STATE OF MINNESOTA
IN COURT OF APPEALS
A11-905

Gary Lee Metcalf, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed December 5, 2011
Affirmed
Worke, Judge
Dissenting, Stauber, Judge

St. Louis County District Court
File No. 69HI-CV-11-68

Todd E. Deal, Deal & Pineo, P.A., Virginia, Minnesota (for appellant)

Lori Swanson, Attorney General, David Strommen Voigt, Deputy Attorney General, Nathaniel A. Dahl, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Wright, Judge; and Worke, Judge.

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

WORKE, Judge

Appellant challenges the revocation of his driver's license under the implied-consent law, arguing that the district court erred by concluding that the stop of his vehicle was supported by reasonable, articulable suspicion. We affirm.

FACTS

Appellant Gary Lee Metcalf was arrested on suspicion of driving while impaired (DWI). Respondent commissioner of public safety revoked appellant's driver's license. Appellant challenged the revocation, arguing that there was no reasonable, articulable suspicion justifying the stop of his vehicle.

The arresting deputy provided the entirety of the testimony at a joint omnibus and implied-consent hearing. The deputy testified that, at approximately 1:00 a.m. on October 21, 2010, he was traveling on Highway 1 towards Highway 73 near Cook. The deputy testified that he has more than ten years of experience working in this particular county and that he is very familiar with this stretch of highway. The deputy characterized the road as "pretty straight and recently paved," and testified that there were no inclement weather conditions affecting his visibility or ability to control his squad car. The deputy stated that he noticed the taillights of a single vehicle traveling about three miles in front of him. The deputy explained that he increased his speed until he was approximately 40 yards behind the car to determine if there "was anything to note" occurring with the vehicle.

Once closer to the vehicle, the deputy observed the vehicle drift towards the left until the driver-side wheels were traveling on top of the centerline. The deputy testified that the vehicle then slowly drifted back towards the right to the point where the passenger-side wheels traveled on top of the fogline. The deputy testified that the car drifted back on top of the centerline for a second time, and then back on top of the fogline again. The deputy never saw the car cross over either line; the vehicle just traveled on

top of the lines for short periods several times over a two-mile stretch. Based on the weaving, the deputy suspected that the driver of the vehicle was impaired and initiated a traffic stop. After appellant performed poorly during field-sobriety testing, the deputy arrested appellant for DWI and his driver's license was revoked pursuant to the implied consent law. *See* Minn. Stat. § 169A.52 (2010) (providing for revocation of license under the implied consent law for test refusal or failure). Appellant declined to testify at the hearing.

The district court concluded that the stop was lawful because it was supported by the deputy's reasonable, articulable suspicion. On the record, the district court noted that appellant's weaving suggested that the driver may be impaired. The district court sustained the revocation of appellant's license, and this appeal follows.

D E C I S I O N

A proceeding to revoke a driver's license under the implied-consent statute is civil in nature, not criminal. *State v. Dumas*, 587 N.W.2d 299, 303 (Minn. App. 1998), *review denied* (Minn. Feb. 24, 1999). In reviewing the revocation of a driver's license, the district court will conduct a hearing pursuant to the rules of civil procedure. Minn. Stat. § 169A.53, subds. 2(c), 3(a) (2010). A district court's findings of fact will not be reversed unless clearly erroneous. *Gergen v. Comm't of Pub. Safety*, 548 N.W.2d 307, 309 (Minn. App. 1996), *review denied* (Minn. Aug. 6, 1996). In the absence of express findings, factual and credibility determinations may be inferred from the district court's resolution of the contested issue. *See, e.g., Umphlett v. Comm't of Pub. Safety*, 533 N.W.2d 636, 639 (Minn. App. 1995) (determining that the district court "implicitly found

that the officer's testimony was more credible" based on its decision to sustain the revocation), *review denied* (Minn. Aug. 30, 1995). The existence of reasonable, articulable suspicion is a legal question, which we review de novo. *Wilkes v. Comm'r of Pub. Safety*, 777 N.W.2d 239, 242-43 (Minn. App. 2010).

An officer may conduct an investigatory stop of a vehicle when the officer has a specific and articulable basis to believe that criminal activity is taking place. *State v. Johnson*, 444 N.W.2d 824, 825 (Minn. 1989). In determining whether a stop was valid, an appellate court considers the totality of circumstances surrounding the stop, including the trained perspective of the officer initiating the stop. *State v. Kvam*, 336 N.W.2d 525, 528 (Minn. 1983). Officers may consider driving conduct as well as the time of night and the area in which the vehicle is traveling. *See, e.g., State v. Engholm*, 290 N.W.2d 780, 784 (Minn. 1980) (stating stop was valid based on vehicle traveling at exceptionally slow speed, weaving within its lane shortly after local bars had closed). But a stop may not be the byproduct of "mere whim, caprice, or idle curiosity." *State v. Johnson*, 257 N.W.2d 308, 309 (Minn. 1977) (quotation omitted).

