

**IN THE SUPREME COURT
IN THE STATE OF NORTH DAKOTA**

Matthew John Richter

Appellee,

v.

North Dakota Department of Transportation

Appellant.

**Appeal from the District Court
South Central Judicial District
Burleigh County, North Dakota
The Honorable Robert O. Wefald**

**SUPREME COURT NO. 20100026
BURLEIGH COUNTY NO. 08-09-C-00898**

BRIEF OF APPELLEE

**Chad R. McCabe
Attorney for Appellee
McCabe Law Firm
402 East Main Ave., Suite 100
Bismarck, ND 58501
(701) 222-2500
State Bar ID #05474**

TABLE OF CONTENTS

	PAR. NO.
TABLE OF AUTHORITIES	1
STATEMENT OF ISSUE	2
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	5
STANDARD OF REVIEW	11
LAW AND ARGUMENT	13
ISSUE: Richter was stopped and seized in violation of the Fourth Amendment of the United States Constitution, and even greater protection under Article 1, Section 8 of the North Dakota State Constitution	13
CONCLUSION AND PRAYER FOR RELIEF	29
CERTIFICATE OF SERVICE	32

1. TABLE OF AUTHORITIES

<u>NORTH DAKOTA SUPREME COURT CASES</u>	<u>PAR. NO.</u>
<i>Aamodt v. North Dakota Dept. Of Transp.</i> , 2004 ND 134, 682 N.W.2d 308	12
<i>Abernathy v. Department of Transp.</i> , 2009 ND 122, 768 N.W.2d 485	22, 23, 24
<i>Borrowicz v. No. Dakota Dept. Of Transp.</i> , 529 N.W.2d 186 (N.D. 1995)	25
<i>City of Jamestown v. Jerome</i> , 2002 ND 34, 639 N.W.2d 478	15, 17, 27
<i>Johnson v. Department of Transp.</i> , 2004 ND 148, 683 N.W.2d 886	12
<i>Lamb v. Moore</i> , 539 N.W.2d 862, 863 (N.D.1995)	12
<i>Minot v. Johnson</i> , 1999 ND 241, 603 N.W.2d 485	19
<i>Salter v. North Dakota Dept. Of Tans.</i> , 505 N.W.2d 111 (N.D. 1993)	12
<i>Sayler v. North Dakota Dep't of Transp.</i> , 2007 ND 165, 740 N.W.2d 94	22
<i>State v. Boyd</i> , 2002 ND 203, 654 N.W.2d 392	23
<i>State v. DeCoteau</i> , 1999 ND 77, 592 N.W.2d 579	14
<i>State v. Hahne</i> , 2007 ND 116, 736 N.W.2d 483	21
<i>State v. Halfmann</i> , 518 N.W.2d 729, 731 (N.D. 1994)	22, 24
<i>State v. Klodt</i> , 298 N.W.2d 783 (N.D. 1980)	28
<i>State v. Langseth</i> , 492 N.W.2d 298, 300 (N.D. 1992)	23
<i>State v. Sarhegyi</i> , 492 N.W.2d 284, 285-86 (N.D. 1992)	15
<i>State of North Dakota v. Addai</i> , 2010 ND 29, 778 N.W.2d 555	16
<i>Wibben v. North Dakota State Highway Com'r</i> , 413 N.W.2d 329 (N.D. 1987)	20, 21
<u>OTHER</u>	<u>PAR. NO.</u>
<i>State v. Lampman</i> , 724 P.2d 1092 (Wash.App 1986)	28

UNITED STATE SUPREME COURT CASES

PAR. NO.

