20180093
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JULY 25, 2018
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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

ON APPEAL FROM A CRIMINAL JUDGEMENT ENTERED MARCH 6, 2018 AFTER MR. BORNSEN CONDITIONALLY PLED GUILTY AFTER DENIAL OF HIS MOTION TO SUPPRESS AND DISMISS DATED JANUARY 19, 2018 FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT GRAND FORKS COUNTY, NORTH DAKOTA THE HONORABLE JAY KNUDSON, PRESIDING.

REPLY BRIEF OF APPELLANT NATHAN THOMAS BORNSEN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ……..… p. 1

LAW AND ARGUMENT ……..…. ¶ 1

I. The District Court erred in denying Mr. Bornsen's Motion to Suppress evidence because Deputy Opp did not have a reasonable and articulable suspicion to believe Mr. Bornsen was violating the law……...……..... ¶ 1

CONCLUSION ……... ¶ 9

TABLE OF AUTHORITIES

CASES:

Borman v. Tschida, 171 N.W.2d 757 (N.D.1969)……..……. ¶ 6

Kappel v. N.D. Dep't of Transp., 1999 ND 213, 602 N.W.2d 718.……...… ¶¶ 1, 7, 8, 9

Salter v. N.D. Dep't of Transp., 505 N.W.2d 111 (N.D. 1993)……..passim

State v. Dorendorf, 359 N.W.2d 115 (N.D. 1984)……... ¶ 6

State v. Kolb, 239 N.W.2d 815 (N.D. 1976)…….¶ 6

State v. Lange, 255 N.W.2d 69 (N.D. 1977)……..... ¶ 6

State v. VandeHoven, 2009 ND 165, 388 N.W.2d 859……. ¶¶ 2, 6, 7, 9

CASES FROM OTHER JURISDICTIONS:

Warrick v. Comm'r of Pub. Safety, 374 N.W.2d 585, 586 (Minn. Ct. App. 1985)……¶ 4

STATUTES:

N.D.C.C. § 39-10-35(1)……. ¶ 5

IN THE SUPREME COURT, STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	Supreme Court No. 20180093
Plaintiff and Appellee,	)	Case No. 18-2017-CR-02221
	)	
vs.	)	**APPELLANT'S BRIEF IN REPLY**
	)	**TO APPELLEE'S RESPONSE BRIEF**
Nathan Thomas Bornsen,	)	
	)	
Defendant and Appellant.	)	

LAW AND ARGUMENT

I. The District Court erred in denying Mr. Bornsen's Motion to Suppress evidence because Deputy Opp did not have a reasonable and articulable suspicion to believe Mr. Bornsen was violating the law.

[¶ 1] The District Court erred in denying Mr. Bornsen's Motion to Suppress evidence because Deputy Opp did not have a reasonable and articulable suspicion to believe Mr. Bornsen was violating the law. The State relies heavily upon the analysis found in Kappel v. N.D. Dep't of Transp., 1999 ND 2013, 602, N.W.2d 718.; however, this argument is incomparably without merit to the present case. While the State recognizes that weaving within one's own lane of travel may give rise to a reasonable and articulable suspicion of violating the law as held in Kappel, the present case is arguably akin to Salter v. N.D. Dep't. of Transp., 505 N.W.2d 111 (N.D. 1993).

[¶ 2] In Salter, this Court distinguished "erratic movement" and "slight weaving" that do not give rise to a reasonable and articulable suspicion. The officer met Salter's vehicle while traveling in the opposite direction at approximately 3 a.m. Id. Salter's vehicle was going 30-35 miles per hour in a 50 mile-per-hour zone. Id. The officer turned his vehicle around and followed Salter, subsequently stopping and arresting him for driving

under the influence. Id. Salter's license was suspended, and he appealed, arguing that the officer had no reasonable or articulable suspicion to stop his vehicle. Id. The officer testified that there was a "slight movement back and forth" within the lane, the vehicle was traveling 30-35 mph in a no-passing zone, and other vehicles were coming up from behind. Id. The district court reversed the Department of Transport's (DOT) suspension, finding the officer lacked reasonable and articulable suspicion to stop Salter's vehicle. Id. The DOT appealed, and this Court held that the officer did not have a reasonable and articulable suspicion that Salter had committed a violation, reasoning:

> In this case there is no evidence of erratic movement, sharp veering, or any of the other factors noted in prior cases. Officer Polasky specifically testified that Salter did not cross the center line or the frost line. In fact, Officer Polasky repeatedly characterized the weaving as "slight" or "minimum," and he apparently did not consider it significant enough to include in his initial written report of the incident. This is precisely the type of "slight weaving" which we cautioned in VandeHoven would not serve as a valid basis for a vehicle stop.

