supp. Tr. 52) (Appellee App. 9). Savageau informed Caren that he had stopped her vehicle to perform a welfare check. (Supp. Tr. 52-53) (Appellee App. 9-10). Savageau observed Matthew in the passenger seat and the two children in the back. Savageau thought it was a little strange that the children were wearing shirts and diapers, but no pants. (Supp. Tr. 51). Nonetheless, the children did not appear to be in distress or in need of assistance. (Supp. Tr. 52, 84) (Appellee App. 9, 21).

[¶27] Savageau asked Caren to get out of the vehicle and join him in his patrol vehicle; Caren complied. (Supp. Tr. 50-51). Savageau is a Drug Recognition Expert ("DRE"). (App. 10-11). However, Savageau only spoke with Caren briefly before going to check on Matthew, who was still in the vehicle with the children. (Supp. Tr. 58). As a result, Savageau did not have the opportunity to use his DRE training, other than making preliminary observations, when speaking with Caren in his patrol vehicle. (Supp. Tr. 85-86) (Appellee App. 22-23).

[¶28] At some point while Matthew was being questioned by Savageau, Matthew volunteered that he had a marijuana pipe in the vehicle, which then gave cause to search the vehicle and, resulted in the charges referenced in the Statement of Case being filed against Caren. (Supp. Tr. 63).

LAW AND ARGUMENT

I. Whether the district court erred in granting Caren's Motion to Suppress Evidence.

A. Standard of Review.

[¶29] "The trial court's disposition of a motion to suppress will not be reversed if, after conflicts in the testimony are resolved in favor of affirmance, there is sufficient competent evidence fairly capable of supporting the trial court's findings and the decision is not contrary to the manifest weight of the evidence. City of Fargo v. Thompson, 520 N.W.2d 578, 581 (N.D. 1994). This standard of review acknowledges the significance of the trial court's opportunity to assess the credibility of witnesses and to weigh their testimony. State v. Knudson, 499 N.W.2d 872, 873 (N.D. 1993). A person alleging his rights have been violated under the Fourth Amendment has an initial burden of establishing a prima facie case of illegal seizure. State v. Glaesman, 545 N.W.2d 178, 182 n. 1 (N.D. 1996). After the defendant has made a prima facie case, however, the burden of persuasion is shifted to the State to justify its actions. State v. Swenningson, 297 N.W.2d 405, 406 (N.D. 1980)."

State v. Smith, 1999 ND 9, ¶ 10, 589 N.W.2d 546.

[¶30] When reviewing a trial court's ruling on a motion to suppress, this Court defers to the trial courts findings of fact. State v. Gregg, 2000 ND 154, ¶ 19, 615 N.W.2d 515 (citing City of Grand Forks v. Zejdlik, 551 N.W.2d 772, 774 (N.D. 1996)). "In a criminal case, we will not overturn a finding of fact unless clearly erroneous." City of Bismarck v. Lembke, 540 N.W.2d 155, 158 (N.D. 1995) (citing City of Fargo v. Ternes, 522 N.W.2d 176, 177 (N.D. 1994)). "A finding of fact is clearly erroneous if no evidence exists to support it." State v. Horning, 2016 ND 10, ¶ 11, 873 N.W.2d 920 (citing State v. Bergstrom, 2006 ND 45, ¶ 10, 710 N.W.2d 407). "A district court's choice between two permissible views of the weight of the evidence is not clearly erroneous." State v. Horning, 2016 ND 10, ¶ 11, 873 N.W.2d 920 (citing $44,140.00 U.S. Currency, 2012 ND 176, ¶ 12, 820 N.W.2d 697).

[¶31] While the underlying factual disputes are findings of fact controlled on appeal under the clearly erroneous standard, whether the findings meet a legal standard, such as

reasonable suspicion or probable cause, is a question of law. Gregg, 2000 ND 154, ¶ 20, 615 N.W.2d 515 (citing Zejdlik, 551 N.W.2d at 774). Questions of law are fully reviewable on appeal. Id. (citing State v. Glaesman, 545 N.W.2d 178 (N.D. 1996)).

B. Protection Under the Fourth Amendment.

[¶32] "The Fourth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, Mapp v. Ohio, 367 U.S. 643 (1961), provides '[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated.'" State v. Ressler, 2005 ND 140, ¶ 10, 701 N.W.2d 915.

C. Standing.

[¶33] It is well established that Caren, as a driver and occupant, had standing to challenge Savageau's unconstitutional stop of her vehicle.

