

20110295

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Myllinda R. Troxel,  
Plaintiff/Appellant,

v.

Francis Ziegler, Director, Department  
of Transportation,  
Defendant/Appellee.

Supreme Ct. No. 20110295

District Ct. No. 30-2011-CV-00432

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STATE OF NORTH DAKOTA

APPEAL FROM THE DISTRICT COURT  
MORTON COUNTY, NORTH DAKOTA  
SOUTH CENTRAL JUDICIAL DISTRICT

HONORABLE DAVID E. REICH

BRIEF OF APPELLEE

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STATE OF NORTH DAKOTA

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	)	
Plaintiff/Appellant,	)	<b>Supreme Ct. No. 20110295</b>
	)	
v.	)	<b>District Ct. No. 30-2011-CV-00482</b>
	)	
Francis Ziegler, Director, Department	)	
of Transportation,	)	
	)	
Defendant/Appellee.	)	

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## STATEMENT OF ISSUE

After locating a vehicle identified by dispatch as possibly being operated by a drunk driver, Officer Widicker observed the vehicle being driven under the posted speed limit and close to the curb. The vehicle swerved a few times into the driving lane and back to the curb then later stopped too far back from a stop sign. Officer Widicker stopped the vehicle. Did the officer have reasonable grounds to stop the vehicle operated by Troxel?

## STATEMENT OF CASE

On April 7, 2011, Officer Rick Widicker (Officer Widicker) of the Morton County Police Department arrested Mylinda R. Troxel (Troxel) for driving a vehicle while under the influence of intoxicating liquor (DUI). App. 39. A Report and Notice, including a temporary operator's permit, was issued to Troxel after chemical test results indicated Troxel's blood alcohol concentration was .18 percent by weight. Id. The Report and Notice notified Troxel of the Department's intent to suspend her driving privileges. Id.

In response to the Report and Notice, Troxel requested an administrative hearing. App. 44. The hearing was held on May 20, 2011. App. 5, 46. In accordance with N.D.C.C. § 39-20-05(2) the hearing officer considered four broad issues, as follows:

- (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 eighteen one-hundredths of one percent by weight.

App. 5, 46.

Evidence was admitted at the hearing showing Troxel had two previous implied consent violations. App. 45. Following the hearing, the hearing officer issued her findings of fact, conclusions of law, and decision suspending Troxel's driving privileges for a period of three years. App. 35-37, 62. Troxel requested judicial review of the hearing officer's decision. App. 64-65.

#### **STATEMENT OF FACTS**

On April 4, 2011, at approximately 10:40 p.m. Officer Widicker was dispatched to the location of a vehicle being driven by a person reported to be possibly under the influence of alcohol. App. 9. The caller indicated the vehicle was being driven from an address in the southeast of Mandan to a local bar to pick up more alcohol. App. 9, 19. The vehicle's description and license number were also reported and the caller identified the suspect's name as Mylinda Troxel. App. 10. Officer Widicker proceeded to the area traveling northbound on 8<sup>th</sup> Avenue Southeast when he passed the vehicle in question which was traveling southbound at around the 1500 block. Id. Officer Widicker turned around to follow the vehicle. Id. He momentarily lost sight of the vehicle as it descended down a hill. App. 21, 26-27. After traveling down the street Officer Widicker could see the vehicle ahead, as there were no other cars in front of the patrol vehicle and he had a good line of sight. App. 10, 25, 28.

Officer Widicker saw the vehicle driving slowly near the right hand curb. App. 10. The speed limit in the area was 25 miles per hour. App. 24. The vehicle swerved back and forth into the driving lane and then back to the curb. App. 10, 23. The vehicle did this at least twice. App. 22. At one point Officer Widicker saw dust flying up. App. 10. He testified, "[A]t first I thought the vehicle had crashed into the curb, but I don't believe it actually did." Id. Officer Widicker considered the driving to be erratic. App. 29, 39. As the vehicle approached 19<sup>th</sup> Street but before it reached the intersection the vehicle came to a complete stop while it was still over on the right side of the street, but then it took off again and crossed the intersection. App. 11, 25, 27. At the 19<sup>th</sup> Street intersection Officer Widicker caught up to the vehicle so that he was directly behind it. App. 21-22.

After the vehicle went through the intersection, Officer Widicker activated his patrol car's emergency lights and initiated a traffic stop. App. 11. The vehicle drove for about two more blocks after the officer initiated his emergency lights. Id. It even sped up briefly prior to pulling over and stopping. Id.

