STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0083

State of Minnesota,
Respondent,

vs.

Freda Lorraine Perry,
Appellant.

Filed February 3, 2009
Affirmed
Shumaker, Judge

St. Louis County District Court
File No. 69VI-CR-07-516

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

Melanie Ford, St. Louis County Attorney, Michelle M. Anderson, Assistant County Attorney, 300 South Fifth Avenue, Room 222, Virginia, MN 55792 (for respondent)

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

Considered and decided by Toussaint, Chief Judge; Shumaker, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

SHUMAKER, Judge

Appellant challenges the district court's denial of her motion to suppress evidence, arguing that the district court erred in ruling that (1) appellant was seized when the trooper reached into her vehicle and turned off the engine, and (2) the manner of investigation was not reasonably related to the circumstances. We affirm.

FACTS

At approximately 10:00 p.m. on February 17, 2007, Minnesota State Patrol Trooper Peter Goman and St. Louis County Sergeant Pat McKenzie responded to a complaint by a 911 caller who told the dispatcher his name. The caller described a dark-colored minivan, Minnesota license plate number WT5514, that was traveling at speeds varying from 30 to 50 miles per hour and was weaving outside its lane on I-35W. The caller followed the minivan and observed this activity until the minivan exited at the Anchor Lake rest area.

Sergeant McKenzie entered the rest area within five minutes of the time the van had reportedly left the highway and observed the minivan parked in a handicapped spot adjacent to the restroom. He waited in the back of the parking lot so that he could follow the minivan if it left. Trooper Goman, who knew Sergeant McKenzie's position, waited on the highway to witness driving conduct if the minivan drove back onto the freeway.

After waiting ten minutes, Sergeant McKenzie and Trooper Goman approached the minivan. As Trooper Goman walked toward the minivan, he saw that the engine was still running, that appellant Freda Perry was sleeping in the driver's seat, that a small

child was asleep in the second-row seat, and that an adult male was asleep in the third-row seat. Trooper Goman opened the front passenger door and reached in to turn off the engine, and in doing so he smelled an odor of alcohol inside the minivan and saw a partially empty bottle of schnapps next to Perry's seat. After turning off the engine, Trooper Goman woke Perry, explained why he was speaking with her, and asked why she was sleeping in the rest area.

Perry told Trooper Goman that she, her child, and husband were driving home to International Falls and that she was tired and stopped at the rest area to sleep. Trooper Goman could smell alcohol on her breath and noticed that she had bloodshot and watery eyes. He administered a preliminary breath test to Perry, and she registered an amount of alcohol above the legal limit. Trooper Goman arrested her for driving under the influence of alcohol.

The state charged Perry with second-degree driving while impaired and an open-bottle violation.

Perry moved to suppress all evidence, arguing that the law-enforcement officers had unlawfully seized her. The district court denied the motion. The parties agreed to a trial under *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980), and the district court found Perry guilty of second-degree driving while impaired. This appeal followed.

D E C I S I O N

Perry argues that the district court erred in denying her motion to suppress evidence because she was seized when Trooper Goman reached inside her minivan and turned the engine off, and Trooper Goman's seizure was unlawful because the manner of

investigation was neither the least intrusive means possible nor reasonably related to the circumstances. "[W]hen reviewing a pre-trial order suppressing evidence where the facts are not in dispute and the trial court's decision is a question of law, the reviewing court may independently review the facts and determine, as a matter of law, whether the evidence need be suppressed." *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992).

Both the United States and Minnesota Constitutions prohibit unreasonable searches and seizures by the government. U.S. Const. amend. IV; Minn. Const. art. I, § 10. A police officer may make a limited investigative stop if the officer has reasonable, articulable suspicion of criminal activity. *Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883 (1968); *State v. Waddell*, 655 N.W.2d 803, 809 (Minn. 2003) (applying *Terry* and stating that an investigative stop is lawful if the state can show that the officer had a "particularized and objective basis" for suspecting criminal activity). Whether police have reasonable suspicion to conduct an investigatory stop depends on the totality of the circumstances, and a stop is not justified if it is "the product of mere whim, caprice, or idle curiosity." *In re Welfare of M.D.R.*, 693 N.W.2d 444, 448 (Minn. App. 2005) (quotation omitted), *review denied* (Minn. June 28, 2005). "The scope of a stop must be strictly tied to and justified by the circumstances which rendered the initiation of the investigation permissible. Police may continue the detention as long as the reasonable suspicion for the detention remains . . . provided they act diligently and reasonably." *State v. Smallwood*, 594 N.W.2d 144, 155 (Minn. 1999) (alteration in original) (quotations omitted). If Perry was seized at any point before the trooper had a reasonable, articulable suspicion of criminal activity, she was illegally seized and any

evidence gathered as a result must be suppressed. *State v. Harris*, 590 N.W.2d 90, 97 (Minn. 1999).

Perry first argues that Trooper Goman seized her when he opened the door of her minivan and reached in and turned off the engine. We need not determine whether that conduct amounted to a seizure under the federal and state constitutions because, even assuming it was a seizure, the trooper had a reasonable, articulable suspicion justifying an investigatory stop and all of his actions were directly related to and justified by his investigatory purpose.