Id. at 113.

[¶ 3] In Salter, the Department also argued that the slow speed of Salter's vehicle was impeding traffic, and therefore provided a reasonable and articulable suspicion. Id. The Department also relied upon Officer Polasky's characterization of Salter's driving as "erratic" to support a reasonable and articulable suspicion of a violation. Id. at 114. When asked to explain what was "erratic" about Salter's driving, Officer Polasky could point only to the slow speed impeding traffic and slight weaving within the lane. Id. This Court held that "it is clear that the characterization of Salter's driving as "erratic" was a mere conclusory statement of the officer and did not add to the mix any new fact supporting the stop. Id. The facts in the record suggest a "mere hunch" of illegal activity; they do not

support the conclusion that Officer Polasky had a reasonable and articulable suspicion that Salter had committed a violation. Id.

[¶ 4] This Court also brought attention to Warrick v. Comm'r of Pub. Safety, which was virtually identical to Salter. 374 N.W.2d 585, 586 (Minn. Ct. App. 1985). In Warrick, the officer stopped the defendant's vehicle at approximately 1:45 a.m. after observing "subtle" weaving of the vehicle within its own lane, and slow speed ranging from 40 to 45 miles per hour. Id. The court held that these facts were insufficient to justify a reasonable and articulable suspicion, making the vehicle stop illegal. Id.

[¶ 5] Here, like this Court has previously held in Salter, Bornsen's driving behavior, although potentially slight, was not erratic in any manner. Too, Bornsen's tires never crossed the center lane or entered the lane of oncoming traffic. (Bornsen Hearing Transcript (Hr'g Tr.) at 18, Feb. 9, 2018). Dep. Opp, like the officer in Salter, did not consider it significant enough to include in the initial written warning, nor upon contact, did he inform Bornsen about the wide turn. (Hr'g Tr. at 19). In the affidavit of probable cause, Dep. Opp specifically wrote and testified to his written statement that "the reason for the traffic stop was stopping, standing where prohibited". Although the officer mentioned the wide turn, it was not cited as a basis for the stop in his initial report. (Hr'g Tr. at 13, 14). The lack of shoulder on the roadway made Bornsen's turn reasonable. Although Bornsen did not drive as close to the curb as possible within the meaning of N.D.C.C § 39-10-35(1), it would be unreasonable to conclude that a slight or minimal movement within one's own lane, would substantiate an articulable and reasonable suspicion distinguishable from that of the standard driver.

[¶ 6] This Court in Salter distinguishes itself from State v. VandeHoven, 2009 ND 165, 388 N.W.2d 859. In VandeHoven, the defendant was traveling northbound when he met two officers traveling southbound on the same road. Id. at 858. As the vehicles approached each other, VandeHoven's vehicle **veered sharply** to the right, and then sharply back to the left, **crossing over** the unmarked center of the roadway. Id. (Emphasis added). According to the officer, the vehicle turned abruptly enough to shine the headlights beyond the fence line and "out across the field to the west side of the roadway." Id. at 858. The officer turned the patrol car around and followed VandeHoven for approximately four-tenths of a mile, at which time he stopped VandeHoven. Id. He was subsequently placed under arrest for driving under the influence and filed a motion to suppress. Id. The trial court denied VandeHoven's motion and this Court affirmed, holding that "although there may be situations where slight weaving cannot serve as a basis for a valid stop, the erratic movement of the vehicle in this case provided sufficient basis to create an articulable and reasonable suspicion that VandeHoven was violating the law." Id. at 859. *See also* State v. Dorendorf, 359 N.W.2d 115 (N.D. 1984) (holding that initial weaving with subsequent weaving within one's own lane of travel may give rise to a reasonable and articulable suspicion of violating the law); State v. Kolb, 239 N.W.2d 815 (N.D. 1976) (slight weaving, extreme fluctuations in speed, veering onto shoulder of road, crossing over center line); Borman v. Tschida, 171 N.W.2d 757 (N.D. 1969) (sharp veering in one direction, squealing of the tires, weaving within own lane); State v. Lange, 255 N.W.2d 69 (N.D. 1977) (responding to a call of a possible DWI, officer observed vehicle weaving in its lane of traffic for .25 miles).

