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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Dean Allan Abernathey, Appellant, v. North Dakota Department of Transportation, Appellee.	)	Supreme Ct. No. 20080336 District Ct. No. 08-C-00082

APPEAL FROM THE DISTRICT COURT
BOTTINEAU COUNTY, NORTH DAKOTA
NORTHEAST JUDICIAL DISTRICT

HONORABLE MICHAEL G. STURDEVANT

BRIEF OF APPELLEE

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STATEMENT OF ISSUES

I. Whether the hearing officer labeled the encounter between Deputy Keesler and Abernathey as a welfare check or a community caretaker function, and if so, whether such a characterization of the encounter warrants reversal of the hearing officer's decision.

II. Whether Deputy Keesler's approach of Abernathey's vehicle violated his Fourth Amendment rights.

STATEMENT OF CASE

Bottineau County Deputy Sheriff Matthew Keesler arrested Dean Allan Abernathey ("Abernathey") on June 10, 2008, for the offense of being in actual physical control of a vehicle while under the influence of intoxicating liquor. (Appendix to Appellee's Brief ("DOT App.") 5, ll. 24-25; 6, ll. 1-2; 14, l. 10; 40.) Abernathey requested a hearing on June 12, 2008, in accordance with N.D.C.C. § 39-20-05. (DOT App. 44.)

The administrative hearing was held on July 7, 2008. (DOT App. 2, ll. 4-6.) The hearing officer, in accordance with N.D.C.C. § 39-20-05, considered the following issues:

> (1) [w]hether the arresting officer had reasonable grounds to believe the person had been driving or was in actual physical control of a vehicle while under the influence of intoxicating liquor in violation of N.D.C.C. section 39-08-01 or equivalent ordinance;
>
> (2) [w]hether the person was placed under arrest;
>
> (3) [w]hether the person was tested in accordance with N.D.C.C. section 39-20-01 or 39-20-03 and, if applicable, section 39-20-02; and
>
> (4) [w]hether the test results show the person had an alcohol concentration of at least eight one-hundredths of one percent but less than eighteen one-hundredths of one percent by weight.

(DOT App. 49.)

Following the hearing, the hearing officer issued his findings of fact, conclusions of law, and decision dated July 7, 2008, suspending Abernathey's driving privileges for a period of two years. (DOT App. 51-52.)

STATEMENT OF FACTS

On June 10, 2008, at approximately 3:00 a.m., Bottineau County Deputy Sheriff Matthew Keesler ("Deputy Keesler") received a report of unidentified individuals in a bar in Lansford creating noise that was disturbing the patrons of an adjacent motel. (DOT App. 5, ll. 24-25; 7, ll. 4-18; 23, ll. 11-25; 24, ll. 20-22.) Deputy Keesler testified the bar is supposed to close at 1:00 a.m. (DOT App. 7, ll. 19-22.) Deputy Keesler traveled from his residence in Westhope to Lansford, a trip which takes "at least 35/40 minutes." (DOT App. 8, ll. 1-6.)

When Deputy Keesler arrived in Lansford at approximately 4:00 a.m., he observed a single vehicle in the parking lot of the bar, which "started up and then . . . turned off again." (DOT App. 8, ll. 7-16; 10, ll. 4-5; 25, ll. 7-16.) Deputy Keesler did not activate his red lights, but "parked off center of the vehicle, so it . . . was free to get out." (DOT App. 8, ll. 17-20.) Deputy Keesler testified he "wanted to make contact with the people to ascertain that they were okay and find out what the call was about." (DOT App. 8, ll. 20-22.) After Deputy Keesler exited his vehicle, he observed the overhead light in the vehicle was on and there were two individuals in the vehicle. (DOT App. 8, ll. 24-25; 9, ll. 1-2; 25, ll. 7-9.) Deputy Keesler requested the driver, who later was identified as Abernathey, "unlock [his] door and come on out, so [he] could talk to him." (DOT App. 9, ll. 9-10.) Before Abernathey complied with the law enforcement officer's request, Deputy Keesler observed Abernathey had bloodshot eyes, he fumbled for the door and appeared confused, and his speech was slurred. (DOT App. 9, ll. 18-25; 10, ll. 1-3.) Upon exiting his vehicle, Abernathey displayed clumsy

movements and poor balance. (DOT App. 10, ll. 6-9.) Deputy Keesler "could smell a strong odor of alcohol, both on [Abernathey's] person and from the truck." (DOT App. 11, ll. 9-10.) Abernathey became belligerent towards Deputy Keesler. (DOT App. 11, ll. 10-13.)

