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20060003

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 APPELLEE

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ISSUE

Whether Deputy Kapp needed probable cause or a reasonable and articulable suspicion to conduct a traffic stop on Gabel's vehicle for an alleged traffic violation?

STATEMENT OF CASE

Mr. Gabel asks this Court to affirm Judge Simonson's decision reversing the administrative suspension of Mr. Gabel's driving privileges. Deputy Kapp did not have the required probable cause or reasonable and articulable suspicion necessary to support the investigative stop of Mr. Gabel's vehicle.

STATEMENT OF FACTS

Jay Gabel was married on April 23, 2005. (Appendix ("App.") 7, ll. 21 – 22). After the ceremony, Mr. and Mrs. Gabel were driving from Little Yellowstone to Jamestown, North Dakota. (App. 7, ll. 22 – 23). A complainant, by the name of Chad Steele ("Steele"), contacted dispatch at the Stutsman County Law Enforcement Center, and complained of erratic driving by North Dakota license, JAYBIRD, which was Mr. Gabel's vehicle. (App. 6, ll. 18 – 21, App. 10, ll. 13). It was reported the driver of that vehicle would not allow Steele to pass his vehicle and the driver would speed up and slow down in the area of 281 South, which is south of Jamestown. (App. 6, ll. 21 – 23). Deputy Kapp, with the Stutsman County Sheriff's Office, was on patrol in the area and responded to the call. (App. 6, ll. 24 – 25). Deputy Kapp never directly spoke to Steele, rather she received the information second hand from dispatch. (App. 7, ll. 6 – 10, App. 8, ll. 24 – 25).

Deputy Kapp located Gabel's vehicle using the license plate information given to her by dispatch. (App. 9, ll. 7 – 9). When she saw the vehicle she stopped it. (App. ll. 10 – 11). Deputy Kapp did not observe Gabel's vehicle cross

the center line, drive on the shoulder, or commit any moving traffic violations prior to the stop which would have given her probable cause to stop Mr. Gabel's vehicle. (App. ll. 12 – 20). Deputy Kapp did claim that Gabel's vehicle was traveling 47 miles per hour in a 65 mile per hour zone, however, Deputy Kapp did admit that there is no minimum speed limit posted on that highway. (App. 9, ll. 18 – 25). According to Deputy Kapp's testimony, when she located Gabel's vehicle. Steele was directly behind Gabel's vehicle and there was at least one other vehicle behind Gabel, a couple hundred feet back. (App. 10, ll. 5 – 8).

Steele remained on the line with dispatch until Mr. Gabel's vehicle was stopped by Deputy Kapp. (App. 10, ll. 11 – 13). Steele stopped close to the scene of where Gabel's vehicle was pulled over and Steele was spoken to by another deputy. (App. 10, ll. 13 – 15). Deputy Kapp testified that she knew Steele in a professional capacity, as Steele does have a criminal record. (App. 10, ll. 22 – 25, App. 11, ll. 1 – 2). Mr. Gabel was subsequently arrested for DUI and transported to the Stutsman County Law Enforcement Center, where an Intoxilyzer test was performed. (App. 19).

An administrative hearing was held on this matter on May 18, 2005. (App. 21). 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 stating "[t]he Court finds that there was not a reasonable and articulable suspicion to stop Gabel's vehicle.

The hearing officer's decision is reversed". (App. 25 – 28). The Order for Judgment, reversing the administrative suspension, was filed on November 10, 2005 and Judgment was entered on November 14, 2005. (App. 29, 30). The Department filed its Notice of Appeal on this Court January 3, 2005. (App. 31).

STANDARD OF REVIEW

Judicial review of a decision to suspend a driver's license is governed by the Administrative Agencies Practice Act, N.D.C.C. ch. 28-32. Larsen v. North Dakota Dep't of Transp., 2005 ND 51, ¶ 4, 693 N.W.2d 39, 693 NW2d 39. N.D.C.C. § 39-20-06 provides that "[t]he court shall affirm the decision of the director or hearing officer unless it finds the evidence insufficient to warrant the conclusions reached by the director or hearing officer." In determining whether the hearing officer's findings of fact are supported by a preponderance of the evidence, the Court must decide whether a reasoning mind could have reasonably determined that the factual conclusions were supported by the weight of the evidence. Feist v. North Dakota Workers Comp. Bureau, 569 N.W.2d 1 (N.D. 1997), 1997 ND 177.

