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STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2338

State of Minnesota,
Respondent,

vs.

James Matthew Otte,
Appellant.

Filed March 25, 2008
Affirmed
Halbrooks, Judge

Hennepin County District Court
File No. 06036030

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

Steven M. Tallen, 4560 IDS Center, 80 South 8th Street, Minneapolis, MN 55402 (for respondent)

Douglas V. Hazelton, 600 South Highway 169, Suite 1597, Minneapolis, MN 55426 (for appellant)

Considered and decided by Klaphake, Presiding Judge; Halbrooks, Judge; and Schellhas, Judge.

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

HALBROOKS, Judge

Appellant was convicted of driving while impaired after the boat he was operating was stopped and he was found to have an alcohol concentration that was over the legal

limit. He challenges the stop of his boat on the ground that reasonable suspicion was not present to justify the stop. In addition, appellant contends that the officer impermissibly expanded the scope of the stop by performing a safety check of his boat. Because we conclude both that appellant's initial stop was justified by reasonable suspicion and that officers had a sufficient basis to suspect that appellant was intoxicated before they performed the safety check, we affirm.

FACTS

On May 27, 2006, Hennepin County Sheriff's Deputy Patrick Chelmo was on patrol in a marked sheriff's boat on Lake Minnetonka. With him were two non-sworn, volunteer "special" deputies, Jason McMahon and Rick Lonetti. While patrolling the Harrison Bay area of the lake around the time of sunset, Deputy Chelmo observed a boat that did not have its lights on. The boat's operator was subsequently identified as appellant James Otte. Deputy Chelmo was aware that both state law and a local Lake Minnetonka Conservation District (LMCD) ordinance required boat operators to have their lights on from the time of sunset to sunrise. Deputy Chelmo initiated a stop of the boat solely on the basis that he believed it was after sunset and the boat's lights were not on, and appellant, with some difficulty, pulled his boat alongside the sheriff's boat.

When the boats were side-by-side, the officers noticed numerous empty beer cans and liquor bottles on board. During a conversation with appellant, Deputy Chelmo also observed that appellant's eyes were bloodshot and watery and that he smelled strongly of alcohol. At some point during this time period, Deputy Chelmo performed a safety check of appellant's boat by asking him to produce flotation devices and fire-safety equipment,

which appellant satisfactorily did. Eventually, Deputy Chelmo asked appellant to step into the sheriff's boat so that he could administer several field sobriety tests and a preliminary breath test. When appellant performed the field sobriety tests poorly and failed the preliminary breath test, he was arrested on suspicion of operating his boat while impaired. A later Intoxilyzer test revealed appellant's alcohol concentration to be .17, more than twice the legal limit.

Appellant was subsequently charged with multiple counts of second-degree driving while impaired in violation of Minn. Stat. §§ 169A.20, subd. 1(1), (5), .25 (2004), for operating a motor vehicle while under the influence of alcohol and for operating a motor vehicle with an alcohol concentration over .08. He was also charged with operating a watercraft after sunset without displaying the proper lights, in violation of Minn. Stat. § 86B.511 (2004). After appellant's motion to suppress all evidence obtained as a result of the stop and to dismiss the complaint for lack of probable cause was denied, he submitted to trial before the district court pursuant to *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980). The district court convicted appellant of second-degree driving while impaired. This appeal follows.

D E C I S I O N

Warrantless searches are per se unreasonable under the Fourth Amendment subject to a few carefully delineated exceptions. *State v. Burbach*, 706 N.W.2d 484, 488 (Minn. 2005). Appellate courts review a district court's determination regarding the legality of a warrantless search or seizure, including a stop based on reasonable suspicion, de novo to determine whether the district court erred in suppressing or not suppressing the evidence.

State v. Askerooth, 681 N.W.2d 353, 359 (Minn. 2004); *State v. Munson*, 594 N.W.2d 128, 135 (Minn. 1999).

Although the factual basis required to support an investigatory stop "is minimal," *Knapp v. Comm'r of Pub. Safety*, 610 N.W.2d 625, 628 (Minn. 2000), an officer's unarticulated hunch will not suffice to justify such a stop. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000).

> In order to justify . . . an investigatory stop, the police must . . . show that the stop was not the product of mere whim, caprice or idle curiosity, but was based upon specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.

State v. Anderson, 683 N.W.2d 818, 823 (Minn. 2004) (quotations omitted). The totality of the circumstances is considered when determining whether reasonable suspicion justifying the investigatory stop existed, and even seemingly innocent factors may be relevant to this evaluation. *State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007).

Minn. Stat. § 86B.511 (2004) states that "a watercraft using the waters of this state, when underway or in use between sunset and sunrise, must carry and display the lights prescribed by the commissioner for the watercraft." The statute does not define the term sunset or sunrise. The district court construed the term "sunset" by referring to the time given by the U.S. Naval Observatory for Lake Minnetonka on the date in question: 8:49 p.m. Neither party disputes this factual finding on appeal.