> "Under the Fourth Amendment of the United States Constitution and Article I, Section 8 of the North Dakota Constitution, all searches and seizures must be reasonable. A stop, which temporarily restrains a person's freedom, is a seizure within the meaning of the Fourth Amendment. During a stop of a vehicle every person in the vehicle is seized..."
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> State v. Addai, 2010 ND 29, ¶ 17, 778 N.W.2d 555 (citing State v. Smith, 2005 ND 21, ¶ 12, 691 N.W.2d 203; Brendlin v. California, 551 U.S. 249, 254-59, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007)).

D. Community Caretaking.

[¶34] The State does not allege on appeal that Savageau's traffic stop was an approved community caretaking action. Therefore, the only issue for this Court is whether the trial court erred in finding that Savageau did not have sufficient reasonable and articulable suspicion to stop Caren's vehicle.

E. Reasonable and Articulable Suspicion.

[¶34A] "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." See State v. Robertsdahl, 512 N.W.2d 427, 428 (N.D. 1994). "The reasonable-and-articulable-suspicion standard requires *the* officer justify the stop 'with more than just a vague 'hunch' or other nonobjective facts; and. . . the articulable facts must produce, by reasonable inference, a reasonable suspicion of unlawful conduct.'" See State v Boyd, 2002 ND 203, ¶ 9, 654 N.W.2d 392. In addition to being reasonable under the circumstances, "[a]n investigative stop of a moving vehicle must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity, and mere curiosity, suspicion, vague hunches, or other non-objective facts will not suffice." Johnson v. Sprynczynatyk, 2006 ND 137, ¶ 9, 717 N.W.2d 586. This protects citizens' right to be free from unreasonable searches and seizures. State v. Glaesman, 545 N.W.2d 178, 182 (N.D. 1996).

[¶35] "Whether an officer had a reasonable and articulable suspicion is a fact-specific inquiry that 'is evaluated under an objective standard considering the totality of the circumstances.'" City of Dickinson v. Hewson, 2011 ND 187, ¶ 8, 803 N.W.2d 814 (citing State v. Wolfer, 2010 ND 63, ¶ 6, 780 N.W.2d 650. In the current case, the evidence presented by the State - *i.e.*, the totality of the facts and circumstances of record, can be summarized as follows: An individual claiming to be Caren's grandmother reported her belief that Caren was high on heroin when she picked up her children; the grandmother did not provide any information explaining why she felt Caren to be high; Ackland issued the teletype, or BOLO, after he spoke with social services and received the grandmother's statement about Caren being high; Savageau received the teletype; Savageau located Caren's vehicle but did not immediately stop the vehicle in response to the teletype; Savageau contacted social services and Ackland who both relayed the grandmother's report and also indicated that Caren and Matthew were eluding social

services; Savageau observed Caren, Matthew and the children at a rest area for approximately 5 minutes, during which time, he did not observe suspicious or concerning behavior; before finally stopping the vehicle, Savageau followed Caren for 25 miles without observing any act, illegal or otherwise, which indicated that Caren may be engaging in, or about to engage in, criminal activity.

[¶36] This Court has identified three situations that may provide an officer with reasonable and articulable suspicion to stop a vehicle: "(1) When the officer relied upon 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." Hewson, at ¶ 9 (citations omitted). Here, Savageau did not observe any illegal activity nor was he ever directed to take action by another officer armed with pertinent information or suspicion. Therefore, the issue before this Court is narrowed even further to whether Savageau had a reasonable and articulable suspicion to stop Caren's vehicle based upon tips received and Savageau's own observations. Id.

> "Information from a tip may provide the factual basis for a stop. State v. Neis, 469 N.W.2d 568 (N.D. 1991). In evaluating the factual basis for a stop, we consider the totality of the circumstances. E.g., Geiger v. Backes, 444 N.W.2d 693 (N.D. 1989). This includes the quantity, or content, and quality, or degree of reliability, of the information available to the officer. Alabama v. White, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990). 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, the greater the quantity of information required to raise a reasonable suspicion. Id. At 330, 110 S.Ct. at 2416."
>
> State v. Miller, 510 N.W.2d 638, 640 (N.D. 1994).

1. Quality and Quantity of the Tip.

[¶37] "When determining whether information available to an officer establishes

reasonable and articulable suspicion, it must be evaluated for its 'quantity, or content, and the quality, or degree of reliability." State v. Fields, 2003 ND 81, ¶ 16, 662 N.W.2d 242. As far as the evidence shows, the grandmother was never identified by name and address or confirmed to be who she claimed to be. Additionally, the record does not indicate that Ackland had a face-to face interaction with the grandmother. Therefore, while the grandmother is not entirely anonymous, the record does not depict the grandmother as an extremely reliable source. See Miller, 510 N.W.2d 638, 640-41 (N.D. 1994) (this Court's discussed the high and low ends of the informant reliability scale).

