STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1566

State of Minnesota,
Respondent,

vs.

Jeremiah Joel Johnson,
Appellant.

Filed December 16, 2008
Reversed
Lansing, Judge

Carlton County District Court
File No. 09-CR-05-3533

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Thomas H. Pertler, Carlton County Attorney, 202 Courthouse, P.O. Box 300, Carlton, MN 55718 (for respondent)

Mark D. Kelly, 2295 Waters Drive, St. Paul, MN 55120-1363 (for appellant)

Considered and decided by Connolly, Presiding Judge; Lansing, Judge; and Minge, Judge.

U N P U B L I S H E D O P I N I O N

LANSING, Judge

The district court denied Jeremiah Johnson's pretrial motion to suppress methamphetamine found following a traffic stop for crossing over a fog line. Johnson preserved his right to raise the validity of the search on appeal and submitted the case to the district court on stipulated facts. The district court found Johnson guilty of second-degree, controlled-substance crime and, on appeal, Johnson argues that the stop was invalid and the search was not voluntary. Because the record does not contain adequate evidence to support a finding of voluntary consent, we reverse.

F A C T S

Jeremiah Johnson was driving a car northbound on I-35 within the city limits of Cloquet at about 1:00 a.m. on October 8, 2005. As Johnson exited I-35 to proceed on Highway 33, a Cloquet police squad car traveling in the same direction activated its overhead lights and pulled him over. At the suppression hearing, the officer testified that he stopped Johnson's car because the passenger-side tires crossed over the right-hand fog line and made contact with the rumble strip.

Upon approaching the car, the officer recognized Johnson from a prior traffic stop "a couple years ago" during which Johnson had sped away. The officer asked Johnson for his keys to avoid any similar evasive action, and Johnson gave him his keys. It appeared to the officer "that [Johnson] was possibly under the influence." But because the officer could not detect an odor of alcohol, he assumed that Johnson "was possibly under the influence of a controlled substance." He asked Johnson if there was "anything

illegal in the vehicle at all" and Johnson said, "he wasn't sure" or "nothing that he knew of." The officer then "asked [Johnson] for consent to search the vehicle . . . which he granted." When asked at the hearing what Johnson said that granted consent to search, the officer stated that he could not remember, "but [Johnson] consented to it."

At this point, a police sergeant and a Carleton County deputy arrived, apparently to back up what was no more than a traffic stop for crossing over the fog line. The officer asked Johnson to step outside his vehicle, where he again asked Johnson to consent to the search. The officer then went to his squad car and got his narcotics-trained canine. The dog alerted to an area on the driver's side of the vehicle. A further examination of that area produced a zip-up bag containing crystal methamphetamine. Johnson was arrested and charged with second-degree, controlled-substance crime.

At the pretrial suppression hearing, Johnson challenged the validity of the stop and the voluntariness of the consent for the search. The Cloquet officer testified that he stopped Johnson's car for crossing over the fog line and that, after the stop, Johnson consented to a search of his car. Johnson sought to establish that he might have crossed over the fog line as a reaction to the officer traveling in Johnson's left-hand blind spot. He also said that he did not come into contact with the rumble strips. Johnson testified that he did not give the officer consent to search the vehicle. He said that he did not want to be delayed by a search because he wanted to get to Subway before it closed.

The district court denied Johnson's motion to suppress. In a written memorandum accompanying the omnibus order, the district court found that the officer's observation of Johnson's passenger-side tires crossing the fog line provided a reasonable, articulable

basis for stopping his vehicle. In a three-sentence paragraph addressing the issue of consent, the district court stated that, although Johnson denied giving consent to the search, three police officers were present when he consented, and Johnson acknowledged in a statement after his arrest that he had consented to the search. On these findings, the district court concluded that Johnson had "freely and voluntarily" consented to the search of his vehicle.

Following the district court's denial of his suppression motion, Johnson preserved his right to appeal the issues related to the search and submitted the case on stipulated facts. In this appeal he challenges the district court's denial of his pretrial suppression motion.

D E C I S I O N

On review of a pretrial order on a motion to suppress, we independently review the facts and determine as a matter of law whether the district court erred in its order. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). We accept the district court's factual findings unless the findings are clearly erroneous. *State v. Gomez*, 721 N.W.2d 871, 883 (Minn. 2006). This appeal raises two distinct issues: whether there was a sufficient basis for the traffic stop and whether the driver voluntarily consented to the search of his vehicle. We first address the validity of the stop.

