**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A17-0319**

State of Minnesota,
Respondent,

vs.

Jason James Johnson,
Appellant.

**Filed November 13, 2017**
**Affirmed**
**Kirk, Judge**

Carver County District Court
File No. 10-CR-16-589

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Mark Metz, Carver County Attorney, Kevin A. Hill, Assistant County Attorney, Chaska, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota; and

Adam G. Chandler, Special Assistant Public Defender, Briggs and Morgan, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Reilly, Judge; and Smith, Tracy M., Judge.

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

**KIRK**, Judge

Appellant challenges the denial of his motion to suppress evidence of intoxication and to dismiss a DWI charge, arguing that officers lacked reasonable articulable suspicion to stop his vehicle because he did not engage in evasive conduct. We affirm.

## FACTS

A police report drafted by Chaska Police Officer Ashlee Bahl contained the following information: At 11:52 p.m. on June 7, 2016, a vehicle pulled into the Chaska Elementary School parking lot and stopped, then extinguished its headlights. The vehicle parked facing westbound. When Officer Bahl approached in her squad car, the vehicle's headlights came back on and the vehicle started to drive away. Officer Bahl pulled the vehicle over and made contact with the driver, appellant Jason James Johnson, who later cooperated with limited field sobriety testing that revealed impairment and was arrested on suspicion of DWI.

On June 8, a prosecutor with the Carver County Attorney's Office emailed Officer Bahl indicating that her report did not provide a reasonable articulable suspicion of criminal activity to support the stop. Officer Bahl replied that she was in field training and that her training officer explained to her that the schools are closed and that occupied vehicles in or around the area are typically doing something illegal. She noted that when someone is stopped looking for directions on a cellphone or making a phone call, the person does not typically extinguish the vehicle's headlights or immediately leave when a squad car shows up. She also noted that there is a sign at the entrance of the school that says "Private

Property no through traffic," and that officers have had a high number of contacts in the parking lot at night with persons committing criminal acts. The prosecutor thanked Officer Bahl for the supplemental information and charged appellant with DWI.

Appellant filed a motion to suppress evidence of intoxication and to dismiss the DWI charge for lack of probable cause because the traffic stop was not supported by reasonable articulable suspicion. At a contested omnibus hearing, Officer Bahl testified that she started working as a police officer for the Chaska Police Department on April 11, 2016, and was still in training on June 7. She testified that at approximately 11:52 p.m. on June 7, she was traveling southbound on Minnesota Highway 41 in a marked squad car with Officer Rob Moore who was training her. She noticed a vehicle parked on school property by the stop sign for the entrance to the Chaska Elementary School with its headlights extinguished. She testified that it was late at night, school was not in session, and the vehicle should not have been there.

Officer Bahl completed a U-turn to return northbound on Highway 41 to investigate the vehicle. When she approached the entrance to the elementary school, Officer Bahl observed "[t]hat the vehicle had turned and parked [facing westbound] with all the lights off kind of crooked between where you can either go to the elementary school or come back out towards westbound Highway 41." She did not see the vehicle move. She testified that the road the vehicle was parked on only allows access to the schools, so it is not a place that vehicles would usually park. Officer Bahl noted that there were not any parking spaces near the vehicle and that there were no cars in the school's parking lot. She also noted that

there was no indication that there was an event happening at the school, and that there are no nearby residences or businesses that the vehicle could have been associated with.

Officer Bahl testified that before she stopped the vehicle she discussed what made it suspicious with Officer Moore. She noted that it was late at night, school was not in session, it was summertime, and law enforcement had prior contacts with persons engaging in criminal activity parked in vehicles with extinguished headlights in that area. She also noted that she did not see any lights inside the vehicle that would indicate the use of GPS or a cell phone.

Officer Bahl first approached the parked vehicle in her squad car without her emergency lights activated. The vehicle's headlights then came on, and it started moving westbound toward Highway 41. Officer Bahl then activated her emergency lights, and the vehicle pulled over at the stop sign before Highway 41. Officer Bahl identified the driver as appellant.

Officer Moore also testified at the hearing. Officer Moore testified consistently with Officer Bahl's description of the vehicle's location and appearance, and described the road appellant was parked on as a frontage road. Officer Moore also testified that there has been criminal activity in the area involving drugs and school break-ins, so vehicles parked in that area with their headlights extinguished are suspicious. He also noted that if a vehicle is parked in a similar location with its headlights on, the driver could be looking for directions, but that there was no reason for appellant's vehicle to be blocking a lane of traffic with its headlights extinguished. He testified that he and other Chaska police

officers have responded to reports of suspicious vehicles in the school parking lots in the past.

