**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A07-0534**

State of Minnesota,
Respondent,

vs.

Thomas Mackrell,
Appellant.

**Filed June 3, 2008**
**Affirmed**
**Schellhas, Judge**

Aitkin County District Court
File No. K2-05-544

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

James P. Ratz, Aitkin County Attorney, Lisa Roggenkamp Rakotz, Senior Assistant County Attorney, 217 Second Street N.W., Aitkin, MN 56431 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Bridget Kearns Sabo, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

**SCHELLHAS,** Judge

Appellant challenges his conviction of refusal to submit to a chemical test and driving after cancellation, arguing that the stop of his vehicle violated his Fourth Amendment rights and that he received ineffective assistance of counsel at his trial. Because we conclude that there was reasonable articulable suspicion to stop appellant's vehicle and that appellant has failed to show that he received ineffective assistance of counsel, we affirm.

## FACTS

Late in the evening on August 1, 2005, Deputy Sheriff John Novotny was driving on Highway 18 in Aitkin County, saw another car approaching him, and observed the car cross the fog line. In his rearview mirror, Deputy Novotny saw four of the six characters on the car's license plate that he thought included the letters HSF and the number seven. Deputy Novotny continued to watch the car in his rearview mirror and saw it contact the centerline of the road. He turned around and followed the car but did not turn on his lights or siren because he wanted to catch up to the car. Deputy Novotny lost sight of the car, but after returning to the point at which he initially observed the car, he noticed dust tracks coming out of a gravel driveway onto the highway in the direction he was driving. As he continued to drive, he saw a car with its exterior lights on, stopped a couple of driveways away from where he had just observed the tracks. To continue his observation of this car, Deputy Novotny pulled into another driveway and turned off all of his car lights. As he watched this car for three-to-five minutes, he noticed that its lights stayed

on and it did not move. Deputy Novotny drove past the car on a nearby frontage road and noticed that its license plate was HSF 722. When Deputy Novotny observed a person standing near the car and noticed that all of the lights in the adjacent house were off, he decided to investigate. As he drove toward the driveway, the person standing next to the car got into it and started to drive.

Deputy Novotny stopped the car and approached it. Deputy Novotny testified that the driver was swearing at him and refused to provide identification or to leave his car when asked. Although the driver did not initially identify himself, after a few minutes of discussion, Deputy Novotny recognized him as appellant Thomas Mackrell and knew that his driver's license was cancelled. He also noticed that appellant had glassy and bloodshot eyes, slurred speech, and smelled of alcohol. After another officer arrived to assist Deputy Novotny, he arrested appellant, searched his car, and found an open can of beer.

Appellant refused to participate in field sobriety tests or a breath test and was uncooperative when Deputy Novotny read the implied-consent advisory to him. Appellant was charged with four counts: (1) first-degree driving while impaired; (2) first-degree refusal to submit to chemical test; (3) driving after cancellation—inimical to public Safety; and (4) failure to produce proof of insurance.

Prior to trial, appellant moved the district court to suppress evidence obtained as a result of the stop of his car, arguing that the stop was illegal because it was not based on a reasonable suspicion of criminal activity. The district court denied appellant's motion, specifically finding that Deputy Novotny "did have reason to believe the vehicle he saw

in the driveway was the same one involved in the earlier minor traffic infraction on the highway," and that Deputy Novotny was justified in stopping appellant based on the "totality of the circumstances." On October 13, 2006, appellant appeared with counsel, waived his right to a jury trial, and agreed to proceed as to counts 2 and 3 under *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980), based on stipulated facts. The parties further agreed that the remaining counts would be dismissed. The district court found appellant guilty of counts 2 and 3.

In his pro se supplemental brief, appellant claims that he agreed to a *Lothenbach* trial because his attorney misrepresented to him that doing so was "the fastest way to get to a jury trial" and that she could question Deputy Novotny's observations at some point during appellant's criminal proceeding. Appellant claims that his attorney was receiving treatment for a methamphetamine addiction for four of the 14 months during her representation of him and that as a result, she was unable to competently represent him.

**D E C I S I O N**

We review the legality of an investigative stop and questions of reasonable articulable suspicion de novo. *State v. Flowers*, 734 N.W.2d 239, 247-48 (Minn. 2007).

***Investigative Stop***

The United States and Minnesota constitutions protect against unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. "To determine whether this constitutional prohibition has been violated, we examine the specific police conduct at issue." *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008). "[T]he principles and framework of [*Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968)]

apply when evaluating the reasonableness of searches and seizures during traffic stops even when a minor law has been violated." *Id.* (quotation omitted). As in *Timberlake*, the conduct at issue here is the investigatory stop of a motor vehicle. A brief investigatory stop does not violate the prohibition against unreasonable search and seizure when the officer has a reasonable articulable suspicion of criminal activity. *Id.* The arresting officer is entitled to make an assessment based on "all of the circumstances" and may draw inferences and deductions "that might well elude an untrained person." *Berge v. Comm'r of Pub. Safety*, 374 N.W.2d 730, 732 (Minn. 1985) (quotation marks omitted) (quoting *United States v. Cortez*, 449 U.S. 411, 418, 101 S. Ct. 690, 695 (1981)).

