STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1245

State of Minnesota,
Respondent,

vs.

Matthew Wayne Mikkelson,
Appellant.

Filed December 9, 2008
Affirmed
Crippen, Judge[*]

Stearns County District Court
File No. 73-K9-06-004263

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Janelle P. Kendall, Stearns County Attorney, Shan C. Wang, Assistant County Attorney, 705 Courthouse Square, Room 448, St. Cloud, MN 56303-4701 (for respondent)

Jenny Chaplinski, Chaplinski Law Office, P.O. Box 336, St. Cloud, MN 56302-0336 (for appellant)

Considered and decided by Connolly, Presiding Judge; Bjorkman, Judge; and Crippen, Judge.

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[*] 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

CRIPPEN, Judge

Appellant Matthew Mikkelson disputes the district court's pretrial order denying his motion to suppress evidence obtained as a result of a traffic stop. Appellant argues that the arresting officer had no reasonable articulable suspicion to justify expanding his inquiry beyond the initial reason for the stop. Because the record shows numerous grounds to support the officer's suspicions beyond appellant's nervousness, we affirm.

FACTS

In the early morning of September 2, 2006, Trooper Van Den Einde stopped appellant while on routine patrol. The trooper had observed appellant's car weave within its own lane and cross the fog line with its passenger-side tires as it went around a curve. He also observed that the tint of the rear window of appellant's car was substantially darker than Minnesota law allows.

After becoming suspicious that appellant was under the influence of a controlled substance, the trooper requested and received appellant's consent to search the car. The search yielded drug paraphernalia and cocaine, which was inside the locked glove compartment. Altogether, the trooper discovered approximately 88 grams of cocaine and two grams of marijuana. Appellant was arrested and charged with committing a controlled substance crime in the first degree. Minn. Stat. § 152.021 (2006).

The district court convicted appellant on the drug charge after denying his suppression motion and accepting his *Lothenbach* stipulation waiving his right to a jury trial.

D E C I S I O N

When reviewing pretrial orders on motions to suppress evidence, we are to undertake an independent review of the facts to determine whether the district court erred. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

The Minnesota Supreme Court has held "that under Article I, Section 10, of the Minnesota Constitution any expansion of the scope or duration of a traffic stop must be justified by a reasonable articulable suspicion of other criminal activity." *State v. Fort*, 660 N.W.2d 415, 419 (Minn. 2003) (citing *State v. Wiegand*, 645 N.W.2d 125, 135 (Minn. 2002)). The scope of an investigation arising from a traffic stop is limited by the initial justification for the stop but may include limited searches for weapons. *Wiegand*, 645 N.W.2d at 136. The scope expands when an officer "develops a reasonable, articulable suspicion" of additional offenses "within the time necessary to resolve the originally-suspected offense." *Id.* (footnote omitted). Appellant argues only that the trooper's request to search his car was an unconstitutional expansion of the stop.

As the parties acknowledge, nervousness and fidgety behavior alone are insufficient to give rise to a reasonable suspicion. *State v. Burbach*, 706 N.W.2d 484, 491 (Minn. 2005). In *Burbach*, the supreme court concluded that, in the absence of other signs of impairment, even the combined factors of nervousness, a tip of unknown provenance, and driving 55 miles-per-hour in a 30-miles-per-hour zone, were insufficient to give rise to a reasonable suspicion of drug possession. *Id.*

The facts of record support the district court's findings.[1] The trooper identified the observations that led to his suspicion of a controlled substance violation: appellant's "driving conduct, his motor skills, and obvious nervousness," combined with his alcohol-free breath test result. Although we independently review the evidence here to determine whether the district court erred, we pay great deference to an "officer's experience and judgment" when we evaluate whether the officer had legitimate cause to act. *See Johnson v. Comm'r of Pub. Safety*, 366 N.W.2d 347, 350 (Minn. App. 1985) (discussing the deference due when evaluating whether an officer had probable cause to require a breath test).

Before appellant was stopped, the trooper observed appellant's car gently moving back and forth within its lane. As he followed the car, he saw it drift over the fog line as it went around a curve. After the trooper stopped the car, he observed cigarette smoke pouring out of appellant's car window. The trooper's training and experience made him aware that people may attempt to disguise the odor of illegal substances with cigarette smoke. After stopping the car, the trooper found appellant's movements to be suspiciously slow and deliberate. The trooper noted that appellant avoided making eye

[1] Despite bearing the burden to provide an adequate record on appeal, *Setter v. Mauritz*, 351 N.W.2d 396, 398 (Minn. App. 1984), appellant did not provide a transcript of the omnibus hearing or a statement of the proceeding as required by the Minnesota Rules of Civil Appellate Procedure. Minn. R. Civ. App. P. 110.02. Consequently, we assume the district court's findings of fact are correct when considering whether the evidence supports the conclusion that Trooper Van Den Einde had justification to expand his search. *Duluth Herald & News Tribune v. Plymouth Optical Co.*, 286 Minn. 495, 498, 176 N.W.2d 552, 555 (1970); *see also State v. Robles*, No. A03-132, 2004 WL 1093310, at *1 (Minn. App. May 18, 2004) (citing *Duluth Herald* to limit appellate review of an incomplete record in a criminal context).

contact with him throughout the stop and exhibited confusion during their conversation. Appellant also acted nervously by fidgeting and scratching. Eventually, the trooper administered a breath test to determine whether appellant's behavior could be attributed to the influence of alcohol; the test detected none. At that point, the trooper asked to search appellant's car.

The evidence shows that the trooper had a reasonable articulable suspicion sufficient to support an expanded search for drugs. The trooper may have begun the traffic stop with a hunch insufficient to form a basis for reasonable suspicion that drug use was afoot. But he did not ask to expand the search until after making further observations of appellant's behavior and motor skills at close proximity and determining that appellant's behavior and apparent impairment were not the result of being under the influence of alcohol. In light of appellant's multiple signs of impairment (weaving and crossing the fog line while driving, slow and deliberate movements, confusion), in addition to other suspicious factors (copious cigarette smoke emanating from his car, refusal to make eye contact, nervous fidgeting and scratching), this case substantially differs from *Burbach*, in which the only articulable indicia of impairment was nervousness.

Because appellant exhibited signs of impairment and suspicious behavior beyond nervousness, the trooper's articulated observations were sufficient, in the aggregate, to support a reasonable suspicion and justify an expanded stop.

Affirmed.