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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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SUPREME COURT

APR 22 '99

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

FILED
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CLERK OF SUPREME COURT

APR 21 1999

STATE OF NORTH DAKOTA

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

APPELLANT'S BRIEF

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TABLE OF CONTENTS

Table of Authorities..... ii
Cases..... ii
Statutes, Rules or Other Authorities.....iii
Statement of Issues Presented For Review..... iv
Statement of Case:
 A. Proceedings Below..... 1
 B. Statement of Facts..... 3
Argument:
 1. WERE THE FINDINGS OF THE REFEREE WHICH LED TO
 DISMISSAL OF THE PETITION INCOMPLETE AND IN ONE
 INSTANCE ACTUALLY ERRONEOUS?..... 12
 2. WAS THE REFEREE'S FINDING THAT THERE WAS NO
 "ARTICULABLE AND REASONABLE SUSPICION" WARRANTING
 A STOP OF T.J.K.'S VEHICLE CONTRARY TO LAW?... 15
Conclusion..... 20
Affidavit of Mailing..... 21

TABLE OF AUTHORITIES

Cases:	Page:
<i>Cheadle v. R.M.B.</i> , 402 NW 2 nd 912 (N.D. 1987).....	12
<i>Eastburn v. J.K.H.</i> , 392 NW 2 nd 406 (N.D. 1986).....	11
<i>Geiger v. Backus</i> , 444 NW 2 nd 692 (N.D. 1989).....	16
<i>Heitkamp v. L.J.</i> , 436 NW 2 nd 558 (N.D. 1989).....	12
<i>In re F.H.</i> , 283 NW 2 nd 202 (N.D. 1979).....	12
<i>In re M.L.</i> , 239 NW 2 nd 289 (N.D. 1976).....	11
<i>State v. Hornaday</i> , 477 NW 2 nd 245 (N.D. 1991).....	17
<i>State v. Ova</i> , 539 NW 2 nd 857 (N.D. 1995).....	16
<i>State v. Smith</i> , 452 NW 2 nd 86 (N.D. 1990).....	16
<i>State v. Storbakken</i> , 552 NW 2 nd 78 (N.D. 1996).....	16
<i>State v. Vandehoven</i> , 388 NW 2 nd 587 (N.D. 1986).....	16

Statutes, Rules or Other Authorities:

Administrative Rule 11.....	2
Administrative Rule 13(11).....	2
NDCC 27-20-56.....	11
NDCC 39-08-03.....	19
NDCC 39-08-03.1.....	19
NDCC 39-09-01.1.....	19
North Dakota Rules of Civil Procedure 52(a).....	11

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Were the findings of the Referee which led to dismissal of the Petition incomplete and in one instance actually erroneous?
2. Was the referee's finding that there was no "articulable and reasonable suspicion" warranting a stop of T.J.K.'s vehicle contrary to law?

STATEMENT OF CASE

(A) PROCEEDINGS BELOW

The Proceedings in this matter were commenced by the filing of a summons and petition in the Juvenile Court on October 27, 1998. The petition alleged that the Respondent, T.J.K., had committed the offenses of Driving Under the Influence of Intoxicating Liquor and Unlawful Consumption of an Alcoholic Beverage. The summons indicated a hearing date of November 23, 1998 at 9:30 AM. (App. at 3).

Prior to the hearing date on November 19, 1998, the Respondent, T.J.K., filed a Motion to Suppress all evidence in the case predicated upon the contention there was no "articulable reason" to stop the motor vehicle he was driving. The Respondent specifically requested an evidentiary hearing to resolve issues relating to the Motion to Suppress. (App. at 8).

On November 25, 1998, the Court scheduled a Suppression Hearing for December 4, 1998 at 10:30 AM. (App. at 11). The hearing was commenced on December 4, 1998, but not concluded and thereafter the Court rescheduled December 16th at 9:30 AM as the time for a continued hearing on the Motion to Suppress. (App. at 12).

Following the Suppression Hearing, the Juvenile Referee on January 8, 1999 issued an Order granting the Respondent's Motion to Suppress. (App. at 13).

The Petitioner did not receive the ruling of the Judicial Referee until January 12, 1999 and thereafter on January 13, 1999 filed a request for review by a District Judge of the Referee's determination pursuant to North Dakota Administrative Rule 13(11). (App. at 18). As is required by Administrative Rule 11, the Petitioner filed with the request for review a statement of reasons for the request for review which was incorporated with the request and filed in the form of a Brief. (App. at 19).

