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STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0957

Patrick Lawrence Zabinski, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed June 2, 2014
Reversed
Stauber, Judge
Hudson, Judge, dissenting
Rodenberg, Judge, concurring specially

Sherburne County District Court
File No. 71CV121098

Charles A. Ramsay, Daniel J. Koewler, Ramsay Law Firm, P.L.L.C., Roseville, Minnesota (for appellant)

Lori Swanson, Attorney General, Jeffrey S. Bilcik, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Hudson, Judge; and Rodenberg, Judge.

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

STAUBER, Judge

Appellant challenges the revocation of his driver's license, arguing that (1) police lacked a reasonable articulable suspicion of criminal activity to justify stopping his

vehicle; (2) his urine test was obtained in violation of his Fourth Amendment rights; and (3) the district court abused its discretion by concluding that the urine test was foundationally reliable. Because we conclude that officers lacked reasonable articulable suspicion to stop appellant's vehicle, we reverse.

FACTS

Appellant Patrick Lawrence Zabinksi was arrested for DWI after an officer stopped appellant's tractor trailer on Highway 169. An unidentified individual had called police from the area of Ray's Auto Body Shop to report a tractor trailer pulling round hay bales traveling north in the southbound lane of Highway 169 in the area of 313th Avenue. After receiving notification from dispatch, the officer headed to the area and observed appellant's tractor trailer with round bales pulling south onto Highway 169; the officer did not observe the tractor trailer driving on the wrong side of the road. Appellant was pulled over just north of 313th Avenue and arrested. Appellant was read the Minnesota Implied Consent Advisory, spoke with an attorney and, after doing so, agreed to take a urine test. His urine tested positive for the presence of alcohol over the legal limit. Appellant's driver's license was revoked and he petitioned for judicial review. The Sherburne County District Court upheld the revocation. This appeal follows.

D E C I S I O N

Appellant argues that the tip police received about his tractor trailer driving on the wrong side of the highway was insufficient to create a reasonable, articulable suspicion of criminal activity. On appeal, the district court's factual findings are reviewed for clear error. *State v. Klamar*, 823 N.W.2d 687, 691 (Minn. App. 2012). The determination of

whether reasonable suspicion existed to justify a traffic stop is a legal question reviewed de novo. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000). When a traffic stop is based on a tip, this court focuses on the reliability of the informant by "(1) identifying information provided by the informant; and (2) the facts supporting the informant's assertion that a driver is under the influence." *Rose v. Comm'r of Pub. Safety*, 637 N.W.2d 326, 328 (Minn. App. 2001), *review denied* (Minn. Mar. 19, 2002). Neither factor is dispositive. *Id*. Ultimately, the totality of the circumstances must be reviewed to determine whether the tip is sufficiently reliable. *Jobe v. Comm'r of Pub. Safety*, 609 N.W.2d 919, 921 (Minn. App. 2000).

I. Identifying information

An informant is considered anonymous unless he or she provides "sufficient identifying information." *Rose*, 637 N.W.2d at 328. Respondent argues that this case is like *City of Minnetonka v. Shepherd*, 420 N.W.2d 887, 890-91 (Minn. 1988), where the supreme court concluded that an informant who stated that he was an employee of a particular gas station was sufficiently identifiable. *See also Playle v. Comm'r of Pub. Safety*, 439 N.W.2d 747, 748–49 (Minn. App. 1989) (concluding that a caller who stated he was an employee of Burger King was not anonymous). But here, we do not know whether the caller was an employee or customer of Ray's Auto Body Shop, or if the caller may have just been driving by Ray's Auto Body Shop at the time of the call. The caller did not give a name, phone number, or any other identifying information. In this case, the caller was anonymous because police did not have a "way to locate the caller

and hold him accountable if he was knowingly providing false information." *Shepherd*, 420 N.W.2d at 890.

II. Facts supporting informant's claims

Appellant argues that the tip in this case was not reliable because the caller made a bare assertion about a lane violation which was not observed by the officer conducting the stop. We agree. In *Olson v. Comm'r of Pub. Safety*, 371 N.W.2d 552, 553 (Minn. 1985), an anonymous caller reported a vehicle being driven erratically. As in this case, the officer located the vehicle and initiated a stop without personally witnessing any illegal driving. *Id.* There, the supreme court affirmed the district court's determination that the officer lacked reasonable articulable suspicion in part because the officer did not witness any erratic driving, which would have "adequately corroborated the anonymous tip and justified an investigative stop." *Id*. at 556. Although an officer does not have to personally observe illegal driving, an informant must be sufficiently reliable to justify an investigatory stop on the basis of a tip alone. *Yoraway v. Comm'r of Pub. Safety*, 669 N.W.2d 622, 626 (Minn. App. 2003). Here, there is no way to determine the reliability of the caller because he or she did not provide any identifying information. Not only is there insufficient indication of the tipster's reliability, there is also objective evidence of the tipster's unreliability because the vehicle was not observed in the wrong lane.