Deputy Novotny testified that one reason he stopped appellant's car was his suspicion about appellant's irregular driving on the highway. Appellant argues that the facts did not support a reasonable articulable suspicion of criminal activity. But the reasonable-suspicion standard is not high, *Timberlake*, 744 N.W.2d at 393; it requires only that the stop not be the product of "whim, caprice, or idle curiosity." *State v. Pike*, 551 N.W.2d 919, 921 (Minn. 1996). "If an officer observes a violation of a traffic law, however insignificant, the officer has an objective basis for stopping the vehicle." *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997). Here Deputy Novotny observed appellant crossing the fog line and contacting the centerline on the highway, which alone could form the objective basis for an investigative stop. *See* Minn. Stat. § 169.18, subds. 1, 7(a) (2004) ("[A] vehicle shall be driven upon the right half of the roadway" and "shall be driven as nearly as practicable entirely within a single lane"); *State v.*

*Wagner*, 637 N.W.2d 330, 336 (Minn. App. 2001) ("Crossing the center line is a violation of the traffic laws and will usually provide the officer with an objective, reasonable suspicion to conduct an investigatory stop."). Appellant argues that Deputy Novotny's observations fail to justify the stop because he made no attempt to pull appellant's car over when he first passed it on the highway. Appellant's argument is unpersuasive because the district court was entitled to consider all of the officer's observations on which he based his eventual decision to stop appellant. *See Wagner*, 637 N.W.2d at 336 (holding that the district court "was entitled to look at all of [the driver's] conduct, even though the trooper did not stop [the driver] immediately after [the driver] crossed the center line.").

Appellant disputes Deputy Novotny's ability to see his license plate well enough to discern four of its characters in his rear-view mirror, while both cars were traveling at high speeds along a curve in the highway. But the district court heard Deputy Novotny's testimony and was persuaded by it. Moreover, where an officer is able to articulate an objective reason for suspecting that a driver is engaged in evasive conduct, an investigative stop is justified. *State v. Johnson*, 444 N.W.2d 824, 827 (Minn. 1989). Deputy Novotny lost sight of appellant's car on the highway and soon afterward noticed tracks revealing that a car had recently pulled out of a driveway onto the highway. Shortly thereafter the officer observed appellant standing outside of his car in a nearby driveway. When an officer suspects that a driver turned off of a highway after observing a police car, the officer's suspicion of evasive conduct has been held to justify an investigative stop. *See State v. Petrick*, 527 N.W.2d 87, 88-89 (Minn. 1995) (holding that

evasive conduct included pulling into the first available driveway and shutting lights off after seeing police); *Johnson*, 444 N.W.2d at 827 (holding that evasive conduct included looking officer "in the eye" and turning off of the highway seconds later). An officer does not need knowledge of evasive conduct to justify an investigative stop; he needs only an objective reason for suspecting the driver is engaged in evasive conduct. *Johnson*, 444 N.W.2d at 827. The record contains ample evidence to support a conclusion that Deputy Novotny had a reasonable articulable basis to suspect that appellant had engaged in criminal activity and was trying to evade him. Deputy Novotny was entitled to consider all of the circumstances surrounding the incident to assess whether to make a stop. *Berge*, 374 N.W.2d at 732.

We conclude that the district court did not err in denying appellant's pretrial motion to suppress evidence.

***Ineffective Assistance of Counsel***

Appellant claims that his attorney was treated for methamphetamine addiction for four months while she was responsible for his legal representation in this case. Appellant also claims that he agreed to a hearing pursuant to *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980), based on his attorney's misrepresentation to him that doing so would be the fastest way to testify before a jury and that they would have a chance to dispute Deputy Novotny's observations. Appellant apparently claims that his ability to defend himself against the charged offenses was prejudiced by ineffective assistance of counsel.

When evaluating an ineffective-assistance-of-counsel claim, we apply the two-prong *Strickland* test: a defendant must prove that (1) the lawyer's representation fell

below an objective standard of reasonableness and (2) a reasonable probability exists that the outcome would have been different but for the lawyer's errors. *Cooper v. State*, 745 N.W.2d 188, 192 (Minn. 2008) (following rule in *Strickland v. Washington*, 466 U.S. 668, 687-88, 692, 104 S. Ct. 2052, 2064, 2067 (1984)). "There is a strong presumption that a counsel's performance falls within the wide range of reasonable professional assistance." *Id*. (quotation omitted).

Here, appellant failed to establish either prong under *Strickland*. Appellant offers no evidence of his attorney's addiction to methamphetamine or her treatment for it, and no proof of her absence during his case at any critical juncture, assuming for appellant's benefit that she was absent at all. And, even assuming appellant's attorney took a medical leave while appellant's case was pending, appellant also offers no evidence that her availability, lack thereof, or alleged addiction affected the quality of her representation or prejudiced appellant in any way. Appellant merely makes the conclusory statement in his pro se supplemental brief that "[his attorney] could not possibly represent [his] interests and she *did not*." (Emphasis in original.)

As to appellant's claim that his attorney misled him about the implications of waiving his right to a jury trial and proceeding with a *Lothenbach* trial, appellant simply provides no evidence that his attorney made this misrepresentation to him. To the contrary, the record shows that appellant was present at the hearing, was clearly informed that his decision to proceed would amount to a waiver of his right to a jury trial, and that he agreed to waive that right.

The record before us does not support appellant's ineffective-assistance-of-counsel claim. Generally, once a direct appeal has been taken, "all matters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief." *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). But we have also held that claims may be presented on postconviction appeal under the interests-of-justice exception to the *Knaffla* rule when fairness requires consideration of such a claim. *White v. State*, 711 N.W.2d 106, 109 (Minn. 2006). Therefore, we preserve this claim for appellant to pursue in a petition for postconviction relief if he so chooses.

**Affirmed.**