20100148

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
AUGUST 3, 2010
STATE OF NORTH DAKOTA

Supreme Court
State of North Dakota

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State of North Dakota	)	Supreme Court No. 20100148
Plaintiff and Appellee	)	Stutsman County No. 47-09-K-624
	)	
	)	
v	)	
	)	
	)	
Kelly Michael Steffes	)	
Respondent and Appellant	)	

Appellee's Brief

Through a conditional guilty plea, Steffes appeals the judgment of conviction.

Fritz Fremgen
State's Attorney, Stutsman County
511 Second Avenue Southeast
Jamestown, ND 58401
(701) 252-6688 ID # 04875
ffremgen@nd.gov

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ISSUE PRESENTED FOR REVIEW

[¶ 3] Whether, the trial court properly denied Steffes' motion to suppress when it found twice tapping on the window and gesturing to roll it down was not a stop.

[¶ 4] **STATEMENT OF THE CASE**

[¶ 5] **Nature of the case**

After his motion to suppress was denied, Steffes entered a conditional guilty plea and was sentenced for committing false information to a law enforcement officer. Steffes reserved the right to appeal the denial of his motion to suppress. A stay of the judgment pending appeal was entered.

[¶ 6] **Statement of the facts**

[¶7] Jamestown Police Department Officer, Michael Craig, drove his marked SUV patrol vehicle, into a parking lot north of the railroad tracks. "Appeal Transcript of Proceedings" at 11, hereinafter "T".

[¶8] Steffes' car was parked up against the north curb of the lot when Craig drove the patrol vehicle into the lot. T13.

[¶9] The railroad tracks run from east to west. T12. The parking lot has four rows of stalls separated by two aisles. T14. The aisles run east to west, parallel with the railroad tracks. Officer Craig, who had been heading south on the avenue along the west edge of the lot, turned east into the lot. Officer Craig drove east and part way through the lot, made a U-turn onto the next aisle of the lot and headed west passing the rear of Steffes' car. Craig parked the patrol vehicle. T14, 15.

[¶10] Steffes was in an angle parking spot with his car facing northwest. T13-14.

Once Craig stopped the SUV, Steffes still could have backed his car out from where Steffes was parked. T15.

[¶11] Craig was alone in his patrol SUV, T11, and, until a little later, was the only officer on the scene. T18; T23, line 22. Craig got out of the patrol SUV and walked toward Steffes' car. T16. Craig had on his uniform with his flack vest on under his shirt. Craig's duty belt docked: pepper spray, a small flashlight, a pistol, handcuffs, and ammunition pouches. Craig had neither a Taser, a baton, nor a long flash light.

[¶12] Craig could see the dome light on, T15; T32. Craig figured the engine was not running because he did not hear any engine noise and he did not see any exhaust, even though it was a cool night. T15.

[¶13] Steffes' doors were closed and the windows were up. T16. Even still, Craig could hear the radio was on inside Steffes' car. T16. When Craig neared Steffes' car, Craig stood slightly behind the driver's side door and saw that Steffes was awake and heard the radio. T33, line 9. Craig saw Steffes in the driver's seat, doing what appeared to be "playing with" a cell phone. T16. "He had it on his lap and he looked like he was texting maybe." T32, line 14. The dash lights were on, the keys were in the ignition turned to either run or accessory. T16; T32.

[¶14] "I rapped on his window and motioned, and I was trying to speak over the noise of the radio. And I don't know if he heard me or not but I asked him if he could open the door so I could talk to him. And then I kind of motioned with my finger to roll the window down or open the door." T16, line 22 to T17, line 2. "I said would you please open the door or roll down the window so I can talk to you." T34, lines 2-7, T36

(request was both to roll down the window and open the door).