Adams vs. Williams, 407 U.S. 143 (1972) 20

Arizona v. Johnson, 129 S.Ct. 781 (2009) 16

Brendlin v. California, 551 U.S. 249 (2007) 16

Brown v. Texas, 443 U.S. 47 (1979) 17

Cady v. Dombrowski, 413 U.S. 31 (1979) 27

INS v. Delgado, 466 U.S. 210 (1984) 17

Michigan v. Chesternut, 108 S. Ct. 1975 (1988) 24

Michigan v. DeFillippo, 443 U.S. 31 (1979) 28

Reid v. Georgia, 448 U.S. 436 (1980) 17

Terry v. Ohio, 392 U.S. 1 (1968) 15

United States c. Calandra, 414 U.S. 338 (1974) 28

United States v. Janis, 428 U.S. 433 (1976) 28

United States v. Peltier, 422 U.S. 531 (1975) 28

U.S. v. Sokolow, 490 U.S. 1 (1989) 17

N.D.C.C.

N.D.C.C. § 28-32 12

2. STATEMENT OF ISSUE

ISSUE: Richter was stopped and seized in violation of the Fourth Amendment of the United States Constitution, and even greater protection under Article 1, Section 8 of the North Dakota State Constitution.

3. STATEMENT OF THE CASE

4. Richter agrees with the Department's Statement of Case.

5. STATEMENT OF FACTS

6. On January 8, 2009, at approximately 1:24 in the morning, Mandan police officer Daniel Poppe was on patrol in the City of Mandan. (App. 2, Tr. p. 2, lines 19-25; App. p. 3, Tr. p. 3, lines 6-8). As he was in the area of Kroll's Diner, he saw a pickup in that parking lot. He noticed the pickup was running, and there were people in the vehicle. Poppe was aware that Kroll's Diner had been burglarized in the past and that Kroll's had been closed for several hours. Based upon this, Poppe decided "to investigate it." (App. p. 3, Tr. p. 3, lines 7-17). Poppe was "curious what was going on." (App. p. 18, Tr. p. 18, line 10).
7. Poppe remembers the vehicle being silhouetted by the bright lights from behind, and that he could see them looking at him from 43rd Avenue. (App. p. 15, Tr. p. 15, lines 24-25; App. p. 16, Tr. p. 16, line 1; p. 3, lines 21-22). It was the only vehicle in the lot. (App. p. 18, Tr. p. 18, line 24). Poppe drove in the east entrance, parked off the passenger front bumper a distance away from it and approached the vehicle from the passenger's side. (App. p. 3, Tr. p. 3, lines 22-25; p. 4, lines 2-6). The people in the vehicle did not have any sort of flashlights or anything, (App. p. 16, Tr. p. 16, lines 9-11), and the vehicle was just sitting there, not even slowly driving away. (App. p. 16, Tr. p. 16, lines 12-15).

8. Poppe did not have his emergency lights on, but had his headlights, take-down lights, and maybe his spotlight. (App. p. 4, Tr. p. 4, lines 5-10). If the spotlight was on, it would have been pointed into the passenger compartment. (App. p. 4, Tr. p. 4, lines 19-22). Poppe walked up to the passenger's side of the vehicle, carrying his flashlight, shining that around inside the vehicle. (App. p. 5, Tr. p. 5, lines 13-15). Poppe motioned for the female passenger to roll the window down. He was motioning with his hand making a circular gesture. (Tr. p. 14, lines 21-24). The female passenger then rolled down the window. (App. p. 5, Tr. p. 15, lines 4-5).
9. Lindsay Ammon, the female passenger, testified that Poppe got out with his flashlight and approached the vehicle, that Poppe shined his flashlight on them and motioned with his hand to roll down the window. (App. p. 20, Tr. p. 20, lines 18-23). Poppe was in a full uniform, in a marked patrol car, and had a badge on. (App. p. 21, Tr. p. 21, lines 2-7). Ammon felt she had to comply and that they could not drive off, that out of respect for the uniform she had to roll down the window, and the she probably would not have rolled down the window if someone else had come up. (App. p. 20, Tr. p. 20, lines 24-25; App. p. 21, Tr. p. 21, lines 20-23; App. p. 22, Tr. p. 22, lines 1-2). Poppe heard Ammon's testimony at the hearing, was asked if he disagreed with anything she testified to, and responded, "No." (App. p. 22, Tr. p. 22, lines 20-22).
10. After the window was rolled down, Poppe asked Ammon and Richter what they were doing. Poppe also did note an odor of alcoholic beverage coming from within the vehicle and noticed Richter's eyes were bloodshot. (App. p. 6, Tr. p. 6, lines 13-21). Richter told Poppe that, "they were talking and waiting for a ride." *Id.* Poppe asked