Deputy Keesler informed Abernathey "why [he] was there." (DOT App. 11, l. 16.) Deputy Keesler advised Abernathey "we got a call there was a disturbance here in the bar parking lot," and then asked Abernathey whether he had "been drinking a little bit because at th[at] point [Deputy Keesler] could smell the alcohol on [Abernathey]." (DOT App. 11, ll. 16-20.)

Deputy Keesler had Abernathey perform a series of field-sobriety tests. (DOT App. 11, ll. 24-25; 12, l. 1.) Although his speech was slurred, Abernathey did not miss any letters during the alphabet-recitation test. (DOT App. 12, ll. 2-10; 27, ll. 18-20.) Abernathey was instructed to count backwards from 57 to 33; however, he counted "all the way past 31," which he was not instructed to do. (DOT App. 13, ll. 13-18.) The walk-and-turn test and the finger-to-nose test were not performed due to the fact Abernathey's passenger, who had been placed in the patrol car, was striking his head on the cage. (DOT App. 12, ll. 13-16.) Abernathey agreed to Deputy Keesler's request he submit to an S-D2 onsite screening test upon which he produced a result of .22. (DOT App. 13, ll. 23-25; 14, ll. 1-8.)

Deputy Keesler arrested Abernathey on June 10, 2008, at approximately 4:10 a.m., for the offense of being in actual physical control of a vehicle while under the influence of intoxicating liquor. (DOT App. 14, ll. 9-12.) The result of an Intoxilyzer test established Abernathey had a blood alcohol concentration of .17 percent by weight. (DOT App. 41.)

PROCEEDINGS ON APPEAL TO DISTRICT COURT

Abernathey appealed the administrative decision to the Bottineau County District Court. (Appendix for Appellee ("Abernathey App.") 10-11.) In the Appellant's Notice of Appeal and Specification of Error, Abernathey identified his issues on appeal to the district court as follows:

> 1. Dean Abernathey hereby reserves the right to make additional specifications of error pending receipt of the transcript of the administrative hearing.[1]
>
> 2. That the Hearing Officer incorrectly determined the arresting officer had reasonable suspicion to approach or engage Defendant and, subsequently, probable cause to make an arrest for DUI.
>
> 3. That the Hearing Officer incorrectly determined that the results are admissible and the approved method was followed.[2]

(Abernathey App. 10.)

With respect to Abernathey's contention the law enforcement officer lacked a "reasonable suspicion to approach or engage Defendant," the hearing officer concluded:

> There was not a violation of the constitutional protections against unreasonable searches and seizures. Deputy Keesler had not stopped the petitioner, Dean Allen Abernathey, when he approached the vehicle on foot after parking his patrol vehicle without turning on its red lights in a way as not to block Abernathey's vehicle. Keesler did not stop or seize Abernathey when he asked if Abernathey would please unlock his door and exit. Even if Abernathey was detained when Keesler asked him a second time to exit, by that point, Keesler had observed that Abernathey's eyes were bloodshot and his speech was slurred justifying the detention to investigate further. Thereafter, Keesler had reasonable grounds to believe that Abernathey had been driving or in actual physical control of a vehicle while under the

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[1] N.D.C.C. § 28-32-42(4) does not provide for such a reservation of right and such a boilerplate specification "is insufficient as a matter of law." <u>See</u> <u>Dettler v. Sprynczynatyk</u>, 2004 ND 54, ¶ 16, 676 N.W.2d 799.

[2] Abernathey has not requested review of the third issue on appeal to the North Dakota Supreme Court.

> influence in violation of North Dakota Century Code Section 39-08-01 or equivalent ordinance.

(DOT App. 51.)