Appellant argues that the district court erred by concluding that his weaving provided a reasonable, articulable suspicion for stopping his vehicle. Appellant first claims that the deputy arbitrarily and capriciously increased the speed of his vehicle to catch up to appellant's car for the sole purpose of effectuating a DWI arrest. But the basis of the stop was not the deputy's decision to follow appellant; rather, appellant was stopped because the deputy noticed appellant driving erratically. As such, the deputy's

motivation in following appellant's vehicle is inconsequential to our reasonable-articulable-suspicion analysis. Appellant's argument fails.

Appellant also contends that his weaving was subtle in nature and occurred as the deputy followed his vehicle for an extended period of time. As support, appellant cites to our decision in *Warrick v. Comm'r of Pub. Safety*, in which we concluded that subtle weaving inside traffic lanes did not amount to reasonable, articulable suspicion to justify a traffic stop. 374 N.W.2d 585, 586 (Minn. App. 1985). However, in *Warrick*, the driver's swerving involved "inches" and occurred on a night when the weather was "cold and windy, and the visibility was impaired." *Id.* at 585, 586. Here, the deputy provided uncontroverted testimony that the weather did not adversely affect driving conditions and also testified that appellant's vehicle weaved back and forth to the point where the vehicle traveled on top of the centerline and fogline several times. Thus, the narrow facts upon which *Warrick* was decided are not present in this case.

Absent the specific circumstances addressed in *Warrick*, ample caselaw supports the district court's conclusion that appellant's weaving provided a valid basis to stop his vehicle. *See, e.g.*, *State v. Richardson*, 622 N.W.2d 823, 826 (Minn. 2001) ("Even observing a motor vehicle weaving within its own lane in an erratic manner can justify an officer stopping a driver."); *Kvam*, 336 N.W.2d at 528 (stating that a vehicle weaving within its own lane is sufficient to support an investigatory stop); *Engholm*, 290 N.W.2d at 784 (noting that a vehicle weaving within its own lane is sufficient to justify stopping the vehicle to inquire about the cause of the unusual driving conduct). Appellant's

argument is unavailing. Accordingly, the district court did not err by sustaining the revocation of appellant's license.

Affirmed.

STAUBER, Judge, (dissenting)

I respectfully dissent. On appeal, we must determine whether Officer Barrett's investigatory stop, based on the totality of the circumstances, was lawful, or whether it was "the product of mere whim, caprice, or idle curiosity." *In re Welfare of M.D.R.*, 693 N.W.2d 444, 448 (Minn. App. 2005) (quotation omitted), *review denied* (Minn. June 28, 2005). The district court here considered the totality of the circumstances, and determined that appellant's driving conduct, though not illegal, was "maybe barely enough" to sustain the stop. But allowing officers to initiate investigatory stops on what can best be articulated as "maybe barely enough" invites even more questionably motivated police conduct.

In *Warrick v. Comm'r of Pub. Safety*, this court concluded that a vehicle's "subtle" weaving within its lane, without crossing over either the center line or the fog line, did not constitute "sufficient articulable facts" that "warrant[ed] the intrusion of a brief investigatory stop." 374 N.W.2d 585, 586 (Minn. App. 1985). I conclude that the factual circumstances in this case present no greater basis for allowing an officer to conduct an investigatory stop.

The record reflects that Officer Barrett spotted the tail lights of appellant's vehicle about three miles ahead of him on Highway 1. The officer did not observe any traffic violations or suspicious activity prior to simply spotting the tail lights. Officer Barrett's only reason for giving chase was that "bars close at 1:00 a.m." But he admitted that he had not seen appellant come from the only bar in Cook open until 1:00 a.m.

Officer Barrett took chase in the whimsical hope that appellant might provide cause for a stop. He accelerated his squad car to 70 miles per hour (mph), 15 mph faster than appellant who, the officer noted, was properly traveling within the designated 55 mph speed limit. Using simple mathematics, traveling at 15 mph over the speed limit, it would have taken Officer Barrett 12 minutes, and 14 miles, to close the three-mile gap and catch up to appellant. He observed no traffic violations during his chase. Once he caught up to appellant, Officer Barrett tailed appellant at a distance of 120 feet for two more miles.

At no time did Officer Barrett notice any driving violations. Appellant drove the speed limit and did not drive carelessly. However, the officer claimed that while following appellant for two miles, he noticed appellant's left tire touch—but not cross—the center line twice; and similarly, claimed that appellant's right tire twice touched—but did not cross—the fog line on the right side of the highway. In each instance, this touch lasted for only a few feet. At 55 mph, this insignificant encroachment onto the lane markers would have lasted for only a fraction of a second. Other than that, Officer Barrett testified that appellant's driving behavior was not objectionable. Officer Barrett, by now many miles outside of Cook, stopped appellant and determined that he was driving while intoxicated. But like *Warrick*, the subtle weaving does not constitute sufficient articulable facts that warranted an investigatory stop. *See* 374 N.W.3d at 586. Therefore, because the record reflects that the investigatory stop was the product of mere whim, caprice, or idle curiosity, I would reverse.