An investigatory stop of a vehicle is not constitutionally unreasonable so long as the officer can show specific and articulable facts that objectively support a suspicion of criminal activity. *State v. Anderson*, 683 N.W.2d 818, 822-23 (Minn. 2004). An objective basis for making a traffic stop ordinarily arises "if an officer observes a

violation of a traffic law, however insignificant." *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997).

Under Minn. Stat. § 169.18, subd. 7(a) (2004), the driver of a car must remain "as nearly as practicable entirely within a single lane." Johnson testified that the officer's squad car was in the left lane on I-35, nearly parallel and slightly behind Johnson's vehicle in the right lane. They remained in that position as they both took the two-lane exit for Highway 33, and Johnson suggests that he may have moved to the right prematurely for the exit, slightly crossing the fog line in the process, in response to the vehicles' relative positions. Under these circumstances, he contends that he did not violate section 169.18 because he was driving his vehicle "as nearly as practicable entirely within a single lane."

We agree that the observed traffic violation was arguably insignificant in these circumstances. The officer testified that Johnson was operating his vehicle within the speed limit, properly signaled his exit, displayed no equipment violations, was not driving erratically, and only briefly crossed over the fog line while exiting and then returned to his proper position within the lane. The officer could not specifically recall whether he was immediately behind Johnson's car or in the left-hand lane at the exit, and the district court did not directly address Johnson's claim that the position of the officer's squad car caused Johnson to cross over the fog line. But the district court found that "the officer had a reasonable basis to stop [Johnson]."

The officer's testimony on this issue, which the district court apparently credited, established that Johnson's car crossed the fog line and that the officer saw this happen.

Seeing the car cross the fog line—although it may be an insignificant infraction—provided the officer a specific reason to believe that the traffic code had been violated and to stop the car to see if a warning or citation was warranted. The district court's finding establishes justification for a limited investigatory stop.

The second issue, whether the officer's search of Johnson's vehicle was justified by consent, is more complex. The Minnesota Constitution limits the scope of an investigatory stop for a traffic violation to "the justification for the stop." *State v. Burbach*, 706 N.W.2d 484, 488 (Minn. 2005). If not encompassed by that justification, a search of the vehicle requires either consent or probable cause. *United States v. Ortiz*, 422 U.S. 891, 896-97, 95 S. Ct. 2585, 2589 (1975). The validity of the consent to search is determined by the totality of the circumstances, and it is the state's burden to prove that consent was voluntary. *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994). We apply "careful appellate review" to decisions that consent during a traffic stop was validly obtained. *George*, 557 N.W.2d at 580.

At the suppression hearing, Johnson disputed the officer's conclusory statements that he consented to a search of his vehicle. He testified that he told the officer that he wanted to get to Subway before it closed and that it was near closing time. He also testified that he had given the officer the keys to his vehicle at the officer's request and that the officer was still holding the keys when he asked Johnson to consent to a search of the vehicle. The district court did not directly address the conflict in the suppression-hearing testimony. The findings acknowledge that Johnson denied that he consented to the search, but state that "the consent was given in the presence of three police officers"

and that "in a statement given to law enforcement after his arrest [Johnson] acknowledges that he consented to the search of his vehicle." On these findings, the district court concluded that the search was "based on consent which was freely and voluntarily given." The district court made no other findings on the issue of consent or whether any consent was voluntary.

The district court apparently discredited Johnson's testimony on the basis that he "acknowledge[d] that he consented to the search of his vehicle" in a "statement given to law enforcement after his arrest." Nothing in the record indicates that Johnson admitted that he consented to a search. On direct examination he was asked by his attorney whether he agreed with the officer's testimony at the suppression hearing that he had consented to the search of the vehicle. He stated that he disagreed with the officer's testimony. Although Johnson, on cross-examination, was asked about whether he had admitted to driving over the fog line, he was never asked any question about whether he had made any postarrest statements admitting that he consented to the search. The Cloquet officer, who was the only other witness, did not testify that Johnson had admitted that he consented to the search in postarrest questioning, and the state offered no report or document into evidence that referred to Johnson's postarrest statements. In fact, the state did not cross-examine Johnson on his testimony that he had not consented to the search.