Judge Michael G. Sturdevant issued a Memorandum Opinion and Order on November 3, 2008, affirming the hearing officer's decision. (Abernathey App. 13-16.) Addressing the hearing officer's conclusion of law regarding the law enforcement officer's approach and ultimate seizure of Abernathey, Judge Sturdevant ruled:

> The mere approaching and questioning of a person seated in a parked vehicle does not constitute a seizure. State v. Halfmann, 518 N.W.2d 729 (N.D. 1994) at 731. The law makes a distinction between the approach of an already stopped vehicle and the stop of a moving vehicle. Id. Justice Levine would even go further stating:
>
> > "It is fair to say that in North Dakota, a driver seated in a car parked for a period of time at 2:35 in the morning raises a reasonable suspicion of actual physical control that warrants investigation." Wibben v. N.D. State Highway Com'r, 413 N.W.2d 329 (N.D. 1987) at 333 (concurring).
>
> Under the facts as disclosed in the record and approximately stated by the hearing officer, this court cannot conclude that Deputy Keesler acted inappropriately under the circumstances.

(Abernathey App. 14.) Judgment was entered on November 13, 2008. (Abernathey App. 17.) Abernathey appealed the Judgment to the North Dakota Supreme Court. (Abernathey App. 22.) The Department requests this Court affirm the judgment of the Bottineau County District Court and the administrative suspension of Abernathey's driving privileges for a period of two years.

STANDARD OF REVIEW

"The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, governs the review of administrative license suspensions." Ringsaker v. Dir., N.D. Dep't of Transp., 1999 ND 127, ¶ 5, 596 N.W.2d 328. "On appeal from a district court's review of an administrative agency's decision, [the North Dakota Supreme Court]

review[s] the agency decision." Elshaug v. Workforce Safety & Ins., 2003 ND 177, ¶ 12, 671 N.W.2d 784. The Court reviews "the agency's findings and decisions, and not those of the district court, though the district court's analysis is entitled to respect if its reasoning is sound." Hawes v. N.D. Dep't of Transp., 2007 ND 177, ¶ 13, 741 N.W.2d 202.

Section 28-32-46, N.D.C.C., provides the Court must affirm an administrative agency's order unless one of the following is 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 conclusions 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 conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

"When reviewing the agency's factual findings, [the Court] do[es] not make independent findings of fact or substitute [its] judgment for that agency, but determine[s] only whether a reasoning mind reasonably could have determined the factual conclusions were proven by the weight of the evidence from the entire record." Ringsaker, 1999 ND 127, ¶ 5, 596 N.W.2d 328.

LAW AND ARGUMENT

I. **The hearing officer did not label the encounter between Deputy Keesler and Abernathey as a welfare check or a community caretaker function, and even if he had done so, such a characterization of the encounter would not warrant reversal of the hearing officer's decision.**

In this case, Abernathey alleges the administrative decision suspending his driving privileges must be overturned because it purportedly was "incorrect for the hearing officer to label the encounter between Keesler and Abernathey as a welfare check or a community caretaker function." (Brief for Appellant (Abernathey Br.) ¶ 7.) Abernathey does not identify where in the administrative decision the hearing officer expressly labeled the approach of him by Deputy Keesler as such an encounter. Rather, a review of the findings of fact and the conclusions of law reveals no such determination by the hearing officer that the encounter was a welfare check or a community caretaker function, and Abernathey's argument lacks merit.

Even if such a determination reasonably could be implied from the hearing officer's decision, such a label would not affect the outcome of this case. The North Dakota Supreme Court has held it "will not set aside a correct result merely because the trial court assigned an incorrect reason if the result is the same under the correct law and reasoning." Frank v. Traynor, 1999 ND 183, ¶ 10, 600 N.W.2d 516.

For example, in City of Jamestown v. Jerome, 2002 ND 34, ¶¶ 1, 3, 639 N.W.2d 478, the defendant appealed the trial court's denial of her motion to suppress evidence relating to her arrest for driving while under the influence of intoxicating beverages on the basis "[Jamestown Police Officer] Shahin's approach to talk to Jerome constituted a valid caretaking function which did not implicate Jerome's Fourth Amendment rights." "On appeal, Jerome assert[ed]

the trial court erred in failing to conclude Shahin committed an unreasonable seizure by stopping Jerome without having a reasonable and articulable suspicion she had committed a crime." Id. at ¶ 4. The Supreme Court "disagree[d] with the trial court's finding that Shahin, in talking with Jerome, was conducting a community caretaking function." Id. at ¶ 8. Characterizing Shahin's approach of Jerome as a "casual encounter" -- rather than as a purely community caretaking function -- the Supreme Court, however, agreed "with the trial court's conclusion that, under these circumstances, Shahin's approach toward and conversation with Jerome was not a stop within the context of the Fourth Amendment and did not implicate Jerome's rights against unreasonable search and seizure." Id. at ¶ 9.

