20210158
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
SEPTEMBER 29, 2021
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA, PLAINTIFF AND APPELLEE *v.* **LEN DEAN VANNETT,** DEFENDANT AND APPELLANT	**SUPREME COURT NO. 20210158** DIST. CT. NO. 09-2020-CR-02907

APPEAL FROM AMENDED CRIMINAL JUDGMENT
ENTERED ON MAY 4, 2021
* * *
CASS COUNTY DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE STEVEN E. MCCULLOUGH, PRESIDING

APPELLEE'S BRIEF

ORAL ARGUMENT REQUESTED

KIMBERLEE J. HEGVIK, *#06194*
NICHOLAS S. SAMUELSON, *#08841*
Assistant State's Attorneys
211 9th Street South
Fargo, North Dakota 58103
(701) 241-5850
sa-defense-notices@casscountynd.gov
Attorney for Respondent/Appellee

TABLE OF CONTENTS

PAGE/PARAGRAPH NO.

TABLE OF AUTHORITIES

CASES PARAGRAPH NO.

STATUTES, REGULATIONS, AND RULES

STATEMENT OF THE ISSUES

[¶ 1] Whether Deputy Murray had reasonable and articulable suspicion to justify his encounter with Vannett.

[¶ 2] Whether N.D.C.C. § 39-20-01(3)(b) requires suppression of chemical test results.

[¶ 3] Whether irregularities with the Intoxilyzer 8000 device require suppression of its test results.

STATEMENT OF THE CASE

[¶ 4] In July 2020, Len Vannett was arrested and cited for being in actual physical control of a vehicle while under the influence of alcohol. Vannett moved to suppress the results of a chemical breath test, arguing Deputy Jacob Murray lacked reasonable suspicion for the stop, the implied consent advisory was defective, and errors in the Intoxilyzer 8000 testing required suppression. Deputies Jacob Murray and Brad Heger and State Toxicologist Charles Eder testified at an evidentiary hearing. The district court denied the motion.

[¶ 5] In May 2021, Vannett conditionally pled guilty, preserving his right to appeal the district court's denial of his motion to suppress. He now appeals.

STATEMENT OF FACTS

[¶ 6] On July 10, 2020, a member of the public called dispatch to report a possibly impaired driver at the Petro Serve gas station in Casselton. Transcript ("Tr.") 5:19–23. The caller stated the individual was struggling to open their car door. Tr. 5:21–23. They described the vehicle as a tan van and provided its license plate number. Tr. 19:2–4. The caller told dispatch they wanted to remain anonymous. Tr. 6:5–7.

[¶ 7] Deputy Murray responded to the area of the Casselton Petro Serve but was unable to locate the suspect vehicle. Tr. 7:2–5. He then drove to the address associated with the license plate number given but was again unable to locate the vehicle. Tr. 7:8–11.

[¶ 8] Deputy Murray began driving back to the station to clear the call when he noticed tan Chevrolet Astro van "parked in an odd position" in front of the Tesoro gas station. Tr. 7:19–8:9. He pulled into the Tesoro parking lot and got out to look at the van's plate. Tr. 8:19–23. He confirmed it was the same plate reported to dispatch. Tr. 9:12–13. Deputy Murray did not activate his squad car's emergency lights or park behind the Astro. Tr. 8:17–19.

[¶ 9] As Deputy Murray was standing by the passenger side of the van, Len Vannett exited the gas station. Tr. 9:20–22. Deputy Murray testified Vannett was "wobbly" and appeared to have balance issues as he came

out the door. Tr. 10:5–15. When they got closer, Deputy Murray noticed Vannett's eyes were bloodshot and watery, and he smelled the odor of alcohol. Tr. 11:17–20. Deputy Murray also noticed Vannett's speech was slurred. Tr. 11:21–24. He testified these observations suggested Vannett was intoxicated. Tr. 11:17–24.

[¶ 10] Deputy Murray asked Vannett if he had been driving the van. Tr. 11:7–9. After first denying driving the van, Vannett admitted he had driven it. Tr. 11:9–14. At that point, Deputy Murray requested Vannett submit to field sobriety tests. Tr. 13:16–19. The tests indicated impairment, and Deputy Murray placed Vannett under arrest. Tr. 16:3–9. Deputy Murray transported Vannett to the Cass County Jail to perform a chemical breath test. Tr. 16:1–3.