The Hon. Glenn Dill, III, District Court Judge, was assigned to perform the judicial review of the Judicial Referee's Order by the Hon. Robert Holte, presiding Judge for the Northwest Judicial District. (App. at 25).

In a memorandum opinion of January 22, 1999, Judge Dill confirmed the decision of the Judicial Referee. (App. at 26).

Thereafter on February 9, 1999, attorney for the Petitioner sent a correspondence to the Judicial Referee indicating that the Petitioner wished to appeal the Order suppressing all evidence in the case to the Supreme Court, but that it was necessary to take the appeal pursuant to NDCC 27-20-56 from a "final Order, Judgement, or Decree of the Juvenile Court." (App. at 30). Thereafter the Judicial Referee recognizing that the granting of the Suppression Motion left the Petitioner without evidence to proceed in the matter, issued her findings of fact and recommendation to

dismiss the Petition which was confirmed by the Order of Judge Dill on February 10, 1999. (App. at 32 and 33).

Following the final Order of the Court dismissing the Petition, the Petitioner filed notice of appeal to the Supreme Court on February 16, 1999. (App. at 34).

(B) STATEMENT OF FACTS

The case before the Court deals with a traffic stop made by Officer David Goodman of the City of Minot Police Department on the evening of September 6, 1998. At approximately 10:17 PM, Goodman was near the intersection of University Ave. and 8th St. NW in Minot traveling eastbound on University Ave. (Dec. 4th Tr. at 39). As he approached the intersection, Officer Goodman observed a vehicle, which he subsequently determined was being operated by T.J.K., in the left hand turn lane for westbound traffic on University Ave., in a position to be turning south onto 8th St. NW. Goodman further indicated another westbound vehicle pulled up along side T.J.K. in the lane for through traffic directly north of T.J.K.'s vehicle. (Dec. 4th Tr. at 40). Goodman indicated as he pulled away in a easterly direction from the intersection, the other vehicle pulled up along side T.J.K.'s vehicle honking it's horn. Officer Goodman indicated when he looked in his rearview mirror he saw the vehicle next to T.J.K's turn left in front of T.J.K's vehicle performing an illegal turn. (Dec. 4th Tr. at 40). Officer Goodman indicated that after

making this observation in his rear view mirror, he went around a few blocks with the idea to catch up to the vehicle that had performed an illegal turn in front of T.J.K.'s vehicle. (Dec. 4th Tr. at 42). After going around the blocks and getting to 8th St., Officer Goodman became aware that T.J.K.'s vehicle was actually in front of the vehicle that had cut him off by turning in front of him at the intersection. (Dec. 4th Tr. at 44). Officer Goodman indicated he was preparing to stop the vehicle that had cut off T.J.K. when he made observations of T.J.K.'s vehicle which he described as a back and forth weaving maneuver, which brought T.J.K.'s vehicle into the oncoming lane of traffic and then back into his lane. (Dec. 4th Tr. at 44 and 45). After witnessing T.J.K.'s weaving maneuver, Officer Goodman continued to make observations, including how T.J.K. negotiated the stop sign at 8th St. and 3rd Ave. NW. In that regard, Officer Goodman indicated he observed T.J.K. accelerate rapidly, spinning and squealing his tires as he negotiated the intersection. (Dec. 4th Tr. at 45 and 46). At that point Officer Goodman indicated he decided to stop T.J.K.'s vehicle as opposed to the other vehicle, feeling the driving he observed of T.J.K. represented a more serious violation, however, he took steps to ensure another patrol officer would stop the vehicle he had initially observed perform an illegal turn in front of the vehicle of T.J.K. (Dec. 4th Tr. at 46 and 47). When asked to give the

reason for the stop of T.J.K.'s vehicle, the officer indicated it was due to his weaving on the roadway and due to the spinning and squealing of his tires at the intersection of 8th St. and 3rd Ave. NW. (Dec. 4th Tr. at 47).

The Respondent, T.J.K., testified at both the December 4, 1998 and December 16, 1998 portions of the Suppression Hearing. Additionally, his testimony appeared in a transcript of an Administrative Hearing of October 13, 1998, which was submitted by the Respondent with his Motion to Suppress.