In this case, the hearing officer concluded:

> There was not a violation of the constitutional protections against unreasonable searches and seizures. Deputy Keesler had not stopped the petitioner, Dean Allen Abernathey, when he approached the vehicle on foot after parking his patrol vehicle without turning on its red lights in a way as not to block Abernathey's vehicle. Keesler did not stop or seize Abernathey when he asked if Abernathey would please unlock his door and exit.

Even if it reasonably could be implied from the decision that the hearing officer considered the encounter between Deputy Keesler and Abernathey to be a welfare check or a community caretaker function, the facts of this case -- as in Jerome and as set forth in Section II (infra) -- support the conclusion Deputy Keesler's approach of Abernathey was a "casual encounter," which did not implicate Abernathey's rights against unreasonable search and seizure.

The hearing officer did not label the encounter between Deputy Keesler and Abernathey as a welfare check or a community caretaking function, and even if he had done so, such a characterization of the encounter would not warrant reversal of the hearing officer's decision.

II. Deputy Keesler's approach of Abernathey's vehicle did not violate his Fourth Amendment rights.

The North Dakota Supreme Court has recognized permissible types of law enforcement-citizen encounters as follows:

> (1) arrests, which must be supported by probable cause; (2) 'Terry' stops, seizures which must be supported by a reasonable and articulable suspicion of criminal activity; and (3) community caretaking encounters, which do not constitute Fourth Amendment seizures.

State v. Albaugh, 2007 ND 86, ¶ 11, 732 N.W.2d 712 (external citation omitted).

The "second category, investigative detentions, involves reasonably brief encounters in which a reasonable person would have believed that he or she was not free to leave." United States v. Hastamorir, 881 F.2d 1551, 1556 (11th Cir. 1989). See also State v. Sarhegyi, 492 N.W.2d 284, 285-86 (N.D. 1992) ("A 'stop' is a temporary restraint of a person's freedom resulting in a seizure within the meaning of the Fourth Amendment.").

In addition to the community caretaking encounter, the third category of law enforcement-citizen encounters includes what the Supreme Court has referred to as the "casual encounter" between a law enforcement officer and a citizen. The Supreme Court stated in Albaugh that "'a casual encounter can become a seizure if a reasonable person would view the officer's actions – if done by another private citizen – as threatening or offensive.'" 2007 ND 86, ¶ 12 (emphasis added). The Supreme Court has stated "an officer may learn something during a caretaking or casual encounter that leads to a reasonable suspicion and that reasonably justifies further investigation, a seizure, or even an arrest." State v. Langseth, 492 N.W.2d 298, 300 (N.D. 1992) (emphasis added).

Courts refer to the third category of law enforcement-citizen encounters descriptively as "police-citizen communications involving no coercion or

detention." Hastamorir, 881 F.2d at 1556. See also United States v. Ford, 548 F.3d 1, 4 (1st Cir. 2008) ("The lowest tier [of law enforcement-citizen encounters], which does not implicate the Fourth Amendment, involves minimally intrusive interactions such as when police officers approach individuals on the street or in public places to ask questions.").

In State v. Guscette, 2004 ND 71, ¶ 8, 678 N.W.2d 126, the Supreme Court held:

> Not every law enforcement contact with a citizen is a seizure, and law enforcement officers do not violate the Fourth Amendment merely by approaching individuals on the street or in other public places. United States v. Drayton, 536 U.S. 194, 200, 122 S.Ct. 2105, 153 L.Ed.2d 242 (2002). In Drayton, at 201, 122 S.Ct. 2105, the United States Supreme Court explained that as long as law enforcement officers do not induce cooperation by coercive means, they may pose questions and ask for consent to search even when they have no basis for suspecting criminal activity. A seizure does not occur simply because a law enforcement officer questions a person, and as long as reasonable persons would feel free to disregard the officer and go about their business, the encounter is consensual and a reasonable suspicion of criminal activity is not required. Florida v. Bostick, 501 U.S. 429, 434-35, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991). If reasonable persons would feel free to terminate the encounter, they have not been seized under the Fourth Amendment. Drayton, at 201, 122 S.Ct. 2105. To constitute a seizure, an officer must in some way restrain an individual's liberty by physical force or show of authority. City of Fargo v. Ovind, 1998 ND 69, ¶ 7, 575 N.W.2d 901. In Fields, 2003 ND 81, ¶ 11, 662 N.W.2d 242, we have said a person has been seized within the meaning of the Fourth Amendment, if, in view of all the surrounding circumstances, a reasonable person would have believed he or she was not free to leave the scene.