Officer Moore testified that he could not see anyone in the vehicle when they first drove by it, and that it took between 30 seconds to 1 minute to make the U-turn and return. When the officers pulled into the school entrance to approach the vehicle, the driver of the vehicle appeared to look up at them before turning on the vehicle's headlights and moving toward Highway 41. Officer Moore told Officer Bahl that they needed to stop the vehicle and make contact with its driver because its actions were suspicious. Officer Moore did not observe any illegal driving conduct by appellant.

Appellant's attorney cross-examined Officer Bahl regarding the stage of training she was in on June 7, as well as her sparse police report and supplemental email. Officer Moore was also cross-examined about whether he reviewed Officer Bahl's police report. Exhibit 1 was received into evidence and included the complaint, police reports, and copies of the above-referenced emails.

On August 31, the district court denied appellant's motion to suppress and dismiss. The court concluded that, although appellant "did not explicitly violate any driving statutes and was not a suspect in any known crimes[,] . . . the location of [his] vehicle, the time of night, Officer Moore's knowledge of criminal activity in the area, and [appellant's] evasive behavior in attempting to drive away as the squad car approached does create a reasonable, articulable suspicion of criminal activity." The court also noted that, although Officer Bahl's police report may not have been adequate to support a finding of reasonable articulable suspicion alone, the officers testified credibly about the basis for the traffic stop

and subsequent arrest. The court found, based on its review of the totality of the circumstances, that the officers had reasonable articulable suspicion to conduct the traffic stop of appellant's vehicle.

On September 21, appellant entered what the parties referred to as a *Lothenbach* plea to DWI pursuant to Minn. R. Crim. P. 26.01, subd. 4, and was found guilty of DWI on October 14.[1] On appeal, appellant challenges his DWI conviction, arguing that officers lacked reasonable articulable suspicion to stop his vehicle.

## D E C I S I O N

### I. The traffic stop was supported by reasonable articulable suspicion.

The United States and Minnesota Constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. However, a law enforcement officer may temporarily detain a person that he or she suspects has engaged in criminal activity if "the stop was justified at its inception by reasonable articulable suspicion, and . . . the actions of the police during the stop were reasonably related to and justified by the circumstances that gave rise to the stop in the first place." *State v. Diede*, 795 N.W.2d 836, 842 (Minn. 2011) (quotation omitted); *see also Terry v. Ohio*, 392 U.S. 1, 19-22, 88 S. Ct. 1868, 1878-80 (1968). We review determinations of reasonable articulable suspicion de novo, and consider the totality of the circumstances to determine whether a reasonable basis justified a stop. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000).

[1] Minn. R. Crim. P. 26.01, subd. 4, has "replaced *Lothenbach* as the method for preserving a dispositive pretrial issue for appellate review in a criminal case." *State v. Myhre*, 875 N.W.2d 799, 802 (Minn. 2016). Here, appellant's plea was called a *Lothenbach* plea, but the district court noted that the plea was entered pursuant to rule 26.01, subd. 4.

The stop must not be "the product of mere whim, caprice, or idle curiosity." *State v. Barber*, 308 Minn. 204, 206, 241 N.W.2d 476, 477 (1976). There must be particularized and objective facts for suspecting criminal activity. *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S. Ct. 690, 695 (1981); *State v. Waddell*, 655 N.W.2d 803, 809 (Minn. 2003). An officer may draw rational inferences and make deductions from all of the circumstances leading up to the stop in determining whether a particular and objective basis exists to justify the stop. *State v. Schrupp*, 625 N.W.2d 844, 846-47 (Minn. App. 2001), *review denied* (Minn. July 24, 2001). An officer must only specify conduct that supports a reasonable inference of criminal activity, not suspicion of a particular crime. *See State v. Johnson*, 444 N.W.2d 824, 827 (Minn. 1989).

### A. The district court's credibility determinations were not clearly erroneous.

Appellant argues that the district court erred in finding that the officers were credible witnesses in light of Officer Bahl's sparse police report. He asserts that Officer Bahl's report is the best evidence of what the officers observed prior to stopping appellant's vehicle, and claims, without citing to any authority, that the police report should be afforded greater weight than the testimony given at the omnibus hearing. Other than alleging that Officer Bahl's email to the prosecutor, written approximately 24 hours after her contact with appellant, was a post hoc rationalization, appellant does not provide any argument as to why the district court's credibility determinations should be disregarded.

