

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Appellee,)	Supreme Court No. 20130203
)	
vs.)	District Court No. 09-2012-CR-04383
)	
Kyler Joseph Blagen,)	
)	
Appellant.)	

Appeal from Criminal Judgment Entered, Following Conditional Guilty Plea,
June 24, 2013 in Cass County District Court, East Central Judicial District,
Honorable Steven E. McCullough

BRIEF OF APPELLEE

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[¶3] JURISDICTIONAL STATEMENT

[¶4] A timely notice of appeal has been filed. This Court has jurisdiction under N.D.R.App.P. 35(b).

[¶5] STATEMENT OF THE ISSUE

- I. [¶6] Whether the information Officer Cruze received from Deputy Oldham was sufficient to create a reasonable and articulable suspicion to support a traffic stop.

[¶7] STATEMENT OF THE CASE

[¶8] Kyler Joseph Blagen, Defendant, appeals from the district court's order denying the motion to suppress evidence issued on April 24, 2013. (Appellant's Appendix at 29.) Defendant subsequently entered a conditional guilty plea on May 28, 2013. (Appellant's App. at 31-32.) On June 24, 2013, sentencing occurred and the Criminal Judgment and Commitment was signed. (Appellant's App. at 33-39.) Notice of Appeal was filed on July 3, 2013. (Appellant's App. at 40-41.)

[¶9] The State asserts that there was reasonable and articulable suspicion to support a traffic stop and requests that this Court affirm the district court's judgment.

[¶10] STATEMENT OF THE FACTS

[¶11] On December 1, 2012, Deputy Matthew Oldham, was in his personal vehicle stopped at a light on Main Avenue and 45th Street. (Tr. 4:2-4; 4:10-11; 4:15.) Deputy Oldham worked part-time for the Cass County Sheriff's Department. (Tr. 3:24-25; 4:1.) He was not a licensed peace officer in the State

of North Dakota. (Tr. 14:7-11.) Deputy Oldham had some narcotics training with investigations and narcotics detectives with the Sheriff's Department. (Tr. 4:24-25; 5:1-2.) Deputy Oldham's minor son, a passenger in the vehicle, drew Oldham's attention to a small four door passenger vehicle that was in the adjacent lane. (Tr. 4:5-7; 4:15-17; 6:8-10; 27:8-11.) With a clear view through the rear driver's window, Deputy Oldham observed a male passenger put a multi colored marijuana pipe up to his lips and light it with a lighter. (Tr. 4:17-23; 5:14-20; 11:8-11.) The passenger then extended his arm and gave Oldham the middle finger. (Tr. 5:22-25.)

[¶12] After the light turned, Oldham proceeded east into Fargo and called Fargo Police Officer Sara Cruze and told her what he had observed, including a description of the vehicle, the approximate location, the license plate, the number of occupants and that he had observed the male passenger smoking marijuana from a pipe. (Tr. 5:25; 6:1-3; 6:20-25; 7:1-16; 17:11-25; 18:1-10; 23:5-7.) Deputy Oldham followed the vehicle until Officer Cruze was able to make a traffic stop on the vehicle. (Tr. 7:22-25; 18:11-20.) Deputy Oldham verified that the vehicle Officer Cruze stopped was the same vehicle that he had made the observations of the passenger using the marijuana pipe. (Tr. 8:4-7.)

[¶13] Officer Cruze was able to identify the driver of the vehicle as Defendant, Blagen, and the passenger as Thaddeus Engebretson. (Tr. 18:24-25; 19:1-10.) Officer Cruze requested a driver's license, proof of insurance and registration from Defendant and then had him come back to her squad car. (Tr.

19:13-19.) Once another officer arrived, Engebretson was brought back to a squad car and Officer Cruze approached the vehicle again and was able to smell the faint odor of burnt marijuana. (Tr. 20:14-20.) Officer Cruze also noticed marijuana on the floorboard of the vehicle. (Tr. 21:4-9.) Officers searched the vehicle and found a significant amount of marijuana, marijuana paraphernalia, including multiple marijuana pipes, and approximately \$1,800.00. (Tr. 21:10-14; 22:13-15; 27:2-5; 28:5-8.)

[¶14] Defendant moved to suppress evidence and at the motion hearing, Deputy Oldham testified about what he saw, as well as what he told Officer Cruze. Additionally, Deputy Oldham testified that Officer Cruze was a friend of his, knew she was working and that he had her contact information in his cell phone. (Tr. 13:8-25.)