[¶15] Craig added detail that between the rapping on the window and the motion to roll down the window there was a break in which Steffes, who was not staring at the window, turned slowly toward Craig. T19. When Craig thought he might have Steffes' attention, Craig motioned to roll down the window. T19. Craig thought Steffes saw him and Craig thought it was most likely that Steffes heard him, but Craig was unsure. T16, line 24; T35. "I wasn't sure with the dome light on if he saw me with the reflection from inside. It was dark outside." T35, line 20-25.

[¶16] Craig said he believed Steffes turned away from looking at the window, back to whatever it was Steffes had been doing prior to Craig's rapping on the window, and Craig repeated the actions to get Steffes' attention. T20, lines 2-7. Fremgen: "But after he looked at you or appeared to look at you and looked away, you then knocked again." Craig: "Yes." T36, line 1-3.

[¶17] Craig thought there was about a 3 second break between the initial rapping and the second set. T35, line 7. Craig testified he felt he was making a request, not an order. T39, line 15-19.

[¶18] Craig testified that Steffes did not open his door after Craig's first try, so Craig, being unsure whether Steffes saw Craig, repeated and Steffes opened the door. T35-36. Once the door was opened, without elevating his voice, T20, line 18, Craig asked Steffes to turn down the radio. T20, line 16 (*asked*); T36, line 22-23 (Aaland offers that Craig "directed" and Craig corrects Aaland "asked"). Craig said the radio wasn't really loud. T 20, line 23-25.

[¶19] Probably about the time Steffes opened his door, another officer arrived in the lot with her patrol car, Officer Meisch. T23, line 22. Meisch stopped her patrol car in the same aisle as Craig's patrol SUV with the front end of her car pointing at the back end of Craig's. She left three or four car lengths between the front of her car and the back of Craig's. T24, at line 11. Steffes could have backed out without a problem. T24-25.

[¶20] With Steffes still in the driver's seat, Craig asked Steffes whether Steffes had a drivers license. T25, line 1. Steffes said he was a licensed driver, he just did not have the license with him. T25, line 4-10. So, Craig asked for his full name and date of birth. T25, line 11. Steffes gave the false name, Michael Shockman and date of birth. T25, lines 13-19. While Steffes was still in his car, Craig stepped back a few feet from Steffes' door to use the radio to ask dispatch to check on the name and date of birth Steffes gave. T26. Steffes got out of his drivers seat. T26, lines 22-25. Steffes did this on his own volition. T27, line 7. Officer Craig neither asked Steffes to get out of his car, T26, line 24, nor told Steffes to get out of his car. T27, line 1. Craig did not know why Steffes decided to get out of his car, and Craig was reluctant to presume, why, but offered maybe it was simply to stretch. T27, line 22.

[¶21] Steffes was swaying, stumbled a little bit, and leaned up against the side of his car. T28, lines 1-4. Steffes had been holding a Budweiser cup between his legs, when he was still seated inside the car, and by the time Craig was telling Steffes to go sit down again, Steffes had dumped out the contents of the cup. T29, line 15.

[¶22] Officer Meisch asked Steffes twice to get back in his car, T28, and Steffes

did not so Craig "pretty much directed him to" get back in his car, T28, line 15, because he was concerned for Steffes safety. "I didn't want him falling down while we were talking to him." T28, line 23

[¶23] **Course of proceedings below**

The trial court judge found that Craig's twice rapping on the window and motioning with his finger to roll it down, whether or not Craig asked anything, was not an order. Defense App. at 7. The Court found that prior to Steffes opening the door, there was no oral order. Defense App. at 7. The court found that Craig was not threatening or imposing by his presence and that his acts did not constitute a show of authority that made them an order. Defense App. at 7.

[¶24] The court explained its conclusion that there had been no oral order with the basis that, "[o]nly after the radio was turned down, could Steffes hear what Craig wanted to say to him. Therefore, whatever Craig did prior to that is not an order. Nor is it a demand for a response by Steffes." Id. As to Craig's actions, Judge Simonson wrote, Craig did not make any show of authority, was not threatening, and did not issue any commands. Id. The judge added, even if Craig had made some show of authority, Steffes was primarily preoccupied, ignoring Craig, and may not have even seen it. Id.