The Respondent was questioned by his counsel with regard to how his vehicle ended up being ahead of the vehicle that cut him off by performing an illegal turn in front of his vehicle at the intersection. T.J.K. indicated that when the vehicle turned in front of him, it forced him into the oncoming lane of 8th Street and he sped up to get in front of the other vehicle. (Dec. 4th Tr. at 12). He indicated that he accelerated ahead of the vehicle so he wouldn't crash. (Dec. 4th Tr. at 13). On cross examination, however, a different motivation was revealed for T.J.K.'s pulling in front of the vehicle that had cut him off. He acknowledged that after they had cut him off and while the cars were along side each other on 8th Street, he had indicated to the occupants of the other vehicle "follow me." (Dec. 4th Tr. at 27). T.J.K. acknowledged it was pre-arranged between himself and the occupants of the other car that he would be the lead

vehicle. (Dec. 4th Tr. at 28). The Respondent acknowledged that at the Administrative Hearing, his testimony had indicated that his actions in getting in front of the other vehicle had been motivated to avoid hitting the other vehicle. (Dec. 4th Tr. at 28 and 29).

With regard to Officer Goodman's allegation that he had observed a weaving motion on the roadway by the Respondent's vehicle, the testimony of T.J.K. was inconsistent. Initially, at the December 4, 1998 hearing, the Respondent indicated he made no weaving movements other than turns that the road would require. (Dec. 4th Tr. at 22). At the Administrative Hearing of October 13, 1998, the Respondent indicated that after the bridge (which would be the time period that Officer Goodman made his observations), the Respondent was sure he did not engage in any weaving. At the December 16, 1998 hearing however, the Respondent's story changed. At that hearing, after hearing the testimony of two of his friends in the vehicle immediately behind his indicating there was weaving, the Respondent acknowledged to his counsel on direct examination that he may have engaged in slight weaving or weaving motions in the area of the stop sign at 3rd Ave. (Dec. 16th Tr. at 22). At that time the Respondent attempted to justify the acknowledged weaving by indicating he wasn't sure where he was going and was thinking about turning right at the upcoming intersection. (Dec. 16th Tr. at 22). When cross

examined about the new justification for acknowledged swerving allegedly related to his thinking about turning right at the intersection, the following exchange took place:

"Q. When did you arrive at this theory that you were thinking about turning right?

A. Hmm?

Q. When did you arrive at the theory that you were thinking about turning right at that intersection?

A. I've always thought that.

Q. You didn't say that in the administrative hearing, though, either, did you?

A. I was never asked any question that deal with that.

Q. Okay. Did you ever put on your turn signal for a right turn?

A. No. I was going to go straight.

Q. So the swerve really had nothing to do with thinking about turning right?

A. Possibly it could have." (Dec. 16th Tr. at 24 and 25).

The real motivation for the Respondent's testimony (that he was thinking about turning right and may have swerved a little) can be found earlier in the hearing where his attorney was cross-examining a prior witness, in which the following exchange occurred:

"Q. Let me ask you this, if you're going to make a right-hand turn, son, you would come close to a vehicle that would be parked on the right-hand side, right?

A. Yeah.

Q. Okay. And then if you changed your mind you might go through the intersection and it might look like he swerved towards the vehicle, right?

A. Yeah.

Q. Could that have been what he was doing?

A. Maybe." (Dec. 16th Tr. at 16 and 17).

The Respondent had never offered indecision about turning as a rationale for swerving until after it was raised in a speculative question posed by his lawyer to the previous witness.

The Respondent's testimony at the Administrative Hearing, the December 4, 1998 hearing and the December 16, 1998 hearing was inconsistent with regard to the issue of whether or not he squealed his tires at the intersection of 8th Street and 3rd Ave. NW. Initially at the December 4, 1998 hearing, the Respondent indicated to his counsel that he did not remember any squealing at the intersection. On cross-examination, the Respondent was more definitive, indicating flatly he did not squeal his tires at the intersection. (Dec. 4th Tr. at 32). Thereafter, the Respondent acknowledged that at the

Administrative Hearing he had indicated he was unsure whether or not he squealed his tires, but was now sure he did not squeal his tires. (Dec. 4th Tr. at 33). Later, at the December 16, 1998 continuation of the Suppression Hearing, the Respondent's story changed dramatically. After hearing his friends testify that he had squealed his tires, the Respondent's testimony became that he did remember squealing his tires a little bit at the stop sign. (Dec. 16th Tr. at 23). Essentially, the Respondent's testimony at various times evolved from he didn't know if he squealed his tires to he definitely didn't squeal his tires to finally acknowledging he did squeal his tires.

