

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
FEBRUARY 23, 2012
STATE OF NORTH DAKOTA

Kirby Clarence Rudolph,)	
)	
Plaintiff/Appellant,)	
)	
v.)	
)	
North Dakota Department of)	Supreme Court No. 20110334
Transportation,)	
)	Burleigh County No. 08-11-C-787
Defendant/Appellee.)	

REPLY BRIEF OF APPELLANT

Appeal from Judgment, dated and filed September 16, 2011

Entered Upon September 12, 2011, Order Upholding Order of

Administrative Hearing Officer

Burleigh County District Court

South Central Judicial District

The Honorable Bruce B. Haskell

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[¶1] TABLE OF AUTHORITIES

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[¶2] LAW AND ARGUMENT

[¶3] The Department of Transportation (DOT) acknowledges that “Deputy Bitz did not explicitly point out at what distance he could not see taillights or from what distance he initially began to see either illuminated taillights or the reflection from his headlights.” *See* Brief of Appellee at 11. Indeed, the record evidence suggests that from outside 1,000 feet the deputy could not see taillights, but within 1,000 feet of Rudolph’s vehicle, the deputy does not know if he could see the taillights.

[¶4] The deputy testified: “When I originally saw the car, it didn’t appear to me that the taillights were on.” (DOT Administrative Hearing Transcript (“Tr.”) at 7, lines (“L.”) 12-13). The deputy first noticed Rudolph’s car “at the intersection of Main and 6th, where there was a red light.” (Tr. at 7, L. 16-18). The deputy testified that when Mr. Rudolph turned the corner at the stop light on Main Street, he was “two, three city blocks behind him, and [he] couldn’t see taillights.” (Tr. at 20, L. 1-2). The deputy estimated that a city block is “400 or 500 feet” in length. (Tr. at 24, L. 1-5). Therefore, the deputy was anywhere from 800 to 1,500 feet behind Rudolph when he couldn’t see taillights.

[¶5] Also, the deputy testified that “brake lights would be brighter” than taillights and he agreed that “when [Rudolph] was at the stop light, braking, his brake lights would have been brighter than his taillights.” (Tr. at 27, L. 16-24). Therefore, Rudolph’s brake lights would have displayed more prominently than his taillights while at the stop light.

[¶6] However, when the deputy got closer, within 1,500 feet, he could see illumination. The deputy testified: “The closer I got, it appeared that I could see something.” (Tr. at 25, L. 18-19). The deputy testified:

“I don’t know if that’s the glare from my headlights, or his tail ... Lights.
I have no idea.”

(Tr. at 17, L. 6-9) (emphasis added). Then, when the hearing officer asked the deputy “[a]re you saying that there are no taillights illuminated,” the deputy responded: “No ... No, I’m not saying that.” (Tr. at 17, L. 20-24). The deputy further testified:

“I don’t know if it’s the illumination from my headlights, or if the taillights are on ... I don’t know if they’re on or off at that point. I don’t know.”

(Tr. at 18, L. 1-6) (emphasis added).

[¶7] When asked if the taillights were “off constantly from the time [the deputy was] following it, until the time of the stop,” the deputy replied: “No.” (Tr. at 7, L. 19-22). The deputy testified that “[t]here are portions [he] couldn’t” see taillights on Rudolph’s Pontiac. (Tr. at 20, L. 1-2).

[¶8] The deputy “did not issue a citation to Mr. Rudolph for the taillights.” (Tr. at 9, L. 6-8). Also, the deputy did not check Rudolph’s taillights after the stop to see if they were operational. (Tr. at 22, L. 13-16). The deputy did not even issue a warning ticket to Rudolph because the taillights were functioning properly. The deputy testified that Rudolph told him “something to the effect that yeah they [taillights] are pretty dim, or something similar to that.” (Tr. at 22, L. 16-18). However, the audio from Exhibit 4 does not show that Rudolph made a statement like that to the deputy.

[¶9] The deputy testified that “the only reason for the stop” was the taillights “[o]r, for [him] not being able to see the taillights.” (Tr. at 9, L. 9-14). The deputy testified that “[i]t’s not that they weren’t working, it’s just that [he] couldn’t see them.” (Tr. at 9, L. 15-17) (emphasis added).

[¶10] After the hearing officer asked the deputy that when he was “within a 1,000 feet” of Rudolph’s vehicle “at that point could you see the taillights[?],” the deputy

replied: “I don’t know.” (Tr. at 21, L. 9-15). The deputy testified: “I don’t know if I seen the reflection from my headlights, or if I was seeing taillights.” (Tr. at 21, L. 9-17).

The hearing officer followed up on the deputy’s reply and this exchange occurred:

“MR. VUKELIC: So why did you stop it, if you weren’t sure?

DEPUTY BITZ: Because prior to that I couldn’t see taillights.

MR. VUKELIC: So you get up closer, and now you’re not sure if they’re on or off?

DEPUTY BITZ: That’s correct.”

(Tr. at 21, L. 18-22). Because the deputy was not sure, he stopped Rudolph’s vehicle.

[¶11] Both the Fourth Amendment to the United States Constitution and Article I, Section 8 of the North Dakota Constitution require that a law enforcement officer be able to articulate reasonable suspicion sufficient to make an investigatory stop of a vehicle. “The reasonable-and-articulable-suspicion standard requires the officer justify the stop “with more than just a vague ‘hunch’ or other non-objective facts; and . . . the articulable facts must produce, by reasonable inference, a reasonable suspicion of unlawful conduct.” *See State v. Boyd*, 2002 ND 203, ¶15, 654 N.W.2d 392 (emphasis in original). “Reasonable suspicion requires more than a ‘mere hunch.’” *See State v. Smith*, 2005 ND 21, ¶15, 691 N.W.2d 203. In our case, “[t]he facts in this record suggest a ‘mere hunch.’” *See Salter v. ND Dept. of Transportation*, 505 N.W.2d 111, 114 (N.D. 1993).

[¶12] Because no reasonable and articulable suspicion of unlawful conduct or violation of law ever manifested in this case, the stop of Mr. Rudolph’s vehicle was unconstitutional, under both the Fourth Amendment to the United States Constitution and

Article I, Section 8 of the North Dakota Constitution. Accordingly, the order is in violation of Mr. Rudolph's constitutional rights.

[¶13] CONCLUSION

[¶14] For the foregoing reasons, Kirby Rudolph respectfully requests that this Court reverse the decision of the district court and reinstate his driving privileges.

Respectfully submitted
this 23rd day of February, 2012.

/s/ Dan Herbel

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[¶15] CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on February 23, 2012, the REPLY BRIEF OF APPELLANT was electronically filed with the Clerk of the North Dakota Supreme Court and was also electronically transmitted to Michael Pitcher, counsel for Appellee, at the following:

Electronic filing TO: "Michael Pitcher" < mtpitcher@nd.gov >

Date this 23rd day of February, 2012.

/s/ Dan Herbel

Dan Herbel