[¶25] **Standard of Review**

[¶26] In 2010 the standard of review for denial of a motion to suppress was stated in *Mohl*.

> This Court's review of a trial court's decision on a motion to suppress evidence is well-established. As we explained in *State v. Wolfer:*
>
> > When reviewing a district court's ruling on a motion to

> suppress, we defer to the district court's findings of fact and resolve conflicts in testimony in favor of affirmance. We affirm the district court's decision unless we conclude there is insufficient competent evidence to support the decision, or unless the decision goes against the manifest weight of the evidence.
>
> Although the underlying factual disputes are findings of fact, whether the findings meet a legal standard, in this instance a reasonable and articulable suspicion, is a question of law. Questions of law are fully reviewable. The ultimate conclusion of whether the facts support a reasonable and articulable suspicion is fully reviewable on appeal.

2010 ND 63, ¶ 5, 780 N.W.2d 650 (citations omitted).

State v. Mohl, 2010 ND 120, ¶ 5, ___ N.W. 2d ____ .

[¶27] **Argument**

[¶28] **The Trial Court's order is correct**

At paragraph 10 of its brief, the Defense argues that the Trial Court's order seems to contradict itself when on one hand it says, "[d]ue to the loud radio, Craig did not try to communicate orally with Steffes. Rather tapped on the driver's side window with his finger motioned downward indicating he wanted Steffes to lower the window," and then a couple of paragraphs later, "[i]t is clear that there was no oral order prior to Steffes opening the door. No oral statement would have been heard due to the loud radio." Defense Appendix at 6.

[¶29] When the Court wrote Craig did not try to communicate orally with Steffes, it could have meant either: Craig did not try to use oral communication as the primary mode, Craig did not try very hard to communicate just orally, or Craig did not try to communicate as one normally would, orally.

[¶30] However the court meant it, it's clear the court recognized Officer Craig had not only rapped on the window and gestured with his finger, but had also said something. The judge had been present throughout the hearing where it had been discussed forward and backward that Craig had a tripartite attempt, the rap, the finger motion, and the oral request. We don't think the court made the error of forgetting that a statement had been made along with the gestures, especially considering the post hearing briefs focused on the oral statements. See, docket # 17, *Defendant's Reply Brief*, at 4-5; docket # 19, *State's Reply to Defendant's Post Suppression Hearing Brief*. It makes more sense to see the statements as harmonious than to interpret them as "seemingly contradictory". It's fairly easy to harmonize the parts when one considers the judge's sentences: "Only after the radio was turned down, could Steffes hear what Craig wanted to say to him. Therefore, whatever Craig did prior to that is not an order." The judge is acknowledging Craig was trying to say something. The judge is recognizing the facts as presented could not have constituted an order. The judge explains that legal finding, with, "No oral statement would have been heard due to the loud radio." Now the judge is reasoning that if a law officer shouts an order–legal or illegal–to a driver who can not hear the order because of the radio and the driver does not respond, then the order can not have violated the driver's Fourth Amendment right. We think the judge's conclusion is logically and legally correct. The court's summation of the facts was correct and the facts of the record support the trial court. Craig did not emphasize oral communication but put forward a package attempt. If an oral request was made or an oral order was given, it may not have been perceived. An oral request or order that is not received does not have the effect of

an order.

[¶31] The Judge also found that Craig, " . . . did not make an order which is similar to a command." Defense App. at 7.

[¶32] Even if one agrees with the defense attorney's argument that the judge contradicted himself in his order, the judge came to the right result. This Court has noted before that it " . . . will not set aside a correct result because the Trial Court assigned an incorrect reason, if the result is the same under the correct law and reasoning." *Cannaday v. Cannaday*, 2003 ND 58, ¶ 8, 659 N.W.2d 363.