In addition, a law enforcement officer's subjective state of mind is immaterial in resolving whether a Fourth Amendment violation has occurred. The Supreme Court has stated "[w]hether a Fourth Amendment violation has occurred 'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time' . . . and not on the officer's actual state of mind at the time the challenged action was taken." State v. Smith, 452 N.W.2d 86, 88 (N.D. 1990) (quoting Maryland v. Macon, 472 U.S. 463, 470-

71 (1985)). See also State v. Bartelson, 2005 ND 172, ¶ 25, 704 N.W.2d 824 ("'The fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.'").

The criteria to apply in determining whether objective circumstances result in a seizure were delineated in a concurring opinion in Wibben v. N.D. State Highway Comm'r, 413 N.W.2d 329 (N.D. 1987). In Wibben, a tip from an unidentified caller reported that a girl who appeared to be sick or intoxicated was seated in a vehicle parked in the parking lot of an apartment complex in Jamestown in the middle of the night. Id. at 330. A police officer went to the scene and could not tell whether the female sitting behind the wheel was sick or intoxicated. Id. The officer tapped his flashlight on the window and the female rolled down the window. Id. The female subsequently was arrested for being in actual physical control of a vehicle while under the influence. Id.

A majority of this Court concluded that a seizure in the form of a "stop" occurred in Wibben when the officer tapped on the window. Id. at 331.[3] However, this Court's jurisprudence cannot be read as supporting the broad proposition that a Fourth Amendment seizure in the nature of a stop occurs whenever a law enforcement officer taps on the window of a parked vehicle.

Indeed, in the years since Wibben was decided, the Supreme Court has repeatedly cited the analysis in now-Chief Justice Gerald VandeWalle's concurring opinion in Wibben as the standard to apply in determining whether a

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[3] This Court upheld the stop on the grounds that the officer had reasonable and articulable suspicion that Wibben was in actual physical control of the vehicle while under the influence of alcohol by the time the officer tapped on the window. Id. at 333.

casual encounter has become coercive to the point of resulting in a seizure. For example, since Wibben was decided, this Court has observed as follows:

> In Borowicz v. North Dakota Dept. of Transp., 529 N.W.2d 186 (N.D. 1995), we reiterated:
>
> > "'[I]t is not a seizure for an officer to walk up to and talk to a person in a public place, including a person in a parked car. "[A] policeman's approach to a parked vehicle is not a seizure if the officer inquires of the occupant in a conversational manner, does not order the person to do something, and does not demand a response." State v. Langseth, 492 N.W.2d 298, 300 (N.D. 1992), citing Wibben v. North Dakota State Highway Comm'r, 413 N.W.2d 329, 334-35 (N.D. 1987) (VandeWalle, Justice, concurring). . .'"

City of Grand Forks v. Zejdlik, 551 N.W.2d 772, 774 (N.D. 1996). The more recent progeny of the Wibben concurring opinion include State v. Gill, 2008 ND 152, ¶ 14, 755 N.W.2d 454, and Brewer v. Ziegler, 2007 ND 207, ¶ 19, 743 N.W.2d 391. Thus, it is well established that the "law distinguishes between the approach of an already stopped vehicle and the stop of a moving one." State v. Franklin, 524 N.W.2d 603, 604 (N.D. 1994).

This standard set forth in Wibben provides that the "encounter becomes a seizure if the officer engages in conduct which a reasonable man would view as threatening or offensive if performed by another private citizen." Wibben, 413 N.W.2d at 335 (VandeWalle, Justice, concurring) (citing 3 W. LaFave, Search and Seizure, § 9.2(h) (1987). See also California v. Hodari D., 499 U.S. 621, 628 (1991). ("[T]he test for existence of a 'show of authority' is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person.").

