

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

**NORTH DAKOTA SUPREME COURT**

**City of Grand Forks**

(Plaintiff and Appellee)

**v.**

**Kevin Jason Reilly**

(Defendant and Appellant)

ON APPEAL FROM ORDER DENYING MOTION TO SUPPRESS AND DISMISS ISSUED  
AUGUST 4, 2016, BY THE HONORABLE DEBBIE G. KLEVEN OF THE GRAND FORKS  
COUNTY DISTRICT COURT FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT

**APPELLANT'S REPLY BRIEF**

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## Law and Argument

### I. The Officers lacked reasonable suspicion prior to stopping Mr. Reilly.

[¶1] The City asserts that the 911 call received by dispatch acted as a tip leading to Ofc. Buelow and Ofc. Essig gaining reasonable suspicion. The City further asserts that the caller strengthened the reliability of the tip by identifying himself. This Court has previously permitted investigatory stops of a vehicle when an officer has received information from other sources and “[t]he officer corroborated the tip with personal observations.” Gabel v. ND Dept. of Transp., 2006 ND 178, ¶ 11, 720 N.W.2d 433. Ofc. Buelow was unable to corroborate the tip received by dispatch with his own personal observations. The officers simply witnessed Mr. Reilly exiting his vehicle; they did not witness Mr. Reilly driving a vehicle.

[¶2] The Court further explained “[a] known informant’s tip can provide sufficient basis to justify a stop [when] the surrounding facts and circumstances verify an informant’s reliability.” Id. In the present case, the 911 call was placed by a concerned citizen identified by dispatch. Solely giving one’s name does not drastically increase the reliability of the tip. There is no evidence indicating this individual was an informant known to the police. Essentially, dispatch received a 911 call from one individual alleging another individual might be driving while under the influence. Simply because the caller identified oneself does not increase the reliability of the tip to a point where personal observations corroborating the call were not needed by Ofc. Buelow.

[¶3] The 911 call alone does not amount to reasonable suspicion. The City cites City of Mandan v. Gerhardt in support of its argument. In Gerhardt, officers personally observed an individual slumped over the wheel of a vehicle parked in an empty parking lot. 2010 ND 112, ¶ 21, 783 N.W.2d 818. The Court ruled the community caretaker function applied in Gerhardt. Id. at ¶ 22. The district court ruled the community caretaker function is not applicable in the present case. The

amount of information the officers had which amounted to reasonable suspicion in Gerhardt grossly outweighs the amount of information obtained by Ofc. Buelow and Ofc. Essig before approaching Mr. Reilly and stopping him against his will.

[¶4] More Specifically, this Court identified three different occurrences that provide an officer with reasonable and articulable suspicion to stop a vehicle: “(1) when the officer relied on a directive or request for action from another officer; (2) when the officer received tips from other police officers or informants, which were then corroborated by the officer's own observations; and (3) when the officer directly observed illegal activity.” Johnson v. Sprynczynatyk, 2006 ND 137, ¶ 8, 717 N.W.2d 586 (quoting Anderson v. Director, ND Dept. of Transp., 2005 ND 97, 696 N.W.2d 918). None of these three situations apply to the present case. Furthermore, this Court previously held the time of night, the possibility of burglary, whether a vehicle was stolen, whether occupants of vehicle needed assistance, and a vehicle pulling away from an approaching officer do not constitute “[l]egally sufficient bases for reasonable suspicion.” Id. at ¶ 13 (citing State v. Sarhegyi, 492 N.W.2d 284 (N.D. 1992)).

[¶ 5] Ofc. Buelow specifically testified he explained to Ofc. Essig the vehicle was already parked and they had “no driving violations, so to park on the side of it, don’t turn your lights on, and that we would walk up to the vehicle and do a community caretaker.” July 22, 2016, Hrg. Transcript p. 20: 1-5. There is no mention by the officers of approaching Mr. Reilly because they had reasonable and articulable suspicion. Ultimately, the officers approached, and stopped, Mr. Reilly without reasonable and articulable suspicion.

## **II. The officers’ interaction with Mr. Reilly was not simply a casual encounter.**

[¶6] The officers’ approach of Mr. Reilly does not constitute a casual encounter. At the original motion hearing, both the City and the officers themselves relied on the community caretaker

function as the basis for the officers' encounter with Mr. Reilly. Buelow even testified that he had been trained to conduct community caretaker stops in this manner. July 22, 2016, Hrg. Transcript p. 20: 6-18. As both parties have agreed, Mr. Reilly turned and walked away when Buelow attempted to make contact with him. Mr. Reilly refused the encounter. Mr. Reilly did not make voluntary or casual contact with the officers. Instead, Mr. Reilly immediately rejected the encounter and attempted to leave the scene.

