

IN THE SUPREME COURT  
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.	)	

---

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

Dan Herbel  
ND State Bar ID # 05769  
Attorney for Appellant Kirby Rudolph

Herbel Law Firm  
The Regency Business Center  
3333 East Broadway Avenue, Suite 1205  
Bismarck, ND 58501  
Phone: (701) 323-0123

TABLE OF CONTENTS

Table of Authorities .....	¶1
Statement of the Issues .....	¶2
Statement of the Case .....	¶3
Statement of the Facts .....	¶7
Standard of Review .....	¶17
Law and Argument .....	¶19
Conclusion .....	¶28
Certificate of Service .....	¶30

[¶1] TABLE OF AUTHORITIES

Constitutional provisions

U.S. CONST. amend. IV. ....	¶¶2, 19, 26-27
N.D. CONST. of 1889, art. I, § 8 .....	¶¶2, 19, 26-27

North Dakota statutes

Chapter 28-32, N.D.C.C. ....	¶18
N.D.C.C. § 28-32-46 .....	¶18

North Dakota cases

<i>Aamodt v. N.D. Department of Transportation</i> , 2004 ND 134, 682 N.W.2d 308 .....	¶18
<i>Dworshak v. Moore</i> , 1998 ND 172, 583 N.W.2d 799 .....	¶18
<i>Eriksmoen v. N.D. Dept of Transp</i> , 2005 ND 206, 706 N.W.2d 610 .....	¶18
<i>Johnson v. Sprynczynatyk</i> , 2006 ND 137, 717 N.W.2d 586 .....	¶20
<i>Landsiedel v. Director, North Dakota Department of Transportation</i> , 2009 ND 196, 774 N.W.2d 645 .....	¶18
<i>Lee v. N.D. Dept of Transportation</i> , 2004 ND 7, 673 N.W.2d 245 .....	¶18
<i>Salter v. ND Dept. of Transportation</i> , 505 N.W.2d 111 (N.D. 1993) .....	¶26
<i>State v. Boyd</i> , 2002 ND 203, 654 N.W.2d 392 .....	¶¶20, 26
<i>State v. Robertsdahl</i> , 512 N.W.2d 427 (N.D. 1994) .....	¶20
<i>State v. Smith</i> , 2005 ND 21, 691 N.W.2d 203 .....	¶26

Cases from other states

<i>State v. Binette</i> , 33 S.W.3d 215 (Tenn. 2000) .....	¶25
--	-----

## [¶2] STATEMENT OF THE ISSUES

- I. The order is in violation of Mr. Rudolph's constitutional rights, as guaranteed under the North Dakota and United States Constitutions; specifically, Deputy Bitz did not have a reasonable and articulable suspicion to stop the vehicle operated by Mr. Rudolph, in violation of the Fourth Amendment to the United States Constitution and Article I, Section 8 of the North Dakota Constitution.

## [¶3] STATEMENT OF THE CASE

[¶4] On February 24, 2011, Kirby Rudolph was arrested for driving under the influence. (DOT Administrative Hearing Transcript ("Tr.") at 5, lines ("L.") 7-8). Mr. Rudolph was issued a temporary operator's permit. (Exhibit 1b, Transcript of DOT Hearing). Mr. Rudolph timely requested an administrative hearing and, on March 24, 2011, the Department of Transportation ("Department" and "DOT") held a hearing where the hearing officer determined that the deputy "had reasonable grounds to stop Rudolph for driving a vehicle with lamps that were not clearly visible from a distance of 1[, ]000 feet" and "had reasonable grounds to believe Rudolph committed a traffic violation at a time when his body contained alcohol." (Appendix ("App.") at 4). The hearing officer revoked Mr. Rudolph's driving privileges for a period of three (3) years. (App. 4).

[¶5] On March 26, 2011, Mr. Rudolph filed a Notice of Appeal and Specifications of Error with the District Court alleging error in the DOT administrative proceedings. (App. 6-7). After both Petitioner and Respondent submitted written arguments to the district court, the court issued its Order affirming the decision of the hearing officer. (App. 25-26).

[¶6] On September 20, 2011, the Department mailed Rudolph the Judgment, Order for Judgment, and Notice of Entry of Judgment in this matter. (App. 27-29). On

November 15, 2011, Rudolph filed a Notice of Appeal to this Court seeking relief. (App. 30-31). Rudolph asks this court to reverse the decision of the district court and to reinstate his driving privileges.

#### [¶7] STATEMENT OF THE FACTS

[¶8] On February 24, 2011, at 11:43 p.m., Deputy Dion Bitz of the Morton County Sheriff's Department made contact with Kirby Rudolph. (Tr. at 2, L. 7-12). The deputy had noticed a vehicle driving without headlights and, as he turned around to follow the vehicle, he testified that he noticed two other vehicles "without taillights, or taillights that [he] couldn't see anyways." (Tr. at 2, L. 14-18). The deputy first noticed these other vehicles as they were stopped for a traffic light "at the intersection Main [Street] and 6th [Avenue]" in Mandan, ND. Of the two other vehicles, the deputy "made a traffic stop on the vehicle that was directly in front of [him] ... which was the vehicle that Kirby Rudolph was driving." (Tr. at 2, L. 20-22).