[¶15] Officer Cruze, Engebretson, and Defendant also testified at the hearing. Engebretson admitted that he had paraphernalia in his hand and that he had used it at some time while Defendant was driving. (Tr. 32:24-25; 33:1; 41:5-12.) Engebretson testified however, that he believed that the pipe was used before Deputy Oldham had made observations of him. (Tr. 41:5-12.) Engebretson denied using the pipe at the intersection of 45th Street and indicated that he did not believe he had brought the pipe up to his mouth at that point either. (Tr. 41:21-25; 42:1-3.) Defendant confirmed that Engebretson had in fact taken a quick hit off a pipe and then hit it on his hand. (Tr. 62:16-19.) Engebretson described the pipe that had been in his hand as brown and Defendant described it as yellow, purple,

white and black. (Tr. 45:17-22; 64:3-25; 65:1-4.) Engebretson also agreed that he extended his arm into the backseat area and gave the middle finger towards Odham's passenger to stir something up. (Tr. 42:8-10; 42:17-18.)

[¶16] Engebretson indicated that after being stopped, two Fargo officers asked him about where the bong was. (Tr. 44:3-11.) Defendant further testified that Officer Cruze asked where the bong was. (Tr. 56:7-10.) Officer Cruze testified that she may have asked where the bong was, however that would have been a "misspeak" and that Deputy Oldham had indicated to her that he saw a pipe being used by the passenger. (Tr. 22:20-25; 23:1-7.)

[¶17] **STANDARD OF REVIEW**

[¶18] The Court has previously outlined how it reviews motions to suppress evidence:

In reviewing a district court's decision on a motion to suppress evidence, we defer to the district court's findings of fact and resolve conflicts in testimony in favor of affirmance. We will affirm a district court's decision on a motion to suppress if there is sufficient competent evidence fairly capable of supporting the trial court's findings, and the decision is not contrary to the manifest weight of the evidence. Our standard of review recognizes the importance of the district court's opportunity to observe the witnesses and assess their credibility. Questions of law are fully reviewable on appeal, and whether a finding of fact meets a legal standard is a question of law.

State v. Doohen, 2006 ND 239, ¶ 8, 724 N.W.2d 158 (citing State v. Graf, 2006 ND 196, ¶ 7, 721 N.W.2d 381).

[¶19] LAW AND ARGUMENT

I. [¶20] **The district court reasonably found that Deputy Oldham was credible and appropriately concluded that Deputy Oldham advising Officer Cruze that a passenger had been smoking from a marijuana pipe inside Defendant’s vehicle created reasonable and articulable suspicion.**

A. [¶21] **The district court properly concluded that Deputy Oldham advising Officer Cruze that a passenger had been smoking from a marijuana pipe inside Defendant’s vehicle created reasonable and articulable suspicion.**

[¶22] “A law enforcement ‘officer must have a reasonable and articulable suspicion that [a driver] has violated or is violating the law’ before making an investigative stop.” City of Minot v. Keller, 2008 ND 38, ¶ 6, 745 N.W.2d 638 (citing State v. Graven, 230 N.W.2d 328, 330 (N.D. 1995)). Reasonable and articulable suspicion is a lesser standard than probable cause requiring only an objective manifestation that an individual has engaged in unlawful activity. Id. at ¶12. One officer’s observations can be imputed to another to provide a basis for a traffic stop. State v. Kenner, 1997 ND 1, ¶11, 559 N.W.2d 538. Additionally, “investigatory stops of vehicles have also been upheld where the stopping officer has received tips from other police officers or informants, which were then corroborated by the stopping officer's observations.” Id. at ¶12.

[¶23] Reasonable suspicion requires “more than a ‘mere hunch,’ but less than probable cause.” Lapp v. N.D. Dep’t of Transp., 2001 ND 140, ¶11, 632 N.W.2d 419. (citations omitted). Suspicion to stop is present when “a reasonable person in the officer’s position would be justified by some objective manifestation

to suspect potential criminal activity.” City of Fargo v. Ovind, 1998 ND 69, ¶ 8, 575 N.W.2d 901). “The reasonable suspicion standard does not require an officer to see a motorist violating a traffic law or to rule out very potential innocent excuse for the behavior in question before stopping a vehicle for investigation.” Kappel v. Dir., N.D. Dep’t of Transp., 1999 ND 213, ¶ 10, 602 N.W.2d 718.

[¶24] Because Deputy Oldham saw the passenger in Defendant’s car smoking from a marijuana pipe and relayed that information as well as a description of the vehicle, the approximate location, the license plate, the number of occupants and Oldham’s location to Officer Cruze, reasonable and articulable suspicion existed. (Tr. 5:14-20; 6:20-25; 7:1-16; 17:11-25; 18:1-10; 23:5-7.) Officer Cruze located the vehicle, corroborated the information given to her by Deputy Oldham by the location, description of the vehicle and license plate and initiated a traffic stop. (Tr. 18:18-23; 26:23-25; 27:1.) Deputy Oldham’s observation of illegal activities, relayed and imputed to Officer Cruze provides a reasonable and articulable suspicion to justify the traffic stop. Kenner, 1997 ND 1, ¶11, 559 N.W.2d 538.