Under N.D.C.C. §28-32-46, the district court must affirm an order of an administrative agency unless it finds any of the following are present:

1. The order is not in accordance with the law
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusion of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. The conclusion of law and order of the agency do not sufficiently explain the agency's rational for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

On an appeal from a district court's ruling on an administrative appeal, this Court reviews the agency's order in the same manner. N.D.C.C. § 28-32-49; Larsen, 2005 ND 51, ¶ 4, 693 N.W.2d 39.

LAW AND ARGUMENT

Deputy Kapp violated Gabel's Fourth Amendment rights because she did not have probable cause or reasonable and articulable suspicion sufficient to justify a traffic stop on Gabel's vehicle.

The Fourth Amendment of the United States 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.

Under the Fourth Amendment of the United States Constitution, police may, in appropriate circumstances and in an appropriate manner, detain an individual for investigative purposes when there is no probable cause to make an arrest if a reasonable and articulable suspicion exists that criminal activity is

afoot. Terry v. Ohio, 392 U.S. 1 (1968). This reasonable suspicion standard is less stringent than probable cause, but does require more than a "mere hunch." State v. Kenner, 1997 ND 1, P8, 559 N.W.2d 538.

A. Deputy Kapp did not have probable cause to stop Gabel's vehicle for a traffic violation that she did not observe.

Traffic violations, even if pretextual, provide the requisite probable cause to conduct an investigatory vehicle stop. State v. Loh, 2000 ND 188 P10, 618 N.W.2d. 477. Appellant claims the district court's determination was erroneous because Deputy Kapp received information from Steele indicating Gabel violated N.D.C.C. §39-10-11. (App. 7). N.D.C.C. §39-10-11 is a moving traffic violation under N.D.C.C. §39-06.1-09 and according to N.D.C.C. §39-06.1-02, a traffic violation is not considered a criminal offense. Therefore, Deputy Kapp needed probable cause to initiate a traffic stop on Gabel's vehicle because the information that she obtained via dispatch from Steele, amounted to nothing more than a traffic violation.

It is well settled, traffic violations, even if considered common or minor, constitute prohibited conduct which provide officers with requisite suspicion for conducting investigatory stops. City of Wahpeton v. Roles, 524 N.W.2d 598, 600-601. (N.D. 1994) (vehicle rolled through stop sign); State v. Woytassek, 491 N.W.2d 709, 710-711 (N.D. 1992) (vehicle swerved in its own lane, crossed the center line once, and nearly struck a curb); State v. Stadsvold, 456 N.W.2d 295, 296 (N.D. 1990) (traveling short distance without headlights on at night). When an officer observes a traffic offense, however minor, he has probable cause to

stop the driver of the vehicle. Zimmerman v. Director, North Dakota Dep't of Transp., 543 N.W.2d 479, 482 (N.D. 1996).

There was not probable cause to perform an investigatory stop on Gabel's vehicle. Deputy Kapp did not observe Gabel driving erratically or committing any moving traffic violations. The stop of Gabel's vehicle constituted a "seizure" of Gabel within the meaning of the Fourth Amendment. The seizure was not reasonable under the circumstances because Deputy Kapp did not have probable cause to believe a traffic violation occurred. Thus, the traffic stop violated Gabel's 4th Amendment rights.

B. Deputy Kapp did not have the required reasonable and articulable suspicion that criminal activity was afoot necessary to conduct a traffic stop on Gabel's vehicle.

An investigatory vehicle stop is analogous to a "*Terry stop*". Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968) and must be analyzed under the same standards. State v. Indivik, 382 N.W.2d 623 (N.D.1986). The United States Supreme Court has held that in evaluating the validity of an investigatory stop to determine whether there was a reasonable suspicion of criminal activity, courts must consider the totality of the circumstances. United States v. Sokolow, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed. 2d, 1 (1989). Reasonable suspicion to justify a stop exists when "'a reasonable person in the officer's position would be justified by some objective manifestation to suspect potential criminal activity.'" State v. Ova, 539 N.W.2d 857, 859 (N.D. 1995).