The dissent cites to a recent U.S. Supreme Court case, *Navarette v. California*, 134 S. Ct. 1683 (2014), to support its position. But that case is factually distinguishable because the caller there was actually a victim of the alleged illegal driving, whereas here there is nothing but an anonymous allegation that could have been easily fabricated.

Although we favor uniformity with the Supreme Court's interpretation of constitutional issues, that "interpretation is not always determinative." *Kahn v. Griffin*, 701 N.W.2d 815, 824 (Minn. 2005). Based on the totality of the circumstances, we conclude that the officer did not have sufficient articulable suspicion to initiate the traffic stop, and the revocation of appellant's driver's license must be reversed. Because we reverse, we do not reach appellant's arguments related to the admissibility of the urine test.

Reversed.

HUDSON, Judge (dissenting)

I respectfully dissent. When the police choose to stop a suspect based solely on an anonymous tip, the informant must provide at least some specific and articulable facts to support the base allegations of criminal activity. "Not much is required, especially for a traffic stop for a suspected traffic offense then in progress." *Olson v. Comm'r of Pub. Safety*, 371 N.W.2d 552, 556 (Minn. 1985) (quotation omitted). Here, based on the totality of the circumstances, the officer had reasonable articulable suspicion to stop appellant's vehicle based on the tip he received.

An informant's credibility is based both on the identifying information provided by the informant and the factual basis for the tip; neither factor is dispositive. *Rose v. Comm'r of Pub. Safety*, 637 N.W.2d 326, 328 (Minn. App. 2001), *review denied* (Minn. Mar. 19, 2002). In this case, the record indicates that the informant was calling from Ray's Auto Body Shop, which would allow police to further inquire into his or her identity. Thus, the caller was not completely anonymous. And "ultimate reliability depends not only on the identification of the informant but also on the nature of the information he or she gives." *Yoraway v. Comm'r of Pub. Safety*, 669 N.W.2d 622, 626 (Minn. App. 2003). Here, the informant provided specific facts about appellant's tractor trailer and stated that he or she personally witnessed appellant's tractor trailer driving on the wrong side of the highway, providing a basis of knowledge for the tip. *See Navarette v. California*, 134 S. Ct. 1683, 1689 (2014) (stating that an anonymous caller who described the specific vehicle and alleged unlawful driving had demonstrated a basis of knowledge that "lends significant support to the tip's reliability"). That distinguishes this

case from *Olson*, in which the caller was completely anonymous and did not provide any factual basis to support his assertion that a driver was possibly intoxicated. 371 N.W.2d at 556. This case is more similar to *Marben v. State, Dep't of Pub. Safety*, 294 N.W.2d 697, 698–99 (Minn. 1980), in which the supreme court concluded that a tip from an unidentified trucker was sufficiently reliable because the trucker personally observed the driver tailgating his truck for a number of miles.

In addition, I would conclude that the tip was sufficiently corroborated, further bolstering the reliability of the informant. The caller gave a detailed description of a tractor trailer carrying a full load of round hay bales at a specific intersection on Highway 169. The testimony indicates that the officer drove directly to that area after receiving the tip and did in fact locate a tractor trailer matching the caller's description in the exact area described. The United States Supreme Court recently stated in a similar case that the "timeline of events suggests that the caller reported the incident soon after [it occurred]. That sort of contemporaneous report has long been treated as especially reliable." *Navarette*, 134 St. Ct. at 1689. Further, it was not necessary for the officer to personally observe appellant driving on the wrong side of the road to conclude that the stop was supported by reasonable articulable suspicion. "[T]he factual basis for stopping a vehicle need not arise from the officer's personal observation." *Marben*, 294 N.W.2d at 699. "An officer may make an investigatory stop without observing any erratic driving if the citizen's tip has a basis to support the allegation of criminal activity." *Rose*, 637 N.W.2d at 329; *see also Navarette*, 134 S. Ct. at 1691 (stating that "an officer who already has

such a reasonable suspicion need not surveil a vehicle at length in order to personally observe suspicious driving”).

Because I conclude that the stop was constitutional, I briefly address appellant’s other two issues. Appellant claims that his consent to a urine test was not voluntary because he was in custody and because the Minnesota Implied Consent Advisory is inherently coercive. When the facts are not in dispute, this court reviews the validity of a search de novo. *Haase v. Comm’r of Pub. Safety*, 679 N.W.2d 743, 745 (Minn. App. 2004). Both of appellant’s arguments were considered and rejected by the supreme court in *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013), *cert. denied*, 134 S. Ct. 1799 (2014). Appellant spoke with an attorney before consenting to the urine test, and he points to no actions on the part of the police involved in his arrest that would indicate he was unduly coerced. *See Brooks*, 838 N.W.2d at 571 (stating that consulting with an attorney “reinforces the conclusion” that consent was voluntary). Appellant was not “confronted with repeated police questioning” or “asked to consent after having spent days in custody.” *Id.* Instead, the record shows that the officer read appellant the Implied Consent Advisory, gave him time to speak with an attorney, and did not place undue pressure on him to consent to a test. Based on the totality of the circumstances, appellant’s consent was voluntary.