[¶33] **A knock is not a stop**

[¶34] The Defense argues that since *State v. Wibben* in 1987, the law has been and is still that, ". . . there was a knock on the window, which by itself is a seizure." Defense Brief at ¶25, citing *State v. Wibben*, 413 N.W.2d 329 (N.D. 1987).

[¶35] North Dakota's application of the law regarding approaching a stopped vehicle has developed since 1987. *Wibben* was a split decision with Justice VandeWalle concurring in the result but pointing out that an approach to a vehicle and a request to communicate may not constitute a stop if the occupant responds voluntarily. *State v. Wibben*, 413 N.W.2d 329, 334-35 (N.D. 1987)(VandeWalle, Justice, concurring). Justice VandeWalle pointed out supporting authority from Minnesota, New Mexico, West Virginia, and LaFave. Id. Within 12 years of the three justice *Wibben* majority writing what the defense interprets as *a knock is a stop*, they had all retired from the court. http://www.ndcourts.com/court/bios/meschke.htm *Wibben*, at 331 ("Whatever the officer's motive in tapping on Wibben's car window, a stop occurred.")

[¶36] After the *Wibben* majority retired, the method Justice VandeWalle suggested in *Wibben* for viewing these cases became the common viewpoint. The Court first cited to it in *State v. Langseth*, 492 N.W.2d 298, 300 (N.D. 1992) and developed it fully when it wrote this passage from *Franklin*.

> The law distinguishes between the approach of an already stopped vehicle and the stop of a moving one. *State v. Halfmann,* 518 N.W.2d 729 (N.D.1994). As we explained there, at 731, it is not a seizure for *605 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). Still, as we explained in *Langseth,* if an officer learns something during a public encounter with a person that causes a reasonable suspicion or probable cause, the encounter can justify further investigation, seizure, and even arrest. A public encounter does not foreclose the officer from making observations that reasonably lead to further action.

State v. Franklin, 524 N.W.2d 603, 604 -605 (N.D. 1994). The Court has continued applying this method over the past five years. *Borowicz v. North Dakota Dept. of Transp.*, 529 N.W.2d 186, 188 (N.D. 1995); *City of Grand Forks v. Zejdlik*, 551 N.W.2d 772, 775 (N.D. 1996); *State v. Boyd*, 2002 ND 203, ¶7, 654 N.W.2d 392, 395 (N.D. 2002) (patrol car blocked rear exit to stopped car and order occupants to put hands on hood of car, not community care taking), *Rist v. North Dakota Dept. of Transp.*, 2003 ND 113, ¶11, 665 N.W.2d 45, 48 (reaching through window to shake slumped over driver is community care taking).

[¶37] In 2009, the Court applied the modern analysis to a set of facts quite close to Steffes'. *Abernathey v. Department of Transp.*, 2009 ND 122, ¶11, 768 N.W.2d 485,

489. The Steffes case is not so different from *Abernathy* that there should be a different result.

[¶38] Steffes' response to Craig's first set of attempted communication was apparently either not realizing Craig was there, or momentarily ignoring it. Craig testified that after Craig's first knock, "If I recall I believe he turned back to what he was doing and then I repeated it." T20, lines 2-7. "Then he opened the door." T20. at 7. The evidence is Steffes experienced an interruption, not a feeling of restraint on his liberty.

[¶39] The facts of Steffes' case certainly do not show Steffes overtly indicating he did not want contact with officer Craig. What exactly Steffes did or did not hear, did or did not see, and did or did not want to do was not really clear to Officer Craig. So, being unsure of whether Steffes had seen him through the reflection, unsure whether Steffes had heard him, Craig decided to repeat the gestures and ask again.

