

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

State of North Dakota,)	
)	
Plaintiff and Appellee)	Supreme Court No. 20180093
)	
vs.)	
)	
Nathan Thomas Bornsen,)	Grand Forks County District Court
)	Case No. 18-2017-CR-02221
Defendant and Appellant.)	
)	

**On Appeal from the District Court,
Grand Forks County, North Dakota
Northeast Central Judicial District
The Honorable Jay Knudson, Presiding**

Brief of Appellee

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TABLE OF CONTENTS

Table of Contents.....	i
Table of Authorities.....	i
Statement of the Issue.....	iv
Statement of the Case.....	¶1
Statement of the Facts.....	¶2
Standard of Review.....	¶6
Law and Argument.....	¶7
Conclusion.....	¶20

TABLE OF AUTHORITIES

Constitutions

U.S. Const. amend. IV.	¶7
N.D. Const. art. I, § 8.	¶7

Federal Cases

<u>Terry v. Ohio</u> , 392 U.S. 1 (1968).	¶7
<u>Whren v. United States</u> , 517 U.S. 806 (1996).	¶7

North Dakota State Cases

<u>Anderson v. Dir., N.D. Dep't of Transp.</u> , 2005 ND 97, 696 N.W.2d 918.	¶9
<u>City of Devil's Lake v. Lawrence</u> , 2002 ND 31, 639 N.W.2d 466.	¶¶10, 19
<u>City of Fargo v. Ovind</u> , 1998 ND 69, 575 N.W.2d 901.	¶10
<u>Crawford v. Dir., N.D. Dep't of Transp.</u> , 2017 ND 103, 893 N.W.2d 770.	¶12
<u>Gabel v. N.D. Dep't of Transp.</u> , 2006 ND 178, 720 N.W.2d 433.	¶¶8, 17
<u>Kappel v. N.D. Dep't of Transp.</u> , 1999 ND 2013, 602 N.W.2d 718.	¶¶15, 16, 17
<u>Pesanti v. N.D. Dep't of Transp.</u> , 2013 ND 210, 839 N.W.2d 851.	¶¶11, 15
<u>State v. Bartelson</u> , 2005 ND 172, 704 N.W.2d 824.	¶7
<u>State v. Dorendorf</u> , 359 N.W.2d 115 (N.D. 1984).	¶15
<u>State v. Fields</u> , 2003 ND 81, 662 N.W.2d 242.	¶10
<u>State v. Goeman</u> , 431 N.W.2d 291 (N.D. 1988).	¶15
<u>State v. Guthmiller</u> , 499 N.W.2d 590 (N.D. 1993).	¶15
<u>State v. James</u> , 2016 ND 68, 876 N.W.2d 720.	¶15
<u>State v. Kaul</u> , 2017 ND 56, 891 N.W.2d 352.	¶6

<u>State v. Overby</u> , 1999 ND 47, 590 N.W.2d 703.....	¶11
<u>State v. Phelps</u> , 2017 ND 141, 896 N.W.2d 245.....	¶6
<u>State v. Storbakken</u> , 552 N.W.2d 78 (N.D. 1996).....	¶12
<u>State v. Torkelsen</u> , 2006 ND 152, 718 N.W.2d 22.....	¶7
<u>State v. Washington</u> , 2007 ND 138, 737 N.W.2d 382.....	¶¶8, 10, 11, 17

Other

Case No. 18-2017-CR-02221, Order dated Feb. 23, 2018.....	<i>passim</i>
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Statutes

N.D.C.C. §39-10-35.....	¶12
N.D.C.C. §39-10-35(1).....	¶¶12, 13, 14

STATEMENT OF THE ISSUE

- I. **The district court properly denied Mr. Bornsen's motion to suppress and dismiss because there was sufficient evidence presented to support the court's findings.**

STATEMENT OF THE CASE

[¶1] On October 18, 2017, Nathan Thomas Bornsen was charged with Driving Under the Influence – Second Offense. (Appellant’s App. at 4). On January 19, 2018, Mr. Bornsen filed a Motion to Suppress and Dismiss. (Docket ID# 17-18). On February 1, 2018, The State of North Dakota filed a response to this motion. (Docket ID# 20). On February 6, 2018, Mr. Bornsen filed a reply brief. (Docket ID# 23). On February 9, 2018, a hearing was held on the motion. On February 23, 2018, the district court issued an order denying the Motion to Suppress and Dismiss. (Order at ¶11). On March 6, 2018, the district court accepted a conditional plea of guilty from Mr. Bornsen, in which he reserved his right to appeal the denial of the Motion to Suppress and Dismiss; on March 15, 2018, an Amended Judgment was entered regarding the conditional plea of guilty. (Appellant’s App. at 10-11). On March 6, 2018, Mr. Bornsen filed a notice of appeal to this Court. (Appellant’s App. at 13).