The only indication of any postarrest statements is a transcript that was at some point appended to the criminal complaint. But neither the complaint nor the transcript was offered as evidence at the suppression hearing. A district court, when deciding a suppression issue, must base its decision on "the record of the evidence elicited at the

time of [the] hearing." *State ex rel. Rasmussen v. Tahash*, 272 Minn. 539, 554, 141 N.W.2d 3, 13 (1965); *see also* Minn. R. Crim. P. 11.02, subd. 1 (stating that "the court shall hear and determine [suppression issues] upon such evidence as may be offered by the prosecution or the defense"). Relying on evidence that is not in the record implicates due process issues. *See Juster Bros., Inc. v. Christgau*, 214 Minn. 108, 119, 7 N.W.2d 501, 507 (1943) (stating that requirement of due process includes opportunity "to know the nature and contents of all evidence adduced in the matter"). Johnson cannot have had a fair opportunity to confront any purported admission that was not referred to nor placed in evidence at the suppression hearing. The district court thus erred in relying on a purported admission by Johnson that he had consented to the search.

The district court did not refer to the officer's testimony that he obtained consent from Johnson shortly after the stop while Johnson was still seated in his vehicle. It was reasonable not to credit this first attempt to obtain consent because the officer sought consent a second time, which would have been unnecessary had the first attempt actually been effective. The district court instead relied on the officer's testimony about the second request. After the officer asked Johnson to get out of the vehicle, "consent was given in the presence of three police officers." But only the officer who stopped Johnson testified—the two back-up officers were not witnesses. And the officer's testimony of Johnson's consent is not moored to any specific words or actions of Johnson. The presence of multiple officers does not advance the state's burden to prove that any consent to search was "freely and voluntarily" given. Standing alone, it is insufficient to support a reasonable inference of voluntariness. *Compare State v. Doren*, 654 N.W.2d

137, 143 (Minn. App. 2002) (stating that "the mere presence of two officers and a simple request for permission to conduct a pat-down frisk do not constitute coercion"), *review denied* (Minn. Feb. 26, 2003), *with George*, 557 N.W.2d at 581 (noting, as one of many factors tending to show that consent was coerced, that two officers had been present).

Carefully reviewing the remainder of the evidence, we are unable to find a basis to conclude that Johnson voluntarily consented. The officer testified that Johnson was informed of his right to refuse consent and to leave the area of the stop, but the officer still held Johnson's car keys at that time. Even if Johnson felt free to leave on foot, it likely appeared that the officers, by keeping his car, would search it whether he consented or not. An inventory search could reasonably be anticipated to protect the property of a driver whose vehicle was about to be impounded. *State v. Holmes*, 569 N.W.2d 181, 186-88 (Minn. 1997) (noting that police may conduct warrantless inventory searches to extent they are necessary to secure and protect vehicles and their contents while in police custody). When officers request consent in the face of an implication that they will search with or without the consent, it weighs against a conclusion that the consent is voluntary. *See George*, 557 N.W.2d at 579 (noting defendant's assertion that he believed officer would conduct search regardless of consent). Furthermore, the officer provided no testimony on what was actually said in the interaction and did not specifically dispute—nor did the state otherwise controvert—Johnson's testimony that he told the officer he objected to the search because he would not make it to Subway before it closed. Johnson's response can fairly be understood as an effort "to fend off a search with equivocal responses," which weighs against voluntariness. *Id.* at 581 (quoting

Dezso, 512 N.W.2d at 881). Finally, given the supreme court's "serious concerns" about the "pretext problem" underlying searches incident to minor traffic stops, *George*, 557 N.W.2d at 579, it must be noted that the marginal nature of Johnson's alleged traffic infraction—that his passenger-side tires crossed the fog line once as he exited the freeway—does not allay those concerns.

As in *Dezso*, "[t]here is considerable ambiguity" in the record and "it cannot be said that the [s]tate has sustained its burden" of showing voluntariness. 512 N.W.2d at 881. Because investigatory traffic stops are susceptible to use for "extracting" consent to search, the state must provide a stronger evidentiary basis than is available in this record. *Id.* at 880. The district court was not asked to consider whether the search was justified on other grounds, and we therefore do not address that question. We simply cannot be confident that the stop was free of pretext or that Johnson's consent was not extracted. The decision of the district court denying suppression of the methamphetamine found in Johnson's car is reversed.

Reversed.