[¶38] Even if the grandmother were to be considered a reliable citizen informant, the trial court's determination that Savageau did not have reasonable suspicion is still proper due to the fact that: (1) The quantity of information provided by the grandmother was very small - *i.e.*, just a bare assertion that Caren was high; and (2) Savageau was unable to corroborate the tip that Caren was high or otherwise impaired. City of Dickinson v. Hewson, 2011 ND 187, ¶ 9, 803 N.W.2d 814.

[¶39] The State argues that the facts of this case are similar to those in Hewson. In August of 2010, Rodney Hewson called 911 after midnight to report that his wife, Lola Hewson, had been drinking heavily, was intoxicated, and that she had almost run Rodney over with her car. Rodney described the vehicle and provided the direction that it was heading. The dispatcher then sent an officer to Rodney's and Lola's residence. The dispatcher gave the officer the name and address of the informant - *i.e.*, Rodney. The dispatcher informed the officer that Rodney had reported that Lola had almost hit him with her car and that she was intoxicated. On the way over to the residence, the officer located Lola's vehicle and stopped the vehicle. Hewson, at ¶ 2. With regard to the traffic stop, the North Dakota Supreme Court stated that:

> "[T]he officer was investigating more than merely an anonymous tip, but

> rather a fact-specific report from an identified individual received sometime after midnight, stating that Lola Hewson was intoxicated and had almost run him over."
>
> Id. at ¶ 13.

[¶40] Unlike Hewson, the informant's identity in this case was never specifically obtained by law enforcement. Additionally, the most striking difference between these cases is the quantity of information provided to law enforcement. In Hewson, Rodney's report established that he lived with Lola (the suspect), his wife, and had personally witnessed how much she had to drink on the evening in question. Rodney's report also included an independent act of potential criminal activity other than intoxication - i.e., Lola nearly hit Rodney with her car. Rodney's report also included information about the vehicle that Lola was driving and the direction it was heading. In the present case, the only information provided by the grandmother was that she believed Caren to be high on heroin. The facts which Savageau relied upon in stopping Caren's vehicle are far less compelling than those in Hewson.

[¶41] The State argues that the grandmother should be deemed just as reliable, if not more than, Rodney Hewson because she, like Rodney, is a family member of the party being reported against. However, the identity of the tipster is not the only factor in assessing the reliability of the tip. The informant's "basis of knowledge" and "veracity" (*i.e.*, how she knows and why we should believe her) remain highly relevant when determining if reasonable suspicion has been obtained. Alabama v. White, 496 U.S. 325, 328-29, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990). Here, the grandmother failed to provide basic details which could establish how she knew that Caren was high on heroin and why she should be believed. Therefore, the trial court was correct to decline "to adopt a 'because grandma said so' exception" to the Fourth Amendment. (App. 40).

[¶42] The United States Supreme Court has explained that tips containing specific

details or predictions of future action fall higher on the reliability scale because they suggest the existence of knowledge to which the public might not have access. Alabama v. White, 496 U.S. 325, 332, 110 S.Ct. 2412. Here, the grandmother's *tip* that Caren was high when she picked up her children, lacked specific detail, and did not predict future events.

[¶43] The United States Supreme Court has further explained that when a tipster's basis of knowledge is a contemporaneous viewing of suspicious activity, that tipster may be deemed more reliable. In this case, there was no evidence presented to support a finding that the grandmother's report was contemporaneously made. See Florida v. J.L., 529 U.S. 266, 270-72, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000).

[¶44] The State argues that the grandmother gave a fact specific report to law enforcement that included names and birth dates for the Ashby children; a description of Caren's vehicles; license plate numbers, and the like. However, the State is assuming facts not in evidence as the record does not reflect that the grandmother provided these details. Even if the grandmother had indeed provided these details, the information itself would not bolster suspicion or make the grandmother's tip more or less reliable. While information about the vehicle would certainly help law enforcement locate Caren, "[t]he reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." United States v. Nelson, 284 F.3d 472, 477 (3rd Cir. 2002) (citing Florida v. J.L., at 272, 120 S.Ct. 1371). The accusation that Caren was high on heroin was the only assertion of illegality and an accurate description of the vehicle and the birth dates of its occupants did not make the illegality more or less likely. Overall, the grandmother's tip did not justify the traffic stop.

