

ORIGINAL

990067

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CLERK OF SUPREME COURT

MAY 27 1999

STATE OF NORTH DAKOTA

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

IN THE INTEREST OF T.J.K., A CHILD

Gloria J. Maragos, )  
)  
Petitioner/Appellant, )  
)  
vs. )  
)  
T.J.K., Child; G.K. Mother; )  
J.K., Father; )  
)  
Respondents/Appellees. )

Case No. 990067

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APPEAL FROM ORDER OF FEBRUARY 10, 1999 DISMISSING  
PETITION FOLLOWING ORDER SUPPRESSING EVIDENCE  
OF JANUARY 8, 1999 AND MEMORANDUM OPINION  
CONFIRMING REFEREE OF JANUARY 22, 1999

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**APPELLEE'S BRIEF**

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SCHOPPERT LAW FIRM

Thomas K. Schoppert (03060)  
Northland Professional Building  
600 22<sup>nd</sup> Ave. NW  
Minot, ND 58701  
(701) 852.1041

ATTORNEY FOR THE APPELLEES

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## STATEMENT OF THE CASE

### A. COURSE OF PROCEEDINGS

The Appellee (hereinafter " T.J.K."), does not have an substantial disagreement with the State's (in a juvenile matter, the Petitioner's name appears as Gloria Maragos, the Ward County Juvenile Supervisor: The Petitioner will be referred to as the "State.") rendition of the "Statement of the Proceedings" below, found at pp. 1-3 of the Appellant's Brief.

### B. STATEMENT OF THE FACTS

In the factual presentation of this matter, the State accepts that Officer Goodman (hereinafter "Goodman") was not going to stop the vehicle driven by T.J.K., until after he notice two events occur. (Appellant's Brief p. 4). That Goodman saw T.J.K.'s vehicle "...weaving on the road all the way into the oncoming lane of traffic and back into his lane." (Tr. 45) And, that Goodman saw T.J.K.'s vehicle, "... rapidly, spinning and squealing his tires." in the intersection of a four lane roadway. (Tr. 46). T.J.K. called into question, at the hearing, whether either of the above two events actually occurred. The testimony was quite conflicting. The Judicial Referee found that T.J.K. did not weave into the oncoming lane of traffic. (App. 16). The Judicial Referee came to the conclusion, after hearing all of the testimony, that T.J.K.. may have swerved a little but was always in his lane. (App. 16). The Judicial Referee also accepted the testimony of T.J.K. that the "squeal" was not out of the ordinary. (App. 17.) Also, the Judicial Referee took into account the testimony of T.J.K.'s mother who testified that Goodman told her that

her son, "...was not all over the road." (App. 17)

Since most of the State's issues seem to re-litigate the factual disputes presented in this matter, they will be appropriately dealt with in the argument.

### ISSUES

1. AFTER GIVING APPRECIABLE WEIGHT TO THE JUVENILE COURT'S FINDINGS, THIS COURT SHOULD NOT DISTURB THOSE FINDINGS.

2. THERE WAS NO 'ARTICULABLE AND REASONABLE SUSPICION' WARRANTING A STOP OF T.J.K.'S VEHICLE CONTRARY TO LAW.

### ARGUMENT

1. AFTER GIVING APPRECIABLE WEIGHT TO THE JUVENILE COURT'S FINDINGS, THIS COURT SHOULD NOT DISTURB THOSE FINDINGS.

Although this Court may independently review the evidence presented to the juvenile court at a hearing on a motion to suppress, the findings of the juvenile court is entitled to appreciable weight. Rummel v. J.D.Z. 431 N.W.2d 272 (N.D. 1988). Only the juvenile court had the opportunity to observe the witnesses and assess their credibility, and demeanor. The State has taken finding #7, (App. 16-17) somewhat out of context. Finding #7, is the Juvenile Court's factual findings as to what was testified by T.J.K., and his other witnesses. Id. Finding #6 (App. 16) is the Juvenile Court's rendition of the factual presentation of Goodman. Finding #8 (App. 8) is the factual rendition of the mother of T.J.K.'s testimony concerning the weaving. Obviously, Finding #9, is the Juvenile Court's choice between Finding #6-Goodman's; and Finding #7-T.J.K. and the other two witnesses; and Finding

#8—the mother's testimony.

