

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

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My linda Rene Troxel,

Appellant,

vs.

Francis Ziegler, Director, Department of  
Transportation,

Appellee.

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**SUPREME COURT NO. 20110295**

Civil No. 30-2011-CV-00482

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ON APPEAL FROM A DISTRICT COURT JUDGMENT  
AFFIRMING AN ADMINISTRATIVE DECISION OF THE  
NORTH DAKOTA DEPARTMENT OF TRANSPORTATION  
MORTON COUNTY, NORTH DAKOTA

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**BRIEF OF APPELLANT**

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**[¶ 4] STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

1. Did Widicker lack reasonable suspicion and therefore did the Department err when it suspended driving privileges?

**STATEMENT OF THE CASE**

[¶ 5] Appellant Mylinda Troxel appeals from the North Dakota Department of Transportation's May 20, 2011, decision suspending her North Dakota driving privileges for three years. (A at 62.) The Department erred when it concluded the law enforcement officer who stopped Troxel's vehicle had reasonable suspicion to stop. As a matter of law, Troxel's driving was perfectly lawful. As there was no reasonable suspicion to support the stop, the stop of Troxel's vehicle was illegal, and the Department's decision should be reversed.

[¶ 6] At approximately 10:40 p.m. on April 7, 2011, Officer Rick Widicker stopped Troxel's vehicle and subsequently arrested her for driving under the influence of alcohol. (Appendix ("A") at 11; Transcript ("Tr.") 11:13-16.) Troxel submitted to a blood test and on April 18, 2011, Widicker served her with a Report and Notice form indicating the Department's intention to suspend her driving privileges. (A at 39.)

[¶ 7] On April 25, 2011, Troxel requested an administrative hearing. (A at 43.)

[¶ 8] The Department conducted an administrative hearing on May 20, 2011. (A at 3.) Widicker testified on behalf of the Department. (A at 8.) Troxel challenged whether Widicker had reasonable suspicion to stop Troxel's vehicle and argued that because the stop was illegal, the Department's case must be dismissed. (A at 28-35; Tr. 28:16-31:11.)

[¶ 9] The Department issued its Hearing Officer's Decision suspending Troxel's driving privileges on May 20, 2011. (A at 62.) The Department concluded Widicker had a proper basis to stop Troxel's vehicle and suspended her license for three years. (A at 62.)

[¶ 10] On May 25, 2011, Troxel filed with the Morton County District Court her Notice of Appeal and Specifications of Error, challenging the Department's order suspending her driving privileges. (A at 64-65.)

[¶ 11] As a result of her arrest, Troxel was charged with the crime of driving under the influence of alcohol in Morton County, North Dakota. (A at 67; Affidavit of Christopher Rausch.) As part of the criminal matter, Troxel moved to suppress all evidence resulting from the stop of her vehicle. (A at 67.) On June 21, 2011, the Court in the criminal case granted the motion to suppress after it concluded Widicker's stop of Troxel's vehicle was illegal. (A at 69.)

[¶ 12] After receiving briefs from the parties, including the suppression Order from the criminal case, on August 8, 2011, the District Court issued its Memorandum Decision and Order affirming the Department's suspension. (A at 71-76.) An Order for Judgment and Judgment were filed on September 8, 2011. (A at 77-78.) Notice of Entry was filed on September 12, 2011. (A at 79.)

[¶ 13] Troxel perfected her appeal to this Court by filing her Notice of Appeal on October 7, 2011. (A at 80.)

## STATEMENT OF THE FACTS

[¶ 14] At approximately 10:40 p.m. on April 7, 2011, Widicker was on duty in Mandan, North Dakota, when he overheard information from police dispatch that an unknown person had reported a possible intoxicated driver in the southeast part of Mandan, and provided a description of a vehicle and the driver. (A at 8, 9-10; Tr. 4:18-23; 5:11-12; 5:25 – 6:6.) Widicker proceeded northbound on 8th Avenue SE in Mandan when he passed a vehicle matching the description travelling southbound, at approximately the 1500 block. (A at 10; Tr. 6:11-13.) Widicker would later identify Troxel as the driver of that vehicle. (A at 12; Tr. 8:1-3.)

[¶ 15] After passing the vehicle, Widicker turned his cruiser around to begin following Troxel. By the time Widicker turned around, Troxel's vehicle was "several blocks ahead" of him. (A at 10; Tr. 6:16-18.) Regarding the distance separating the two vehicles, Widicker stated:

I don't know exactly how many blocks because the street, as it goes down the hill, like I said, there's a field on one side and kind of a big ravine type thing on the other. There's . . . there's no houses, and there's actually . . . there's no street signs for several blocks . . . So I don't know exactly how many blocks it was.