The driver of the vehicle that initially cut off T.J.K.'s vehicle at University and 8th Street and thereafter was passed by T.J.K.'s vehicle, testified on December 4, 1998. When asked to describe T.J.K.'s driving after he had passed his vehicle, the witness indicated he was swerving on the roadway a little, like he was goofing around. (Dec. 4th Tr. at 59). The witness further indicated that T.J.K. had squealed his tires following stopping at the intersection of 8th Street and 3rd Ave. (Dec. 4th Tr. at 59, 60 and 61). On cross-examination, the witness testified that the weaving he observed of T.J.K. did not cross over into the other lane of traffic and it looked like he was probably leaning over to mess with his radio or something. (Dec. 4th Tr. at 65).

However, on redirect examination, the witness acknowledged that he had indicated to the arresting officer that it looked like T.J.K. was swerving at cars to see how close he could get to them to show off. (Dec. 4th Tr. at 74). The witness further acknowledged that he had indicated to the arresting officer that T.J.K. was weaving from one side of the road and then into the oncoming lane of traffic back and forth. (Dec. 4th Tr. at 74). The witness further acknowledged that he had previously indicated the squealing of tires at the intersection of 8th Street and 3rd Ave. was for at least halfway across the intersection if not more. (Dec. 4th Tr. at 75). On recross-examination, the witness again minimized the extent of the swerving and squealing of tires. (Dec. 4th Tr. at 76-77).

A second juvenile witness was called that was also in the vehicle immediately behind that of T.J.K. That witness also described swerving by T.J.K., indicating he observed approximately three swerving actions where his left tire may have been on the center line and back and forth a little bit. (Dec. 16th Tr. at 14). He further indicated that the Respondent almost hit a vehicle near the stop sign at 3rd Ave. and 8th St. This witness further corroborated that T.J.K. squealed his tires at the intersection. (Dec. 16th Tr. at 14). On cross-examination he described it as a "medium" squeal and that although he didn't see burning tires, it was more than a

squeal associated with popping a clutch. (Dec. 16th Tr. at 17 and 18).

LAW AND ARGUMENT

Appeals to the Supreme Court under the Uniform Juvenile Court Act are governed by NDCC 27-20-56 which indicates that an aggrieved party may appeal from a final Order, Judgement, or Decree of the Juvenile Court to the Supreme Court. This case centers on the Petitioner's Appeal of the determination of the Juvenile Court, that the officer in the case did not have an articulable and reasonable suspicion to stop the motor vehicle driven by T.J.K. Following requested review by a District Court Judge, the Referee's determination was confirmed. Thereafter the Referee recommended dismissal of the Petition predicated upon the granting of the Suppression Motion leaving the Petitioner no evidence to proceed and that finding led to a final Order dismissing the Petition signed by the Hon. Glenn Dill on February 10, 1999.

The scope of review in appeals taken pursuant to NDCC 27-20-56 is broader in nature than in other cases taken to the Supreme Court and they are reviewable without reference to the "clearly erroneous" standard of the North Dakota Rules of Civil Procedure 52(a). *In re M.L.*, 239 NW 2nd 289 (N.D. 1976) and *Eastburn vs. J.K.H.*, 392 NW 2nd 406 (N.D. 1986). In reviewing questions under the Juvenile Court Act, the Supreme Court re-

examines the evidence in a manner similar to a trial de novo procedure. *In re F.H.*, 283 NW 2nd 202 (N.D. 1979), *Cheadle vs. R.M.B.*, 402 NW 2nd 912 (N.D. 1987). The Juvenile Court's findings are afforded appreciable weight, but are not binding. *Heitkamp vs. L.J.*, 436 NW 2nd 558 (N.D. 1989).

In this case it is the Petitioner's contention that the Referee's findings resulting in the suppression of the traffic stop, which ultimately led to the dismissal of the Petition were incorrect in two respects. First, the Petitioner alleges the findings were incomplete and in one significant aspect simply erroneous. Secondly, the Petitioner contends that the finding that there was not a "reasonable and articulable suspicion" warranting the officer's stop of the vehicle is contrary to the facts developed at hearing and existing case law.

1. WERE THE FINDINGS OF THE REFEREE WHICH LED TO DISMISSAL OF THE PETITION INCOMPLETE AND IN ONE INSTANCE ACTUALLY ERRONEOUS?

