STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1556

State of Minnesota,
Respondent,

vs.
Emmanuel Gordon Anim,
Appellant.

Filed May 27, 2008
Affirmed
Wright, Judge

Hennepin County District Court
File No. 06019961

Lawrence Hammerling, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

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

Jay Heffern, Minneapolis City Attorney, Flavio DeAbreu, Assistant City Attorney, 300 Metropolitan Center, 333 South Seventh Street, Minneapolis, MN 55402 (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Peterson, Judge; and Wright, Judge.

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

WRIGHT, Judge

In this challenge to his conviction of driving while impaired (test refusal), appellant contends that the constitutional standard established by the United States Supreme Court in *Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769 (1996), has proven ineffective in combating discriminatory police tactics, and he urges us to adopt a different legal standard. We affirm.

FACTS

On March 24, 2006, at approximately 12:30 a.m., Officer Luke Huck of the University of Minnesota Police Department and his partner were at the intersection of Cedar Avenue and Minnehaha Avenue in Minneapolis when they heard loud music coming from an unknown area. The music became louder as a vehicle approached them on Cedar Avenue. From approximately 100 feet away, Officer Huck determined that the loud music was coming from a vehicle, which was driven by appellant Emmanuel Anim.

As Anim's vehicle approached the squad car, the officers discussed the Minneapolis ordinance that prohibits the amplification of music from a motor vehicle being driven on a public street so that the music is audible by any person from a distance of 50 feet or more. Minneapolis, Minn., Code of Ordinances § 389.65(c)(6) (1991).[1] The

[1] Minneapolis, Minn., Code of Ordinances §389.65(c)(6) prohibits in pertinent part "the playing or operation . . . of any radio, tape player, disc player, loud speaker . . . which is located within a motor vehicle being operated on a public street or alley . . . which is audible by any person from a distance of fifty (50) feet or more from the vehicle."

officers followed Anim's car and initiated a traffic stop near the intersection of Cedar-Riverside and Fourth Street.

When Officer Huck stood at the driver's-side window and asked Anim to turn down the music, Anim avoided eye contact. But the officer eventually determined that Anim's eyes were bloodshot and his speech was slurred. When getting out of the vehicle at the officer's direction, Anim leaned on the door for support.

After failing several field sobriety tests, Officer Huck arrested Anim for driving while impaired. He subsequently was charged with two counts of driving while impaired, gross-misdemeanor violations of Minn. Stat. §§ 169A.20, subds. 1(1) (driving under the influence of alcohol), 2 (test refusal), 169A.25, subds. 1(b), 2, 169A.26, subds. 1(a), 2 (2004). Anim moved to suppress the evidence seized pursuant to his arrest. The district court denied the motion, and the case proceeded to trial.

After the state presented its case-in-chief to the jury, the district court granted Anim's motion for a judgment of acquittal on the driving-under-the-influence-of-alcohol count because the state had failed to offer evidence on an essential element of the offense. The jury, however, convicted Anim on the test-refusal count. This appeal followed.

D E C I S I O N

I.

Anim does not challenge the district court's denial of the motion to suppress based on the argument presented to the district court. Rather, he argues for the first time on appeal that the constitutional standard set forth in *Whren v. United States*, 517 U.S. 806,

116 S. Ct. 1769 (1996), encourages discriminatory police practices and, therefore, no longer should be followed by Minnesota courts.[2]

In *Whren*, police officers with the District of Columbia Metropolitan Police Department were on patrol in a "high drug area" when they observed a driver waiting at a stop sign for an unusually long time and looking down in the direction of the front passenger seat. 517 U.S. at 808, 116 S. Ct. at 1772. After the officers made a U-turn to follow the vehicle, the vehicle made a sudden turn without signaling and sped off. *Id.* The officers stopped the vehicle to issue a warning regarding the traffic violations. But when one of the officers reached the vehicle, he observed two large plastic bags of crack cocaine in the passenger's hands. *Id.* at 808-09, 116 S. Ct. at 1772. Both the driver and the passenger were arrested and charged with drug possession. *Id.* at 809, 116 S. Ct. at 1772. The defendants moved to suppress the evidence, arguing that (1) the stop was not supported by probable cause or reasonable suspicion to believe that they were engaged in illegal drug activities, and (2) the officer's motivation for stopping the vehicle was pretextual. *Id.*

