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[¶ 3] STATEMENT OF THE ISSUES

1. Whether the Appellant's conviction should be reversed as the officer's actions of approaching the Appellant in a parked car based on anonymous tip lacking any indicia of reliability, amounted to a warrantless stop / seizure of Appellant requiring suppression of the evidence.

STATEMENT OF THE CASE

[¶ 4] This is an appeal from the judgment of conviction in the above-entitled matter, which was signed by the Honorable Mikal Simonson and filed on May 14, 2010. (Appendix "App" at 5.) Appellant Kelly Michael Steffes was charged by criminal complaint dated October 14, 2009, with the criminal offense of False Information or Report to Law Enforcement Officers, in violation of North Dakota Century Code section 12.1-11-03(1) (App. at 5.).

[¶ 5] On November 16, 2009, Appellant filed a Motion and Memorandum to Suppress Evidence. (App. at 2.) On March 1, 2010, a suppression hearing was held before the Honorable Mikal Simonson in Stutsman County District Court. (App at 2.) Testimony was presented at the suppression hearing that an officer responding to an anonymous tip approached Steffes' car, knocked on the window, and requested that he either open the door or roll down the window. (Transcript of suppression hearing ("T.") at 11, 16-17, 18.) According to the officer's testimony, Steffes turned, looked at him, and then turned away. (T. at 19-20). The officer knocked on the window a second time and again requested that Steffes open his car door or roll down the window. (T. at 20). Officer Craig confirmed that at an earlier hearing he had testified that he immediately directed Steffes to turn down his radio after he opened the door. (T. at 38). He then engaged Steffes in conversation at which he noticed the odor of alcohol. (T. at 38). However, during the suppression hearing, the officer testified that he smelled the odor of an alcoholic beverage was coming from the vehicle and from Steffes as he was speaking to him. (T. 38-39). An order denying the motion to suppress was entered on April 19, 2010. (App. at 2, 6-7).

[¶ 6] Upon hearing the evidence, the district court denied Mr. Steffes's motion to suppress. (App. at 6-7.) Mr. Steffes entered conditional guilty pleas on April 6, 2010 and filed this appeal on May 14, 2010. (App. at 8-13, 15). He now asks this Court to find that the district court erroneously denied his motion to suppress, to reverse his conviction, and to remand with instructions to allow him to withdraw his guilty pleas.

STATEMENT OF THE FACTS

[¶ 7] On October 4, 2009, Officer Michael Craig was dispatched to the Brass Rail parking lot following an anonymous tip of a possibly intoxicated male walking in the parking lot and getting into a car. (T at 11). The officer was given a description of the vehicle and a North Dakota license plate number. Id. The officer drove into the parking lot, circled around the lot, and saw the car parked against a curb near the front of the bar. (T. at 12). Officer Craig parked his squad car perpendicular to and just past the rear of the suspect car. (T. at 15).

[¶ 8] The officer testified at the suppression hearing that he did not block Steffes' vehicle in as he would have been able to maneuver his way around the patrol vehicle. (T. at 15). Officer Craig, dressed in uniform and clearly a police officer, approached the car on the driver's side. (T. at 16). Steffes was seated in the driver's seat with the dome light on; the key was in the ignition in the accessory position, so the radio could be played. (T. at 16). The engine was not running. Id. Steffes appeared to be doing something on his cell phone and was fully awake and alert. (T. at 16, 33). The officer observed nothing to indicate a violation of law or that Steffes was in duress or in need of assistance. (T. at 34).

[¶ 9] The officer knocked on the driver's window while asking Steffes to open the door or roll down the window. (T. at 16-18). As he made this request, Officer Craig repeatedly gestured with his finger in a downward motion for Steffes to roll down his window. (T. at 16-18). According to the officer's testimony, Steffes turned, looked at him, and then turned away. (T. at 19-20). The officer knocked on the window again while verbally asking Steffes to open his door and / or roll down his window. (T. at 20). Again, Officer Craig did this while repeatedly gesturing in a downward pointing motion.

(T. at 20). Steffes then opened his door. (T. at 20). Officer Craig then directed Steffes to turn down his radio. (T. at 20, 36-39). Steffes complied and the officer engaged him in conversation and noticed an odor of alcohol. (T. at 38-39). The officer admitted that he had previously testified that he did not observe an odor of alcohol until after he directed Steffes to turn down his music and began questioning him. (T. at 38).