Richter how much he had to drink and Richter told Poppe he had a couple earlier. *Id.* Poppe then asked Richter out of the vehicle to do some field sobriety test. (App. p. 6, Tr. p. 6, lines 24-25). Richter performed and failed the Horizontal Gaze Nystagmus test, the alphabet test, and the counting backwards test. (App. pp. 7-8, Tr. pp. 7-8). Poppe placed Richter under arrest at 1:33 a.m. for being in actual physical control of a vehicle while under the influence of intoxicating liquor and transported him to the Morton County Jail. (App. p. 11; App. p. 26, Exhibit 1b).

11. STANDARD OF REVIEW

12. The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, governs this Court's review of an administrative suspension of a driver's license. *Johnson v. Department of Transp.*, 2004 ND 148, 683 N.W.2d 886, ¶ 5. This Court reviews that 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). However, "[I]f sound, the district court's analysis is entitled to respect." *Aamodt v. North Dakota Dept. Of Transp.*, 2004 ND 134, 682 N.W.2d 308, ¶12. This Court exercises a limited review in appeals involving driver's license suspensions or revocations, and affirms the agency's decision unless:

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.

Johnson, supra, at ¶ 5, citing N.D.C.C. § 28-32-46. “[T]he ultimate conclusion of whether [the] facts meet the legal standard, rising to the level of a reasonable and articulable suspicion, is a question of law which is fully reviewable on appeal.” *Salter v. North Dakota Dept. of Transp.*, 505 N.W.2d 111, 112 (N.D.1993).

13. LAW AND ARGUMENT

ISSUE: Richter was stopped and seized in violation of the Fourth Amendment of the United States Constitution, and even greater protection under Article 1, Section 8 of the North Dakota State Constitution.

14. The Fourth Amendment to the United States Constitution and Article 1, Section 8, of the North Dakota Constitution protect individuals from unreasonable searches and seizures. *State v. DeCoteau*, 1999 ND 77, ¶ 7, 592 N.W. 2d 579. Subject to a few well-delineated exceptions, searches and seizures without a warrant are unreasonable under the Fourth Amendment. *Id.*
15. A temporary restraint of a person's freedom, or a “*Terry stop*”, is a seizure within the meaning of the Fourth Amendment. *City of Jamestown v. Jerome*, 2002 ND 34, ¶ 5, 639 N.W.2d 478, *citing Terry v. Ohio*, 392 U.S. 1, 16 (1968); *State v. Sarhegyi*, 492 N.W.2d 284, 285-86 (N.D.1992). It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person.” *Sarhegyi, supra, citing Terry v. Ohio*, 392 U.S. 1 (1968).
16. The Department argues that Richter was not personally seized within the meaning of the Fourth Amendment when Poppe motioned for Ammon to roll down the passenger window, and that, even if Ammon was stopped as a passenger, Richter, as

the driver, was in a position to leave the scene if he so chose. This position, however, is contrary to established case law. “During a stop of a vehicle *every* person in the vehicle is seized...” *State of North Dakota v. Addai*, 2010 ND 29, 778 N.W.2d 555 (emphasis added), *citing Brendlin v. California*, 551 U.S. 249, 254-59 (2007). “[F]or the duration of a traffic stop...a police officer effectively seizes *everyone* in the vehicle, the driver and all passengers.” *Arizona v. Johnson*, 129 S.Ct. 781 (2009)(emphasis added), *citing Brendlin v. California*, 551 U.S. 249 (2007). Richter was within the vehicle at the time of the stop and, “any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission.” *Brendlin, supra*.