(A at 21; Tr. 17:2-9.)

[¶ 16] As he pursued Troxel at a high rate of speed, Widicker saw Troxel's vehicle drive slowly and near the right-hand curb. (A at 10; Tr. 6:18-21.) Eighth Avenue is not marked with a mandatory minimum speed limit. (A at 24; Tr. 20:24-25.) During the entire time Widicker pursued Troxel's car, no other vehicle was present in the southbound lane of 8th Avenue. (A at 25; Tr. 21:7-9.)

[¶ 17] Widicker stated he believed he saw the vehicle move toward the driving lane and back toward the curb. (A at 10; Tr. 6:21-23.) Widicker could not remember how many times the vehicle allegedly moved away from the curb. (A at 11; Tr. 7:2-4.) Furthermore, he testified he could not remember how far he was behind Troxel when he thought he saw her vehicle move away from the curb. (A at 26; Tr. 22:1-6.) However, he reiterated that he was a few blocks behind Troxel as he rapidly caught up to her vehicle. (A at 26; Tr. 22:7-11.) Moreover, he testified about the poor visibility on sections of 8th Avenue which impaired his ability to witness Troxel's driving:

A: I don't remember what [her vehicle] was doing when I first turned around. I . . . I had to . . . the . . . the 1500 block of . . . 8th Avenue, there's not a real good line of sight from that exact location. I had to turn around and drive down the street a little ways before I could actually see where her vehicle was at.

Q: Okay.

A: But like I said, by that time, she was already a few blocks ahead of me . . . I guess off the top of my head, I don't remember exactly where she was swerving towards [the curb] when I first caught sight of her.

Q: Okay. So it's possible that . . . when you say that you'd saw the car moving [away from the curb], it could've been possible that that was the . . . the time when she moved towards the side of the road?

A: It could've been the first time she moved towards the side of the road . . .

Q: You're just not sure, at this point?

A: I . . . I don't, I mean yeah. I did . . . I didn't have sight of the vehicle, and I didn't have a clear sight of the vehicle during the entire process.

(A at 26-27; Tr. 22:23 – 23:25) (emphasis added.)



[¶ 18] Finally, Widicker testified that, when Troxel's vehicle reached the intersection of 8<sup>th</sup> Avenue and 19th Street, it was still travelling near the right-hand curb before it appeared to stop "before" the stop sign and then proceed through the intersection. (A at 11; Tr. 7:9-15.) However, he testified he did not know how far back Troxel was from the stop sign when her vehicle stopped at the intersection. (A at 29; Tr. 25:11-12.) In fact, Widicker was "still catching up to" Troxel at the time he saw her vehicle stop, and did not actually get right behind Troxel's vehicle until after the 8th Avenue/ 19<sup>th</sup> Street intersection. (A at 25; Tr. 21:16-25.)

[¶ 19] After the vehicle drove through the intersection, Widicker activated his emergency lights and initiated a traffic stop of the vehicle. (A at 11; Tr. 7:17-19.) After further investigation, Widicker arrested Troxel for driving under the influence of alcohol. (A at 15; Tr. 11:13-16.)

[¶ 20] At the close of the administrative hearing, Troxel argued Widicker lacked reasonable suspicion to stop Troxel's vehicle. (A at 32-35; Tr. 28:20 – 31:11.) Troxel argued that, even if the officer's observations of Troxel's driving were accurate, her driving was not only legal, but entirely in accordance with the law. (A at 33-35; Tr. 29:9 – 31:11.) Troxel contended the Department had not met its burden of proof given the lack of clarity in the officer's observations, including his inability to recollect when he witnessed certain driving behavior, or to what extent he witnessed such behavior. (Id.)

[¶ 21] On May 20, 2011, the same day as the hearing, Administrative Hearing Officer Mary Ellen Varvel issued her decision suspending Troxel's driving privileges for three years. (A at 62; Hearing Officer's Decision.) While the Hearing Officer recounted

Widicker's observations, she did not address any of Troxel's arguments except to state simply that, "Officer Widicker had a proper basis to stop MyLinda [sic] Troxel." (Id.)

## **LAW AND ARGUMENT**

### **I. STANDARD OF REVIEW.**

[¶ 22] Appeals from the Department of Transportation are governed by the Administrative Agencies Practices Act. Wolfer v. North Dakota Dept. of Transp., 2010 ND 59, ¶ 10, 780 N.W.2d 645. This Court reviews the appeal based on the record filed with the Court, and must affirm the order of the agency unless it finds that any of the following are 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 the [Administrative Agencies Practices Act] 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.

