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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Jay Gabel, Appellee, vs. North Dakota Department of Transportation, Appellant.	**Supreme Court No. 20060003** **Stutsman County No. 47-05-C-00266**

APPEAL FROM THE DISTRICT COURT
STUTSMAN COUNTY, NORTH DAKOTA
SOUTHEAST JUDICIAL DISTRICT

HONORABLE MIKAL SIMONSON

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

North Dakota Cases

Other Cases

Statutes and Rules

STATEMENT OF ISSUE

Whether there was a reasonable and articulable suspicion to stop Gabel's vehicle based on detailed information of a traffic violation relayed to law enforcement from a known informant.

STATEMENT OF CASE

The North Dakota Department of Transportation ("Department") appeals from the district court's judgment reversing an administrative hearing officer's decision suspending the driving privileges of Jay Gabel ("Gabel") for 91 days. The Department seeks reversal of the district court's judgment and reinstatement of the administrative suspension.

Stutsman County Sheriff's Deputy Elizabeth Kapp ("Deputy Kapp") arrested Gabel for driving under the influence of alcohol on April 23, 2005. (Appendix ("App.") 8, ll. 11-20; App. 18.) Deputy Kapp issued a Report and Notice, including a temporary operator's permit, to Gabel after the results of an Intoxilyzer test indicated his blood alcohol concentration was .13 percent by weight. (App. 18-19.)

Gabel requested an administrative hearing. (App. 21.) It was held on May 18, 2005. (App. 1, l. 3.) In accordance with N.D.C.C. § 39-20-05(2), the hearing officer considered four broad issues: First, whether Deputy Kapp had reasonable grounds to believe Gabel had been driving or was in actual physical control of a vehicle in violation of N.D.C.C. § 39-08-01 or equivalent ordinance; second, whether Gabel was placed under arrest; third, whether Gabel was tested in accordance with N.D.C.C. § 39-20-01 or 39-20-03, and if applicable, § 39-20-02; and fourth, whether the chemical test results indicated Gabel had an alcohol concentration of at least .08 percent by weight. (App. 1, ll. 21-25; App. 2, ll. 1-7.)

The hearing officer issued his findings of fact, conclusions of law, and decision suspending Gabel's driving privileges for 91 days. (App. 22.) Gabel filed a Notice of Appeal and Specifications of Error with the district court. (App. 23-24.) On November 2, 2005, the district court issued its Memorandum Opinion reversing the administrative suspension. (App. 25-28.) The Order for Judgment, reversing the administrative suspension, was filed on November 10, 2005. (App.

29.) Judgment was entered on November 14, 2005. (App. 30.) The Department filed its Notice of Appeal on this Court on January 3, 2005. (App. 31.)

STATEMENT OF FACTS

A vehicle with the license plate "JAYBIRD" was reported to the Stutsman County Sheriff's Department by another driver, Chad Steele ("Steele"). (App. 6, ll. 18-23.) Steele reported to the law enforcement center that the vehicle would speed up and then slow down, preventing him from safely passing. (*Id.*) The driver of vehicle with the license plate "JAYBIRD" was Gabel. (App. 10, ll. 5-7.) Gabel was driving his vehicle erratically on US-281 south of Jamestown on April 23, 2005, when he was stopped by Deputy Kapp. (App. 6, ll. 20-23; App. 7, ll. 14-18.)

Deputy Kapp was dispatched to locate the vehicle with the license plate "JAYBIRD." (App. 9, ll. 1-9.) She was told by her dispatcher "[t]hat the vehicle, JAYBIRD, would speed up, slow down, [and] would not allow Mr. Steele to pass him." (App. 7, ll. 2-5.) Deputy Kapp was also informed by her dispatch that the name of the informant was Steele. (*Id.* at ll. 9-10.) Deputy Kapp knew Steele, having met him in her professional capacity. (App. 10, ll. 22-25.)

Deputy Kapp located Gabel's vehicle, "JAYBIRD." (App. 7, ll. 14-18.) But she did not observe Gabel preventing traffic from passing, or any other traffic violations or unlawful activity. (App. 10, ll. 16-22.) Yet she did observe at least two cars behind Gabel, one was Steele. (*Id.* at ll. 3-8.) And Gabel was traveling 18 mph slower than the allowable speed of 65 mph. (App. 9, l. 18.)