[¶ 10] After the suppression hearing, the court denied Steffes' motion. (App. at 6-7). Among other things, the court found that due to the loud radio, the officer did not try to orally communicate with Steffes. Id. In seemingly contradictory fashion, the court also found that because Steffes had his music up, he did not hear what the officer said to him. Id. The court also concluded that the officer's actions did not amount to a seizure. Id. Therefore, the court reasoned, anything the officer said was not an order. Id. There was no evidentiary support for this finding.

[¶ 11] After his motion to suppress was denied, Steffes entered a conditional plea and filed this appeal. (App. at 8-13, 15).

JURISDICTIONAL STATEMENT

[¶ 12] The district court had jurisdiction over this case pursuant to N.D. Const. art. VI, § 8 and N.D.C.C. § 27-05-06(1). This Court has jurisdiction over this appeal under N.D. Const. art. VI, § 6 and N.D.C.C. § 29-28-06(2). This appeal is timely under N.D.R.App.P. 4(b)(1)(A). Regarding the standard of review, this Court accords deference to the factual findings of the trial court when reviewing the denial of a motion to suppress. State v. Keilen, 2002 ND 133, ¶10, 649 N.W.2d 224 (quoting State v. Huffman, 542 N.W.2d 718, 720 (N.D. 1996)). However, the trial court's legal

conclusions are fully reviewable. Id. Questions of law are reviewable de novo. State v. Kitchen, 1997 ND 241, ¶ 12, 572 N.W. 2d 106.

LAW & ARGUMENT

[¶ 13] The Fourth and Fourteenth Amendments of the United States Constitution and Article I, Section 8 of the North Dakota Constitution prohibit unreasonable searches and seizures. "The temporary restraint of a person's freedom, or a 'Terry stop,' is a seizure within the meaning of the Fourth Amendment." Terry v. Ohio, 392 U.S.1, 15 (1968). To make a legal investigatory stop or seizure, an officer must have a reasonable and articulable suspicion the person has violated or is violating the law. State v. Miller, 510 N.W. 2d 638, 640 (1994). "In evaluating the factual basis for an investigative stop or arrest, [a court] consider[s] the totality of the circumstances." City of Fargo v. Ovind, 1998 ND 69, ¶ 8, 575 N.W.2d 901.

I. The district court erroneously denied appellant's motion to suppress where the officer seized appellant without a reasonable, articulable suspicion.

[¶ 14] Although not all law enforcement encounters with citizens implicate Fourth Amendment rights, a seizure occurs "when a law enforcement officer, by means of physical force or show of authority, in some manner restrains the liberty of a citizen." Terry v. Ohio, 392 U.S. 1 (1968). In other words, a person has been 'seized' for Fourth Amendment purposes when a reasonable person would have believed he was not free to leave. State v. Fields, 2003 ND 81, ¶ 11, 662 N.W.2d 242. A person has also been seized when a reasonable person would not feel free to decline the officers' requests or otherwise terminate the encounter. Florida v. Bostick, 501 U.S. 429, 436 (1991). The North Dakota Supreme Court has explained that:

> . . . 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. Wibben v. North Dakota State Highway Comm'r, 413 N.W.2d 329, 334-35 (N.D. 1987) (VandeWalle, Justice, concurring). 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. Id. at 335.

State v. Langseth, 492 N.W.2d 298, 300 (N.D. 1992) (emphasis added). This Court in Abernathey v. N.D. Department of Trans., 2009 ND 122, 649 N.W.2d 224, held:

> If...an officer directs a citizen to exit a parked vehicle, or otherwise orders a citizen to do something, then the officer has arguably made a stop which, consistent with the Fourth Amendment rights of the citizen, requires the officer to have reasonable articulable suspicion that the person has been or is violating the law.

Id. at ¶10, (citing State v. Leher, 2002 ND 171, ¶ 7, 653 N.W.2d 56)).

[¶ 15] In the current case, Officer Craig was armed, in uniform, and obviously a police officer. The facts show he knocked on the driver's side car window before asking Steffes to open his window or his door. (T. at 34, 39). As he made the request he gestured repeatedly in a downward pointing motion. (T. at 16-18). Steffes looked at the officer after he made his request and then he looked away, obviously declining to engage in any verbal contact with the officer. (T. at 34). Officer Craig did not walk away from the encounter, but instead remained in front of Steffes' car window. (T. at 34).

[¶ 16] After Steffes turned away from the officer, Officer Craig knocked on the car window a second time, again requesting that Steffes open his door or roll down his window, and yet again motioning repeatedly with his finger pointing down. (T. at 35-36). Steffes complied with the second request by opening his door. (T. at 36). Officer Craig then directed him to turn down his music pursuant to his prior testimony at the administrative hearing regarding Steffes driving privileges. (T. at 36-38).