N.D.C.C. § 28-32-46. An agency's decisions on questions of law are fully reviewable.

Kiecker v. N.D. Dept. of Transp., 2005 ND 23, ¶ 8, 691 N.W.2d 266.

**II. WIDICKER LACKED REASONABLE SUSPICION AND THEREFORE THE DEPARTMENT ERRED WHEN IT SUSPENDED TROXEL'S DRIVING PRIVILEGES.**

[¶ 23] The Department erred when it suspended Troxel's driving privileges. Widicker did not possess reasonable suspicion to support the stop and seizure of Troxel's vehicle. Specifically, Widicker's testimony does not lay a basis for the stop, as his testimony was vague and unclear as to the timing and extent of his observations. Further, even if Widicker's observations were correct, Troxel's driving was in accordance with the law, and as such could not form the basis for a traffic stop.

[¶ 24] The Court in the criminal matter properly concluded the stop was illegal. Although the decision in that case is not binding precedent in the present appeal, it is persuasive authority for the Court, particularly since the criminal matter was decided not upon merely analogous facts, but the exact same facts as are contemplated in this appeal. See St. Benedict's Health Center v. North Dakota Dept. of Human Services, 2004 ND 63, ¶ 12, 677 N.W.2d 202 (noting persuasive authority of un-appealed district court decisions, and holding such decisions may be res judicata as to the rights of parties in that action).

[¶ 25] The Fourth Amendment of the United States Constitution and Article I, Section 8 of the North Dakota Constitution require all searches and seizures to be reasonable. State v. Thompson, 2011 ND 11, ¶ 8, 793 N.W.2d 185. The traffic stop in this case was a seizure under the Fourth Amendment. Id.

[¶ 26] An investigative stop of an automobile and its occupants may be upheld if an officer had reasonable suspicion the motorist violated the law. State v. Washington, 2007 ND 138, ¶ 11, 737 N.W.2d 382. Reasonable suspicion requires more than a mere

hunch, and exists when a reasonable person in the officer's position would be justified by some objective manifestation to suspect potential unlawful activity. Id.

[¶ 27] When an officer receives a tip of possible criminal behavior, the officer is required to corroborate the tip by observing behavior on the part of the driver that alerts the officer to a possible violation. City of Fargo v. Ovind, 1998 ND 69, ¶ 11, 575 N.W.2d 901. The bare assertion of a possible reckless or drunk driver is not sufficient to justify a stop. Gabel v. North Dakota Dept. of Transp., 2006 ND 178, ¶ 10, 720 N.W.2d 433. When there is less quality or reliability to a tip, a greater quantity of information is required in order to create reasonable suspicion. State v. Boline, 1998 ND 67, ¶ 32, 575 N.W.2d 906. A face-to-face informant is more reliable than an anonymous tipster. Id.

[¶ 28] Here, Widicker did not obtain his information from a known informant. Rather, he heard second-hand information from dispatch of a possible drunk driver, and set out to investigate. As such, Widicker was required to obtain a "greater quantity of information" in order to form reasonable suspicion to justify the stop. The Department essentially found Widicker obtained reasonable suspicion from three "facts": (1) that the vehicle was driving slowly and near the right-hand curb; (2) that the vehicle moved from the lane toward the curb and back into the lane; and (3) that the vehicle appeared to stop prior to the intersection. However, Widicker's testimony on these actions does not form a proper basis for the stop, as he was unable to testify with clarity of when he saw these alleged acts occur, or to what extent any act occurred. Further, assuming the veracity of Widicker's testimony, each action would have been specifically in conformance with the law, and as such does not create grounds to initiate a traffic stop.

A. **The Allegation That Troxel Was Driving Slowly Near the Right-Hand Curb.**

[¶ 29] The Department noted Widicker’s stop was supported by his testimony that Troxel was driving slowly near the right-hand curb of the road. First, the street upon which Troxel was travelling does not have a mandatory minimum speed limit, and there was no other traffic on the southbound lane of 8th Avenue SE at the time of the stop. Therefore, had Troxel been travelling at a speed slower than the posted speed limit, it was not itself a traffic violation. See Mandan Municipal Ordinance § 20-05-06 (noting that driving at a slow speed is a traffic violation only if it impedes the normal and reasonable movement of traffic or when there is a posted mandatory minimum speed limit). Moreover, the “mere fact that a driver is travelling at a slower than usual speed on a roadway does not by itself create a reasonable suspicion of driving under the influence of alcohol or of other illegal activity.” Johnson v. Sprynczynatyk, 2006 ND 137, ¶ 9, 717 N.W.2d 586.