17. To make a legal investigative stop of a vehicle, an officer must have a reasonable and articulable suspicion the motorist has violated or is violating the law. *Jerome, supra*, ¶ 5. The Supreme Court requires the officers to have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity. *Brown v Texas*, 443 U.S. 47 (1979). The officer, of course, must be able to articulate something more than an “inchoate and unparticularized suspicion or ‘hunch.’” *U.S. v Sokolow*, 490 U.S. 1 (1989), *quoting INS v. Delgado*, 466 U.S. 210 (1984). The Fourth Amendment requires “some minimal level of objective justification” for making the stop. *Id.* Any curtailment of a person's liberty by the police must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity. *Reid v. Georgia*, 448 U.S. 436 (1980).
18. In this case, prior to Officer Poppe motioning for the passenger to open the vehicle,

no reasonable suspicion existed. Indeed, the hearing officer even concluded that it was the smell of odor of alcoholic beverages coming from inside the pickup (learned only after the window was rolled down) which “gave the officer reasonable suspicion.” (App. p. 27, Hearing Officer’s Decision).

19. Prior to Poppe motioning the passenger to roll down the window, he merely saw a vehicle lawfully parked in Kroll’s parking lot and was aware that Kroll’s Diner had been burglarized in the past and that Kroll’s had been closed for several hours. His sole reason to stop the vehicle was his awareness of past burglaries in the area. However, this Court made clear in *Minot v. Johnson*, 1999 ND 241, 603 N.W.2d 485, that an officer’s awareness of past burglaries in the area amounts to no more than a vague hunch of illegal activity. *Id.* In summary, prior to Poppe motioning the passenger to roll down the window, there was no reasonable suspicion, based on objective facts, that the individuals were involved in criminal activity.
20. In this case, Richter was subjected to a stop by Poppe’s actions. Initially, the hearing officer first ruled that no stop occurred in this case when Poppe motioned for the passenger to roll down the window. Richter then filed a petition for reconsideration, citing *Wibben v. North Dakota State Highway Com’r*, 413 N.W.2d 329, 331 (N.D.1987)(“Whatever the officer's motive in tapping on Wibben's car window [with a flashlight], a stop occurred.”)(emphasis added), citing *Adams v. Williams*, 407 U.S. 143 (1972) (when police officer tapped on car window and asked occupant to open door and he responded by rolling down window, Supreme Court presumed “forcible stop” occurred, noting it was not claimed he “acted voluntarily in rolling down the window of his car”). The hearing officer then changed his mind and ruled that,

“Officer Poppe may have stopped Ammon.” (App. p. 31, Order of Petition for Reconsideration). Indeed, Ammon was stopped (as was Richter) when Poppe walked up to the passenger’s side of the vehicle, carrying his flashlight, shining that around inside the vehicle, and motioning with his hand making a circular gesture for her to roll the window down.

21. Moreover, the hearing officer also erroneously ruled that, “[E]ven if Richter was stopped, this was not a seizure.” Such legal reasoning is completely erroneous. Indeed, “[A]n investigative stop is a seizure within the meaning of the Fourth Amendment.” *Wibben v. ND State Highway Com’r*, 413 N.W.2d 329 (N.D.1987); *also see State v. Hahne*, 2007 ND 116, 736 N.W.2d 483, ¶ 6 (“A Fourth Amendment ‘seizure’ occurs when a vehicle is stopped by police at a checkpoint.”).
22. A law enforcement officer'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.” *Abernathey v. Department of Transp.*, 2009 ND 122, ¶ 8, 768 N.W.2d 485; *State v. Halfmann*, 518 N.W.2d 729, 731 (N.D.1994). A seizure occurs for Fourth Amendment purposes only, “when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.” *Sayler v. North Dakota Dep’t of Transp.*, 2007 ND 165, ¶ 18, 740 N.W.2d 94.
23. On the other hand, even a casual encounter can become a seizure if the officer acts in a manner that a reasonable person would view as threatening or offensive if done by another private citizen - through an order, a threat, or display of a weapon. *State v. Langseth*, 492 N.W.2d 298, 300 (N.D.1992)(emphasis added); *Abernathey, supra*,

(quoting *State v. Boyd*, 2002 ND 203, ¶ 7, 654 N.W.2d 392).

