

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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

ON APPEAL FROM A CRIMINAL JUDGEMENT ENTERED MARCH 6, 2018
AFTER MR. BORNSSEN 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.

**BRIEF OF APPELLANT
NATHAN THOMAS BORNSSEN**

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STATEMENT OF THE ISSUE

- I. **Did the District Court err in finding Deputy Opp possessed a reasonable and articulable suspicion to justify the stop of Mr. Bornsen?**

STATEMENT OF THE CASE

[¶ 1] Nathan Thomas Bornsen (Mr. Bornsen), appeals from a criminal judgment entered after he entered a conditional plea of guilty following an order denying his Motion to Suppress and Dismiss in the District Court of Grand Forks County. (Appellant’s App. at 5-9). On October 20, 2017, Mr. Bornsen was charged with Driving Under the Influence—2nd Offense. (Appellant’s App. at 4). Mr. Bornsen filed a Motion to Suppress and Dismiss on January 19, 2018. Record (R.) at Doc ID# 17-18. The State of North Dakota filed its response to Mr. Bornsen’s motion on February 1, 2018, Mr. Bornsen submitted a Reply Brief on February 6, 2018, and a hearing was held on February 9, 2018. *Id.* at 20-23.

[¶ 2] The District Court issued its order denying the Motion to Suppress and Dismiss on February 23, 2018, finding Deputy Opp possessed a reasonable and articulable suspicion to stop Mr. Bornsen’s vehicle. (Appellant’s App. at 5-9). Mr. Bornsen entered a conditional plea of guilty, reserving his right to appeal the denial of his motion, which was accepted by the Court on March 6, 2018, with an Amended Judgment being entered on March 15, 2018 reflecting the conditional plea. (Appellant’s App. at 10-11). Mr. Bornsen timely filed his notice of appeal on March 6, 2018. (Appellant’s App. at 13). Mr. Bornsen argues the District Court erred in finding Deputy Opp possessed a reasonable and articulable suspicion to justify the stop of Mr. Bornsen and

therefore erred in denying his Motion to Suppress and Dismiss, and resultantly, the District Court's order should be reversed.

STATEMENT OF THE FACTS

[¶ 3] On October 18, 2017, at approximately 10:06 p.m., Deputy James Opp (Dep. Opp) was stationary facing westbound in an approach on County Road 4 approximately 15-20 yards from the intersection of County Road 4 and County Road 4A in Grand Forks County. Hearing Transcript (Hr'g Tr.) at 6-7. Dep. Opp testified the intersection at that location is a T-Intersection. Id. at 7. Dep. Opp observed a vehicle traveling southbound on County Road 4A. Id. at 6. The vehicle stopped at the stop sign and remained stopped for approximately 15 seconds. Id. Dep. Opp testified as the vehicle began to enter the intersection, he left his approach to get behind the vehicle. Id. Dep. Opp testified he observed the driver's-side tires make contact with the center line. Id. However, Dep. Opp also testified that the vehicle never crossed the center line. Id. at 18. Dep. Opp testified the vehicle never entered the eastbound lane of traffic. Id.

[¶ 4] Dep. Opp testified that after he saw the vehicle stop for approximately 15 seconds, he "had suspicion that something may have been going on with the driver." Id. at 9. Dep. Opp continued to follow the vehicle in an attempt to observe further traffic violations. Id. at 10. Dep. Opp followed the vehicle for approximately one-half mile to observe further traffic violations but did not observe any. Id. at 18-19. Dep. Opp subsequently initiated a traffic stop on the vehicle. Id. at 10. Dep. Opp testified the reason for the stop was "stopping at a stop sign, would be stopping or standing where prohibited"--presumably in violation of section 39-10-49 of the North Dakota Century

Code; and a “wide turn.” *Id.* at 11. Dep. Opp read part of his affidavit of probable cause into the record at the motion hearing which specifically stated, “The reason for the traffic stop was stopping, standing, or parking where prohibited.” *Id.* at 14, lines 16-18.