[¶ 17] The evidence shows that Craig directed Steffes to open his window or his door to engage in a discussion with him. (T. at 36-38). Craig's actions in their entirety should be construed as an "order" because when Steffes tried to ignore the officer, Officer Craig simply persisted in attempting to engage Steffes. Id. Even if Craig began by asking Steffes to open the door or window, he ultimately insisted that Steffes do so by knocking and gesturing again after Steffes had indicated his desire to be left alone.

[¶ 18] Officer Craig testified at the suppression hearing as to the difference between directing an action and requesting an action and confirmed that to direct an action is an order. (T. at 36). Officer Craig admitted that he previously testified under oath (at the administrative hearing) that he "directed" Steffes to turn down his music. (T. at 36-38). The evidence shows Officer Craig did not notice an odor of alcohol until after the car door was opened and possibly after he had directed Steffes to turn down the radio. (T. at 38-39).

[¶ 19] Officer Craig's persistence demanded a response. (T. at 34-36). Steffes declined the officer's first knock, verbal request, and hand gestures by looking at the officer and then turning away. (T. 34-35). The officer's actions, amounted to a seizure within the language of Langseth.

[¶ 20] The facts in this case are similar to the facts of the case that this Court decided in City of Jamestown v. Jerome, 2002 ND 34, 681 N.W.2d. In deciding Jerome, this court held that the facts in that case, deemed a "casual encounter" did not rise to the level of a seizure of the defendant. Jerome, 2002 ND at ¶ 1. In Jerome an anonymous tip to law enforcement led to an officer to engage the defendant. Id. at ¶2. The officer did not make any attempt to stop the vehicle while it was in operation, but rather allowed the

vehicle to come to a stop in a driveway and the defendant voluntarily exited the vehicle Id. The officer then approached the defendant and asked in a "conversational and nonthreatening manner, if he could speak to her for a minute." Id. at ¶ 7. The defendant then "turned recognized the officer, and without hesitation or condition responded 'yes.'" Id.

[¶ 21] This case is distinguishable from Jerome because Steffes was still in his vehicle when the officer approached him. Moreover, Officer Craig persisted when Steffes tried to ignore him. Officer Craig's actions of knocking on the window and gesturing with his finger downward, and asking Steffes to "open the door or roll down the window so I can talk to you," required Steffes to make a decision as to whether he would respond voluntarily to the officer's direction or not. Choosing to look at the officer through the window but not to roll down the window or open the door, Steffes in essence made a decision not to respond to the officer.

[¶ 22] When the officer knocked on the window a second time, repeated his verbal requests, along with the attendant hand gesture, the officer went beyond what can be considered a "casual encounter" with law enforcement and the actions became a seizure. If Steffes would have "voluntarily" opened the door initially after the officer's first request, then the encounter could more plausibly construed as a "casual" in nature. However, when Steffes decided not to engage in any contact with the officer, even after looking at him directly, and instead continued with what he was doing, (T. at 16, 32), the incident went beyond the realm of the "casual encounter." A reasonable person in Steffes' position would not have felt free to leave, to ignore the officer's requests, or to otherwise terminate the encounter. Furthermore, the action of telling Steffes to turn his

radio down, after he complied with opening the door further shows that this was not a "casual encounter" as the State has argued. (T. at 36-38). While it is not entirely clear, it seems that Officer Craig may not have noticed the odor of alcohol until after he instructed Steffes to turn down the radio. (T. at 37-39).

[¶ 23] At the District Court level, the State cited Abernathey, 2009 ND 122, as authority in support of its argument. However, Abernathey does not support the State's contentions. Abernathey involved an officer's approach to a stopped vehicle. The issue was whether the officer escalated a "casual encounter" into a seizure by ordering Abernathey "to do something, by demanding a response, or by threatening [him] with a show of authority or command." Id. at ¶ 9 (citing Jerome, 2002 ND at ¶ 9)).

[¶ 24] The Abernathey officer approached a parked vehicle and asked the driver: "can I please talk to you?" followed by "please unlock the door and come on out" so they could talk. Abernathey 2009 ND at ¶13. The officer then noticed bloodshot eyes; the driver fumbled with the door and appeared confused. Id. The officer then asked: "could you please unlock the door and talk to me." Id. The Supreme Court stated:

> Assuming a seizure occurred the second time Keesler asked Abernathey to unlock the door and exit the pickup, Keesler had by then already observed enough to give him reasonable and articulable suspicion of actual physical control. Keesler was dispatched to investigate an after-hour disturbance at a bar and observed Abernathey's pickup, the only vehicle in the parking lot. When Keesler spoke to Abernathey, Keesler observed Abernathey's bloodshot eyes, his "confused" state, and his "slurred" speech. Under the totality of the circumstances, we conclude Keesler had a reasonable and articulable suspicion that Abernathey was in actual physical control of a vehicle while under the influence of alcohol before Keesler made the second request to open the door and exit the vehicle.