24. Whether a stop or seizure of an individual has occurred is determined, “only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *Michigan v. Chesternut*, 108 S.Ct. 1975 (1988). Moreover, “what constitutes a restraint on liberty prompting a person to conclude that he is not free to ‘leave’ will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs.” *Id.* at 1979. An occupant of a vehicle has been “seized” only when a law enforcement officer order or commands, rather than requests, that the occupant open a window or exit a vehicle. *Abernathey, supra*, at ¶ 12. Consequently, when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen, the Court may conclude that a ‘seizure’ has occurred. *State v. Halfmann*, 518 N.W.2d 729, 731 (N.D.1994).
25. Compare *Borrowicz v. No. Dakota Dept. Of Transp.*, 529 N.W.2d 186 (N.D.1995), where this Court stated, “in this case, a stop arguably occurred when Officer Erickson requested Borowicz to open the door of the pickup and asked Borowicz to produce his driver’s license. The requests could be interpreted as an order ‘to do something’ depending on how it was made,” with *Wibben v. North Dakota State Highway Com’r*, 413 N.W.2d 329, 330 (N.D.1987), where the officer approached Wibben’s car and tapped on the window with his flashlight, and Wibben rolled down the window, where this Court ruled that, “Whatever the officer's motive in tapping on Wibben's car window, a stop occurred.” *Wibben* at 331 (emphasis added).
26. Under these circumstances, Richter was stopped when Poppe walked up to the

passenger's side of the vehicle, carrying his flashlight, shining that around inside the vehicle, and motioning with his hand making a circular gesture for Ammon to roll the window down.

27. Poppe was not performing a community caretaking function. He admittedly was investigating a possible crime, (Tr. p. 3, lines 7-17), and was just "curious what was going on." (Tr. p. 18, line 10). The United States Supreme Court has described community caretaking functions as those "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady v. Dombrowski*, 413 U.S. 433 (1973). Moreover, in situations where it is obvious that a citizen neither needs nor desires assistance, an officer has no community caretaking role to fill. *City of Jamestown v. Jerome, supra*.
28. Lastly, while Richter believes that the Fourth Amendment protections are enough, he is afforded even greater constitutional protection under Article 1, Section 8 of the North Dakota Constitution, especially regarding the protection against unreasonable searches and seizures. In *State v. Klodt*, 298 N.W.2d 783 (N.D.1980), this Court stated:

It is within the power of this court to apply higher constitutional standards than are required of the States by the Federal Constitution.

More importantly, this Court stated:

We agree that Article 1, section 8, N.D. Constitution, may afford individual greater protection against unreasonable searches and seizures than that which the Fourth Amendment provides.

In *Michigan v. DeFillippo*, 443 U.S. 31 (1979), the Court held that the exclusionary rule is merely a remedial measure for Fourth Amendment violations. The *DeFillippo* court noted that "[t]he purpose of the exclusionary rule is to deter unlawful police

action” 443 U.S. at 38 n.3. *Accord, United States v. Janis*, 428 U.S. 433 (1976); *United States v. Peltier*, 422 U.S. 531 (1975); *United States v. Calandra*, 414 U.S. 338 (1974). By contrast, the emphasis of Article 1, section 8 of the North Dakota State Constitution should be on protecting an individual’s right to privacy rather than on curbing governmental actions. *See State v. Lampman*, 724 P.2d 1092 (Wash.App.1986).

29. CONCLUSION AND PRAYER FOR RELIEF

30. WHEREFORE, based upon the foregoing, the Appellee, Matthew John Richter, respectfully requests that this Court will affirm the judgment from the district court
31. Dated this 26th day of April, 2010.

/s/ Chad R. McCabe
CHAD R. MCCABE
Attorney for the Appellee
402 East Main Ave., Suite 100
Bismarck, North Dakota 58501
(701) 222-2500
N.D. State Bar ID #05474

32. CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was sent by electronic transmission on this 26th day of April, 2010, to the following:

Michael Trent Pitcher
Asst. Attorney General
500 N. 9th St.
Bismarck, ND 58501-4509
Mtpitcher@nd.gov

/s/ Chad R. McCabe
CHAD R. MCCABE