This court has discussed three situations that provide an officer reasonable and articulable suspicion to stop a vehicle: (1) when the officer relied on a directive or request for action from another officer; (2) when the officer received tips from other police officers or informants, which were the corroborated by the officer's own observations; and (3) when the officer directly observed illegal activity. *In re T.J.K.*, 1999 ND 152, ¶ 8, 598 N.W.2d 781, 1999 ND 152. In the present case, the deputy was not acting on a directive from another officer and she did not directly observe illegal activity. Deputy Kapp only received second hand information from the dispatcher and that information was not corroborated by the officer's own independent observations.

Information obtained through a tip may provide a factual basis for a traffic stop. Anderson v. Director, North Dakota Dep't of Transp., 2005 ND 97, ¶ 10 (citing State v. Miller, 510 N.W.2d 638, 640 (N.D.1994)), 696 NW2d 918. The Court must consider the "quantity or content, and quality, or degree of reliability, of the information available to the officer." Id. The reliability of a known informant "has a higher indicia of reliability than information obtained from a purely anonymous informant". Id. at ¶ 15.

Appellant urges this court to follow State v. Rutzinski, 623 N.W.2d 516 (Wis. 2001). This case is distinguishable from Rutzinski because the unidentified motorist-informant in Rutzinski reported observing a black pickup truck weaving within its lane, varying its speed from too fast to too slow, and tailgating. Rutzinski, 623 N.W.2d at P4. The informant remained on the phone with dispatch and informed dispatch he or she was directly in front of the black pickup

and updated dispatch as to their location. Id. The informant pulled over when law enforcement conducted the traffic stop on Rutzinski and talked to law enforcement personnel. Id.

In the case at hand, the motorist-informant did not provide the specificity that the informant in Rutzinski provided. The Rutzinski informant described several incidents that could be considered erratic driving, such as weaving, tailgating and varying speeds. The motorist also gave dispatch a description of the suspect vehicle and informed dispatch of his or her location relative to that of Rutzinski's vehicle. In Gabel, the motorist-informant only complained that Gabel would speed up and slow down when he attempted to pass. The informant did not update dispatch as to the location of their vehicles and that information was not passed along to Deputy Kapp. The informant in Gabel only made bare assertions of a possible traffic violation and did not provide dispatch with specified information regarding what was happening on the scene. When looking at the totality of the circumstances in Rutzinski, there was much more specific information known by the officer at the time of the traffic stop and the officer had a reasonable and articulable suspicion that criminal activity was afoot.

The case at hand is much more similar to Anderson. In Anderson, the DOT's suspension order was reversed by the District Court and this Court affirmed the reversal. In each case, a dispatcher received a telephone call from a motorist. The Anderson informant reported a possible "reckless driver or drunk driver." Reckless driving and DUI are both criminal offenses in North Dakota. See N.D.C.C. §§ 39-08-01, 39-08-03. The Gabel informant reported Gabel

would speed up and slow down which prevented him from passing. Varying speed while another motorist is attempting to pass is a moving traffic violation and a noncriminal offense. See N.D.C.C. §§ 39-10-11, 39-06.1-09, 39-06.1-02. 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 identified himself as Chad Steele. The deputy was familiar with Steele because Steele has a criminal history in Stutsman County and the deputy has had dealings with him in her professional capacity. In both cases the deputy located the vehicle, observed no illegal or erratic driving, and stopped the vehicle.

The specificity of the information relayed to Deputy Kapp is even more attenuated than the information relayed in Anderson and was insufficient to raise a reasonable and articulable suspicion to stop Gabel's vehicle. Deputy Kapp was not informed of any specific like if Steele tried to pass more than one time, specific information about the road conditions or mile markers, the make or model of Gabel's vehicle, how long Steele had been following Gabel, or the different speeds they were traveling. While Deputy Kapp testified that Steele stayed on the phone with dispatch until she pulled over Gabel's vehicle, there is nothing in the record to indicate that Steele was updating dispatch about what he was observing, their location, or any other specifics. The record also does not

indicate that dispatch was continually updating Deputy Kapp while she looked for Gabel's vehicle.