2. Corroborating the Tip.

[¶45] "When the informant's tip, standing alone, lacks sufficient indicia of reliability because it does not do enough to establish the informant's basis of knowledge and veracity, it may still support a finding of reasonable suspicion if sufficiently corroborated through independent police investigation." United States v. Elmore, 482 F.3d 172, 179 (2d Cir. 2007) (citing Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959)). Given that the trial court properly concluded that the grandmother did not provide the basis of her knowledge and veracity, corroboration by Savageau was required.

[¶46] Additionally, since the tip in this case was about a potentially impaired driver, corroboration of impairment has generally been required from this Court:

> "Typically, our impaired driver cases involve tips that give a description and the location of the vehicle – 'easily obtained facts and conditions existing at the time of the tip' and available to the general public. Corroboration of this type of information does not increase the reliability of the tip. See 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]. Therefore, our cases have required that the officer corroborate the tip by observing some behavior on the part of the driver, either illegal or indicative of impairment, that alerts the officer to a possible violation."
>
> State v. Miller, 510 N.W.2d 638, 642 (N.D. 1994).

[¶47] Savageau testified at hearing that, prior to stopping the vehicle, he did not observe any behavior which indicated illegal activity or impairment. Therefore, Savageau was unable to corroborate the tip about Caren being high on heroin prior to initiating the traffic stop. [6]

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[6] With regard to the State's argument about a potential signal violation discovered after-the-fact on video which was never observed by Savageau, no response is being submitted as the argument is entirely without merit and need not be addressed.

3. The Teletype.

[¶48] The State argues that the facts here are analogous to those in State v. Boyd, 2002 ND 203, 654 N.W.2d 392. In Boyd, a deputy was on patrol when she observed a vehicle with Texas plates. The deputy asked dispatch to run the plates. The deputy observed three individuals in the vehicle. The individual in the back seat of the vehicle appeared to be a woman. When the vehicle turned south, the deputy did not follow. Sometime shortly thereafter dispatch reported to the deputy that "a National Crime Information Center ("NCIC") request to perform a welfare check on the owner of the vehicle, as a 'possibly missing and/or endangered' female." The deputy then requested assistance and located the vehicle in a mall parking lot. State v. Boyd, 2002 ND 203, ¶ 2, 654 N.W.2d 392.

[¶49] The deputy pulled behind the vehicle as the three occupants exited. Two men were in the front of the vehicle, and the woman in the back was identified as Jocelyn Boyd. The deputy identified herself, showed her badge and directed the individuals to place their hands on the vehicle. The individuals did not comply until another officer arrived. It was discovered that Jocelyn Boyd was the owner of the vehicle. Pat-down searches revealed drugs and a drug dog hit on the vehicle. Jocelyn Boyd consented to the search of the vehicle and police discovered drugs. State v. Boyd, 2002 ND 203, ¶ 3, 654 N.W.2d 392. Jocelyn Boyd appealed the trial court's order denying her Motion to Suppress arguing that the stop was not supported by reasonable suspicion nor made pursuant to a valid community caretaking function. Boyd, at ¶¶ 3-4.

[¶50] The North Dakota Supreme Court determined that there was no community caretaking encounter due to the deputy's actions and orders - *i.e.*, pulling behind the vehicle and blocking it in, ordering the individuals to place their hands on the hood, etc. Boyd, at ¶ 10. However, this Court did find that the deputy had received "sufficient

information to form a reasonable and articulable suspicion of criminal activity." Id. at ¶ 11.

[¶51] This Court in Boyd correctly noted that "[a]n investigative stop must be 'justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.'" Id. at ¶ 13, (citing State v. Glaesman, 545 N.W.2d 178, 182 (N.D. 1996)). The deputy had received a report that the female owner of the recently located vehicle may be missing and/or endangered. In other words, the teletype indicated that criminal activity may be afoot. The deputy, through her own personal observations, confirmed that the suspect vehicle was from Texas and is being driven around North Dakota. The vehicle being from Texas alone is not suspicious, but when combining it with the fact that the owner of said vehicle is reported to be missing or in danger, the presence of this out-of-state vehicle becomes reasonably suspicious. The deputy was also able to personally observe three individuals in this vehicle with the lone occupant of the backseat being a woman. If just a woman was driving by herself in the vehicle, such would not indicate criminal activity. However, since the deputy knew that the female owner of the vehicle was possibly the victim of an abduction, observing a female being the lone occupant of a vehicle occupied by three (3) individuals is reasonably consistent with an abduction. Therefore, based on the totality of the circumstances in Boyd, the stop was premised on sufficient suspicion.