[¶40] The question is whether Steffes opened the door voluntarily or felt compelled through physical force or a show of the color of law to do so. There is nothing in the record indicating that after the first knock Steffes knew it was a law enforcement officer outside his window. T41, lines 8-9. One legitimately wonders if after the first knock Steffes was even sure that someone had knocked on his window. The record supports the finding that if Steffes did think someone knocked, he felt free to ignore it and continue whatever it was he was doing prior to the knock. T20, lines 2-7. Although Mr. Steffes never testified or in any other way let the court know what he thought after the first knock, his legal team argues that, ". . . Steffes turned away, declining the officer's

request." Defense Brief at ¶26; T41, lines 8-9. The Defense conclusion extends beyond the support of the facts. This Court has in the past and will continue to defer to the district court's findings of fact and resolve conflicts in testimony in favor of affirmance. The district court's decision will be affirmed unless it is concluded there is insufficient competent evidence to support the decision, or unless the decision goes against the manifest weight of the evidence. The Court's findings of fact are reasonably supported by the record.

[¶41] The Defense mistakenly argues that this case is different than *Abernathy* because the law enforcement in *Abernathy* said "please" but officer Craig did not. Defense Brief at ¶25. Officer Craig did say "please." Officer Craig testified, "I said would you please open the door or roll down the window so I can talk with you." T34, lines 16-17. Whether the officer did or did not say please is not dispositive anyway.

[¶42] The Defense claims that the Fourth Amendment stop occurred with the knock, and at the point of the knock there was no reasonable articulable suspicion supporting a stop. Defense Brief at ¶¶ 17-19. The trial court's order shows the court agreed with the Prosecution that the stop did not take place with either the first or second set of rapping. It's the State's position that the stop occurred after Craig told Steffes to sit down in his car. The Defense conceded, "We're not making an issue of probable cause. Once he was in a position to talk to the client and to smell him, then obviously he would have a basis for the stop." T22, line 14.

[¶43] Craig arrived on the scene after being told by the dispatcher, "someone had called in and said that a male that appeared intoxicated was walking to the parking lot

and getting into a car." T11, line 1. The dispatcher gave a vehicle description and license plate number. T11, line 24. The dispatcher did not identify the person who called. T11, line 5; T30-31. Steffes' car matched both the vehicle description and the license plate number. T11-12. Craig rapped, and after Steffes opened the door, Craig smelled the odor of alcohol. T38, line 12; T39. Craig stepped back to call in the false name Steffes gave. Steffes got out of his car, of his own volition, without being asked or told by Craig to do so. T26-27. Steffes swayed, stumbled, and leaned up against the side of his car, T28, lines 1-4. Both officer Meisch–unsuccessfully–and then officer Craig–successfully, told Steffes to sit back down in his car. T28. Craig was worried Steffes was going to fall down and hurt himself. T28.

[¶44] Although officer Craig was responding to a typical dispatch call of a drunk driver that did not allow Craig to evaluate the credibility of the caller, by the time Craig told Steffes to sit back down, he had sufficiently corroborated the tip to reasonably articulate the suspicion that there was a crime of actual physical control happening.

[¶45] **Conclusion**

The State asks this Court to uphold the denial of the motion to suppress evidence and affirm the judgment of conviction.

Dated 03 August 2010

Fritz Fremgen
State's Attorney, Stutsman County
511 2nd Ave SE
Jamestown, ND 58401
(701) 252-6688 (ND ID 04875)
ffremgen@nd.gov

[¶ 46] CERTIFICATE OF SERVICE

On 03 August 2010, a copy of the Appellee's Brief was served by e-mail to:

Mr. Jesse Nathan Lange, 415 11th St. S., Fargo, ND 58103
jesse@aalandlaw.com

On 03 August 2010, a copy of the Appellee's Brief was filed electronically with the Clerk of the Supreme Court by e-mailing to: supclerkofcourt@ndcourts.gov

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Fritz Fremgen
State's Attorney, Stutsman County
511 2nd Ave. SE
Jamestown, ND 58401
(701) 252-6688 (ID#04875)
ffremgen@nd.gov