Prior to stopping Gabel, Deputy Kapp used radar to clock Gabel traveling 47 in a 65 mile per hour zone and noticed only one vehicle directly behind Gabel's vehicle, being that of the motorist-informant, Steele. One other vehicle followed a couple hundred feet behind Gabel and Steele. There was no minimum speed limit posted on 281 South. Therefore, when Deputy Kapp pulled Gabel over, all she knew was Gabel was legally traveling 47 miles per hour in a 65 mile per hour, a known motorist-informant, with a criminal history, reported that a vehicle with the license plate JAYBIRD, sped up and slowed down preventing him from passing and they were traveling on 281 South.

These facts do not provide the Deputy with a reasonable and articulable suspicion criminal activity is afoot. Appellant's argues: "Gabel essentially argues that Deputy Kapp should not have stopped him unless she observed unlawful activity, which would include erratic driving. But other courts have rejected this argument, as it pertains to possible drunk drivers". (Appellant's Brief, P9). Deputy Kapp was not responding to a call of a possible drunk driver. Deputy Kapp was responding to a report of a moving traffic violation which is a noncriminal offense. She may have had a "mere hunch" that she may have be dealing with a individual who was DUI when she responded, however, reasonable suspicion requires more than a "mere hunch" that criminal activity is afoot to conduct an investigatory traffic stop on a motorist.

C. The Hearing Officer's Decision is not in accordance with the law and the district court properly reversed the DOT suspension of Mr. Gabel's driving privileges.

The DOT hearing officer incorrectly relied on facts not in the record when issuing his decision. According to the Hearing Officer's Decision, in the Finding of Fact, the hearing officer stated "Deputy Kapp responded to the area of the report while receiving updates on the vehicles' location and progress from Mr. Steele, who followed the suspect vehicle in his own and provided the information to the dispatcher". (App. 22). Deputy Kapp testified that she never spoke to Steele directly and there is nothing in the record to indicate that Deputy Kapp received updates as to the vehicles' location and progress from dispatch.

The Hearing Officer concluded in his Hearing Officer's Decision that the case at hand was distinguishable from Anderson in that,

> the reporting party had already been identified. Mr. Gabel's speed and the location of vehicles behind his was not proof that he had not been allowing vehicles to pass, but it was certainly consistent with the specific allegation made by Mr. Steele. The particular facts in this case sufficiently differ from those in Anderson to make Anderson inapposite. Under the particular facts of this case, sufficient grounds existed to stop Mr. Gabel.

Steele was the only vehicle directly behind Gabel. According to Deputy Kapp's testimony there was one other car a couple of hundred feet behind the two vehicles. The Deputy did not observe either Steele or the other car attempt to pass Gabel and did not testify that Gabel was driving at varying speeds which would prevent other motorists from passing him. Deputy Kapp testified she did not see nay erratic driving or traffic violations committed by Gabel prior to the stop. There was also no testimony regarding 281 South, so we do not know if

there were hills, curves, or no passing zones in the area that Gabel was traveling. The only evidence presented regarding a possible traffic violation came from Steele, who the Deputy knew only because of his criminal record in Stutsman County.

The Hearing Officer's Decision is not in accordance with the law and violates Gabel's Fourth Amendment rights to be free from illegal seizures. The findings of fact are not supported by a preponderance of the evidence and the district court's reversal should stand.

CONCLUSION

The DOT's decision to suspend Mr. Gabel's driving privileges was contrary to law and was properly reversed by the district court. Mr. Gabel respectfully requests that this Court affirm the district court's reversal.

Dated this 15th day of March, 2006.

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FILED
IN THE OFFICE OF THE
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Dianne M. McGarvey, being first duly sworn, deposes and says that on the 15th day of March, 2006, she served the attached:

Brief of Appellee

upon the following person(s) by placing a copy of same in the US mails at Bismarck, ND, with sufficient postage attached, in envelope addressed as follows:

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Dianne M. McGarvey

Subscribed and sworn to before me this 15th day of March, 2006.

Sonja L. Ostenson, Notary Public
State of North Dakota
My Commission Expires 8/30/07

(SEAL)
SONJA L OSTENSON
Notary Public
State of North Dakota
My Commission Expires Aug. 30, 2007