20160323
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MARCH 23, 2017
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court Case No. 20160323
District Court Case No. 18-2016-CR-00657

City of Grand Forks,

Plaintiff/Appellee,

v.

Kevin Jason Reilly,

Defendant/Appellant.

CITY/APPELLEE'S BRIEF

Appeal from Order Denying Defendant's Motion
to Suppress and Dismiss Dated August 4, 2016
Grand Forks County District Court
Northeast Central Judicial District
The Honorable Debbie Kleven

Sarah Gereszek/ID#7017
Grand Forks Assistant City Prosecutor
311 South 4th Street, Suite 103
Grand Forks, ND 58201
Phone: (701) 780-9276
Fax: (701) 780-0786
sgereszek@kalashpettitlaw.com
Attorney for Plaintiff/Appellee

[¶1.] I. TABLE OF CONTENTS

I. Table of Contents. . . . . ¶1

II. Table of Authorities. . . . . ¶2

III. Statement of the Issues. . . . . ¶3

IV. Statement of the Case. . . . . ¶5

V. Statement of the Facts. . . . . ¶7

VI. Standard of Review . . . . . ¶12

VII. Law and Argument. . . . . ¶14

A. Whether the district court erred in denying Defendant's motion to suppress and dismiss finding the officers' had reasonable suspicion to approach the Defendant? . . . . . ¶15

B. If the district court erred in finding the officers had reasonable suspicion, did the officers' approach of Defendant constitute a casual encounter?. . . . . ¶19

VIII. Conclusion. . . . . ¶30

IX. Certificate of Service. . . . . ¶32

[¶2.] II. TABLE OF AUTHORITIES

CASES

City of Grand Forks v. Zejdlik, 551 N.W.2d 772 (N.D. 1996). . . . . ¶13

City of Jamestown v. Jerome, 2002 ND 34, 639 N.W.2d 478 . . . . . ¶16, 20

City of Mandan v. Gerhardt, 2010 ND 112, 783 N.W.2d 818 . . . . . ¶18

City of Minot v. Nelson, 462 N.W.2d 460, 462 (N.D. 1990). . . . . ¶16

Maryland v. Macon, 472 U.S. 463 (1985). . . . . ¶21

Rist v. North Dakota Department of Transportation, 2003 ND 113, 665 N.W.2d 45. . . ¶24

Scott v. United States, 436 U.S. 128 (1978). . . . . ¶21

State v. Boline, 1998 ND 67, 575 N.W.2d 906 . . . . . ¶21

State v. Decoteau, 2004 ND 139, 681 N.W.2d 803 . . . . . ¶18

State v. Deviley, 2011 ND 182, 803 N.W.2d 561 .. . . . . ¶21

State v. Franzen, 2010 ND 244, 792 N.W.2d 533. . . . . ¶21

State v. Gregg, 2000 ND 154, 615 N.W.2d 515. . . . . ¶13

State v. Hawley, 540 N.W.2d 390 (N.D. 1995). . . . . ¶13, 16

State v. Langseth, 492 N.W.2d 298 (N.D. 1992) . . . . . ¶19, 20

State v. Miller, 510 N.W.2d 638 (N.D. 1994) . . . . . ¶16, 17

State v. Neis, 469 N.W.2d 568 (N.D. 1991). . . . . ¶17

State v. Schneider, 2014 ND 198, 855 N.W.2d 399. . . . . ¶21

State v. Smith, 452 N.W.2d 86 (N.D. 1990). . . . . ¶21

Terry v. Ohio, 392 U.S.1 (1968). . . . . ¶16

United States v. Flores-Sandoval, 474 F.3d 1142 (8th Cir. 2007) . . . . . ¶21

United States v. Hathcock, 103 F.3d 715 (8th Cir. 1997) .. . . . . ¶21

United States v. Mendenhall, 446 U.S. 544 (1980) . . . . . ¶27

STATUTES

U.S. Const. amend IV. . . . . ¶16

[¶3.] III. STATEMENT OF THE ISSUES

[¶4.] **A. Whether the district court erred in denying Defendant's motion to suppress and dismiss finding the officers' had reasonable suspicion to approach the Defendant?**

B. If the district court erred in finding the officers had reasonable suspicion, did the officers' approach of Defendant constitute a casual encounter?