The Wibben concurring opinion identified some specific criteria to apply in determining whether a seizure occurs when a law enforcement officer approaches a parked vehicle, as follows:

> . . . the mere approach and questioning of such persons does not constitute a seizure. The result is not otherwise when the officer utilizes some generally accepted means of gaining the attention of the vehicle occupant or encouraging him to eliminate any barrier to conversation. The officer may tap on the window and perhaps even open the door if the occupant is asleep. A request that the suspect open the door or roll down the window would seem equally permissible, but the same would not be true of an order that he do so. Likewise, the encounter becomes a seizure if the officer orders the suspect out of the car. So too, other police action which one would not expect if the encounter was between two private citizens -- boxing the car in, approaching it on all sides by many officers, or use of flashing lights as a show of authority -- will likely convert the event into a Fourth Amendment seizure.

Wibben, 413 N.W.2d at 335 (VandeWalle, J., concurring) (quoting 3 W. LaFave, Search and Seizure at 415-17 (footnotes omitted)).

This Court applied this standard to determine whether a seizure occurred when a law enforcement officer approached a vehicle on foot after observing the driver park on her own volition in State v. Halfmann, 518 N.W.2d 729 (N.D. 1994). In Halfmann, a trooper was following a vehicle on a gravel road at about 1:00 a.m. Id. at 730. The trooper did not suspect that any traffic violation had been committed. Id. Halfmann pulled onto the shoulder of the road and stopped on her own volition and the trooper also stopped. Id.

The trooper activated his patrol car's amber lights as a procedural caution to maintain traffic flow and approached Halfmann's vehicle on foot. Id. at 730, 731. The trooper spoke with Halfmann through the open driver's side window. Id. at 730. The conversation ended in Halfmann's arrest for driving under the influence of alcohol. Id. This Court concluded that a seizure had not occurred when the trooper approached the vehicle because Halfmann had stopped on her

own volition and the trooper had inquired of Halfmann in a conversational manner. Id. at 731.

This Court subsequently relied on Halfmann in concluding that a police officer's initial contact with a citizen just outside her vehicle, after following it, did not constitute a seizure in City of Jamestown v. Jerome, 2002 ND 34, 639 N.W.2d 478. A dispatcher received an anonymous tip that Brenda Jerome was driving and was intoxicated. Id. at ¶ 2. A police officer located Jerome's vehicle and began following it. Id. The officer watched as the vehicle drifted slightly in its lane but did not observe any traffic violations. Id. Jerome parked in her driveway and stepped out of her vehicle. Id. The officer had not made any attempt to pull over or stop Jerome. Id. at ¶ 7. The officer parked on the street and sought to get Jerome's attention by asking "hey Brenda, can I speak to you for a minute?" Id. Jerome turned and said yes after recognizing that the question had been asked by an officer. Id. The officer subsequently arrested Jerome for driving under the influence. Id.

Jerome filed a suppression motion, arguing that the officer lacked reasonable and articulable suspicion "for a legal stop of the defendant's person." Id. at ¶ 3. The trial court denied the motion, concluding that the officer's approach to talk to Jerome constituted a "valid caretaking function which did not implicate Jerome's Fourth Amendment rights." Id. Jerome entered a conditional guilty plea and appealed the denial of the suppression motion to this Court. Id. This Court disagreed with the trial court's conclusion that the officer, in talking to Jerome, was conducting a community caretaking function. Id. at ¶ 8. Nonetheless, this Court stated that "[w]e agree . . . with the trial court's conclusion that, under these circumstances, [the officer's] approach toward and conversation with Jerome was not a stop within the context of the Fourth

Amendment and did not implicate Jerome's rights against unreasonable search and seizure." Id. at ¶ 9.

This Court explained as follows:

> When [the officer] approached Jerome he requested permission to speak with her and she readily agreed to talk with him. [The officer] did not escalate the casual encounter into a seizure by ordering Jerome to do something, by demanding a response, or by threatening her with a show of authority or command. There is no assertion or evidence that Jerome's consent was based upon any show of authority by [the officer] or demand by him that she talk to him. Only when an officer by means of physical force or show of authority has in some way restrained the liberty of a citizen may we conclude that a Fourth Amendment seizure has occurred. State v. Halfmann, 518 N.W.2d 729, 731 (N.D. 1994). Consequently, the trial court correctly concluded [the officer's] actions in approaching and conversing with Jerome did not constitute a seizure or stop and did not implicate Jerome's Fourth Amendment rights.