[¶ 11] Deputy Brad Heger is an approved operator for the Intoxilyzer 8000. Tr. 24:19. Deputy Heger read the implied consent advisory for a chemical breath test, and Vannett agreed take the test. Tr. 24:12–16. Vannett's first breath sample resulted in a "purge fail" error. Tr. 28:12–14. Vannett provided a second breath sample, which resulted in a "calibration check out of tolerance" error. Tr. 29:1–3. After the second test, Deputy Heger called the field inspector, who instructed him to restart the Intoxilyzer 8000. Tr. 29:3–5. Deputy Heger restarted the machine and obtained a valid test on the third try. Tr. 29:5–9.

A. The November 2020 suppression hearing.

[¶ 12] The State charged Vannett with being in actual physical control of a vehicle while under the influence an intoxicating liquor or having an alcohol concentration of 0.08 percent or greater within two hours of driving. Vannett moved to suppress the results of the chemical test, arguing the stop was unsupported by reasonable suspicion, the implied consent advisory was incomplete, and the testing procedures violated the approved method.

[¶ 13] The district court held a hearing on November 16, 2020. At the hearing, Deputy Murray testified about his initial contact with and arrest of Vannett. Deputy Heger testified regarding the implied consent advisory and administration of the Intoxilyzer 8000 tests. State toxicologist Charles Eder also testified at the suppression hearing. Eder explained the difference between the Intoxilyzer 8000 training manual and the approved method. Tr. 45:15–18. Eder testified he had reviewed the Intoxilyzer records from each test. Tr. 45:12. According to Eder, Deputy Heger followed the approved method on all three tests. Tr. 45:18–19. He also opined that the third chemical test was valid. Tr. 46:14–16.

B. The district court's findings and order.

[¶ 14] The district court found that an anonymous caller informed dispatch of the description of a van and license plate number and Deputy

Murray found a vehicle matching the description and plate number at the Tesoro gas station in Casselton. Tr. 51:18–23; 52:8–13. The court found Deputy Murray observed Vannett exit the gas station exhibiting poor balance, which the court noted "would have been corroborative of the initial call." Tr. 52:17–19. Based on this and Deputy Murray's observations of Vannett's slurred speech, watery eyes, and the odor of alcohol, the court found "[t]here was clearly reasonable, articulable suspicion to do what the officer did at that point in time." Tr. 52:25–53:4, 53:14–16. Vannett's performance on the field sobriety tests suggested impairment, and the court found there was "[c]learly probable cause to arrest at the time he did." Tr. 53:9–16.

[¶ 15] The court found the implied consent advisory was read. Tr. 53:22–23.

[¶ 16] Three tests were attempted on the Intoxilyzer 8000—the first resulted in a "purge fail" exception message. The second test resulted in a "calibration check out of tolerance" message. Tr. 54:3–7. After the second test, Deputy Heger contacted the field inspector who told him to restart the machine. Tr. 54:15–20. The court found this was consistent with State Toxicologist Eder's testimony regarding appropriate procedure under the training manual. Tr. 54:21–23.

[¶ 17] At about 1936 hours, a third test yielded a breath sample with an alcohol concentration of 0.241 percent. Tr. 54:8–9. Regarding the validity of the third test, the court stated:

> [THE COURT]: . . . But more importantly, for the Court's purposes, the state toxicologist testified that the officer followed the approved method all three times. And that's what's important for purposes of this motion. Also, the state toxicologist testified that there's no reason to believe the third test was invalid in any way or that the exception messages received on the first two tests would render that third test invalid.

Tr. 55:3–10. The court denied the motion. Tr. 55:11–12. Vannett conditionally pled guilty, preserving his right to appeal, and he now appeals.

STANDARD OF REVIEW

[¶ 18] This Court's standard of review on motions to suppress is well established:

> [t]he trial court's disposition of a motion to suppress will not be reversed if, after conflicts in the testimony are resolved in favor of affirmance, there is sufficient competent evidence fairly capable of supporting the trial court's findings, and the decision is not contrary to the manifest weight of the evidence. [This standard] recognizes the importance of the trial court's opportunity to observe the witnesses and assess their credibility, and [this Court] "accord[s] great deference to [the trial court's] decision in suppression matters."

State v. Vetter, 2019 ND 138, ¶ 5, 927 N.W.2d 435 (quoting *State v. Montgomery*, 2018 ND 20, ¶ 4, 905 N.W.2d 754). "Whether the facts

support a finding of reasonable articulable suspicion is a question of law, and thus, is fully reviewable by this Court." *State v. Adan*, 2016 ND 215, ¶ 9, 886 N.W.2d 841 (citing *State v. Fields*, 2003 ND 81, ¶ 6, 662 N.W.2d 242).