STATEMENT OF THE FACTS

[¶2] On October 18, 2017, at approximately 10:06 p.m., Deputy James Opp (“Opp”) of the Grand Forks County Sheriff’s Department was stationary, facing west, approximately 15 to 20 yards from the intersection of County Road 4 and County Road 4A in Grand Forks County. (Case No. 18-2017-CR-02221, Order dated Feb. 23, 2018 (“Order”) ¶2); (Transcript of Proceedings (“T.”) at 6). This intersection is a T intersection. (T. at 7).

[¶3] Opp observed a vehicle traveling southbound. (T. at 6). The vehicle came to a stop in front of the stop sign at the end of County Road 4A. (Order ¶2). The district court found Opp observed the vehicle stop for “approximately fifteen seconds” at that intersection. (Id.) The district court found the extended stop “raised suspicion that something might be going on” with the driver. (Id.) The district court found Opp observed the vehicle make “a wide turn”, in which both driver-side tires “drove onto the center line.” (Order ¶2; T. at 6). County Road 4 is a two-lane highway. (Id.) The center line divides the east and westbound lanes of traffic. (T. at 10).

[¶4] Opp testified that he left his stationary position after the vehicle entered the intersection and began heading westbound to get behind the vehicle. (T. at 6). As he was doing this, Opp testified that “the driver’s side wheel drove onto the centerline followed by the rear driver’s side wheel.” (T. at 9). During the right turn, Opp testified the driver-side tires remained on the center line for three seconds. (T. at 6). Opp testified there was nothing obstructing his view of this intersection. (T. at 7). Opp testified that the intersection was clear of pedestrians or other motor vehicle traffic at that time. (T. at 22).

Opp testified that, in his experience at that intersection, a normal stop is often between one to two seconds. (T. at 9).

[¶5] After following the vehicle westbound for half a mile, Opp testified “the reason for the traffic stop was stopping at a stop sign, would be stopping or standing where prohibited, and a wide turn.” (T. at 11). Opp testified he identified the driver of the vehicle as Nathan Bornsen. (T. at 11). Opp read a portion of his affidavit into the record, stating “the vehicle remained stationary for fifteen seconds before making a wide turn onto county road four. The reason for the traffic stop was stopping, standing, or parking where prohibited.” (T. at 14). On cross, Opp testified, “I stopped your client for two violations: for stopping at the stop sign too long and making the wide turn.” (T. at 12).

STANDARD OF REVIEW

[¶6] This Court defers to the district court's findings of fact and resolves conflicts in testimony in favor of affirmance. State v. Kaul, 2017 ND 56, ¶5, 891 N.W.2d 352. This Court will affirm a district court decision regarding a motion to suppress if there is sufficient evidence fairly capable of supporting the district court's findings, and the decision is not contrary to the manifest weight of the evidence. State v. Phelps, 2017 ND 141, ¶5, 896 N.W.2d 245. Questions of law are fully reviewable on appeal, and whether a finding of fact meets a legal standard is a question of law. Id.

LAW AND ARGUMENT

I. The district court properly denied Mr. Bornsen's motion to suppress and dismiss because there was sufficient competent evidence presented to support the court's findings.

[¶7] The temporary detention of an individual during the stop of a vehicle by police constitutes a seizure under the Fourth Amendment. State v. Bartelson, 2005 ND 172, ¶8, 704 N.W.2d 824 (citing Whren v. United States, 517 U.S. 806, 809–10 (1996)). Under the Fourth Amendment of the United States Constitution and article 1, section 8 of the North Dakota State Constitution, police may conduct an investigatory stop if the officer can “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” State v. Torkelsen, 2006 ND 152, ¶21, 718 N.W.2d 22 (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).

[¶8] This Court has described the basis upon which an officer can stop a vehicle:

To justify the stop of a moving vehicle for investigation, an officer must have a reasonable and articulable suspicion the motorist has violated or is violating the law . . . the validity of a stop is evaluated under an objective standard considering the totality of the circumstances.

Gabel v. N.D. Dep't of Transp., 2006 ND 178, ¶9, 720 N.W.2d 433. Reasonable suspicion requires more than a hunch. State v. Washington, 2007 ND 138, ¶11, 737 N.W.2d 382. “Reasonable suspicion for a stop exists when a reasonable person in the officer's position would be justified by some objective manifestation to suspect potential unlawful activity.” Id.

