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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2208

State of Minnesota,
Respondent,

vs.

Christopher James Ozmun,
Appellant.

Filed August 31, 2010
Affirmed
Hudson, Judge

Winona County District Court
File No. 85-CR-08-2835

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

Charles E. MacLean, Winona County Attorney, Francis P. McQuillan, Jr., Assistant County Attorney, Winona, Minnesota (for respondent)

Richmond H. McCluer, Jr., Price, McCluer & Plachecki, Winona, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Hudson, Judge; and Larkin, Judge.

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

HUDSON, Judge

Appellant challenges the district court's order denying his motion to suppress evidence gained as a result of a traffic stop, arguing that police lacked reasonable

suspicion to stop his vehicle. Because the totality of the circumstances, including appellant's driving behavior, provided police with a reasonable, articulable suspicion that appellant may have been engaged in criminal activity, the district court did not err in denying the motion to suppress, and we affirm.

FACTS

After police conducted a traffic stop of a vehicle driven by appellant Christopher James Ozmun, the state charged appellant with one count of third-degree driving under the influence, one count of third-degree driving while impaired, and one count of failure to provide proof of insurance. Appellant moved to suppress evidence on the ground that the officer lacked reasonable articulable suspicion to stop appellant's vehicle and moved to dismiss the action for lack of probable cause.

At an evidentiary hearing on appellant's motion to suppress, a Winona police officer testified that while on routine patrol around 2:00 a.m., he observed a red car driving northbound on Walnut Street in Winona. The officer testified that he followed the car about two blocks and saw it take a right turn into an alley, then proceed about a block and turn left on Market Street, returning northbound. The car then parked in front of a bar. The officer testified that as he drove his squad past the car, the driver exited the car and watched the officer, giving him "kind of a funny look."

The officer testified that he kept driving but believed that, based on his observations, the driver might have been trying to evade him. Therefore, the officer drove back southbound through an alley in order to observe the vehicle further. The

officer saw that the car remained parked only "[a] few seconds" and then was driven southbound, in its previous direction.

The officer testified that he was suspicious because there had been about ten recent vehicle thefts in the Winona and Austin areas, and a suspect in the thefts had not yet been apprehended. The officer testified that, at that point, he believed the actions of the driver to be suspicious, and he initiated a traffic stop. He identified the driver as appellant by his driver's license and asked appellant what he was doing. Appellant replied that he had lost some money a few hours earlier and was looking for it.

The officer requested proof of insurance, which appellant did not have in his car. The officer detected a strong odor of an alcoholic beverage coming from appellant and observed that appellant's eyes were bloodshot and watery and that he was acting very nervous. When questioned, appellant admitted to drinking four beers in four hours. Appellant agreed to take an Intoxilyzer test, which resulted in a blood-alcohol content reading of .13.

After the evidentiary hearing, the district court denied appellant's motions to suppress, concluding that the officer had a reasonable, articulable basis for initiating the stop. Appellant agreed to a procedure to preserve the issue for appeal pursuant to Minn. R. Crim. P. 26.01, subd. 4. The court issued its findings of fact, conclusions of law, and order finding appellant guilty of third-degree driving under the influence, in violation of Minn. Stat. §§ 169A.20, subd. 1(1), .26, subd. 1(a) (2008); the court dismissed the other two counts. This appeal follows.

D E C I S I O N

When a suppression order is challenged on appeal, this court independently reviews the facts and the law to determine whether the district court erred by suppressing or refusing to suppress the evidence. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). Limited investigative stops are subject to the prohibitions against unreasonable searches and seizures in the Fourth Amendment to the United States Constitution and article I, section 10 of the Minnesota Constitution. *State v. Askerooth*, 681 N.W.2d 353, 359–60 (Minn. 2004). A limited investigative stop requires a showing of reasonable suspicion, rather than probable cause. *State v. Pike*, 551 N.W.2d 919, 921 (Minn. 1996). To justify an investigative stop, an officer "must be able to point to specific and articulable facts which, taken together with rational inference from those facts, reasonably warrant the intrusion." *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968). A decision to conduct a stop must be based on more than "mere whim, caprice, or idle curiosity." *Marben v. State, Dep't of Pub. Safety*, 294 N.W.2d 697, 699 (Minn. 1980) (quotation omitted). A reviewing court considers the totality of the circumstances surrounding the stop, giving due regard to the officer's experience and training in law enforcement. *State v. Kvam*, 336 N.W.2d 525, 528 (Minn. 1983).

Appellant argues that the district court erred by failing to suppress evidence recovered as a result of the stop because the police officer failed to articulate a reasonable, articulable suspicion for stopping his vehicle. Appellant maintains that the officer's suspicion was based on a mere "hunch," which was insufficient to support a legal stop. "Articulable, objective facts that, by their nature, quality, repetition, or pattern

become so unusual and suspicious that they support at least one inference of the possibility of criminal activity, are what will be necessary to justify an investigatory stop of a motor vehicle." *State v. Schrupp*, 625 N.W.2d 844, 847–48 (Minn. App. 2001), *review denied* (Minn. July 24, 2001).

Even if a driver's actions are consistent with innocent behavior, if they give rise to a reasonable suspicion that a driver is deliberately trying to evade an officer, they may provide a basis for an investigative stop. *State v. Johnson*, 444 N.W.2d 824, 827 (Minn. 1989). Here, the officer first saw appellant driving down a city street. When the officer followed appellant's car, he observed appellant turn into an alley and then resume driving on a parallel street in the same direction as before. The officer then saw appellant stop briefly, look at the officer, and turn his car to proceed in the other direction. Although these actions were consistent with innocent behavior, they also provided the officer with facts sufficient to create a reasonable inference that appellant was deliberately trying to evade him. *See id.* (concluding that a driver's actions of exiting a highway after seeing a police officer and quickly reentering the highway, going in the same direction, provided police with reasonable suspicion that the driver was trying to evade the officer, justifying a limited investigative stop).

Appellant argues that, unlike the defendant in *Johnson*, appellant did not have an "immediate, panicked reaction" to the officer's presence. But such a reaction, although it may contribute to an officer's decision to initiate a stop, is not required when the totality of the circumstances provides the officer with reasonable suspicion that a person is trying to evade police. Further, the officer was also entitled to consider the late time of night as

a factor contributing to his decision to conduct the stop. *Cf. State v. Uber*, 604 N.W.2d 799, 801–02 (Minn. App. 1999) (concluding that when a stop occurred at 2:00 a.m., time of night was a contributing factor that supported the decision to conduct stop).

Appellant correctly notes that the district court discounted the reports of car thefts over a wide geographic area as an adequate basis for the stop. Nonetheless, we conclude that appellant's unusual driving behavior, along with the late time of night, provided sufficient articulable facts by which the officer could have reasonably believed that appellant was deliberately trying to evade him and may have been involved in criminal activity. *See Johnson*, 444 N.W.2d at 827. The stop was supported by reasonable suspicion, and the district court did not err by denying the motion to suppress evidence.

Affirmed.