Deputy Kapp stopped Gabel's vehicle. (App. 9, ll. 7-11.) Steele, who had remained on the telephone with the dispatcher until the stop, also stopped; he was later interviewed by another deputy. (App. 10, ll. 11-15.) Gabel smelled of alcohol and admitted to having drunk alcohol earlier. (App. 7, ll. 19-23; App. 18.)

He failed the one leg stand test, walk and turn test, and HGN test; he refused an S-D2 test. (App. 18.) A valid Intoxilyzer test indicated Gabel's blood alcohol concentration was .13 percent by weight. (App. 18-19.) Gabel stipulated to the following at the administrative hearing: probable cause existed for his arrest, a valid chemical test was performed, and the test results indicated a blood alcohol concentration of .13 percent by weight. (App. 8, ll. 2-10.)

PROCEEDINGS ON APPEAL TO DISTRICT COURT

In reversing the administrative suspension of Gabel's driving privileges, Judge Mikal Simonson observed as follows:

> Recently the North Dakota Supreme Court ruled in favor of a motorist in *Anderson v. Director, North Dakota Dep't of Transp.*, 2005 ND 97. The facts in the instant case are very similar to *Anderson*. In each case a dispatcher received a telephone call from a motorist. The *Anderson* informant reported a "possible reckless driver or drunk driver." Here the informant told of Gabel not letting the informant pass him. He mentioned how the vehicle would slow down and speed up. The report in *Anderson* is an allegation of a crime being committed. Here there is no evidence of a crime. There was no minimum speed posted on the highway. Though the driver sped up, there was no evidence of speeding. In *Anderson* the informant had seen the Defendant hit cones in a construction zone. No illegal conduct such as that was seen in the instant case.
>
> In both cases the informant told dispatch and dispatch told the deputy the license plate number of the vehicle. Each dispatcher passed along to the deputy information received from the informant. In *Anderson* the name of the informant was unknown. Here the informant was Chad Steele. The deputy knew Mr. Steele based on past conduct. As a result, she had a better chance to judge his credibility. Something that could not be done by the officer in *Anderson*.
>
> In both cases the law enforcement officer located the vehicle, observed no illegal or erratic driving, and stopped the vehicle.
>
> The Court finds that there was not a reasonable and articulable suspicion to stop Gabel's vehicle. The hearing officer's decision is reversed.

(App. 27.)

STANDARD OF REVIEW

"An appeal from a district court decision reviewing an administrative license suspension is governed by the Administrative Agencies Practice Act, Chapter 28-32, N.D.C.C." *McPeak v. Moore*, 545 N.W.2d 761, 762 (N.D. 1996). "This Court reviews the record of the administrative agency as a basis for its decision rather than the district court decision." *Lamb v. Moore*, 539 N.W.2d 862, 863 (N.D. 1995)(citing *Erickson v. Director, N.D. Dep't of Transp.*, 507 N.W.2d 537, 539 (N.D. 1993). "However, the district court's analysis is entitled to respect if its reasoning is sound." *Kraft v. State Bd. of Nursing*, 2001 ND 131, ¶ 10, 631 N.W.2d 572.

This Court's review "is limited to whether (1) the findings of fact are supported by a preponderance of the evidence; (2) the conclusions of law are sustained by the findings of fact; and (3) the agency's decision is supported by the conclusions of law." *McPeak*, 545 N.W.2d at 762 (citing *Zimmerman v. N.D. Dep't of Transp. Dir.*, 543 N.W.2d 479, 481 (N.D. 1996)). "When reviewing factual determinations made by the agency, '[w]e do not make independent findings or substitute our judgment for that of the agency.'" *McNamara v. Director of N.D. Dep't of Transp.*, 500 N.W.2d 585, 586 (N.D. 1993)(quoting *Boyce v. Backes*, 488 N.W.2d 45, 47 (N.D. 1992)).

LAW AND ARGUMENT

Deputy Kapp received specific information of unlawful activity from a reliable informant that provided her with a reasonable and articulable suspicion that a law was being violated.