[¶9] The deputy testified that, after he performed a u-turn and began following the other two vehicles, "[t]here are portions [he] couldn't" see taillights on Rudolph's Pontiac. (Tr. at 20, L. 1-2). 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). 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).

[¶10] 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: “It’s not that they weren’t working, it’s just that [he] couldn’t see them.” (Tr. at 9, L. 15-17) (emphasis added). The taillights “weren’t flickering or anything like that” and they were not “off constantly from the time [the deputy was] following it, until the time of the stop.” (Tr. at 7, L. 14-22). The deputy “did not issue a citation to Mr. Rudolph for the taillights.” (Tr. at 9, L. 6-8).

[¶11] When asked by the hearing officer, after looking at the video, what lights were showing on Mr. Rudolph’s vehicle, the deputy responded: “I don’t know if that’s the glare from my headlights, or his tail ... Lights. I have no idea.” (Tr. at 17, L. 2-9) (emphasis added). The deputy testified that he saw brake lights and that “the taillights in respect to the brake lights ... [w]ell, I think they’re one in the same.” (Tr. at 17, L. 13-18). The deputy then testified that he is not “saying that there are no taillights illuminated.” (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).

The deputy then appeared to alter his testimony when he testified:

“I tried to see if [Rudolph] had his headlights on, and I couldn’t tell if he did or not ‘cause a ... at that point I had a decision to make. Do I stop the one without taillights (the vehicle ahead of Rudolph) ... [o]r, does this guy (Rudolph) have headlights on and I need to stop him.”

(Tr. at 20, L. 7-11). Of the two vehicles, the deputy chose to stop Rudolph’s vehicle, which was the first one in front of him. (Tr. at 20, L. 18-20). The deputy testified that he “couldn’t tell whether [Rudolph] had his headlights on at that time” and that after he

stopped Rudolph's vehicle he determined that Rudolph "did have his headlights on." (Tr. at 7, L. 5-10).

[¶12] The deputy further testified that he turned on his emergency lights within 1,000 feet of Rudolph's vehicle, but, at that point, he does not know if he could see the taillights, stating: "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 deputy testified: "The closer I got, it appeared that I could see something." (Tr. at 25, L. 18-19). The hearing officer questioned the deputy about the stop and the exchange went as follows:

"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.

[¶13] 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 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.

[¶14] Toward the end of his testimony, the deputy testified that he "tried to see if the vehicle even had headlights on, and I made the stop." (Tr. at 26, L. 2-3). This seems to be in conflict with the deputy's earlier testimony where he testified that the only reason for the stop was his uncertainty about the taillights. The deputy also testified that he

“didn’t know if [Rudolph] had headlights on” and that “[a]t some point after [he was] uncertain as to whether or not [Rudolph] had headlights; [he] checked and determined that [Rudolph] did have headlights” (Tr. at 26, L. 5-14). However, the deputy “did not check whether his taillights were working.” (Tr. at 26, L. 15-17).

[¶15] Mr. Rudolph’s vehicle “wasn’t speeding” or driving at varying speeds, and it “wasn’t weaving.” (Tr. at 8, L. 4-17). Also, the deputy “didn’t notice any veering movements” or “sharp jerking movements” (Tr. at 8, L. 12-14). Furthermore, the vehicle “did not cross the centerline,” it “didn’t obstruct traffic” or “drive into oncoming traffic,” and it didn’t “block traffic coming up behind, from passing or anything like that.” (Tr. at 8, L. 18 – 9, L. 3).

[¶16] After the deputy engaged his emergency lights, “Mr. Rudolph pulled ... over within a reasonable time” and “within a reasonable distance.” (Tr. at 10, L. 4-8). Ultimately, the deputy placed Rudolph under arrest for DUI. (Tr. at 5, L. 8).

#### [¶17] STANDARD OF REVIEW

[¶18] “The Administrative Agencies Practice Act, N.D.C.C. ch 28-32, governs review of an administrative decision to suspend or revoke a driver's license.” *See Dworshak v. Moore*, 1998 ND 172, ¶6, 583 N.W.2d 799. “This Court will affirm the agency's decision unless:

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 this chapter 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.” *See Lee v. NDDOT*, 2004 ND 7, ¶8, 673 N.W.2d 245. “In reviewing a license suspension, we give deference to the Department's findings” and determine “only whether a reasoning mind could have concluded the Department's findings were supported by the weight of the evidence from the entire record.” *See Eriksmoen v. NDDOT*, 2005 ND 206, ¶7, 706 N.W.2d 610. “An agency's decisions on questions of law are fully reviewable.” *See Landsiedel v. Director, North Dakota Department of Transportation*, 2009 ND 196, ¶6, 774 N.W.2d 645. “[W]hether the facts meet the legal standard, rising to the level of probable cause or reasonable and articulable suspicion, is a question of law fully reviewable on appeal.” *See Aamodt v. N.D. Department of Transportation*, 2004 ND 134, ¶12, 682 N.W.2d 308.