Officer Widicker approached the driver and identified her as Troxel. App. 12. While conversing with Troxel, Officer Widicker could smell the odor of an alcoholic beverage coming from inside the vehicle and he noticed that Troxel's speech was slow and slurred and her movements were slow. Id. Troxel attempted several field sobriety tests. App. 13-15. She failed the horizontal gaze nystagmus standardized field sobriety test exhibiting all six clues. App. 13. Troxel attempted the walk-and-turn test but due to Troxel's poor balance Officer



Widicker discontinued the test for her safety. App. 14. Troxel was also unable to complete the one-leg-stand test. App. 15.

Officer Widicker placed Troxel under arrest for driving under the influence. Id. Troxel agreed to blood testing. Id. The results of the blood test showed her blood alcohol concentration was .18% by weight. App. 18, 41.

#### **PROCEEDINGS ON APPEAL TO DISTRICT COURT**

Troxel appealed the administrative decision to the Morton County District Court. App. 64. In the Appellant's Notice of Appeal and Specifications of Error, Troxel alleged that "[t]he Department and its Hearing Officer erred when it found there were reasonable grounds to believe Appellant was driving under the influence." Id.

With respect to Troxel's contention that there was no reasonable and articulable suspicion for the officer to stop her vehicle, the hearing officer found as follows:

Officer Rick Widicker was dispatched to the location of a vehicle that had been reported was being driven by a person who was possibly under the influence of alcohol. The vehicle's description and license number were provided by the caller. Officer Rick Widicker met the described vehicle, turned around, and followed it. He saw it being driven slowly, close to the curb, almost striking the curb. He saw the vehicle swerve into the driving lane and then back to the curb at least twice. He saw it make an improper stop, stopping too far back from the stop sign. He stopped the vehicle.

App. 35, I. 18 – App. 36, I. 3. The hearing officer concluded, "Officer Widicker had a proper basis to stop Mylinda Troxel, then had reasonable grounds to believe that she had been driving in violation of N.D.C.C. § 39-08-01 or equivalent ordinance." App. 32, II. 20-23.

Judge Reich affirmed the hearing officer's decision suspending Troxel's driving privileges for three years. App. 71-76. In regards to whether Officer Widicker had reasonable and articulable suspicion to stop Troxel, Judge Reich ruled:

The totality of the circumstances, which the DOT contends establish a reasonable and articulable suspicion for the traffic stop of Troxel's vehicle, are contained in Officer Widicker's testimony set forth above. The anonymous tip did not provide reasonable and articulable suspicion. However, Officer Widicker's testimony provided his independent observations of Troxel's driving which corroborated the information provided by the informant.

Troxel contends that because the Court in the criminal proceedings determined the traffic stop to be illegal and suppressed evidence resulting from the stop, this Court should reach a similar conclusion. However, this Court is not bound by the Court's ruling in the criminal cases. The Order in those cases merely states the Court's ruling, but does not discuss the evidence presented at the suppression hearing. It is unknown what facts presented to the Court in the suppression hearing and what facts the Court relied upon in reaching its decision.

Based upon an objective standard and taking into consideration the totality of the circumstances as related in Officer Widicker's testimony, the Court determines that Officer Widicker had reasonable and articulable suspicion to stop Troxel's vehicle. The administrative hearing officer's decision in this matter is **AFFIRMED**.

App. 75-76.

Judgment was entered on September 8, 2011. App. 78. Troxel appealed from the Judgment to this Court. App. 80. The Department requests this Court affirm the judgment of the Morton County District Court and the administrative suspending of Troxel's driving privileges for a period of three years.

## STANDARD OF REVIEW

“An appeal from a district court decision reviewing an administrative license suspension is governed by the Administrative Agencies Practice Act, Chapter 28-32, N.D.C.C.” McPeak v. Moore, 545 N.W.2d 761, 762 (N.D. 1996). “This Court reviews the 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) (citing Erickson v. Dir., N.D. Dep’t of Transp., 507 N.W.2d 537, 539 (N.D. 1993)). “However, the district court’s analysis is entitled to respect if its reasoning is sound.” Kraft v. State Bd. of Nursing, 2001 ND 131, ¶ 10, 631 N.W.2d 572.