This Court has set forth necessary standards that a police officer must follow before making an investigative stop. *State v. Decoteau*, 2004 ND 139, ¶ 11, 681 N.W.2d 803. A reasonable and articulable suspicion that a law has been, or is being, violated must exist for a police officer to make an investigative

stop. *Id.* This Court defined what is meant by "reasonable and articulable suspicion":

> "The reasonable suspicion standard is less stringent than probable cause. Although the concept of reasonable suspicion is not readily reduced to a neat set of legal rules, it does require more than a 'mere hunch.' In determining whether an investigative stop is valid, we employ an *objective* standard and look to the totality of the circumstances. Reasonable suspicion for a stop exists when a *reasonable person* in the officer's position would be justified by some *objective* manifestation to believe the defendant was, or was about to be, engaged in unlawful activity."

Id. (quoting *State v. Corum*, 2003 ND 89, ¶ 10, 663 N.W.2d 151) (emphasis added). Also considered in the reasonable suspicion analysis are inferences and deductions an officer necessarily makes that a layperson may not. *State v. Smith*, 452 N.W.2d 86, 88 (N.D. 1990).

Both the Fourth Amendment of the United State Constitution and Article I, § 8 of the North Dakota Constitution guarantee an individual's right to be secure against *unreasonable* searches and seizures. *State v. Bartelson*, 2005 ND 172, ¶ 8, 704 N.W.2d 824. The United States Supreme Court stated:

> "Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]. An automobile stop is thus subject to the constitutional imperative that it not be 'unreasonable' under the circumstances. As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred."

Id. (quoting *Whren v. United States*, 517 U.S. 806, 809-10 (1996)). Traffic violations give law enforcement the requisite probable cause to perform an investigatory stop, regardless of pretext and subjectivity of the officer. *Bartelson*, 2005 ND 172, ¶ 8.

A. Gabel committed a traffic violation, observed by Steele and relayed to Deputy Kapp, which formed the valid basis for the stop.

The Department's position is much like its position in *Anderson*, but stronger. Unlike *Anderson*, where this Court held that the specificity of the information relayed to the trooper was insufficient to raise a reasonable and articulable suspicion to stop, the specificity of the information relayed to Deputy Kapp meets the standard delineated in *Anderson*. Here the reliability of the informant, who was actually known by Deputy Kapp, was stronger than the reliability of the informant in *Anderson*. But Judge Simonson determined that because there was no evidence of a crime committed by Gabel, and relayed to Deputy Kapp by Steele, the stop was invalid.

The district court's determination is erroneous. Specifically, there *was* a traffic violation that was being committed by Gabel, observed by Steele, and relayed with specificity to Deputy Kapp. Gabel was an impediment to traffic. (App. 9, ll. 21-22.) And, more specifically, Deputy Kapp received information from Steele indicating Gabel violated N.D.C.C. § 39-10-11, which states in relevant part:

> The following rules govern the overtaking and passing of vehicles proceeding in the same direction . . . :
>
> 1. The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance and may not again drive to the right side of the roadway until safely clear of the overtaken vehicle.
>
> 2. Except when overtaking and passing on the right is permitted, the driver of an overtaken vehicle shall give way to the right in favor of the overtaking vehicle on audible signal and may not increase the speed of that driver's vehicle until completely passed by the overtaking vehicle.

It is of no consequence that Gabel's traffic violation was perhaps minor by some standards. *Hanson v. Director, N.D. Dep't of Transp.*, 2003 ND 175, ¶ 15, 671 N.W.2d 780 (citing *Zimmerman*, 543 N.W.2d at 482). Minor or common traffic violations are equal to major traffic violations in that both permit an officer to perform a valid investigatory stop of a vehicle. *Id.* Even the possibility that a

driver had an innocent excuse for the traffic violation does not prohibit an officer from making an investigatory stop. *Id.* (citing *Kappel v. Director, N.D. Dep't of Transp.*, 1999 ND 213, ¶ 10, 602 N.W.2d 718).