LAW AND ARGUMENT

I. Deputy Murray had reasonable suspicion to conduct an investigative stop of Vannett.

[¶ 19] A law enforcement officer must have reasonable and articulable suspicion that a motorist has violated the law to make a legal investigative stop. *State v. Lykken*, 406 N.W.2d 664, 666 (N.D. 1987). To determine whether an officer had reasonable and articulable suspicion, this Court examines the information known to the officer at the time of the stop. *State v. Boyd*, 2002 ND 203, ¶ 15, 654 N.W.2d 392 (internal citations omitted). Under this standard, an officer must justify the stop with "more than just a vague 'hunch' or other non-objective facts; and … the articulable facts must produce by reasonable inference, a reasonable suspicion of unlawful conduct." *Id.* (internal citations omitted).

[¶ 20] An officer may form reasonable suspicion through the officer's personal observations or from information provided by another person. *Lykken*, 406 N.W.2d at 666 (citing *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921 (1972)). "Even an anonymous informant may supply sufficient

information for a reasonable suspicion justifying a stop." *Wibben v. N.D. State Highway Comm'r*, 413 N.W.2d 329, 331 (N.D. 1987) (internal citations omitted).

[¶ 21] In *State v. Miller*, 510 N.W.2d 638, 639 (N.D. 1994), a caller identified only as "Jody with Wendy's" called dispatch to report a possible drunk driver in the Wendy's drive-through. The informant told the dispatcher the driver "could barely hold his head up." *Id.* An officer responded and observed a pickup exit the parking lot. *Id.* The officer followed the pickup until it pulled back into the parking lot. *Id.* The officer observed no traffic violations or driving behavior corroborative of impairment. *Id.* Relying on only the informant's tip, the officer pulled in behind the driver and initiated a stop. *Id.* The *Miller* plurality concluded the tip was insufficient to provide the officer with reasonable suspicion because the anonymous informant lacked reliability and the information provided only an inference of criminal activity. *Id.* at 644-45.

[¶ 22] Here, as in *Miller*, law enforcement was tipped off to a possible crime by an anonymous informant. However, unlike in *Miller*, the law enforcement officer here observed signs of impairment corroborative of the informant's tip before seizing the suspect. Deputy Murray observed Vannett walking with poor balance, slurring his words, and smelling of alcohol. Tr. 11:17–24. In addition, Vannett admitted to Deputy Murray

that he was driving the van. Tr. 11:9–14. These facts taken together corroborate the anonymous informant's tip and independently gave rise to a reasonable and articulable suspicion that Vannett had driven under the influence. Therefore, the district court properly found Deputy Murray had reasonable suspicion, and it properly denied the motion.

II. The implied consent advisory was properly given.

[¶ 23] The district court found that "[t]he implied consent advisory was read." Tr. 53:22–23. The record supports that finding. Specifically, Deputy Heger testified he read the September 2019 version of the implied consent advisory. Tr. 24:12–14.

[¶ 24] Vannett argues the district court should have suppressed the results of the chemical breath test because, he asserts, Deputy Heger or Deputy Murray impermissibly modified the implied consent advisory. The district court was correct not to suppress the test results on these grounds because the statute Vannett cited does not apply to suppression of test results. Vannett argues N.D.C.C. § 39-20-01(3)(b) requires suppression of test results. At. Br. ¶27. Prior to August 1, 2019, N.D.C.C. § 39-20-01(3)(b) read:

> A test administered under this section is not admissible in any criminal or administrative proceeding to determine a violation of section 39-08-01 or this chapter if the law enforcement officer fails to inform the individual charged as required under subdivision a.

(emphasis added). However, N.D.C.C. § 39-20-01(3)(b) was amended effective August 1, 2019, and now states:

> "If an individual refuses to submit to testing under this section, proof of the refusal is not admissible in any administrative proceeding under this chapter if the law enforcement officer fails to inform the individual as required under subdivision a.

Section 39-20-01(3)(b), N.D.C.C. (emphasis added); *see also* 2019 N.D. Laws ch. 322, § 3. The present text of N.D.C.C. § 39-20-01(3)(b) is clearly inapplicable here because it makes inadmissible only evidence of a refusal and applies only to administrative proceedings. Here, Vannett seeks to suppress a chemical test result, not evidence of a refusal; and he wants it suppressed at a criminal trial, not an administrative proceeding. Because suppression of a chemical test at a criminal trial is not a remedy under N.D.C.C. § 39-20-01(3)(b), the district court properly denied the motion to suppress.