Id. at ¶16.

[¶ 25] The Abernathey Court's ruling seems to support Steffes' position. In the case at bar, there was no "please" that was asked of Steffes, but rather there was a knock

on the window, which by itself is a seizure. Wibben, 413 N.W.2d 329 (1987) (citing Adams v. Williams, 407 U.S. 143 (1972)).

[¶ 26] Further distinguishing this case from Abernathey, is the fact that after the initial verbal request and finger gesture directing Steffes to open his window, Steffes looked away, declining the officer's request. (T. 34-36). The officer then made a second knock, gesture and verbal request, followed by an order to turn down the radio. (T. at 36). Unlike the facts in Abernathey, Steffes' did not voluntary respond to the officer's initial attempt to engage in conversation. Moreover, Officer Craig did not see any evidence of impairment or alcohol consumption until after Steffes' opened the door.

[¶ 27] It is conceivable that the State will argue that the anonymous tip created a reasonable suspicion for the seizure. Anonymous tips can form the basis for reasonable suspicion only if accompanied by sufficient indicia of reliability. Florida v. J.L. 529 U.S. 266, 270 (2000). "Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated 'an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity,' J.L. 529 U.S. at 270, (quoting Alabama v. White, 496 U.S. 325 (1990)).

[¶ 28] The United States Supreme Court has decided that an anonymous informant's ability to simply identify a particular person does not render the tip sufficiently reliable to give rise to even a reasonable suspicion. As the Court explained:

> An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

J.L., 529 U.S. at 272.

[¶ 29] In the present case, the facts presented are that the officer was dispatched to the location of the bar where Steffes was located. (T. at 10). The officer was told by dispatch that "someone had called in and said a male that appeared intoxicated was walking to the parking lot and getting into a car." (T. at 11). The officer was not given the identity of the person that made the call. Id. The dispatcher provided the officer with a vehicle description and a North Dakota license number, which the officer corroborated after he arrived on the scene. (T. at 11, 12).

[¶ 30] The facts show that the extent of Officer Craig's "corroboration" of the anonymous tip is his confirmation of North Dakota license information and the car. Craig didn't go inside of the bar to confirm any information that was alleged by the caller. Craig never saw any potential indicia of intoxication exhibited by Steffes. There was no indication of any physical movements by Steffes witnessed by Craig to confirm the caller's allegations of intoxication before he approached Steffes' car. The information that Officer Craig relied upon in making an investigatory stop of Steffes' car had absolutely no indicia of reliability that he was engaging in criminal behavior at the time of his seizure.

[¶ 31] Officer Craig did nothing to corroborate the anonymous tip other than observe the "subject's readily observable location and appearance." As such, the anonymous tip did not create a reasonable suspicion to justify a seizure.

[¶ 32] The officer performed a warrantless investigatory stop and seizure upon Steffes in the absence of any reasonable and articulable suspicion that Steffes was or was about to be involved with criminal activity. According to the officer, Steffes' vehicle was

lawfully parked in a parking lot, among other vehicles, which was not uncommon for that time of day. (T. at 31).

[¶ 33] The state failed in its burden to establish the Terry exception to the warrant requirement of the Fourth Amendment to the United States Constitution and Article I, Section 8 of the North Dakota Constitution. For these reasons the actions of Officer Craig amounted to a seizure without a reasonable articulable. As such, all evidence obtained as a result of the seizure should have been suppressed.

CONCLUSION

[¶ 34] For all of the foregoing reasons, Kelly Michael Steffes asks this Court to reverse the lower court's denial of his motion to suppress and to allow him to withdraw his guilty plea.

Dated this the 5th day of July, 2010.

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[¶ 35] CERTIFICATE OF SERVICE

A copy of this document and the Appendix to Brief of Appellant in pdf format were e-filed with the North Dakota Supreme Court and served upon Fritz Fremgen, pursuant to Administrative Order 14 on the 5th day of July, 2010. Specifically, the preceding Brief of Appellant and the Appendix to Brief of Appellant were electronically filed and served as follows:

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