[¶9] This Court has described three situations in which an officer has 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.” Anderson v. Dir., N.D. Dep’t of Transp., 2005 ND 97, ¶9, 696 N.W.2d 918. On this appeal, the State maintains that only the third permissible situation applies.

[¶10] Whether the officer had reasonable suspicion to justify the stop is a question of law. State v. Fields, 2003 ND 81, ¶6, 662 N.W.2d 242 (citing City of Fargo v. Ovind, 1998 ND 69, ¶6, 575 N.W.2d 901). The reasonable suspicion standard is objective and does not consider the subjective beliefs or motivations of the arresting officer. Washington, 2007 ND 138, ¶11, 737 N.W.2d 382. Under this objective standard, all the information known to the officer, including the officer’s personal observations, is significant in determining whether reasonable suspicion existed. Fields, 2003 ND 81, ¶15-16, 662 N.W.2d 242. This Court does not require an officer to isolate a single factor which, standing alone, signals a potential violation of the law. City of Devil’s Lake v. Lawrence, 2002 ND 31, ¶8, 639 N.W.2d 466. Rather, “officers are to assess the situation as it unfolds and, based upon inferences and deductions drawn from their experience and training, make the determination whether all of the circumstances viewed together create a reasonable suspicion of potential criminal activity.” Id.

[¶11] The reasonable suspicion standard does not require the officer to rule out every potential innocent excuse for the behavior in question before stopping a vehicle for investigation. Washington, 2007 ND 138, ¶11, 737 N.W.2d 382. Rather, officers are permitted to formulate common-sense conclusions in determining whether criminal activity is occurring. Id. When making a stop, a law enforcement officer “need not have knowledge or facts sufficient to establish guilt [at trial], only knowledge that would give a prudent person reasonable grounds to believe an offense has been or is being

committed.” Id. (quoting State v. Overby, 1999 ND 47, ¶13, 590 N.W.2d 703). The time of day may render an officer's suspicion more reasonable. Pesanti v. N.D. Dep't of Transp., 2013 ND 210, ¶11, 839 N.W.2d 851.

A. The traffic stop was based on an observed traffic violation.

[¶12] The district court found that the low threshold of reasonable suspicion was met in this case. (Order ¶11). Here, Deputy Opp directly observed a traffic violation when he saw the tires of the vehicle travel onto the center line of the roadway and continue on it for three seconds during a right turn. “Traffic violations, even if considered common or minor, constitute prohibited conduct and, therefore, provide officers with requisite suspicion for conducting investigatory stops.” Crawford v. Dir., N.D. Dep't of Transp., 2017 ND 103, ¶6, 893 N.W.2d 770 (quoting State v. Storbakken, 552 N.W.2d 78, 80–81 (N.D. 1996)). Mr. Bornsen violated Required Position and Method of Turning, N.D.C.C. §39-10-35. The turning method statute states, “Right turns. Both the approach for a right turn and a right turn must be made as close as practicable to the right-hand curb or edge of the roadway.” N.D.C.C. §39-10-35(1).

[¶13] Here, evidence presented at the suppression hearing indicated that Opp had a reasonable suspicion Mr. Bornsen violated N.D.C.C. §39-10-35(1) by driving onto a center line during a right turn. By driving onto the center line, Mr. Bornsen did not make his right turn “as close as practicable to the right-hand curb or edge of the roadway.” N.D.C.C. §39-10-35(1). The district court found that, “although Opp may have not initially mentioned the wide turn to Bornsen during the investigatory stop, there is sufficient evidence to conclude it was considered by Opp before and during the stop of the vehicle.” (Order ¶10). The district court found the right turn consisted of tires driving onto the marked center lane of traffic on an obstruction or vehicle-free roadway. (Order

¶2). In this case, using the analysis set in Storbakken, the validity of the investigatory stop is justified Opp's reasonable suspicion that a traffic law had just been broken pursuant to N.D.C.C. §39-10-35(1). Opp made the stop pursuant to objective evidence including the extended stop and the wide turn. Opp proceeded to stop Mr. Bornsen's vehicle on more than a mere hunch because he had reasonable suspicion to believe that the driver may have violated the law.