This Court’s review “is limited to whether (1) the findings of fact are supported by a preponderance of the evidence; (2) the conclusions of law are sustained by the findings of fact; and (3) the agency’s decision is supported by the conclusions of law.” McPeak, 545 N.W.2d at 762 (citing Zimmerman v. N.D. Dep’t of Transp. Dir., 543 N.W.2d 479, 481 (N.D. 1996)).

Findings by an administrative agency are sufficient if the reviewing court is able to understand the basis of the fact finder’s decision. In re Boschee, 347 N.W.2d 331, 336 (N.D. 1984). A court must not make independent findings of fact or substitute its judgment for that of the agency. Bryl v. Backes, 477 N.W.2d 809, 811 (N.D. 1991). Rather, a reviewing court determines only “whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record.” Id. (citation omitted).

## LAW AND ARGUMENT

### **Officer Widicker had sufficient grounds to stop Troxel's vehicle.**

When law enforcement stops a vehicle and temporarily detains an individual, the temporary detention is a "seizure" within the Fourth Amendment. Whren v. United States, 517 U.S. 806, 809-10 (1996). For this reason, "[a]n automobile stop is . . . subject to the constitutional imperative that it not be 'unreasonable' under the circumstances." Id. at 810.

This Court has summarized the reasonableness standard:

Unlike the probable cause standard where it is necessary that a prudent person believe that the suspect had committed or was committing an offense, a stop of a person or vehicle requires only suspicion that a law has been violated or is being violated. However, this suspicion must be 'articulable and reasonable.' The articulable aspect requires that the stop be justified with more than just a vague 'hunch' or other non-objective facts; and the reasonable aspect means that the articulable facts must produce, by reasonable inference, a reasonable suspicion of unlawful conduct.

State v. VandeHoven, 388 N.W.2d 857, 858 (N.D. 1986) (internal citations omitted).

"The ultimate conclusion of whether those 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. N.D. Dep't of Transp., 505 N.W.2d 111, 112 (N.D. 1993). It is, however, "well settled," that traffic violations, even "common or minor" ones "constitute prohibited conduct which provide officers with requisite suspicion for conducting investigatory stops." Zimmerman v. N.D. Dept. of Transp., 543 N.W.2d 479, 482 (N.D. 1996).

A law enforcement officer's reasonable belief that a person may be committing a traffic violation is sufficient to make a traffic stop. See State v. Oliver, 2006 ND 241, ¶¶ 7-10, 724 N.W.2d 114. Oliver provides that reasonable suspicion of even a "possible" violation provides sufficient grounds for a lawful stop. Similarly, a lawful stop, under the Fourth Amendment merely "requires 'some minimal level of objective justification.'" City of Fargo v. Ovind, 1998 ND 69, ¶ 7, 575 N.W.2d 901 (quoting State v. Robertsdah], 512 N.W.2d 427 (N.D. 1994) (emphasis added.))

It follows that the reasonable suspicion standard is easier to satisfy than the standard for an arrest or conviction. See City of Grand Forks v. Egley, 542 N.W.2d 104, 106 (N.D. 1996) ("Reasonable and articulable suspicion is less stringent than probable cause.") In fact, "[p]robable cause is a much more exacting standard" than the reasonable-and-articulable suspicion standard. State v. Ova, 539 N.W.2d 857, 859 (N.D. 1995) (emphasis added.) "The reasonable suspicion standard does not require an officer to see a motorist violating a traffic law or to rule out every potential innocent excuse for the behavior in question before stopping a vehicle for investigation." Kappel v. N.D. Dep't of Transp., 1999 ND 213, ¶ 10, 602 N.W.2d 718.

From these cases it is clear that for purposes of determining whether there was reasonable suspicion for the stop, it is immaterial whether Officer Widicker even had probable cause to believe that Troxel had committed a traffic violation. The Wisconsin courts have elaborated on this same analysis applied by this Court. For example, one court has observed, "[r]easonable suspicion does not

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require that the officer have grounds to issue a traffic citation in order to make a traffic stop.” State v. Westberg, 659 N.W.2d 507 (Wis. Ct. App. 2003). Otherwise, as the Wisconsin Supreme Court observed, “there could never be investigative stops unless there was simultaneously sufficient grounds to make an arrest. That is not the law.” State v. Waldner, 556 N.W.2d 681, 685 (Wis. 1996).