Id. (emphasis added.)

In this case, Deputy Keesler received a report of unidentified individuals in a bar in Lansford creating noise that was disturbing the patrons of an adjacent motel. (DOT App. 5, ll. 24-25; 7, ll. 4-18; 23, ll. 11-25; 24, ll. 20-22.) Deputy Keesler testified the bar is supposed to close at 1:00 a.m. (DOT App. 7, ll. 19-22.)

When Deputy Keesler arrived in Lansford at approximately 4:00 a.m., he observed a single vehicle in the parking lot of the bar, which "started up and then . . . turned off again." (DOT App. 8, ll. 7-16; 10, ll. 4-5; 25, ll. 7-16.) Deputy Keesler did not activate his red lights, but "parked off center of the vehicle, so it . . . was free to get out." (DOT App. 8, ll. 17-20.) Deputy Keesler testified he "wanted to make contact with the people to ascertain that they were okay and find out what the call was about." (DOT App. 8, ll. 20-22.) After Deputy Keesler exited his vehicle, he observed the overhead light in the vehicle was on and there were two individuals in the vehicle. (DOT App. 8, ll. 24-25; 9, ll. 1-2; 25, ll. 7-9.) Deputy Keesler requested the driver, who latter was identified as Abernathey,

"unlock [his] door and come on out, so [he] could talk to him." (DOT App. 9, ll. 9-10.)

Before Abernathey complied with the law enforcement officer's request, Deputy Keesler observed Abernathey had bloodshot eyes, he fumbled for the door and appeared confused, and his speech was slurred. (DOT App. 9, ll. 18-25; 10, ll. 1-3.) Upon exiting his vehicle, Abernathey displayed clumsy movements and poor balance. (DOT App. 10, ll. 6-9.) Deputy Keesler "could smell a strong odor of alcohol, both on [Abernathey's] person and from the truck." (DOT App. 11, ll. 9-10.) Abernathey became belligerent towards Deputy Keesler. (DOT App. 11, ll. 10-13.)

Deputy Keesler informed Abernathey "why [he] was there." (DOT App. 11, l. 16.) Deputy Keesler advised Abernathey "we got a call there was a disturbance here in the bar parking lot," and then asked Abernathey whether he had "been drinking a little bit because at th[at] point [Deputy Keesler] could smell the alcohol on [Abernathey]." (DOT App. 11, ll. 16-20.)

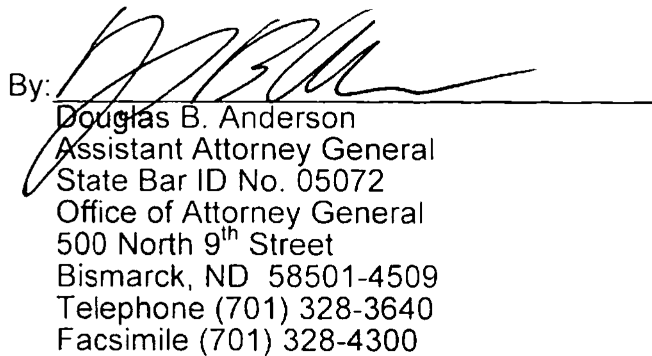
There is no evidence that Deputy Keesler's initial approach of Abernathey's vehicle involved coercion under a reasonable person standard or that Abernathey did not believe he was free to leave so as to constitute a stop. Rather, the approach constituted a casual encounter to determine if a problem existed. Only after observing the indicia of alcohol impairment did Deputy Keesler formulate an opinion that Abernathey was in actual physical control of a vehicle while under the influence of intoxicating liquor. At that point, the law enforcement officer had a reasonable and articulable suspicion to stop Abernathey. Deputy Keesler's approach of Abernathey's vehicle did not violate his Fourth Amendment rights.

CONCLUSION

The Department respectfully requests that this Court affirm the judgment of the Bottineau County District Court and the Department's decision suspending Dean Allan Abernathey's driving privileges for a period of two years.

Dated this 3rd day of March, 2009.

State of North Dakota
Wayne Stenehjem
Attorney General



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