III. The Intoxilyzer 8000 tests were fairly administered in accordance with the approved method.

[¶ 25] "Section 39-20-07, N.D.C.C., governs the admission of a chemical test result and allows the use of certified documents to establish the evidentiary foundation for the result." *Ell v. Dir., N.D. Dep't of Transp.*, 2016 ND 164, ¶ 17, 883 N.W.2d 464. Section 39-20-07(5), N.D.C.C., eases the burden in laying the evidentiary foundation for a chemical test result when four foundational elements are met:

> (1) the sample must be properly obtained, (2) the test must be fairly administered, (3) the method and devices used to test the sample must be approved by the director of the state crime laboratory or the director's designee, and (4) the ... test must be performed by an authorized person or by one certified by the director of the state crime laboratory or the director's designee as qualified to perform it.

Ell, at ¶ 18 (citing *Filkowski v. Dir., N.D. Dep't of Transp.*, 2015 ND 104, ¶ 12, 862 N.W.2d 785); *see also State v. Blaskowski*, 2019 ND 192, ¶ 5, 931 N.W.2d 226. "To facilitate compliance with N.D.C.C. § 39-20-07 and the foundational element requiring a test be fairly administered, the state toxicologist has established approved methods for administering chemical breath tests." *Blaskowski*, at ¶ 6.

[¶ 26] The district court found Deputy Heger complied with the approved method on each of the three tests. Tr. 55:2–6. This is supported by the record. Deputy Heger is trained in operation of the Intoxilyzer 8000 and is a qualified operator. Tr. 24:19–23. At the bottom of each test record, Deputy Heger signed his name, indicating his compliance with the approved method and the instructions displayed by the Intoxilyzer 8000 in conducting the test. Appellant's Appendix ("App.") at 8–10. Eder reviewed the test records and concluded Deputy Heger followed the approved method for each of the three tests. Tr. 45:15–19.

[¶ 27] Because Deputy Heger complied with the approved method, not only are the test results admissible but under N.D.C.C. § 39-20-07(5),

they *must* be admitted. Therefore, the district court properly denied the motion to suppress.

CONCLUSION

[¶ 28] Because the district court properly denied the motion to suppress, the State respectfully requests this Court **AFFIRM** the amended criminal judgment.

ORAL ARGUMENT STATEMENT

[¶ 29] The State requests oral argument to emphasize its written argument and respond to rebuttal arguments presented by the Appellant.

Respectfully submitted this 29th day of September, 2021.

KIMBERLEE J. HEGVIK, *#06194*
NICHOLAS S. SAMUELSON, *#08841*
Assistant State's Attorneys
211 9th Street South
Fargo, North Dakota 58103
(701) 241-5850
sa-defense-notices@casscountynd.gov
Attorney for Respondent/Appellee

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA, PLAINTIFF AND APPELLEE *v.* **LEN DEAN VANNETT,** DEFENDANT AND APPELLANT	**SUPREME COURT NO. 20210158** DIST. CT. NO. 09-2020-CR-02907

CERTIFICATE OF COMPLAINCE

[¶ 1] Pursuant to N.D.R.App.P. 32(e), the principal brief complies with the page limitation and consists of 15 pages.

Respectfully submitted this 29th day of September, 2021.

KIMBERLEE J. HEGVIK, *#06194*
NICHOLAS S. SAMUELSON, *#08841*
Assistant State's Attorneys
211 9th Street South
Fargo, North Dakota 58103
(701) 241-5850
sa-defense-notices@casscountynd.gov
Attorney for Respondent/Appellee

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA, PLAINTIFF AND APPELLEE *v.* **LEN DEAN VANNETT,** DEFENDANT AND APPELLANT	**SUPREME COURT NO. 20210158** DIST. CT. NO. 09-2020-CR-02907

CERTIFICATE OF SERVICE

[¶ 1] A true and correct copy of the foregoing document was sent by e-mail on September 29, 2021, to:

Leslie Johnson Aldrich (ljohnson@ljalaw.net).

KIMBERLEE J. HEGVIK, *#06194*
NICHOLAS S. SAMUELSON, *#08841*
Assistant State's Attorneys
211 9th Street South
Fargo, North Dakota 58103
(701) 241-5850
sa-defense-notices@casscountynd.gov
Attorney for Respondent/Appellee