"The credibility of the witnesses and the weight to be given their testimony are determinations to be made by the factfinder." *DeMars v. State*, 352 N.W.2d 13, 16 (Minn. 1984). This court will not disturb a district court's credibility determinations on appeal

"absent a showing of clear error." *State v. Eakins*, 720 N.W.2d 597, 604 (Minn. App. 2006). Here, the district court acknowledged that Officer Bahl's police report was "lacking in specific details," but nonetheless made a finding that the officers testified credibly at the omnibus hearing. An officer must have reasonable articulable suspicion at the time of the traffic stop and cannot create a post hoc justification, but Officer Bahl's report does not compel the conclusion that the information in her email, or in the testimony given by the officers at the omnibus hearing, was fabricated, especially in light of her lack of experience in report writing. Appellant does not offer any legal authority that would require this court to reach a different conclusion. We defer to the district court's credibility determinations.

**B. Appellant's conduct was evasive.**

An attempt to evade an officer may be factored into an analysis of whether the officer had reasonable articulable suspicion to support a limited investigative stop. *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S. Ct. 673, 676 (2000); *Florida v. Rodriguez*, 469 U.S. 1, 6, 105 S. Ct. 308, 311 (1984); *Johnson*, 444 N.W.2d at 826. Evasive conduct by an individual in a high-crime area after observing law enforcement may provide reasonable articulable suspicion to seize that individual. *Wardlow*, 528 U.S. at 124, 120 S. Ct. at 676; *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992). Ambiguity as to the reason an individual is "fleeing" a high-crime area can be a basis for law enforcement to detain the individual in order to resolve the ambiguity. *Wardlow*, 528 U.S. at 125, 120 S. Ct. at 677.

Appellant argues that his attempt to leave the scene before he was seized did not constitute evasive conduct. Appellant points to three situations where evasive conduct was found to justify a stop as noted by Professor Wayne R. LaFave and quoted in *Johnson*:

(1) "the individual made repeated efforts to avoid police contact," (2) the individual "engaged in a combination of several different possibly furtive actions," or (3) the individual "engaged in a rather extreme means of avoidance such as high-speed flight." 444 N.W.2d at 826 (quoting 3 Wayne R. LaFave, *Search and Seizure* § 9.3(c), at 451 (2d ed. 1987)). Appellant argues that his conduct did not qualify under any of these situations and cannot therefore be deemed evasive. There is nothing in the *Johnson* decision that compels the conclusion that the situations noted by LaFave are formal, all-inclusive categories that conduct must fit into in order to be deemed evasive.

Appellant also asserts that his conduct was not evasive because unlike in *Johnson* where the driver made direct eye contact with an officer before pulling off onto a side road and "disappearing," appellant did not make eye contact with the officers. *Johnson*, 444 N.W.2d at 825. Appellant further argues that a number of this court's unpublished opinions compel the conclusion that his conduct was not evasive. "Unpublished opinions of the Court of Appeals are not precedential." Minn. Stat. § 480A.08, subd. 3(c) (2016). In addition, upon review of these opinions, this court does not find them to be persuasive.

Although there is no evidence in the record that appellant made eye contact with the officers, Officer Moore testified credibly that the driver of the vehicle appeared to look up at the squad car before turning on the vehicle's headlights and attempting to leave. Here, under the totality of the circumstances, there is evidence in the record that appellant was sitting in a parked vehicle with the headlights extinguished in a high-crime area, then turned on the headlights and started to leave the area after seeing a squad car. It was not error for

the district court to conclude that appellant's conduct was evasive or that it contributed to the officers' reasonable articulable suspicion to support the traffic stop.

Furthermore, in addition to finding that appellant's behavior was evasive, the district court relied on the location of appellant's vehicle, the time of night, and Officer Moore's knowledge of criminal activity in the area. The court found that the officers testified credibly that because of the vehicle's unusual location, its extinguished headlights, the lack of light inside the vehicle, its movement from one side of the frontage road to the other, and its presence in an area that was considered to be high-crime on a summer night, they became suspicious of the vehicle. Under the totality of these circumstances, the officers had reasonable articulable suspicion to stop the vehicle even without a finding that it engaged in evasive conduct.

**Affirmed.**