[¶25] However, if this Court doesn’t consider Deputy Oldham, a police officer for the standards of assessing the tip, the credibility of his tip as a citizen informant is analyzed. Oldham would be regarded as “someone who volunteer[s] information, [does] not want anything in return for the information, and [is] not at risk or in fear of going to jail.” State v. Rangeloff, 1998 ND 135, ¶ 4, n. 3, 580 N.W.2d 593. Citizen informants enjoy a presumption of reliability and “their

reliability should be evaluated from the nature of their report, their opportunity to hear and see the matters reported, and the extent to which it can be verified by independent police investigation.” State v. Roth, 2004 ND 23, ¶ 10, 674 N.W.2d 495 (citing State v. Frohlich, 506 N.W.2d 729, 733 (N.D. 1993)).

[¶26] At the high end of the reliability scale are those known informants who personally give information to law enforcement. State v. Miller, 510 N.W.2d 638, 640 (N.D. 1994). Deputy Oldham is known to Officer Cruze. (Tr. 13:8-25.) He personally called her to relay the information about his observations. (Tr. 6:20-21.) “[At] the high end of the reliability scale: the quality of the information, provided in person by an informant known to the officer, [is] enough so that the quantity of the information provided by the tip alone, that the defendant was engaged in criminal activity, [is] sufficient to raise a reasonable suspicion.” Id. at 641. The quantity of information provided by Oldham regarding the passenger engaging in criminal activity was sufficient to raise a reasonable suspicion on its own. In addition, Officer Cruze verified the location and description of the vehicle as well as the license plate prior to initiating a traffic stop. (Tr. 18:21-23; 26:23-25; 27:1.) This only adds to the credibility and reliability of Oldham’s information.

[¶27] Oldham is a well-known informant and United States Supreme Court precedent allows his tip to be sufficient to raise reasonable suspicion:

In reaching this conclusion, we reject respondent’s argument that reasonable cause for a stop and frisk can only be based on the officer’s personal observation, rather than on information supplied

by another person. Informant's tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability. One simple rule will not cover every situation. Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized. But in some situations—for example, . . . when a credible informant warns of a specific impending crime—the subtleties of the hearsay rule should not thwart an appropriate police response.

Adams v. Williams, 407 U.S. 143, 147 (1972). In Adams, “a person known to Sgt. Connolly approached his cruiser and informed him that an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist.” Id. at 144-145. Adams is much better suited for comparison than the cases cited by Defendant. Id. In that case, the Court rejected the notion that the reasonable suspicion standard required some corroboration of the tip. Id. at 147.

[¶28] Contrary to Defendant's claim, Deputy Oldham is distinguishable from the anonymous tipster in Miller. 510 N.W.2d 638 (N.D. 1994). The tip in Miller was given by an anonymous individual, claiming a driver was possibly drunk. Id. at 644. Furthermore, the informant in Miller misdescribed the pickup's color. Id. The tip was struck down because it was inferential and imprecise. Id. Nothing about Oldham's tip can be described as inferential or imprecise.

[¶29] Defendant also argues Oldham's tip was a bare assertion similar to the tip produced in Anderson v. Director, North Dakota Dept. of Transp., 2005 ND 97, 696 N.W.2d 918. The tip in Anderson was insufficient because it was determined to be a bare assertion of a possible reckless driver or drunk driver. Id.

at ¶21. In ruling that the bare assertion was not of sufficient quantity, the Court noted that:

[t]he Department failed, however, to establish that the informant told the dispatcher the suspect hit cones in a construction zone and that the dispatcher gave that information to the deputy. The record indicates only that the dispatcher relayed to the deputy the descriptions of the informant and suspect's vehicles and that the informant had witnessed a “possible reckless driver or drunk driver.”

Id. at ¶19.

[¶30] Noting that the Court specifically addressed other information that it found had not been established, it can be inferred that the information relayed, coupled with the non-established information - that the vehicle had hit cones in a construction zone - likely would have been considered by the Court as more than a bare assertion. In this case, Deputy Oldham relayed specific information about seeing the passenger in the vehicle using a marijuana pipe and the district court found Oldham to have credibly testified to that fact. (Tr. 4:17-19; 68:14-17.) This is more than a bare assertion.