“The Fourth Amendment does not require a police officer who lacks the precise level of information necessary for probable cause to arrest to simply shrug his or her shoulders and thus possibly allow a crime to occur or a criminal to escape.” Id. “Reasonable suspicion need only be one reasonable interpretation of the facts. It does not have to be more likely than not.” Westberg at ¶ 12.

The Wisconsin Supreme Court’s decision in Waldner illustrates the parameters of the reasonable suspicion standard. In Waldner, a police officer saw a vehicle stop briefly at an intersection at which there was no stop sign or light and then turn and accelerate to 20 to 25 miles per hour in several seconds. Waldner, 556 N.W.2d at 683. The vehicle then parked legally on the street and the driver opened his door and poured a mixture of liquid and ice from a plastic cup onto the pavement. Id. The police officer approached the driver as he walked from the vehicle and asked him to stop. Id. A DUI arrest followed. Id.

Waldner argued on appeal that “lawful acts cannot form the basis for a reasonable suspicion justifying a stop.” Id. at 685. The Wisconsin Supreme Court replied that “[w]e agree that these acts by themselves were lawful and that

each could well have innocent explanations. But that is not determinative.” Id.

The Wisconsin Supreme Court continued as follows:

Suspicious conduct by its very nature is ambiguous, and the principal function of the investigative stop is to quickly resolve that ambiguity. Thus, when a police officer observes lawful but suspicious conduct, if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for the purpose of inquiry. Police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop.

Id. (emphasis added). Applying this standard, the Wisconsin Supreme Court concluded that “it was entirely reasonable for [the police officer] to stop Waldner and make inquiry.” Id.

In this case, Officer Widicker had several grounds to stop Troxel's vehicle. Troxel suggests that none of Officer Widicker's observations standing alone justify the stop of the vehicle. However, the Supreme Court has observed as follows:

[L]aw enforcement officers are not required ‘to point to a single factor which, standing alone, signals a potential violation of the law’, but rather ‘are to assess the situation as it unfolds and, based upon inferences and deductions drawn from their experience and training, make the determination whether all of the circumstances viewed together create a reasonable suspicion of potential criminal activity.

State v. Hornaday, 477 N.W.2d 245, 247 (N.D. 1991) (quoting Geiger v. Backes, 444 N.W.2d 692, 693 (N.D. 1980)). Hence, arguing the factors considered separately would not have provided sufficient grounds for a vehicle stop is pointless.

First, there was an objective basis for reasonable and articulable suspicion of a traffic violation. For example, N.D.C.C. § 39-10-17(1) requires that “[a] vehicle must be driven as nearly as practicable entirely within a single lane.” It is legally immaterial whether Officer Widicker subjectively had N.D.C.C. § 39-10-17(1) in mind. It is uncontested that Troxel was driving close to the right hand curb. Officer Widicker testified that at one point while he was following Troxel he saw dust flying up from Troxel’s vehicle. App. 10.

In addition, there was reasonable and articulable suspicion of either impaired or erratic driving. This Court has held that information from a tip may provide the factual basis for a stop. See State v. Miller, 510 N.W.2d 638, 640 (N.D. 1994). In Miller the Court stated:

In evaluating the factual basis for a stop, we consider the totality of the circumstances. This includes the quantity, or content, and quality, or degree of reliability, of the information available to the officer. Although the totality-of-the-circumstances approach makes categorization difficult, our cases involving reasonable suspicion arising from an informant’s tip demonstrate the inverse relationship between quantity and quality, and may be analyzed generally according to the type of tip and, hence, its reliability. As a general rule, the lesser the quality or reliability of the tip, the greater the quantity of information required to raise a reasonable suspicion.

Id. (internal citations omitted). While this tip was anonymous and of a lesser quality than a face-to-face tip, the quantity of the information was specific and the officer corroborated the information. The reporting party identified Troxel by name, identified her vehicle by its make and license plate number. App. 9-10. The caller also indicated Troxel was leaving her residence and heading to a bar to pickup more alcohol and was possibly intoxicated. App. 9, 19. The Miller



court explained the type of corroboration needed for this type of tip in order for it to provide an officer reasonable suspicion to initiate a stop.

Typically, our impaired driver cases involve tips that give a description and the location of the vehicle – "easily obtained facts and conditions existing at the time of the tip" and available to the general public. Corroboration of this type of information does not increase the reliability of the tip. Therefore, our cases have required that the officer corroborate the tip by observing some behavior on the part of the driver, either illegal or indicative of impairment, that alerts the officer to a possible violation.