[¶ 5] After stopping the vehicle, Dep. Opp approached it and immediately informed the driver, later identified as Mr. Bornsen, the reason for the stop was because he stopped at the stop sign too long. *See* Defendant’s Exhibit 1, Hr’g Tr. at 16. Dep. Opp did not mention anything regarding a wide turn, and in fact the wide-turn appeared only in the affidavit of probable cause. Additionally, Dep. Opp issued Mr. Bornsen a written warning for “Stopped/Standing/Parking in Places Where Prohibit.” *See* Defendant’s Exhibit 2, Hr’g Tr. at 20-21 (Appellant’s App. at 12). Dep. Opp did not issue any warnings to Mr. Bornsen for the wide turn, nor did he mention that as his reason for the stop in his communications to Mr. Bornsen. *See* Defendant’s Exhibit 1, Hr’g Tr. at 16. Mr. Bornsen was subsequently arrested and charged with Driving Under the Influence—2nd Offense. (Appellant’s App. at 4).

STANDARD OF REVIEW

[¶ 6] This Court gives deference 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 (citing *State v. Tognotti*, 2003 ND 99, ¶ 5, 663 N.W.2d 642). This Court “will not reverse a district court decision on a motion to suppress . . . if there is sufficient competent evidence capable of supporting the court’s findings, and if the decision is not contrary to the manifest weight of the evidence.” *Id.* (quoting *State v. Gefroh*, 2011 ND 153, ¶ 7, 801 N.W.2d 429). Questions of law are fulling reviewable on

appeal, and whether a finding of fact meets a legal standard is a question of law. Id. (citing State v. Reis, 2014 ND 30, ¶ 8, 842 N.W.2d 845). Therefore, the ultimate conclusion about whether the facts support a reasonable and articulable suspicion are fully reviewable on appeal. State v. McLaren, 2009 ND 176, ¶ 7, 773 N.W.2d 416 (citing State v. Smith, 2005 ND 21, ¶ 11, 691 N.W.2d 203).

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.

[¶ 7] The Fourth Amendment to the United States Constitution and Art. I, Section 8 of the North Dakota Constitution prohibit unreasonable searches and seizures. State v. Ballard, 2016 ND 8, ¶ 8, 874 N.W.2d 61. An officer conducting an investigatory traffic stop must have a reasonable and articulable suspicion the motorist has violated or is violating the law. State v. Knox, 2016 ND 15, ¶ 7, 873 N.W.2d 664 (citing State v. Rahier, 2014 ND 153, ¶ 12, 849 N.W.2d 212). An officer has reasonable suspicion if, under the totality of the circumstances, a reasonable person in the officer’s position would be justified by some objective manifestation to believe that the person stopped engaged in or was about to engage in criminal activity. Id. at ¶ 8. The reasonable and articulable suspicion standard requires less than probable cause but more than a mere hunch. State v. Hawley, 540 N.W.2d 390, 392 (N.D. 1995). Police may conduct an investigatory stop if the State can “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant those intrusions.” State v. Torkelsen, 2006 ND 152, ¶ 21, 718 N.W.2d 22 (quoting Terry v. Ohio, 392 U.S.

1, 20 (1968)). An objective standard is used, and the court views the totality of the circumstances to determine whether an investigatory stop is valid. State v. Smith, 2005 ND 21, ¶ 15, 691 N.W.2d 203. 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. (quoting City of Fargo v. Ovind, 1998 ND 69, ¶ 9, 575 N.W.2d 901).

[¶ 8] The District Court here determined the facts in this case were similar to the facts in Kappel. In Kappel, Officer Vanyo observed a motorcycle stopped at a stop sign. Kappel v. N.D. Dep't of Transp., 1999 ND 213, ¶ 2, 602 N.W.2d 718. Vanyo did not observe traffic coming from either direction, but the motorcycle remained stopped for approximately ten seconds. Id. The motorcycle eventually proceeded to turn right, after which Vanyo followed the motorcycle for approximately two blocks. Id. In the two blocks Vanyo followed the motorcycle, he observed it weaving several times within its own lane. Id. Vanyo initiated a traffic stop on the vehicle. Id.

[¶ 9] Kappel requested an administrative hearing. Id. at ¶ 4. The hearing officer found Vanyo observed the motorcycle pausing longer than normal at the intersection and later observed the motorcycle weaving within its own lane and therefore concluded Vanyo had a reasonable and articulable suspicion that Kappel was driving under the influence. Id. at ¶ 4.