[¶ 30] Furthermore, Widicker first passed Troxel’s vehicle at the 1500 block of 8<sup>th</sup> Avenue. When Widicker turned around to follow Troxel, he was several blocks behind Troxel’s vehicle, yet still managed to catch up to her vehicle at the beginning of the 1900 block. Therefore, Widicker would have had to cover significant ground in a relatively short period of time in order to catch Troxel’s vehicle, and was thusly travelling at a significant speed.

[¶ 31] Troxel, then, was travelling slowly with a vehicle approaching her rapidly from behind. Section 20-09-03(2) of the Mandan Municipal Ordinances specifically provides:

Upon all roadways any vehicle proceeding at less than the normal speed of traffic at the time and place and under the

conditions then existing must be driving in the right-hand lane then available for traffic, or as close as practicable to the right-hand curb or edge of the roadway, except when overtaking and passing another vehicle proceeding in the same direction or when preparing for a left turn in an intersection or into a private road or driveway.

(emphasis added). By driving slowly near the right-hand curb, Troxel was not only not committing a traffic violation, but was in fact specifically driving in a manner to conform with the law: by driving close to the right-hand lane in an effort to allow the speeding vehicle behind her to safely pass.

**B. The Allegation that Troxel's vehicle moved from the driving lane toward the curb and back into the lane.**

[¶ 32] In its decision, the Department noted Widicker's testimony that Troxel drove from the lane, toward the curb, and back to the lane. This testimony, however, also fails to provide reasonable grounds for the stop of the vehicle. Widicker's testimony itself lacks any particularity, as he was unable to pinpoint when he saw Troxel commit any such movements, and further he could provide no reliable testimony on the extent to which these movements allegedly occurred. Widicker stated he was several blocks behind Troxel's vehicle on a hilly road at night, and could not have adequately observed the minute movements of Troxel's vehicle with any clarity or preciseness.

[¶ 33] Further, as explained above, Troxel followed the law by pulling closer to the right-hand curb. From an objective officer's point of view, such movements conducted in the vicinity of the curb could only have been actions in furtherance of Troxel obeying traffic laws by judging where she should be driving to allow the speeding vehicle to pass, and when she should be in that position.

C. **The Allegation that Troxel stopped along the side of the road before the intersection.**

[¶ 34] Finally, the Department noted that Widicker testified Troxel stopped along the side of the road prior to the intersection of 8th Avenue and 19th Street. First, Widicker did not testify on how far Troxel allegedly stopped for the stop sign before the intersection, and in fact stated he could not tell how far before the intersection she had stopped. Widicker testified he was still trailing Troxel's vehicle at the time she stopped; as he was directly behind her at night, he lacked a view of the front of the vehicle, and of the amount of room between the front of the car and the beginning of the intersection.

[¶ 35] Even assuming Troxel had stopped just prior to the intersection, such action again would have been conducted in conformity with the law, as Troxel would have stopped her automobile to allow for the speeding vehicle (which had nearly caught up to her car at this juncture) to pass. Section 20-14-05 of the Mandan Municipal Code specifically authorizes an individual to park prior to an intersection "to avoid conflict with other traffic or in compliance with law." Therefore, Troxel's stop would have been made both to avoid conflict with the speeding vehicle behind her, as well as to comply with the law in letting faster-travelling traffic pass by.

[¶ 36] Further, Section 20-08-01 of the Mandan Municipal Code notes:

[E]very driver of a vehicle approaching a stop intersection indicated by a stop sign shall stop before entering the crosswalk on the near side of the intersection or, in the event there is no crosswalk, shall stop at a clearly marked stop line, but if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway.

(emphasis added). There was no testimony indicating the presence of a crosswalk or clearly marked stop line at the intersection of 8th Avenue and 19th Street. Therefore,

even if Troxel made her stop prior to the stop sign at the intersection, she clearly obeyed the law in stopping where she would have a view of any approaching traffic on the intersecting roadway.

[¶ 37] As the District Court found in State of North Dakota v. Mylinda Troxel, by viewing the evidence from the standpoint of a reasonable, objective officer, it is clear Widicker did not have reasonable grounds to stop Troxel's vehicle. Widicker's testimony lacked particularity and details concerning Troxel's driving, and all of his observations are equally consistent with lawful legally-mandated actions. Accordingly, the Widicker did not have reasonable suspicion to stop Troxel's vehicle.

### **CONCLUSION**

[¶ 38] The Department's order suspending Troxel's driving privileges should be overturned.

Dated this 16<sup>th</sup> day of November, 2011.

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