#### [¶19] LAW AND ARGUMENT

- I. The order is in violation of Mr. Rudolph’s constitutional rights, as guaranteed under the North Dakota and United States Constitutions; specifically, Deputy Bitz did not have a reasonable and articulable suspicion to stop the vehicle operated by Mr. Rudolph, in violation of the Fourth Amendment to the United States Constitution and Article I, Section 8 of the North Dakota Constitution.

[¶20] “To make a legal investigative stop of a vehicle, an officer must have a reasonable and articulable suspicion that the motorist has violated or is violating the law.” *See State v. Robertsdahl*, 512 N.W.2d 427, 428 (N.D. 1994). “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, ¶9, 654 N.W.2d 392 (emphasis in original). In addition to being reasonable under the circumstances, “[a]n investigative stop of a moving vehicle must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity, and mere curiosity, suspicion, vague hunches, or other non-objective facts will not suffice.” *See Johnson v. Sprynczynatyk*, 2006 ND 137, ¶9, 717 N.W.2d 586.

[¶21] In the case at hand, when the deputy first noticed these other two vehicles at the Main Street traffic light, he was 2 or 3 city blocks behind Rudolph; or as the deputy estimated, anywhere from 800 to 1,500 feet behind Rudolph (the deputy estimated that a city block is “400 or 500 feet” in length (Tr. at 24, L. 1-5)). Also, the deputy testified that brake lights are brighter than taillights and 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). The deputy testified that it was at this point, the braking at the traffic light, that he first noticed Rudolph’s vehicle and that he couldn’t see taillights. (Tr. at 7, L. 16-18). However, the deputy qualified that by testifying: “It’s not that they weren’t working, it’s just that [he] couldn’t see them.” (Tr. at 9, L. 15-17).

[¶22] When asked by the hearing officer “[a]re you saying that there are no taillights illuminated,” the deputy testified: “No, I’m not saying that.” (Tr. at 17, L. 20-24). When asked which lights on Rudolph’s vehicle were illuminated, the deputy responded: “I have no idea.” (Tr. at 17, L. 2-9). The deputy did not know if he saw “the reflection from my headlights, or if I was seeing taillights.” (Tr. at 21, L. 9-17). This uncertainty does not amount to reasonable and articulable suspicion and the hearing officer’s finding that Deputy Bitz “was certain he could not see taillights illuminated on Rudolph’s vehicle when he was within 1000 feet” is not supported by the evidence. (App. 4).

[¶23] Essentially, the deputy testified that from outside 1,000 feet, he could not see taillights. He also explained that brake lights are brighter than taillights, so the brake lights may have displayed more prominently while at the traffic light. When the deputy turned on his emergency lights, within 1,000 feet of Rudolph’s vehicle, he does not know if he could see the taillights. The deputy testified: “The closer I got, it appeared that I could see something.” (Tr. at 25, L. 18-19).

[¶24] When asked by the hearing officer why he stopped Rudolph’s vehicle if he wasn’t sure about the taillights, the deputy stated: “Because prior to that [outside 1,000 feet and with brake lights glaring] I couldn’t see taillights ... [s]o [I] get up closer, and now [I’m] not sure if they’re on or off.” (Tr. at 21, L. 18-22). Because the deputy was not sure about the taillights, he stopped Rudolph’s vehicle. The deputy’s not being sure is the functional equivalent of “a hunch,” not reasonable and articulable suspicion.

[¶25] “[T]he danger of finding reasonable suspicion under these facts” is that it “creates a ‘stop at will’ standard for police.” *See State v. Binette*, 33 S.W.3d 215, 219-20

(Tenn. 2000). Reasonable and articulable suspicion cannot be underpinned by this kind of uncertainty. Indeed, the deputy did not issue a citation to Rudolph for a taillight violation and he did not even bother to check Rudolph's taillights after the stop to see if they were operational. (Tr. at 22, L. 13-16). The deputy stopped the vehicle on a mere hunch. The constitution does not condone the restraint of liberty on a mere hunch.

[¶26] 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).

[¶27] 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.

[¶28] CONCLUSION

[¶29] 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 10<sup>th</sup> day of January, 2012.

*/s/ Dan Herbel*

---

Dan Herbel  
Attorney for Appellant Kirby Rudolph  
ND State Bar ID # 05769

Herbel Law Firm  
The Regency Business Center  
3333 East Broadway Avenue, Suite 1205  
Bismarck, ND 58501  
Phone: (701) 323-0123

[¶30] CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on January 10, 2012, the BRIEF OF APPELLANT and the APPENDIX TO BRIEF OF APPELLANT were electronically filed with the Clerk of the North Dakota Supreme Court and were also electronically transmitted to Michael Pitcher, counsel for Appellee, at the following:

Electronic filing TO: "Michael Pitcher" < [mtpitcher@nd.gov](mailto:mtpitcher@nd.gov) >

Date this 10<sup>th</sup> day of January, 2012.

*/s/ Dan Herbel*

---

Dan Herbel