[¶14] There was sufficient evidence presented to the district court indicating that the driver-side tires remained on the center line of the roadway for at least three seconds of the turn. N.D.C.C. §39-10-35(1) clearly states: "Both the approach for a right turn and a right turn must be made as close as practicable to the right-hand curb or edge of the roadway." To comply with this subsection, a vehicle's driver-side tires should not touch the center line position because that position is not "as close as practicable to the right-hand curb or edge of the roadway." N.D.C.C. §39-10-35(1). Further, Opp testified the tires remained on the center line for "two or three seconds." (T. at 6). In this instant case, N.D.C.C. §39-10-35(1) requires drivers to conduct a right turn while staying as close as the circumstances allow to the right side of the road. Because Mr. Bornsen's vehicle made contact with the centerline, Opp had a reasonable belief that the driver of the vehicle was violating the law.

B. The traffic stop was reasonable.

[¶15] In North Dakota, an extended stop at a stop sign coupled with a secondary factor justifies a traffic stop. Kappel v. N.D. Dep't of Transp., 1999 ND 2013, ¶2, 602 N.W.2d 718; see also State v. Guthmiller, 499 N.W.2d 590, 593 (N.D. 1993) (holding that an anonymous D.U.I. tip plus an observed hesitation at stop sign justified the stop of vehicle); State v. Goeman, 431 N.W.2d 291, 291-92 (N.D. 1988) (holding that an abrupt

stop at stop sign plus weaving within own lane justified the stop of vehicle); State v. Dorendorf, 359 N.W.2d 115, 117 (N.D. 1984) (holding that continuous weaving within own lane justified the stop of the vehicle). An officer has reasonable suspicion if he observes a vehicle weaving, plus another factor, even if the suspected vehicle never crosses the center or fog lines. State v. James, 2016 ND 68, ¶9, 876 N.W.2d 720; Pesanti, 2013 ND 210, ¶10, 839 N.W.2d 851.

[¶16] The district court found this case paralleled Kappel. (Order ¶8-11). In that case, this Court justified a traffic stop after an officer observed a vehicle make an extended stop at a stop sign plus observed weaving within the vehicle's own lane. Kappel, 1999 ND 2013, ¶2, 602 N.W.2d 718. In Kappel, the stop at the stop sign lasted for approximately "ten seconds." Id. The officer then testified that the intersection was clear of traffic and obstructions. Id. After following the vehicle, the officer conducted a traffic stop and a D.U.I. investigation. Id. at ¶3. This Court found that the officer had reasonable suspicion to justify the traffic stop based on the extended stop plus the weaving. Id. at ¶15. Further, this Court reasoned that on these facts, "a reasonable person in [the officer's] position would suspect Kappel was intoxicated or otherwise impaired." Id. at ¶19. Mr. Bornsen's appeal is factually similar to Kappel, and the district court properly found that Kappel controls the issue.

[¶17] Moreover, using the analysis from Kappel, the district court explained certain facts, specifically the extended stop and wide turn, taken together with the rational inferences Opp made, specifically that the driver may be impaired based on those observations, justified the traffic stop. (Order ¶11). Therefore, with the analysis from

Washington, an objective manifestation to suspect potential unlawful activity existed.

See supra ¶8.

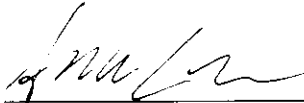
[¶18] In this case, Opp had reasonable suspicion. From Gabel, this Court looks to the totality of the circumstances. See supra ¶8. In this case, that totality includes: an extended stop of fifteen seconds when the normal stop lasts “a second or two” (T. at 9), a wide right turn, the encroachment of the tires onto the center line for three seconds, the nonexistence of traffic or pedestrians, the unobstructed view of the intersection, and the time of night.

[¶19] This Court does not require Opp to isolate a single factor which signals a potential violation of the law. Lawrence, 2002 ND 31, ¶8, 639 N.W.2d 466. To the contrary, Opp identified several factors in his testimony such as: the extended stop, the wide turn, the encroachment onto the center line, the three seconds spent on the center line as considerations for the traffic stop. This Court allows Opp to assess the situation as it unfolds and use common-sense determinations when accessing a potential traffic stop. Id. Therefore, Opp, based on his observations, had knowledge that would give a prudent person reasonable grounds to believe the driver at the intersection may be impaired.

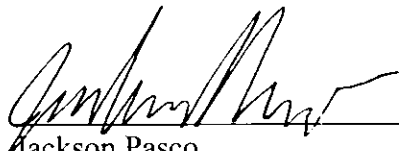
CONCLUSION

[¶20] For the above-stated reasons, the State of North Dakota respectfully requests this Court affirm the order of the district court denying Mr. Bornsen's Motion to Suppress and Dismiss.

Respectfully submitted this 11th day of July, 2018.



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