[¶31] In State v. Gabel, police received a tip from a known informant that a particular vehicle was committing traffic violations. 2006 ND 178, ¶15, 720 N.W.2d 433. Police ultimately pulled over the vehicle without observing any traffic violations. Id. The nature of the violation alleged in Gabel is so different from the current case that its comparative value is substantially diminished. Id. In Gabel, the entire tip could have been corroborated through simple observation of a moving vehicle. See id. It is not unreasonable to expect an officer to view a

traffic violation in order to pull over a vehicle for an alleged traffic violation. In the current case, Officer Cruze corroborated as much of the tip as could be reasonably expected, including seeing the described vehicle, noting the location given to her by Oldham and confirming the license plate. (Tr. 18:18-20.)

[¶32] Another case supportive of the State's position is State v. Lykken, 406 N.W.2d 664 (N.D. 1987). The decision in Lykken cited to the Court's opinion in Adams, specifically that the factual basis for a stop may arise from information that an officer received from another person. 406 N.W.2d 664, 665 (relying on Adams, 407 U.S. 143). Lykken presented a scenario in which a known informant witnessed a vehicle driving the wrong way on a highway, confronted the driver personally, observed him to be impaired, and relayed information regarding the features of the vehicle and the license plate number to law enforcement. Id. Based upon the informant's information and observations, law enforcement had a reasonable basis upon which to conduct a stop. Id. at 666. As in Adams and Lykken, Oldham was a known informant who conveyed credible and reliable information about ongoing criminal violations. Lykken, 406 N.W.2d 664; Adams, 407 U.S. 143.

[¶33] Given the special set of facts in this case, the tip from Oldham amounted to more than a bare assertion. Oldham relayed specific information about a passenger in a particular vehicle, smoking marijuana out of a pipe. (Tr. 5:25; 6:1-3; 6:20-25; 7:1-16; 17:11-25; 18:1-10; 23:5-7.) This is a far more informed tip than the examples chosen by Defendant for comparison. Given

Oldham's heightened reliability and specificity, reasonable suspicion was present for Officer Cruze to pull over Defendant.

B. [¶34] The district court reasonably found that Deputy Oldham was credible.

[¶35] Defendant also attempts to attack the lower court's credibility analysis. Defendant is correct to remind the court that "in reviewing a district court's decision on a motion to suppress evidence, we defer to the district court's findings of fact and resolve conflicts in testimony in favor of affirmance." State v Smith, 2005 ND 21, ¶11, 691 N.W.2d 203. A district court's ruling on a motion to suppress will be affirmed if "there is sufficient competent evidence fairly capable of supporting the trial court's findings, and the decision is not contrary to the manifest weight of the evidence." City of Fargo v. Thompson, 520 N.W. 2d 578, 581 (N.D. 1994). The Court "recognizes the importance of the district court's opportunity to observe the witnesses and assess their credibility." State v Mitzel, 2004 ND 157, ¶10, 685 N.W.2d 120.

[¶36] Oldham's tip about criminal activity was deemed credible and reliable by the district court judge. (Tr. 68:14-15.) The district court judge had ample opportunity to observe and review any conflicting testimony at the motion hearing. The lower court's credibility analysis enjoys immense deference from this court and should not be disturbed.

[¶37] In his tip to law enforcement, Oldham gave detailed information including a description of the vehicle, the approximate location, the license plate,

the number of occupants and that he had observed the male passenger smoking marijuana from a pipe. (Tr. 7:7-17; 4:15-19.) Oldham described the vehicle to Officer Cruze. (Tr. 6:22-24; 18:5-6.) Oldham identified the license plate number. (Tr. 7:8-9; 18:2-4.) Deputy Oldham followed the sedan until law enforcement arrived. (Tr. 7:20-23; 18:11-20.)

[¶38] Deputy Oldham testified that he had some narcotics training with investigations and narcotics detectives with the Sheriff's Department. (Tr. 4:24-25; 5:1-2.) Additionally, this incident took place around noon during daylight hours and Deputy Oldham testified that he had a clear view into the vehicle. (Tr. 6:10-11; 14:20-22.)

[¶39] Given the totality of the circumstances the district court's finding that Deputy Oldham was credible was reasonable and not an abuse of discretion.

[¶40] **CONCLUSION**

[¶41] The State respectfully asks the court to conclude that there was a reasonable and articulable suspicion to support the stop of the vehicle and further petitions the court to affirm the trial court's order denial of the motion to suppress.

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[¶42] CERTIFICATE OF SERVICE

[¶43] A true and correct copy of the foregoing document was sent by e-mail on the 16th day of October, 2013, to: momertz@nd.gov and fargopublicdefender@nd.gov.

Kara Schmitz Olson