The *Whren* Court held that, when an officer has probable cause to believe that a traffic violation has occurred, the officer may lawfully stop the offender, regardless of the officer's actual motivation for doing so. *Id.* at 811-813, 116 S. Ct. at 1773-74. In reaching this holding, the *Whren* Court specifically addressed the argument that the legal standard for a traffic stop should be whether a reasonable officer in the same

[2] Generally, we will not consider matters that were not argued and considered in the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). But we may review a matter "as the interests of justice may require." Minn. R. Crim. P. 28.02, subd. 11.

circumstances would have made the stop. *Id.* at 813-16, 116 S. Ct. at 1774-76. In doing so, the *Whren* Court rejected a legal standard that subjectively examined the motivations of the arresting officer as contrary to the United States Supreme Court precedent governing the Fourth Amendment to the United States Constitution. *Id.* Thus, the *Whren* Court expressly considered and rejected the "reasonable officer" or "would have stopped" test advanced by Anim.

Minnesota courts have adhered to the constitutional standard iterated in *Whren*. For example, in *State v. George*, after holding that the seizure of a motorcyclist was constitutionally invalid because the Minnesota State Trooper lacked a legal basis for the stop, the Minnesota Supreme Court addressed the defendant's argument that the stop also was illegal because of its pretextual nature. 557 N.W.2d 575, 578-80 (Minn. 1997). The *George* court opined that, "under a *Whren* analysis, any subjective desire by [the trooper] to seek evidence of other illegal activity would not have invalidated the stop, had it been otherwise valid." *Id.* at 577 n.1. And in *State v. Battleson*, we relied on *Whren* and held that, even if the officer had ulterior motives for investigating the driver, the traffic stop was valid because the officer had a reasonable, articulable legal basis for suspecting that the defendant had violated the law. 567 N.W.2d 69, 71 (Minn. App. 1997). Indeed, even before the *Whren* decision, Minnesota courts had held that a stop is valid, regardless of the officers' motives, provided that an objective legal basis for the stop exists. *State v. Everett*, 472 N.W.2d 864, 867 (Minn. 1991); *State v. Faber*, 343 N.W.2d 659, 660 (Minn. 1984); *State v. Pleas*, 329 N.W.2d 329, 332 (Minn. 1983).

In light of the well-established precedent governing seizures under the United States and Minnesota constitutions, we reject Anim's invitation to repudiate the *Whren* standard.

II.

Anim also challenges his conviction, arguing that the traffic stop is invalid under the Equal Protection Clause of the United States Constitution, which prohibits discriminatory enforcement of nondiscriminatory laws. *City of Minneapolis v. Buschette*, 307 Minn. 60, 64, 240 N.W.2d 500, 502 (1976). Generally, it is presumed that a criminal prosecution has been conducted in a nondiscriminatory manner and in good faith. *State v. Hyland*, 431 N.W.2d 868, 872 (Minn. App. 1988). But if discriminatory enforcement is demonstrated by a preponderance of the evidence, the defendant is entitled to dismissal of the charges. *Buschette*, 307 Minn. at 66, 240 N.W.2d at 503.

To establish a prima facie case of discriminatory enforcement, the defendant must demonstrate

> (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, *i.e.*, based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of a constitutional right.

Hyland, 431 N.W.2d at 872-73 (quotation omitted).

Careful examination of the record establishes that Anim did not raise the issue of discriminatory enforcement during the pretrial or trial proceedings. Ordinarily, we will

not consider matters that were not raised in the trial court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Moreover, because Anim failed to adequately address this issue in his appellate brief, this argument is waived. *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997) (stating that issues not briefed on appeal are waived), *review denied* (Minn. Aug. 5, 1997).

Notwithstanding Anim's failure to establish that he is entitled to relief, the gravity of being subjected to discriminatory police practices is not lost on us. We reiterate that the doctrine of discriminatory enforcement provides legal redress for those who are wrongfully accused as the result of such practices.

Affirmed.