The Order dismissing the Petition of February 10, 1999 was predicated upon a finding by the Court that the granting of a Suppression Motion left the Petitioner without evidence to proceed. The suppression of evidence was predicated upon certain findings of fact issued by the Judicial Referee on January 8, 1999. The Referee in finding #7 stated as follows:

" The Respondent denies that he was weaving across both lanes on 8th St. NW. There were two additional witnesses that testified in Court that the Respondent may have swerved a little, but always remained in his lane. The Respondent denies squealing his tires. The two witnesses testified that there was not a long drawn out squeal, but it sounded as if the Respondent may have slipped off the clutch. In any event, the witnesses testified the squeal was not out of the ordinary." (App. at 16 and 17).

In analyzing this finding, the Petitioner contends it is both incomplete and in some respects erroneous when one views the testimony that was actually adduced at the hearing. The Referee's finding "There were two additional witnesses that testified in Court that the Respondent may have swerved a little, but always remained in his lane." is incomplete. The first witness, although indicating on cross-examination, he felt the Respondent always stayed in his lane, acknowledged that he had previously affirmed in a statement the weaving was from one side of the road and then into the oncoming lane of traffic and back and forth. (Dec. 4th Tr. at 74). The witness further had testified that he had given a statement in which he indicated it looked to him like the Respondent was swerving at cars to see how close he could get to them to show off for

the following vehicle. (Dec. 4th Tr. at 74). The second witness alluded to in the Referee's finding actually testified that he had observed approximately three swerving actions by the Respondent in which the Respondent's left tire may have been on the center line and back and forth. (Dec. 16th Tr. at 14). He further described the swerving as being consistently back and forth for a little bit. (Dec. 16th Tr. at 13). With regard to the allegation of the Respondent squealing his tires at an intersection, the Referee's finding indicates "The two witnesses testified that there was not a long drawn out squeal, but it sounded as if the Respondent may have slipped off the clutch. In any event, the witnesses testified that the squeal was not out of the ordinary." That statement in the finding is incomplete and represents a mischaracterization of the evidence. The first witness did testify on cross-examination that he did not feel the squealing tires were anything out of the ordinary. (Dec. 4th Tr. at 67). He further did state that he felt it may have occurred when the Respondent's foot slipped off the clutch or something. (Dec. 4th Tr. at 61). What the Court's findings fail to acknowledge in any manner, however, is the witnesses prior statement that the Respondent had squealed his tires at least halfway across the intersection if not more. (Dec. 4th Tr. at 75). The witness then clarified his statement that he was not sure if it was halfway across the road, he just remembered the

Respondent squealing his tires. (Dec. 4th Tr. at 76). The second witness alluded to by the Referee in that specific portion of her finding never indicated the squeal was "ordinary" and in fact declined to describe the squeal as being consistent with "popping a clutch." (Dec. 16th Tr. at 17 and 18).

In addition to the foregoing, the Referee's finding "The Respondent denies squealing his tires" is erroneous. As is discussed in the preceding facts of the case, the Respondent's description of what happened at the intersection of 8th Street and 3rd Avenue has been marked by inconsistency. At the Administrative Hearing he was unsure whether he squealed his tires, early in the early Suppression Hearing he affirmatively denied squealing his tires, but his last definitive statement on the subject was a statement indicating he did squeal his tires and had current recollection of doing the same. (Dec. 16th Tr. at 23). Therefore the Referee's finding that the Respondent denies squealing his tires is both incomplete and in fact factually inaccurate.

2. WAS THE REFEREE'S FINDING THAT THERE WAS NO "ARTICULABLE AND REASONABLE SUSPICION" WARRANTING A STOP OF T.J.K.'S VEHICLE CONTRARY TO LAW?

To justify a stop of a moving vehicle, a police officer must have reasonable and articulable suspicion that the law

has been or is being violated. *State vs. Storbakken*, 552 NW 2nd 78 (N.D. 1996). Significantly, the Referee's findings cite no authority actually construing what the Court has held constitutes "reasonable and articulable suspicion." The Courts use an objective standard to determine whether the stop of a moving automobile is valid. *Storbakken* supra. Traffic violations, even if considered common or minor, constitute prohibited conduct and provide an officer with requisite suspicion for conducting a legitimate investigatory stop. *Storbakken* supra. The reasonable and articulable suspicion standard justifying a traffic stop is significantly less than that of probable cause. *State vs. Vandehoven*, 388 NW 2nd 587 (N.D. 1986). Indeed, in some circumstances, the officer need not even wait for an actual violation of the law before making a valid investigatory stop. *State v. Ova*, 539 NW 2nd 857 (N.D. 1995). Reasonable and articulable suspicion takes into account the inferences and deductions of a trained officer which may elude a layman. *State v. Smith*, 452 NW 2nd 86 (N.D. 1990). A reviewing Court will use an objective standard to determine whether an investigatory stop is valid looking to the totality of the circumstances. *Geiger v. Backus*, 444 NW 2nd 692 (N.D. 1989). The ultimate question being whether a reasonable person in the officer's position would be justified by some objective manifestation to suspect potential criminal

activity. *State v. Hornaday*, 477 NW 2nd 245 (N.D. 1991).