Goodman's facts were quite specific. That T.J.K. was all the way into the other lane. Not half way, or partially, or sort of, but all the way. And, that he heard tires squealing in the intersection.

None of the witnesses, nor T.J.K. testified that the vehicle was "all the way" into the other lane. T.J.K. testified that he may have slightly wove. One of the witnesses stated that T.J.K. had not in any way gone into the other lane of traffic. That was under oath at the hearing. The statement that the witness affirmed giving was not under oath, and was made to Goodman with his mother present, perhaps to please his mother. At best, the juvenile court was presented with a prior inconsistent statement that is within the province of the trier of fact to chose. The second witness testified that the tires "may have been on the center line and back and forth." (Dec 16<sup>th</sup> Tr. 14). That was not for certain. He did not describe the degree of weaving. Remember the officer said there was only one weave completely into the other lane of traffic. Certainly, the juvenile court could surmise from that witness that since the degree of weaving was not asked or stated, that it was insignificant, because all of the driving in this case was down a two lane roadway with cars on both sides of the road way, and the road did curve.

As for the second witness that the State characterized, he changed his testimony as to the squealing of the tires. Although not all witnesses will remember the testimony exactly as it was, at least one witness characterized it as a foot slipping off the clutch, and one testified it was not out of the ordinary. These are not

really significances with any difference. T.J.K. denied squealing his tires in any intentional context.

Finding #7, is a fair and accurate rendition of the testimony which should be given great deference.

2. THERE WAS NO ARTICULABLE AND REASONABLE SUSPICION WARRANTING A STOP OF T.J.K.'S VEHICLE CONTRARY TO LAW.

The Juvenile Court was called upon to resolve the conflict in the testimony between the Officer Goodman and the witness, whose cumulative testimony as found by the Juvenile Court was that the "Respondent may have swerved a little, but always remained in this lane." Certainly the Juvenile Court was well within reason to not accept the officer's conclusion that T.J.K. was all the way into the other lane. In fact, his credibility was strained to the limits. The Juvenile Court chose to disbelieve the officer on that point. The Juvenile Court was certainly within its discretion to do so. The State may not like that conclusion, but it is acceptable. This Court has never held that a Juvenile Court or a Trial Court must always factually accept the reason for stopping a vehicle, as stated by the officer. Although not done often, the Juvenile Court or Trial Court may simply not accept the testimony of the officer. Besides the testimony of three witness, there was also the testimony of the mother of T.J.K. who severely put in issue the officer's rendition of the facts. Therefore, the question in this case is what is the standard for legal review of a "little weaving." T.J.K. is not going to deny to this Court that weaving may be a ground for articulable suspicion. However, the State has simply chosen

to forget this Court's holding, as a matter of law, the pronouncement in Salter v. N.D. Department of Transportation, 505 N.W.2d 111, (N.D. 1993). In this case, with the officer's testimony being less than credible, and being left with a "little weaving," Salter, is instructive:

"In this case there is no evidence of erratic movement, sharp veering, or any of the other factors noted in prior cases.... This is precisely the type of "slight weaving" which, we cautioned in VandeHoven (388 N.W.2d 857 (N.D. 1986), 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).

Simply stated, "slight" weaving is the same as a "little" weaving.

Again, the squealing of tires issue is no more than a matter of degree. The Juvenile Court chose to characterize that as a foot slipping off of the pedal, and not out of the ordinary. T.J.K. had to cross a four lane road. There were not tire marks, no dust, no other extrinsic evidence, other than a noise. Was that noise out of the "ordinary." Certainly not. Was there weaving? Certainly not.

### CONCLUSION

The decision of the District Court should be affirmed.

Dated this 27<sup>th</sup> day of May, 1999.

RESPECTFULLY SUBMITTED.

SCHOPPERT LAW FIRM

By: \_\_\_\_\_

Thomas K. Schoppert (03060)  
Northland Professional Building  
600 22<sup>nd</sup> Ave. NW  
Minot, ND 58703  
701-852-1041