Judge Simonson concluded that there was evidence of a crime in *Anderson*. But this conclusion is incorrect. While it was relayed to the trooper that Anderson may be a possible reckless or drunk driver, there was no evidence presented that the trooper was relayed information about Anderson hitting cones in a construction zone. *Anderson*, 2005 ND 97, ¶ 21. In fact, that is the very reason this Court reversed the Department in *Anderson*. *Id.* Because there was no evidence established that the trooper was relayed information that Anderson had hit construction cones, and because the trooper only received information that Anderson was a possible drunk or reckless driver, this Court concluded that there was no evidence of unlawful activity. Therefore, the stop was invalid. Presumably, the decision in *Anderson* would have been different if the trooper had received more specificity from his dispatcher as to what Anderson was doing.

Here, the reliability of the informant is buttressed by the specificity of information of unlawful activity that was conveyed to Deputy Kapp. When she located Gabel's vehicle, she noted that he was traveling well below the speed limit of 65 mph. (App. 9, l. 18.) And at least two other vehicles were behind Gabel. (App. 10, ll. 5-8.) These facts gave Deputy Kapp enough to further corroborate that a traffic violation had been committed by Gabel, lending to the credibility of the informant and increasing the likelihood that the violation occurred. Although Deputy Kapp did not observe a traffic violation, this is not a prerequisite to a valid investigatory stop.

This Court has held that erratic driving is an indicator of a possible intoxicated driver. *State v. Berger*, 2004 ND 151, ¶ 14, 683 N.W.2d 897; *see*

also Anderson, 2005 ND 97, ¶ 17. Erratic driving is not just weaving or veering, but includes "behavior that 'deviat[es] from what is ordinary or standard.'" *Chadwick v. Moore*, 551 N.W.2d 783, 785-86 (N.D. 1996). Gabel essentially argues that Deputy Kapp should not have stopped him unless she observed unlawful activity, which would include erratic driving. (App. 12-13.) But other courts have rejected this argument, as it pertains to possible drunk drivers. *State v. Rutzinski*, 623 N.W.2d 516, 526-27 (Wis. 2001) (stating that the allegations reported by the informant (i.e. weaving, varying speed, and tailgaiting) *suggested* Rutzinski may have been intoxicated, which supplemented the tip's reliability and helped further justify the investigative stop) (citations omitted). The reasoning is, of course, drunk drivers are a potentially deadly addition to traffic. *Id.* Now armed with greater specificity and reliability as to what an erratically driving individual was actually doing, this Court should distinguish these facts from *Anderson* and affirm the Department's decision to suspend Gabel's driving privileges.

B. *Anderson* distinguished.

Most recently, in *Anderson*, this Court addressed the present issue; that is, when is it permissible for law enforcement in North Dakota to stop a vehicle based solely on information obtained from an informant? Information obtained through a tip may provide a factual basis for a traffic stop. *Anderson*, 2005 ND 97, ¶ 10 (citing *State v. Miller*, 510 N.W.2d 638, 640 (N.D. 1994)). The totality of the circumstances must be considered. *Id.* This analysis includes the "quantity, or content, and quality, or degree of reliability, of the information available to the officer." *Id.* Generally, as the reliability of the informant's tip increases, the amount of information required to raise a reasonable suspicion decreases. *Id.* at ¶ 18. The converse is also true: if an informant's reliability is low, then a greater amount of information is required to raise a reasonable suspicion. *Id.* at ¶ 10.

The reliability of a known informant "has a higher indicia of reliability than information obtained from a purely anonymous informant." *Id.* at ¶ 15.

In *Rutzinski*, as outlined by this Court in *Anderson*, the Wisconsin Supreme Court held an investigatory stop premised on an informant's tip valid. The informant called into the police department to report a vehicle "weaving within its lane, varying its speed from too fast to too slow, and 'tailgaiting.'" *Rutzinski*, 623 N.W.2d at 519. The informant was not truly anonymous. *Id.* at 525-26. The informant was identifiable, thus subject to arrest if the tip proved false. *Id.* at 527. The informant provided the police dispatcher with verifiable information that formed the basis of his knowledge. *Id.* at 525-26. The informant's report was relayed to the officer. *Id.* at 519. The informant gave a description of the vehicle, its direction, and periodic updates of its location as it passed recognizable markers on the road. *Id.* at 525-26. The *Rutzinski* court also noted that the tip from the informant reported Rutzinski was driving erratically (slowing and speeding up, tailgating, and weaving), which is a possible sign of intoxicated use of a motor vehicle. *Id.* at 519, 525-26.