[¶7] In State v. Laib, the Court held that threats could be communicated not only through words but also through non-verbal actions. 2005 ND 191, ¶ 12, 705 N.W.2d 815. The Court specifically stated “[a]ctions are louder than words.” Id. Threats are not the only messages that can be communicated through non-verbal conduct. Multiple types of messages can be communicated through non-verbal conduct. “Communication” has been defined as: “The expression or exchange of information by speech, writing, gestures, or conduct; the process of bringing an idea to another’s perception.” Black’s Law Dictionary 296 (8<sup>th</sup> ed. 2004). When one individual walks away from a second individual, the first individual has communicated that he or she does not want to speak with the second individual. In the context of citizen-peace officer encounters, when a citizen is stopped after communicating he or she does not want to voluntarily interact with a peace officer, it cannot reasonably be considered a casual encounter.

[¶8] After Mr. Reilly rejected the encounter and attempted to leave the scene, Ofc. Buelow claims he approached Mr. Reilly to check on his safety while performing the community caretaker role. July 22, 2016, Hrg. Transcript p. 7: 22 – p. 8: 5. Ofc. Buelow could only check on Mr. Reilly’s welfare by stopping him. Thus, Ofc. Buelow ran after Mr. Reilly, who had already rejected Ofc. Buelow’s attempt to make contact, with the intention of stopping him. It cannot be a casual encounter when an officer chases an individual, who had already rejected a request for contact,

with the intention of stopping that individual one way or another. Ofc. Buelow testified he requested Mr. Reilly's identification before Mr. Reilly began speaking with the officers. July 22, 2016, Hrg. Transcript p. 9: 1-10 Case law does not support this view of a casual encounter. See City of Jamestown v. Jerome, 2002 ND 34, 639 N.W.2d 478, driver of vehicle voluntarily interacted with officer upon request; and U.S. v. Mendenhall, 446 U.S. 544, 100 S. Ct. 1870, no officer intrusion as long as individual questioned remains free to disregard questions and leave the scene.

[¶9] Additionally, the North Dakota legislature has previously identified limited situations in which law enforcement officers may stop people for the limited purpose of stop-and-identify. NDCC § (29-29-21) states,

A peace officer may stop any person abroad in a public place whom the officer reasonably suspects is committing, has committed, or is about to commit:

1. Any felony.
2. A misdemeanor relating to the possession of a concealed or dangerous weapon or weapons.
3. Burglary or unlawful entry.
4. A violation of any provision relating to possession of marijuana or of narcotic, hallucinogenic, depressant, or stimulant drugs.

The peace officer may demand of such person the person's name, address, and an explanation of the person's actions.

Thus, specific situations in which officers may stop-and-identify individuals are recognized by law. The investigation into a possible DUI does not meet one of the four requirements under § 29-29-21.

[¶10] A stop-and-identify is a seizure implicating the Fourth Amendment. State v. Musselman, 2016 ND 111, ¶ 10, 881 N.W.2d 201. Thus, § 29-29-21 provides statutory exceptions to the warrant requirement in four specific situations. If the Court accepts the City's argument, the result would eliminate the need for § 29-29-21 entirely. It would allow peace officers to approach any individual in public under the guise of a casual encounter, even when the individual rejects the

encounter. The purpose of enacting § 29-29-21 (limited situations in which stop-and-identify is permitted) would be nullified. Peace officers could then essentially conduct Terry stops on any member of the public demanding identification and an explanation of the person's actions.

[¶11] The officers forced an interaction with Mr. Reilly that cannot reasonably be considered a casual encounter. Mr. Reilly declined Ofc. Buelow's request for contact. Ofc. Buelow specifically stated he initiated a community caretaker stop due to concern for Mr. Reilly's safety. The officers then asked Mr. Reilly for his identification before he even began speaking. This is not the type of 'casual encounter' contemplated in Jerome as, there, the defendant *voluntarily* began speaking with an officer. Mr. Reilly did not voluntarily begin speaking with Ofc. Buelow but rather tried to leave the scene and was prevented from doing so by the officers.

### **Conclusion**

[¶12] For the afore-mentioned reasons contained in the Brief of the Appellant and Appellant's Reply Brief, Mr. Reilly respectfully requests that this Court reverse the district court's Order Denying Motion to Suppress and Dismiss.

DATED: April 6<sup>th</sup>, 2017.

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

**ON APPEAL OF ORDER DENYING MOTION TO SUPPRESS AND DISMISS, THE  
HONORABLE DEBBIE G. KLEVEN, DISTRICT JUDGE PRESIDING, NORTHEAST  
CENTRAL JUDICIAL DISTRICT, FILED AUGUST 4, 2016**

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State of North Dakota,	)	
	)	
Plaintiff/Appellee,	)	Case No. 20160323
-vs-	)	District Court No. 18-2016-CR-00657
	)	
Kevin Jason Reilly,	)	CERTIFICATE OF SERVICE
	)	BY E-MAIL
Defendant/Appellant.	)	

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STATE OF NORTH DAKOTA                    )  
  )SS  
COUNTY OF GRAND FORKS                )

The undersigned, being of legal age, being first duly sworn deposes and says that on the 6<sup>th</sup> day of April, 2017, served a true and correct copy of the following document(s):

1. Appellant’s Reply Brief

Electronically via email to:

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