[¶ 10] Kappel appealed to the district court, which affirmed, concluding the longer than normal pause at the intersection and the weaving together were enough to

constitute a reasonable and articulable suspicion justifying the stop. Id. at ¶ 5.

[¶ 11] Kappel appealed to this Court and this Court affirmed the order of the district court upholding the hearing officer's determination. Id. at ¶ 19. In doing so, this Court refused to distinguish or abandon its prior precedent set in Goeman, Dorendorf, and Guthmiller, and determined the prolonged stop coupled with the weaving provided Vanyo sufficient suspicion to justify the stop. Id. at ¶¶ 16, 19. (*See State v. Goeman*, 431 N.W.2d 291, 291-92 (N.D. 1988) (holding a stop was justified where the car came to an abrupt halt at an intersection and the car later weaved within its own lane); State v. Dorendorf, 359 N.W.2d 115, 117 (N.D. 1984) (holding a vehicle weaving within its own lane may be enough to justify the stop of that vehicle); State v. Guthmiller, 499 N.W.2d 590, 593 (N.D. 1993) (holding a prolonged stop at the stop sign was sufficiently corroborative of an anonymous tip to justify the reasonable suspicion stop of the driver)).

[¶ 12] The facts in this case are indeed distinguishable from Kappel. Here, Dep. Opp observed a vehicle approach a T-intersection and remain stopped for approximately fifteen seconds. Then, from what Dep. Opp believed was twenty yards away, he observed Mr. Bornsen's tires touch, but not cross the center line. In fact, Dep. Opp specifically testified the vehicle never entered the eastbound lane of travel and in fact turned into the correct lane. (Hr'g Tr. at 10, 18). He followed Mr. Bornsen for an at least one half-mile in an "attempt to observe further violations." Dep. Opp didn't observe any further violations. This specific fact is extremely important in distinguishing this case from Kappel. Dep. Opp did not observe any additional weaving, or any other indications that would give an individual in Dep. Opp's position a reasonable belief that Mr. Bornsen

was violating the law. In Kappel, it was the prolonged stop coupled with the weaving that justified the stop. Here, there was a prolonged stop and a “wide” turn of a vehicle which did not leave its own lane of travel. The district court erred in determined the facts presented in this case are similar to the facts in Kappel.

[¶ 13] Similarly, this case is distinguishable from Guthmiller. In Guthmiller, dispatch received an anonymous tip of a potential intoxicated driver. State v. Guthmiller, 499 N.W.2d 590, 591 (N.D. 1993). Deputy Kapp responded to the tip, which had described a light blue pickup, the license plate number, and its direction of travel. Id. As Dep. Kapp located the vehicle, he observed it exit Interstate 94 and stop at a stop sign. Id. Dep. Kapp had not observed any erratic driving, but did observe the vehicle remain stationary at the stop sign for an extended period of time. Id. Dep. Kapp pulled up behind the stopped vehicle and paused for a few seconds to see whether the vehicle would move. Id. When the vehicle remained stopped at the stop sign, Dep. Kapp turned on his amber flashers and approached the pickup. Id. Guthmiller was subsequently arrested for DUI. Id.

[¶ 14] Guthmiller relied on an unlawful stop at his court trial, which the district court upheld as a lawful stop. Id. In denying the defense, the court found Dep. Kapp had a reasonable and articulable suspicion to investigate the vehicle because the prolonged stop was the “something more” independent of the anonymous tip that made it reasonable for the officer to investigate the vehicle. Id. This Court upheld the trial court’s determination for the same reasons. Id. at 592. However, Justice Levine, in a concurring opinion cautioned that Guthmiller’s stop at the stop sign, without the anonymous tip,

would not be sufficient to constitute either reasonable suspicion or trigger any caretaking duty on the part of a law enforcement officer. Id. (Levine, J. concurring). “After all, the Fourth Amendment seeks to minimize governmental confrontations with the individual.” Id.