[¶5.] IV. STATEMENT OF THE CASE

[¶6.] Kevin Jason Reilly ("Defendant") appeals from the district court's order denying his motion to suppress evidence resulting from the stop of Defendant and dismiss the charge of Actual Physical Control. On March 5, 2016, Defendant was cited for Actual Physical Control, in violation of Grand Forks City Code ("G.F.C.C.") § 8-0202. (Doc. ID# 1). Defendant requested the case be transferred to Grand Forks County District Court for the purpose of a jury trial. The matter was transferred on March 31, 2016. (Doc. ID# 8). Defendant filed a motion to suppress and dismiss on July 1, 2016. (Doc. ID# 20). The City filed its response to the motion on July 14, 2016. (Doc. ID# 24). A motion hearing was held on July 22, 2016. (App. p. 4). The district court issued its Order Denying Motion to Suppress and Dismiss on August 4, 2016. (App. pp. 7-10). Defendant entered into a conditional plea on August 29, 2016. (Doc. ID# 37). The Defendant filed a Notice of Appeal on September 29, 2016. (Doc. ID# 40).

[¶7.] V. STATEMENT OF THE FACTS

[¶8.] On March 5, 2016, at approximately 7:54 p.m., Cpl. Buelow and Officer Essig received a call from dispatch regarding a possible drunk driver. (T. p. 4). Dispatch informed the officers the vehicle was a green pickup and provided a license plate number. (T. p. 4, 25). Dispatch also indicated the vehicle was in the area of South Washington Street and 32nd Avenue. (T. p. 4). Dispatch informed the officers a named caller had given a description of the driving behavior wherein the driver was stopped for an extended period of time at a stoplight and failed to move despite the caller honking his horn. (T. p. 24). The

named caller also indicated they drove up next to the suspect vehicle, observed the driver, and believed the driver was under the influence. (T. p. 24). Dispatch ran the license plate information and informed the officers the vehicle was registered to Kevin Jason Reilly who resided at 924 32nd Avenue South. (T. 5, 25).

[¶9.] That day, Officer Essig was in training with his field training officer, Cpl. Buelow. Officer Essig drove the officers by the apartment building at the address received by dispatch where they both observed a green truck with its headlights on parked in the parking lot. (T. p. 5, 23, 25-26). Officer Essig conducted a u-turn and entered the apartment building parking lot. (T. 5-6, 26). Officer Essig parked the vehicle approximately twenty to thirty feet from the suspect vehicle. (T. p. 6, 27). While parking, the officers observed the headlights on the truck were off and a male was sitting in the driver's seat. (T. p. 6, 26-27).

[¶10.] Once the vehicle was parked, Cpl. Buelow exited the vehicle and waited for Officer Essig to radio their location to dispatch. (T. p. 6, 27). Both officers observed the driver exit his vehicle and stumble out. (T. p. 6, 27). Cpl. Buelow called out to the suspect saying "excuse me, sir." (T. p. 7, 27). The suspect did not acknowledge the officers and walked toward the apartment building. (T. p. 7, 27). Cpl. Buelow did not know if the suspect had heard him call out. (T. p. 7). Cpl. Buelow followed the suspect, and got in front of him to get his attention. (T. p. 7, 28). Once Cpl. Buelow got to the Defendant's location, Officer Essig, approximately fifteen feet behind, walked to their location. (T. p. 29). Cpl. Buelow asked if the suspect was okay and the suspect did not respond but looked around, shook his head, and shrugged his shoulders. (T. p. 8). While standing with the suspect, Cpl. Buelow observed the suspect swaying while standing and detected an odor of an alcoholic beverage. (T. p. 8). Cpl. Buelow requested a driver's license and identified the suspect as Kevin Jason Reilly, Defendant. (T. p. 9). Based on the information from dispatch and his own personal observations, Cpl. Buelow initiated an investigation of Defendant and ultimately placed him under arrest for Actual Physical Control ("APC"). (App. p. 8).