[¶52] There are several key differences between this case and Boyd. First, the nature of the report in this case is that of a parent driving while impaired with that parent's childrne in the vehicle. In Boyd, the nature of the suspected criminal activity was an abduction. Next, in Boyd the deputy received the teletype, relied upon the report and her corroborating observations, and then seized the vehicle and its occupants. Here, Savageau did not rely on the teletype in stopping the vehicle. Rather, after receiving the

teletype, Savageau contacted social services and Ackland and then learned exactly why the teletype had been issued - *i.e.*, the grandmother reported that Caren was high on heroin, and specifically who had issued the teletype - *i.e.*, Ackland. So to say that Savageau was relying upon the teletype as a basis for the stopping Caren's vehicle would be a farce. He was relying on the information he received from Ackland and Libby.

[¶53] In Boyd, the deputy received a teletype indicating a possible abduction and her immediate observations were consistent with that report. So she acted on the information then available to her. Unlike the deputy, Savageau was not of the opinion that the nature of the teletype coupled with his immediate observations warranted a traffic stop. Savageau did not even deem it appropriate to attempt a casual/consensual encounter. (Supp. Tr. 78). Savageau felt more was needed before he could engage Caren's vehicle. After Savageau finished peeling back all the layers of the onion, he learned that the teletype was issued as the result of an isolated report from Caren's grandmother in which it was alleged that Caren was high on heroin. This, and not the teletype, is the information that Savageau relied upon in making the stop.

[¶54] In Boyd, the suspected criminal activity was some form of an abduction. Here, the suspected criminal activity was that of an impaired driver. In Boyd, the deputy made observations which corroborated the tip about a possible abduction. Here, Savageau, after following Caren for approximately 30 miles, and over a period of about 30 minutes, did not make a single observation indicating that Caren was impaired. Therefore, for the reasons stated herein, the trial court was correct in ruling that Savageau lacked the requisite level of suspicion to initiate a traffic stop.

4. Articulable Suspicion.

[¶55] "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." See State

v. Robertsdahl, 512 N.W.2d 427, 428 (N.D. 1994) (emphasis added). Savageau was unable to clearly articulate his suspicion at hearing on this matter. At certain points he stated that he stopped the vehicle to perform a welfare check. (Supp. Tr. 83). When asked a different way, Savageau testified he stopped the vehicle based upon reasonable suspicion. (Supp. Tr. 96-97). By the end of the hearing, Savageau was stating that he stopped the vehicle both to perform a welfare check and because he believed that a crime had been committed or was about to be committed. (Supp. Tr. 98). The record reflects that Savageau could not articulate his suspicion and this was due to the fact that he never had more than a vague hunch.

5. Totality of the Circumstances.

[¶56] When reviewing the totality of the circumstances in this case, it is apparent that Savageau did not have sufficient suspicion to stop Caren's vehicle. The teletype was issued as the result of the grandmother's single report indicating that Caren was high on heroin when she picked up her children. The grandmother was not identified by name or address and the evidence does not establish that Ackland spoke with her face-to-face. Even if the interaction had been face-to-face, the quantity of information was so small that there still would have been no basis, without some objective manifestation of impairment, to stop Caren's vehicle. The trial court was correct to grant Caren's Motion to Suppress.

CONCLUSION

[¶57] For the foregoing reasons, it is respectfully requested that the trial court's Order Granting Defendant's Motion to Suppress be affirmed.

Respectfully submitted this 10th day of October, 2016.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,	
Plaintiff/Appellant,	**ND Supreme Ct. No. 20160157**
vs.	**District Ct. No. 52-2015-CR-00075**
Caren Charaye Ashby,	
Defendant/Appellee.	

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the following documents were served on the 10TH day of October, 2016, by sending it via US Mail to:

1. Brief of Appellee; and
2. Appellee's Appendix.

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20160157
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
OCTOBER 12, 2016
STATE OF NORTH DAKOTA

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STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	**ND Supreme Ct. No. 20160157**
Plaintiff/Appellant,	)	
	)	**District Ct. No. 52-2015-CR-00075**
vs.	)	
	)	
Caren Charaye Ashby,	)	
	)	
Defendant/Appellee.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the following documents were served on the 12TH day of October, 2016, by sending it via US Mail to:

1. Corrected page #10 from Brief of Appellee.

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A copy of the *corrected* Brief of Appellee, in WordPerfect Format, was also, on the above-signed date, filed by email with the ND Supreme Court Clerk and served by email to Kathleen K. Murray at: kmurray@nd.gov

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