Yet the officer in *Rutzinski* did not observe any traffic violations when he located the vehicle. The court, however, concluded the "inside information" that had been conveyed gave the informant reliability and allowed the officer to reasonably infer that the informant had a reliable basis of knowledge. *Id.* at 525-26. Because of the reliability and content of the informant's tip, the officer had a reasonable suspicion to justify the investigative stop. *Id.* at 527-28.

Like *Rutzinski*, the informant In *Anderson* was not truly anonymous. While this Court determined that the tip had more reliability that if it had been purely anonymous, it determined that the quantity of information conveyed to the trooper by his dispatcher was inadequate to allow the trooper to make a valid investigatory stop. The identity of the informant was unknown to the trooper at

the time of the stop, however, it was easily ascertainable because the informant was following the suspect's vehicle and pulled over at the time of the stop. *Anderson*, 2005 ND 97, ¶ 14.

Though bearing some reliability, the informant in *Anderson* merely reported to the police dispatcher the "bare assertion" that the informant had observed a "possible reckless driver or drunk driver." *Id.* at ¶ 21. The officer did not observe Anderson's vehicle perform any illegal or erratic driving before the stop. *Id.* at ¶ 3. There was no evidence presented indicating that the dispatcher told the trooper before the stop that the suspect hit cones in a construction zone. *Id.* at ¶ 19. In other words, this Court concluded that there was no evidence of a *specific* unlawful activity taking place. The only content relayed to the officer from the dispatcher before the stop was the description of the informant's vehicle and suspect's vehicle, the informant was following the vehicle and providing updates regarding Anderson's direction and location, and the informant had witnessed a "possible reckless driver or drunk driver." *Id.* at ¶¶ 2, 18-19. This Court concluded that because the information relayed to the officer from the dispatcher contained only a "bare assertion" that the suspect was "possib[y] [a] reckless driver or [a] drunk driver" the officer lacked a reasonable and articulable suspicion to justify the stop. *Id.* at ¶ 21.

The facts in this case can be differentiated from the facts in *Anderson*. And this case is much more akin to *Rutzinski*. The information conveyed to Deputy Kapp from her dispatcher was more descriptive than the information received by the officer in *Anderson*. Here, Steele conveyed *exactly and specifically* what Gabel's vehicle was doing, it was not allowing him to pass and would slow down and then speed up. It was more than a "bare assertion." Further, this description of what Gabel was doing, specifically relayed to Deputy Kapp, gave her the specificity that this Court held was lacking in *Anderson*. The

information conveyed to the deputy is more similar to the information conveyed to the officer in *Rutzinski*.

In this case there was "'at least some specific and articulable facts to support the bare allegations of criminal activity.'" *Anderson*, 2005 ND 97, ¶ 20 (quoting *Olson v. Commissioner of Pub. Safety*, 371 N.W.2d 552, 556 (Minn. 1985)). Steele was not an anonymous informant. (App. 6, ll. 18-19.) Deputy Kapp knew Steele personally; albeit through her line of work. (App. 10, ll. 22-25.) Steele was even more reliable than the informant in *Anderson* because Steele was actually known to Deputy Kapp. And, while Deputy Kapp did not observe a traffic violation, she did observe corroborating evidence; at least two cars were behind Gabel and he was traveling significantly below the speed limit. (App. 9-10.)

The amount of information of unlawful activity conveyed to Deputy Kapp, via her dispatcher, from Steele was greater than the amount of information conveyed in *Anderson*. Accordingly, a valid investigatory stop was performed on Gabel. In weighing the scale of totality, this Court should consider the key differences between this case and *Anderson* and affirm the Department's decision to suspend.

CONCLUSION

The Department respectfully requests that this court affirm the administrative hearing officer's decision suspending Gabel's driving privileges for 91 days.

Dated this 13th day of February, 2006.

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