[¶11.] A hearing on Defendant's motion was held on July 22, 2016. (App. p. 4). Both officers testified at the hearing and provided similar testimony regarding the incident. The district court denied Defendant's motion to suppress holding the officers had reasonable suspicion to approach and speak with the Defendant. (App. p. 10). Furthermore, neither of the officers used a show of authority in their contact with Defendant. (App. p. 10).

[¶12.] VI. STANDARD OF REVIEW

[¶13.] In reviewing a district court's ruling on a motion to suppress, the appellate court defers to the district court's findings of fact and resolves conflicts in testimony in favor of affirmance. State v. Gregg, 2000 ND 154, ¶¶ 19-20, 615 N.W.2d 515. The district court's decision is affirmed unless the appellate court concludes there is insufficient competent evidence to support the decision, or unless the decision goes against the manifest weight of the evidence. Id. "The underlying factual disputes are findings of fact, whether the findings meet a legal standard, in this instance a reasonable and articulable suspicion, is a question of law." City of Grand Forks v. Zejdlik, 551 N.W.2d 772, 774 (N.D. 1996). "The ultimate conclusion of whether the facts support a reasonable and articulable suspicion is fully reviewable on appeal." State v. Hawley, 540 N.W.2d 390, 392 (N.D. 1995).

[¶14.] VII. LAW AND ARGUMENT

[¶15.] A. The district court did not err in denying Defendant's motion to suppress and dismiss finding the officers' had reasonable suspicion to approach the Defendant.

[¶16.] The Fourth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend IV. "A temporary restraint of a person's freedom, or a 'Terry stop,' is a seizure within the meaning of the Fourth Amendment. City of Jamestown v. Jerome, 2002 ND 34, ¶ 5, 639 N.W.2d 478 (citing Terry v. Ohio, 392 U.S. 1, 16 (1968)). To make a legal investigative stop of a vehicle, an officer must have a reasonable and articulable suspicion

the motorist has violated or is violating the law. State v. Miller, 510 N.W.2d 638, 640 (N.D. 1994). When analyzing the factual basis for a stop, the court considers the totality of the circumstances. Id. "[T]he reasonable-and-articulable-suspicion standard is objective, and it does not hinge upon the subjective beliefs of an arresting officer." Hawley, 540 N.W.2d at 392-93. An officer can use information received from other persons along with his or her personal observations to form the factual basis needed for a legal investigatory stop. City of Minot v. Nelson, 462 N.W.2d 460, 462 (N.D. 1990).

[¶17.] Information from a tip may provide the factual basis for a stop. State v. Neis, 469 N.W.2d 568, 570 (N.D. 1991). The court reviews the "quantity, or content, and quality, or degree of reliability, of the information available to the officer." Miller, 510 N.W.2d at 640. "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. "The most reliable tip is the one relayed personally to the officer" while "[a]t the law end of the reliability scale are tips from anonymous callers." Id. at 640-41.

[¶18.] In this case, officers received a call from dispatch regarding information received by an identified caller. The caller reported a vehicle that was stopped for extended periods of time, approximately twenty seconds, at a stoplight. The vehicle did not respond when the caller honked its horn at the vehicle. The caller made the opinion the other driver was under the influence when they drove by the stopped vehicle and looked at the driver. The caller provided dispatch with a license plate number, a description of the vehicle, the location, and a direction that the vehicle was traveling. The fact that the caller was identified, and the level of details about the driving behavior, the driver, and the vehicle heightens this tip on the reliability scale. The officers had more than a "mere hunch that criminal activity was afoot" but had reasonable suspicion to stop and talk with the Defendant for further investigation. City of Mandan v. Gerhardt, 2010 ND 112, ¶ 21, 783 N.W.2d 818 (quoting State v. Decoteau, 2004 ND 139, ¶ 13, 681 N.W.2d 803).