[¶ 15] Here, there is not the “something more” to justify Dep. Opp’s stop of Mr. Bornsen’s vehicle. Mr. Bornsen did not remain stopped at the stop sign like Guthmiller. Mr. Bornsen stopped at the stop sign before proceeding on his journey. Dep. Opp followed the vehicle for at least one-half mile in an attempt to observe the “something more” which would justify the intrusion, but was unable to find it. Guthmiller cannot stand for the proposition Dep. Opp possessed a reasonable and articulable suspicion to stop Mr. Bornsen.

[¶ 16] As stated repeatedly throughout the motion hearing, Dep. Opp testified the reason for the stop was for “stopping, standing, parking where prohibited” and “wide turn.” However, there are three separate instances which refute Dep. Opp’s testimony that he considered the wide turn in making the stop, and instead the wide turn was included only in the affidavit of probable cause written after the fact. First, in the affidavit of probable cause, Dep. Opp specifically wrote and he testified he wrote, “The reason for the traffic stop was stopping, standing where prohibited.” (Hr’g Tr. at 13, 14). Second, Dep. Opp initiated a traffic stop and approached the vehicle, whereupon he immediately informed the driver, “The reason for the stop, is at the stop sign at County Road 4 and 4A, you stopped there and were sitting there for about 15 seconds, any reason for that?” *See* Defendant’s Exhibit 1, Hr’g Tr. at 16. Dep. Opp even testified it would

not be suspicious for a vehicle to stop for an extended period of time if the vehicle were lost, or in an abundance of caution. (Hr'g Tr. at 18). Dep. Opp did not inform Mr. Bornsen about any wide turn that occurred. Finally, Dep. Opp issued Mr. Bornsen a written warning for stopping, standing, or parking where prohibited, but did not issue any written warnings for making a wide turn. *See* Defendant's Exhibit 2, Hr'g Tr. at 21 (Appellant's App. at 12). These three instances lend themselves to the fact that Dep. Opp did not consider the wide turn, a turn in which Mr. Bornsen did not cross into another lane of travel, but in fact maintained his own lane of travel, as a basis for the stop. It wasn't until after the encounter had been completed that the wide turn was mentioned. The competent evidence in this case shows Dep. Opp relied solely on Mr. Bornsen's prolonged stop at the stop sign before initiating a traffic stop. Dep. Opp lacked a reasonable and articulable suspicion to justify the stop of Mr. Bornsen's vehicle.

CONCLUSION

[¶ 17] Because Dep. Opp lacked a reasonable and articulable suspicion to justify the seizure of Mr. Bornsen, 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 11th day of June, 2018.

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CERTIFICATE OF COMPLIANCE

The undersigned, as the attorney representing Appellant, Nathan Thomas Bornsen, and the author of the 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 2617 words from the portion of the brief entitled “Statement of the Issues” 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 11th day of June, 2018.

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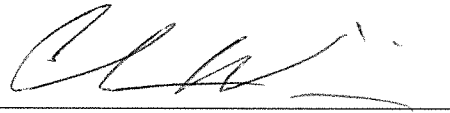
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State of NORTH DAKOTA)
) ss
County of GRAND FORKS)

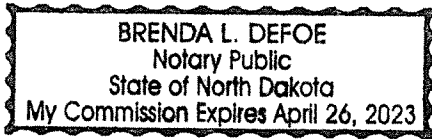
CHALLIS WILLIAMS, being first duly sworn, says that he is 18 years of age and that on the 11th day of June, 2018 he served a copy of **APPELLANT'S BRIEF and APPELLANT'S APPENDIX**, in the above entitled case by electronically mailing to the below described people:

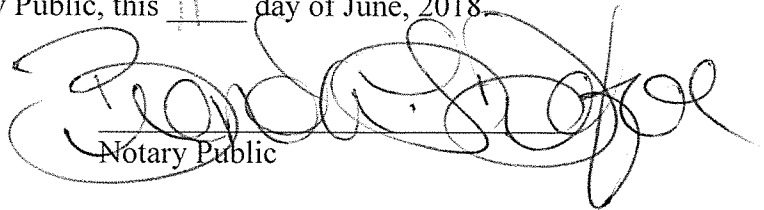
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CHALLIS WILLIAMS

Subscribed and sworn to before me, a Notary Public, this 11th day of June, 2018.





 Notary Public