[¶ 7] Both Salter and the present case are distinct from VandeHoven. Here, Dep. Opp was stationary, 120 yards away from Bornsen as he entered the intersection, although he testified he was only 15-20 yards away. (Hr'g Tr. at 6-7). Dep. Opp observed the vehicle remain stopped at a stop sign for approximately fifteen seconds. (Hr'g Tr. at 6). However, Dep. Opp testified it would not be suspicious for a driver, perhaps lost or overly cautious, to remain stationary at a stop sign for longer than usual. (Hr'g Tr. at 17-18). And although this Court stated, in Kappel, an officer does not need to "rule our every potential innocent excuse" for the behavior in question, an officer cannot stop a vehicle based on a mere hunch of illegal activity. Once Bornsen began entering the intersection, Dep. Opp then left his approach, observing from this distance that Bornsen's driver's side tires although making contact with the center line for approximately 2-3 seconds, never crossed the center line, distinct from VandeHoven whose driving behavior was held to include sharp and erratic veering into another lane. (Hr'g Tr. at 6-7, 18). Nothing in the record states that Bornsen made any sharp veering or erratic movements as found in VandeHoven. Dep. Opp continued to follow Bornsen for at least one-half mile but did not observe any further traffic violations. (Hr'g Tr. at 18-19). Dep. Opp also testified that there were no other vehicles present at the stop sign, therefore, Bornsen cannot reasonably be found to have impeded or slowed traffic in any way as the DOT argued in VandeHoven. (Hr'g Tr. at 17). The facts here may suggest a "mere hunch" of illegal activity, however, Dep. Opp's statement like the officer in Salter is conclusory and does not justify a reasonable and articulable suspicion this Court previously cautioned in VandeHoven and more importantly, is required by North Dakota law to have initiated this traffic stop.

[¶ 8] Moreover, both the district court and the State's heavy reliance upon Kappel, holding that an extended stop at a stop sign coupled with a secondary factor justifies a traffic stop provides no substantial argument here. (Appellee's Brief at ¶ 15, 16). The State emphasizes the erratic weaving corroborative with a prolonged stop at a stop sign rises to a reasonable and articulable suspicion of criminal activity. (Appellee's Brief at ¶ 16, 17). However, as this Court concluded in Salter, and too, should conclude here, Mr. Bornsen's alleged 'wide right turn' without crossing into another lane, does not constitute weaving of any kind, nor could one reasonably conclude this incident to have been erratic, or nonetheless, 'significant' enough for Dep. Opp to have written in the initial report as a reasoning factor of this traffic stop. Therefore, the present case is distinct from Kappel, making the 'secondary factor' argument that the State and the district court rely on hereby inapplicable.

CONCLUSION

[¶ 9] This Court has previously held that slight or minimal weaving does not warrant a reasonable or articulable suspicion to justify a traffic stop. Because the present case is analogous to Salter, and is distinct from both Kappel and VandeHoven, this Court should reverse the district court's ruling and find that Dep. Opp did not have a reasonable or articulable suspicion as required by the Fourth Amendment to the United States Constitution and Art. I, Section 8 of the North Dakota Constitution.

[¶ 10] Mr. Bornsen respectfully requests this Court **REVERSE** the February 23, 2018 Order denying his Motion to Suppress and Dismiss and allow him to withdraw his guilty plea.

Dated this 25th day of July, 2018.

REICHERT ARMSTRONG

/s/Alexander F. Reichert

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CERTIFICATE OF COMPLIANCE

The undersigned, as the attorney representing Appellant, Nathan Thomas Bornsen, and the author of the Reply Brief of Appellant, hereby certifies that said brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 1763 words from the portion of the brief entitled "Law and Argument" through the signature line. This word count was done with the assistance of the undersigned's computer system, which also counts abbreviates as words.

Dated this 25th day of July, 2018.

REICHERT ARMSTRONG

/s/Alexander F. Reichert

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Nathan Thomas Bornsen,	)	**AFFIDAVIT OF SERVICE**
	)	
Defendant and Appellant.	)	

State of NORTH DAKOTA)
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County of GRAND FORKS)

I, Challis Williams, hereby certify that on the 25th day of July, 2018, I served a copy of the following:

- Reply Brief of Appellant Nathan Thomas Bornsen

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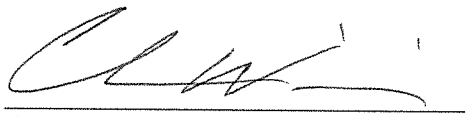

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