What is disputed is the time of the stop in relation to 8:49 p.m. At the omnibus hearing, appellant and two passengers on his boat testified that the stop occurred before 8:49 p.m. But their testimony regarding the time of the stop was not confirmed by any

clock; it was based on the time that they estimated had passed since leaving a bar on the lake at about 8:30 p.m. The only confirmed time in relation to the stop was 8:55 p.m., when police dispatch received a transmission from the sheriff's boat regarding the stop. The precise time of the stop in relation to this transmission is also unknown. Deputy Chelmo and Special Deputy Lonetti testified that the transmission was made right before the stop occurred, meaning that the stop was initiated after sunset. On the other hand, Special Deputy McMahon testified that the transmission occurred up to ten minutes after the stop occurred, meaning that the stop could have occurred as early as 8:45 p.m.

Addressing this issue in its order, the district court stated:

> 2. . . . Deputy Chelmo knew the law requires lights on after sunset. By all witness accounts, the stop took place within minutes before or after the only objective measure of sunset, i.e., the meteorological sunset of 8:49 p.m.
>
> 3. Thus, Deputy Chelmo had an objective legal basis for the stop and the Court need not decide the precise minute of the stop.

The district court correctly realized that any mistake here, if one was made at all, was a mistake of fact and not a mistake of law. The supreme court has held that a mistake of law cannot form the basis for a seizure. *Anderson*, 683 N.W.2d at 824 (holding that "an officer's mistaken interpretation of a statute may not form the particularized and objective basis for suspecting criminal activity necessary to justify a . . . stop"). But "honest, reasonable mistakes of fact are unobjectionable under the Fourth Amendment." *State v. Licari*, 659 N.W.2d 243, 254 (Minn. 2003). As the United States Supreme Court has stated:

> [I]n order to satisfy the "reasonableness" requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government—whether the magistrate issuing a warrant, the police officer executing a warrant, or the police officer conducting a search or seizure under one of the exceptions to the warrant requirement—is not that they always be correct, but that they always be reasonable.

Illinois v. Rodriguez, 497 U.S. 177, 185-86, 110 S. Ct. 2793, 2800 (1990). Our supreme court has also specifically upheld the stop of a vehicle based on a reasonable mistake of fact. *State v. Sanders*, 339 N.W.2d 557 (Minn. 1983).

The district court here concluded that any potential mistake in stopping appellant's boat was a reasonable one. We agree. That the stop occurred within a few minutes of sunset is undisputed. The only confirmed time regarding the stop—the time at which police dispatch received a transmission from Deputy Chelmo—established that, at the most, the stop occurred four minutes before sunset. We conclude that any mistake of fact, if one was made at all, in stopping appellant's boat before sunset was a reasonable one. Thus, the officers had a reasonable articulable suspicion that appellant was operating his boat after sunset without the required lights.

II.

Appellant also contends that Deputy Chelmo impermissibly expanded the duration and scope of the stop of his boat by performing a safety check and that he did not observe indicia of appellant's intoxication until conducting this improper safety check. Article I, section 10 of the Minnesota Constitution requires that both a stop's scope and duration be limited to the underlying justification for the stop, absent additional facts. *State v. Fort*,

660 N.W.2d 415, 418-19 (Minn. 2003). Any expansion of either the scope or duration of the stop requires additional "reasonable articulable suspicion of other criminal activity." *Id.* at 419. We review a district court's determination on such matters de novo. *See Burbach*, 706 N.W.2d at 487.

In *State v. Hussong*, this court held that these principles apply within the context of a safety check of a boat. 739 N.W.2d 922, 927 (Minn. App. 2007). There, we held that the officer's actions in performing a safety check of Hussong's boat were proper because "the absence of [the necessary safety equipment] in plain sight provides probable cause to believe that the operator of the watercraft is violating" state law requiring such safety equipment to be "immediately available" in the watercraft. *Id*. at 927-28. Accordingly, we concluded that the officer properly asked Hussong to produce the required safety equipment and reversed the district court's decision to suppress the evidence of Hussong's intoxication observed during the safety check. *Id.* at 929.

Here, the facts do not support appellant's argument that Deputy Chelmo had no basis to suspect that he was intoxicated until after the safety check had begun. In addressing this argument, the district court stated that "[o]nce Deputy Chelmo saw the liquor and beer bottles and noticed indicia of intoxication while the boats were side by side, it was proper to seize the [appellant] for further investigation." We again agree with the district court.

After initiating the stop, Deputy Chelmo observed that appellant had an unusually difficult time maneuvering his boat alongside the sheriff's boat, and the deputy testified that, in his experience, such difficulty is often because the boater is intoxicated. When

the boats were side-by-side, numerous empty beer cans and alcohol bottles in appellant's boat were clearly visible to the deputies. These observations occurred before the safety check began.

Deputy Chelmo also testified on direct examination that he observed additional indicia of intoxication—such as the smell of alcohol on appellant and his bloodshot and watery eyes—before beginning the safety check. On cross-examination by appellant's counsel, Deputy Chelmo also indicated that he observed indicia of intoxication during the safety check, but this testimony does not undermine the district court's conclusions. Deputy Chelmo easily could have observed indicia of intoxication both before and during the safety check. Furthermore, unlike *Hussong*, the district court here made no express finding that indicia of intoxication were not observed until after the safety check began. Based on this record, we conclude that the evidence of intoxication was not obtained by means of any impermissible expansion of the stop.

Affirmed.