510 N.W.2d at 642 (emphasis added). It is true that Officer Widicker would not have been able to legally have stopped Troxel's vehicle if he had simply identified Troxel's vehicle as the reported vehicle. However, Officer Widicker did not initiate his stop until he had corroborated that Troxel was likely driving while impaired.

The record shows that after seeing Troxel's vehicle Officer Widicker turned around to follow it and observed Troxel driving slowly, below the 25 mile per hour posted speed limit. App. 10, 24. Troxel's vehicle was being driven near the curb of the street. App. 10. Officer Widicker watched as Troxel's vehicle swerved into the driving lane and back to the curb on at least two occasions. App. 10, 22-23. Officer Widicker also saw Troxel's vehicle briefly stop on the side of the street prior to the 19<sup>th</sup> Street intersection then proceed through the intersection. App. 11, 25, 27. These observations by Officer Widicker were indicative of impairment.

With respect to the law enforcement officer's observations, Troxel failed to offer any substantive evidence to refute the officer's testimony. As a result of Troxel's failure to testify and present substantive contrary evidence, the hearing

officer was allowed to draw an unfavorable inference. See Geiger v. Hjelle, 396 N.W.2d 302, 303 (N.D. 1986) (“[f]ailure of a party to testify permits an unfavorable inference in a civil proceeding”); Pladson v. Hjelle, 368 N.W.2d 508, 511 (N.D. 1985) (hearing officer can consider lack of contrary evidence). As expressed by this Court in Kappel v. Dir., Dep’t of Transp., 1999 ND 213, ¶ 10, 602 N.W.2d 718, a law enforcement officer is not required “to rule out every potential innocent excuse for the behavior in question before stopping a vehicle for investigation.” Troxel’s alternative explanations to excuse the manner in which she operated her vehicle are not persuasive.

Specifically Troxel argues she was conforming to the law by driving close to the curb to allow the officer to pass her as a Mandan Municipal ordinance allows. However, Troxel did not testify and there is no evidence in the record to indicate that Troxel was even aware Officer Widicker was approaching and that her reason for driving close to the curb was to allow his vehicle to pass.

In this case, a reasonable person in Officer Widicker’s position would have been justified based upon the undisputed, objective manifestations observed by the law enforcement officer to suspect Troxel was engaged in unlawful activity. The law enforcement officer had a reasonable and articulable suspicion to make an investigative stop of Troxel’s vehicle.

### **CONCLUSION**

The Department respectfully requests this Court affirm judgment of the Morton County District Court and affirm the hearing officer’s decision suspending Troxel’s driving privileges three years.

Dated this 15<sup>th</sup> day of December, 2011.

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IN THE SUPREME COURT  
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Plaintiff/Appellant,	)	<b>Supreme Ct. No. 20110295</b>
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v.	)	<b>District Ct. No. 30-2011-CV-00482</b>
	)	
Francis Ziegler, Director Department of Transportation,	)	
	)	
Defendant/Appellee.	)	

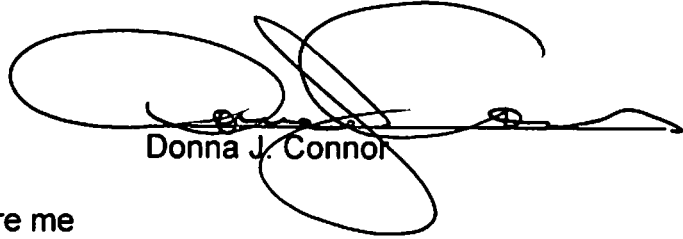
STATE OF NORTH DAKOTA    )  
  ) ss.  
COUNTY OF BURLEIGH        )

Donna J. Connor states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.
  
2. I am of legal age and on the 15<sup>th</sup> day of December, 2011, I served the attached **BRIEF OF APPELLEE** upon Myllinda R. Troxel, by and through her attorney Monte Rogneby, by placing a true and correct copy thereof in an envelope addressed as follows:


Monte L. Rogneby  
Attorney at Law  
Vogel Law Firm  
P.O. Box 2097  
Bismarck, ND 58502-2097

and depositing the same, with postage prepaid, in the United States mail at  
Bismarck, North Dakota.



Donna J. Connor

Subscribed and sworn to before me  
this 15<sup>th</sup> day of December, 2011.



Notary Public