[¶19.] **B. If the district court erred in finding the officers had reasonable suspicion, the officers' approach of Defendant constituted a casual encounter.**

[¶20.]"[N]ot all personal intercourse or communications between law enforcement officers and citizens involve seizures implicating Fourth Amendment rights." Jerome, 2002 ND 34 at ¶ 5. An "officer's approach of a parked vehicle is not a seizure if the officer 'inquires of the occupant in an conversational manner, does not order the person to do something, and does not demand a response.'" Id. (quoting State v. Langseth, 492 N.W.2d 298, 300 (N.D. 1992)). A "casual encounter" may also lead to a seizure where "an officer . . . learn[s] something during a . . . casual encounter that leads to a reasonable suspicion and that reasonably justifies further investigation, a seizure, or even an arrest." Langseth, 492 N.W.2d at 300.

[¶21.] "To determine whether reasonable suspicion exists, we consider the totality of the circumstances and apply an objective standard, taking into consideration the inferences and deductions an investigating officer would make based on the officer's training and experience." State v. Deviley, 2011 ND 182, ¶ 8, 803 N.W.2d 561 (quoting State v. Franzen, 2010 ND 244, ¶ 8, 792 N.W.2d 533). "The question is whether a reasonable person in the officer's position would be justified by some objective manifestation to suspect the defendant was, or was about to be, engaged in unlawful activity." Id. "A consensual encounter becomes a seizure implicating the Fourth Amendment when, considering the totality of the circumstances, the questioning is 'so intimidating, threatening, or coercive that a reasonable person would not have believed himself free to leave.'" State v. Schneider, 2014 ND 198, ¶ 11, 855 N.W.2d 399 (citing United States v. Flores-Sandoval, 474 F.3d 1142, 1145 (8th Cir. 2007)(quoting United States v. Hathcock, 103 F.3d 715, 718 (8th Cir. 1997)). "A seizure occurs within the context of the Fourth Amendment only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." State v. Boline, 1998 ND 67, ¶ 25, 575 N.W.2d 906. "Whether a Fourth Amendment violation has occurred 'turns on an objective assessment of the officer's actions in light of the

facts and circumstances confronting him at the time,' . . . and not on the officer's actual state of mind at the time the challenged action was taken." State v. Smith, 452 N.W.2d 86, 88 (N.D. 1990)(quoting Maryland v. Macon, 472 U.S. 463, 470-71 (1985)(quoting Scott v. United States, 436 U.S. 128, 136 (1978)).

[¶22.] In this case, there was no stop of the Defendant's vehicle. The officers received information from an identified caller describing the Defendant's unusual driving behavior. The officers located a vehicle that matched the description given by dispatch. The vehicle was in the parking lot at an address that matched the address for the registered owner. Officers observed the vehicle running and a male occupant in the driver's seat.

[¶23.] While providing their location to dispatch over the radio, officers observed the Defendant stumble out of his pickup truck. From approximately twenty to thirty feet away, Cpl. Buelow called out to the Defendant saying "excuse me, sir." The Defendant argues he declined voluntary contact with the officers by walking away however, the Defendant did not provide any evidence at the motion hearing. Cpl. Buelow, however, testified that he was unable to determine if the Defendant was intentionally ignoring him or simply had not heard him. Cpl. Buelow followed the Defendant, got in front of him, and again attempted to talk with him. This time, the officer knew the Defendant heard him, however, the Defendant did not provide a response but looked around, shrugged his shoulders, and mumbled incoherently.

[¶24.] In Rist v. North Dakota Department of Transportation, 2003 ND 113, ¶ 10, 665 N.W.2d 45, this Court held:

> [a]lthough an officer acting as a community caretaker may not exceed the basic scope of permissible conduct described in our cases, . . . he or she may encounter an individual whose state of consciousness prevents a conversational inquiry from occurring. Under those circumstances, the officer must determine what actions need to be taken to get the individual to respond and therefore may need to approach a person who does not respond differently from a person who is conscious and able to converse with the officer.

[¶25.] The officer's conduct of catching up to the Defendant did not involve physical force or a show of authority. The Defendant made no indication that he had heard the officer

and it was reasonable for the officer to attempt to communicate with the Defendant a second time. A reasonable person would make a second attempt if they did not believe someone heard them call out the first time. The officer was not overtly persistent or badgering the Defendant into communicating with him and this second attempt to make contact did not escalate the situation into a seizure.