The information necessary to support an investigative stop need not come from the officer's personal observations; rather, an informant's tip will suffice if it has sufficient indicia of reliability. *State v. Cavegn*, 294 N.W.2d 717, 721 (Minn. 1980). "We presume that tips from private citizen informants are reliable. This is particularly the case when informants give information about their identity so that the police can locate them if necessary." *State v. Davis*, 732 N.W.2d 173, 182-83 (Minn. 2007) (citations omitted)

Trooper Goman had an objective, particularized basis for suspecting that Perry was engaged in criminal activity. The informant gave a precise description of Perry's minivan, disclosed the correct location of the vehicle, and identified driving conduct that appeared to violate the law. Furthermore that conduct, speeding and weaving across lanes of travel, is consistent with impaired driving. Although the minivan was parked when the trooper came upon it, its engine was running. A motor vehicle need not be in motion before a driver may be charged with driving while impaired. It is sufficient if, as here, the driver was in physical control of the vehicle. Minn. Stat. § 169A.20, subd. 1

(2008). Thus, the basis for the trooper's suspicion continued to exist beyond Perry's actual operation of the minivan.

Perry argues that the manner in which the trooper investigated was neither the least intrusive means possible nor was it reasonably related to the circumstances. She contends that *Overvig v. Comm'r of Pub. Safety* is instructive as to how the trooper should have proceeded. 730 N.W.2d 789 (Minn. App. 2007), *review denied* (Minn. Aug. 7, 2007). In *Overvig*, an officer came upon the defendant's vehicle, which was parked at night in an empty lot with its engine running. *Id*. at 791. The officer observed that the defendant was either asleep or unconscious in the driver's seat. *Id.* The officer rapped on the window and asked the defendant to lower it. *Id.* After the defendant responded by tapping back on the window and rolling his body away from the door, the officer opened the door. *Id.* This court concluded that no seizure had occurred because the defendant's actions did not communicate a desire to end the encounter and "it is not reasonable in situations such as this to require officers to communicate with unresponsive or unconscious drivers through closed car windows when the driver refuses or is unable to lower the window." *Id.* at 792-93.

Contrary to Perry's contentions, *Overvig* did not mandate particular investigative procedures for officers. And the Minnesota Supreme Court has held that, because officers can order a driver out of a vehicle during a lawful stop, they can open a car door and order an occupant out of the vehicle. *State v. Ferrise*, 269 N.W.2d 888, 890-91 (Minn. 1978) (applying *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S. Ct. 330 (1977)); *see also Vivier v. Comm'r of Pub. Safety*, 406 N.W.2d 587, 589 (Minn. App. 1987) (stating

that an officer opening a car door and asking an individual to exit a vehicle "may not always constitute a seizure"). Thus, based upon Trooper Goman's ability to lawfully stop Perry's vehicle on suspicion that she was driving while impaired, it was reasonable for Trooper Goman to open the vehicle door. *See Ferrise*, 269 N.W.2d at 891 (opening passenger door was reasonable); *see also Overvig*, 730 N.W.2d at 792-93 (opening driver's door was reasonable investigation when driver failed to respond to tapping).

The underpinning of search-and-seizure jurisprudence is reasonableness. Conduct related to seizures and searches is not per se unlawful; it becomes so only if it is unreasonable. *Ferrise*, 269 N.W.2d at 890 n.1.

Trooper Goman's conduct began with a reliable tip about Perry's ostensibly illegal driving. It was reasonable for the trooper to follow up and investigate further by approaching the car. When the trooper came upon the minivan, parked with its engine running and none of the occupants awake, it was reasonable for him to continue to investigate. Although the trooper could have tapped on the driver's window, that action was neither required nor prudent. Unlike in *Overvig*, the trooper here knew that there was a likelihood the driver was impaired. It was reasonable and prudent for the trooper to turn the engine off as his first act. First alerting an impaired driver to the presence of a law-enforcement officer could trigger an irrational impulse to flee, thus jeopardizing the trooper's safety, thwarting, or at least interrupting, the investigation, and exacerbating the circumstances by additional impaired driving. Allowing the engine to run while he attempted to communicate with the driver under circumstances such as these would increase the possibility of any or all of those consequences. Although opening the

vehicle door and reaching inside to turn off the engine was intrusive, it was not unreasonably so and was a necessary, integral part of the trooper's proper investigation.

In addition to the likelihood that Perry was impaired by alcohol or drugs, the trooper also had to consider the possibility that she and the others needed medical assistance. Only a short time had elapsed since the minivan left the highway. Although very tired people can fall asleep rather quickly, the circumstances of erratic driving, coupled with all vehicle occupants being unconscious shortly after that driving and the vehicle's engine left running, are unusual enough that a medical emergency could not be ruled out. This would also support the conclusion that the trooper's decision to open the door was reasonable. *Overvig*, 730 N.W.2d at 793.

We hold that none of the trooper's actions violated Perry's constitutional rights and that the district court properly exercised its discretion in denying her motion to suppress evidence gathered from the trooper's investigation.

Affirmed.