The initial incident at 8th Street and University Avenue was clearly a case where the other vehicle was at fault. It is unanimously agreed by the parties that the officer's initial reason for becoming involved in pursuit of the vehicles was to stop the vehicle that had cut off T.J.K. The officer's initial observation upon getting behind the vehicles on 8th Street was that the vehicle of T.J.K. was now in front of the other vehicle. The situation would raise in any reasonable officer, questions as to exactly what was going on in this factual context. As was adduced at the hearing, what in fact had occurred was that T.J.K. and the occupants of the other vehicle had had contact and T.J.K. had indicated that the other vehicle should follow him.

The testimony of the officer as to the weaving was that it extended into the oncoming lane of traffic, was exaggerated and was in a quick back and forth manner. (Dec. 4th Tr. at 45). The testimony of the two independent witnesses corroborates weaving or swerving on the part of T.J.K. (Dec. 4th Tr. at 59) (Dec. 16th Tr. at 13 and 14). The juvenile witness testifying on December 16, 1998, indicates as a result of the swerving, T.J.K. almost hit a parked vehicle. (Dec. 16th Tr. at 16). Although T.J.K. initially testified, he did not make any weaving movements, (Dec. 4th Tr. at 22) he later

acknowledged there possibly would have been weaving motions in the area of the stop sign at 8th Street and 3rd Avenue. (Dec. 16th Tr. at 22). In essence, there was unanimity amongst the witnesses that there was swerving or weaving by the Respondent which could logically have led a reasonable officer to feel he may be dealing with an impaired driver, or a driver showing off or angry, or a driver experiencing equipment problems.

At the intersection of 8th Street and 3rd Avenue, as is discussed above, there is again unanimity of the witnesses that there was squealing of the tires following T.J.K.'s stop at the intersection. The exact duration or distance of the squealing is not significant, what is important is that a trained officer would note the squealing of tires as well as the unnecessary weaving as part of the totality of circumstances he would take into account to warrant an investigatory traffic stop. Once again, a reasonable officer could conclude he may be dealing with an impaired driver, a driver showing off or angry, or a vehicle with defective equipment or equipment problems which was consistent with the defendant's testimony about having "bald" tires. (Dec. 16th Tr. at 22). A reasonable officer taking into account the totality of circumstances would have a reasonable and articulable suspicion which would justify a stop of the vehicle for further investigation.

In viewing the totality of the circumstances, a


reasonable officer, given the facts acknowledged by all witnesses could conclude the Respondent's driving may constitute any number of possible offenses, including an equipment violation; exhibition driving, which includes at 39-08-03.1, tires squealing and executing unnecessarily abrupt turns as falling within the definition; reckless driving at 39-08-03 by driving recklessly and possibly showing off; care required at 39-09-01.1 in not driving in a careful and prudent manner; or as turned out to be the case, DUI in which the driving was likely attributable to an alcohol impaired driver.

The Referee's Findings of Fact which were confirmed by the District Court and led to the dismissal of the Petition failed to show any analysis of the standard of "reasonable and articulable suspicion" or the totality of circumstances available to the officer at the time his decision to stop the vehicle was made. The District Court reviewing the Referee's findings merely cites some cases dealing with what is required for a traffic stop, then acknowledges that a different determination might have been made if the case had been before the District Court, but goes on inexplicably to affirm the Referee's conclusion. Neither the Referee's findings, nor the memorandum opinion confirming the Referee's findings show in any manner how the undisputed violations observed by the officer fail to meet the threshold of reasonable and articulable suspicion justifying a traffic stop.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests the Court reverse the Order of the District Court dismissing the Petition which was predicated upon the suppression of all evidence following Suppression Hearing in this matter. The Petitioner specifically requests that the Court find the lower Court erred in finding that there was no reasonable and articulable suspicion justifying the stop of the Respondent's vehicle and that the matter be remanded to the Juvenile Court with instructions that the Petition be refiled and the alleged violations be heard by the Court on their merits.

Respectfully submitted this 21st day of April, 1999.



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