[¶26.] Defendant argues that the officers *ran* after him which is more threatening and heightened the situation into a seizure. (emphasis added). The City disagrees. Due to the initial distance between the Defendant and the officer, in order to attempt to talk with him, it was reasonable for the officer to catch up to the Defendant. Defendant states a reasonable person would view the officer's act of running to catch up with him as threatening. Cpl. Buelow made no statements, nor did he take any action, such as drawing a weapon, that could be conceived as threatening while attempting to catch up to the Defendant. It is unclear in this case whether the Defendant was even aware that Cpl. Buelow was running to catch up to him as the Defendant did not provide any testimony. The second officer did not run after the Defendant but walked up to Cpl. Buelow who, by that time, was standing with the Defendant. Neither of the officers' conduct heightened the situation into a seizure as there were no demands made while catching up to the Defendant, neither officer had a weapon drawn, and there was no other use of force or show of authority.

[¶27.] Defendant also argued two officers approaching him created a more restrictive situation than had only one officer approached him. The United States Supreme Court in United States v. Mendenhall, 446 U.S. 544, 554 (1980) analyzed circumstances that *might* indicate a seizure including "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." Based on the testimony, Cpl. Buelow was the only officer to run after the Defendant. When Cpl. Buelow caught up to the Defendant, Cpl. Buelow's first statement was to inquire as to whether the Defendant was okay. There was nothing intimidating or

threatening about the statement, nor did Cpl. Buelow's tone indicate that compliance would be compelled. While Cpl. Buelow and the Defendant were talking, Officer Essig arrived at their location. The City would agree two officers were involved in this case, however, the presence of two officers alone did not heighten the situation into a seizure.

[¶28.] While standing with the Defendant, Cpl. Buelow quickly observed the odor of an alcoholic beverage and noticed the Defendant swayed while standing. Cpl. Buelow asked the Defendant for his identification at which point he started arguing with the officer. Cpl. Buelow noticed the Defendant's speech was slurred a bit and the Defendant was not providing complete sentences making it hard to understand him. Cpl. Buelow identified the Defendant who, at that point, was being detained for an investigation based on reasonable suspicion that the Defendant was under the influence and had been in actual physical control of a motor vehicle.

[¶29.] If this Court does not agree that the officers had reasonable suspicion to approach the Defendant, their contact should fall under the casual encounter approach. The officers approached an individual who exited a parked vehicle. The officers did not make any threats, demands, or orders to the Defendant. The officers' conduct did not involve force, a weapon, or other show of authority. Cpl. Buelow spoke to the Defendant in a casual manner and made observations that led him to reasonably believe the Defendant under the influence justifying a further investigation and, ultimately, an arrest.

[¶30.] VIII. CONCLUSION

[¶31.] For the above-stated reasons, the City respectfully requests that this Court affirm the district court's Order Denying Motion to Suppress and Dismiss and order the sentence provided in the criminal judgment be imposed.

Dated this 23rd day of March, 2017.

/s/Sarah Gereszek
Sarah Gereszek/ID#7017
Grand Forks Asst. City Prosecutor
311 South 4th Street, Suite 103

Grand Forks, ND 58201
Phone: (701) 780-9276
Fax: (701) 780-0786
sgereszek@kalashpettitlaw.com
Attorney for Plaintiff/Appellee

[¶32.] **IX. CERTIFICATE OF SERVICE**

[¶33.] I hereby certify that on the 23rd day of March, 2017, a copy of the foregoing Appellee's Brief was electronically served on Mathew Jensen at the following email address:

Mathew Jensen
mathew@morrowlawfirms.com

[¶34.] I hereby certify that on the 23rd day of March, 2017, a copy of the foregoing Appellee's Brief was electronically filed with the Supreme Court at the following email address:

Clerk of Supreme Court
supclerkofcourt@ndcourts.gov

/s/Sarah Gereszek
Sarah Gereszek/ID#7017
Grand Forks Asst. City Prosecutor
311 South 4th Street, Suite 103
Grand Forks, ND 58201
Phone: (701) 780-9276
Fax: (701) 780-0786
sgereszek@kalashpettitlaw.com
Attorney for Plaintiff/Appellee