In addition, the district court did not abuse its discretion by concluding that appellant’s urine test was foundationally reliable. The commissioner has the burden “to establish that the test itself is reliable and that its administration in the particular instance conformed to the procedure necessary to ensure reliability.” *Bortnem v. Comm’r of Pub.*

Safety, 610 N.W.2d 703, 705 (Minn. App. 2000) (quotation omitted), *review denied* (Minn. July 25, 2000). Appellant claims that because the sample was not tested for the presence of glucose, which can ferment and affect alcohol levels in urine, the test was not reliable and should not have been admitted. But the analyst from the Bureau of Criminal Apprehension who handled appellant's urine sample testified that their lab uses a preservative that inhibits fermentation of glucose in all of their urine testing kits, which would prevent the sorts of problems identified by appellant. The state met its burden of showing that the test and its administration in this case were reliable.

For all these reasons, I would affirm the revocation of appellant's driver's license.

RODENBERG, Judge (concurring specially)

I concur in the court's opinion, but write separately to observe that the outcome here depends, in my view, on whether *Olson v. Comm'r of Pub. Safety*, 371 N.W.2d 552 (Minn. 1985), remains good law after the United States Supreme Court's opinion in *Navarette v. California*, 134 S. Ct. 1683 (2014).

In *Navarette*, the United States Supreme Court held that a police officer may lawfully stop a driver based solely on a tip from an anonymous caller, without independent verification of any bad driving conduct, when the tip itself establishes a level of reliability because it identified a vehicle that police located in a place where the tip indicated it would be found. 134 S. Ct. at 1688-89, 1692. The Court determined the tip to be sufficient to justify a stop of the vehicle and seizure of the motorist for investigation despite the police having followed the described vehicle for five minutes during which no violation of the law was observed by the police. *See id.* at 1696 (Scalia, J., dissenting) (characterizing the driving observed by police as "irreproachable" and not even suspicious).

This case presents facts very similar to those present in *Navarette*. The anonymous tip identified apparently illegal driving conduct.[1] The officer, after locating appellant's vehicle, saw no illegal driving conduct before making the stop and, like the

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[1] The tip in this case was of a vehicle "going northbound in the southbound lane of [U.S. Highway] 169." The record does not reveal if highway 169 is a divided highway in the area. Not all driving left of the roadway center is illegal. *See, e.g.*, Minn. Stat. § 169.18, subds. 3, 5 (2010). On appeal, the parties seem to agree that the tipster was reporting what she believed to be illegal driving conduct.

officer in *Navarette*, made observations *inconsistent* with the report of bad driving conduct.

Although the language of the Fourth Amendment is identical to that of article 1, section 10 of the Minnesota Constitution, "[i]t is axiomatic that a state supreme court may interpret its own constitution to offer greater protection of individual rights than does the federal constitution." *State v. Fuller,* 374 N.W.2d 722, 726 (Minn. 1985). On the subject of traffic stops and the constitutional requirement of reasonable suspicion, our supreme court has departed from the jurisprudence of the United States Supreme Court so as to afford the people greater constitutional protection under our state constitution than that afforded by the federal constitution. *See, e.g.*, *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 447, 110 S. Ct. 2481, 2483 (1990) (authorizing roadblocks to detect intoxicated drivers in the absence of individualized articulable suspicion of intoxication); *Ascher v. Comm'r of Pub. Safety*, 519 N.W.2d 183, 187 (Minn. 1994) (requiring individualized suspicion for a traffic stop under the state constitution).

Olson is directly on point. The anonymous tip in that case was not attended by "even the most minimal indicia of reliability." 371 N.W.2d at 556. That is exactly what happened here. The police in this case appropriately reacted to the anonymous tip by locating the vehicle claimed to be violating the law. But when the responding officer found the vehicle, he was not only unable to verify any illegal driving conduct, but he saw with his own eyes something very different than what had been anonymously reported: the described vehicle was *not* driving in the wrong lane of traffic. *Olson* distinguished the earlier decision in *Marben v. State, Dep't of Pub. Safety*, 294 N.W2d

697 (Minn. 1980), holding that a stop based upon such a tip is constitutionally impermissible. 371 N.W.2d at 555. Our supreme court held in *Olson* that, "[i]f police cannot stop a car on the highway on the basis of mere whim, neither can they stop on the basis, for all they know, of the mere whim of an anonymous caller." *Id.* at 556. In this, Minnesota's traffic-stop jurisprudence affords greater protection of individual liberties than does the Fourth Amendment under *Navarette*. This is a very close case, but I believe that *Olson* survives *Navarette*. Therefore, I concur.