STATE OF MINNESOTA
IN COURT OF APPEALS
A09-800

State of Minnesota,
Respondent,

vs.

Clifford Clarence Cypher,
Appellant.

Filed March 9, 2010
Affirmed
Worke, Judge

Pine County District Court
File No. 58-CR-08-33

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

John Carlson, Pine County Attorney, Nathan E. Sosinski, Assistant County Attorney, Pine City, Minnesota (for respondent)

Jeffrey S. Sheridan, Strandemo, Sheridan & Dulas, P.A., Eagan, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Worke, Judge; and Larkin, Judge.

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

WORKE, Judge

Appellant challenges his felony driving-while-impaired (DWI) conviction, arguing that (1) the arresting officer failed to identify appellant as the driver and (2) the evidence

is insufficient to show that appellant committed the traffic violation justifying the stop. We affirm.

D E C I S I O N

Identification

Appellant Clifford Clarence Cypher was charged with felony[1] DWI after an officer observed the vehicle appellant was driving cross over the fog line twice. Following a *Lothenbach* proceeding, the district court found appellant guilty of felony DWI. Appellant first argues that the record is devoid of any individualized suspicion that he engaged in criminal activity.[2] As the state points out, whether appellant was the driver of the vehicle is an issue reviewed as a challenge to probable cause, which presents a mixed

[1] Appellant has a prior felony DWI conviction and six impaired-driving-related license revocations.

[2] We note that when appellant requested a contested omnibus hearing, he asserted that "the sole issue" was the stop, and at the hearing, appellant's attorney reiterated that the "one issue" was the stop. But following the arresting officer's testimony, appellant's attorney declared: "The vehicle was never identified and [appellant] was never identified, the State can't uphold the stop." Appellant challenged the officer's identification of appellant as the driver of the vehicle. The district court gave the parties an opportunity to respond to appellant's identification challenge before concluding that the officer identified appellant and that appellant was the only occupant of the vehicle. Appellant similarly raises this issue on appeal with misplaced confidence, deeming it a sure-fire triumph. But appellant's attorney's tactic to attempt to hoodwink the prosecutor and the district court by raising this issue in the manner in which he did, although clever from his perspective, was imprudent. We note that after appellant's attorney remarked in district court that the officer failed to identify appellant and, as a result, the state could not uphold the stop, the district court had discretion to reopen the record and allow additional testimony from the officer, which it did not. Additionally, the district court could have precluded appellant from challenging identification because when appellant raised the "sole issue" of the stop he no longer had standing to challenge whether he was the driver. Appellant essentially conceded that he was the driver when he challenged the legality of the stop and he was the vehicle's only occupant; he had no standing to challenge the stop if he was not the driver

question of fact and law. *Clow v. Comm'r of Pub. Safety*, 362 N.W.2d 360, 363 (Minn. App. 1985), *review denied* (Minn. Apr. 26, 1985). "After the facts are determined, this court must apply the law to determine if probable cause existed" to invoke the implied-consent law. *Groe v. Comm'r of Pub. Safety*, 615 N.W.2d 837, 840 (Minn. App. 2000) (citation omitted), *review denied* (Minn. Sept. 13, 2000).

Appellant compares his case to *State v. Cripps*, 533 N.W.2d 388 (Minn. 1995). In *Cripps*, the appellant was drinking alcohol in a bar when an officer, who was checking identification to enforce alcohol-consumption age requirements, asked for her identification. 533 N.W.2d at 389. Cripps gave the officer false identification and was arrested. *Id.* The supreme court held that the officer failed to articulate sufficient individualized suspicion of criminal activity to justify the seizure, which occurred when the officer asked for identification. *Id.* The court based its holding on the fact that the officer failed to articulate that she specifically suspected Cripps of underage drinking based on her appearance. *Id.* at 392.

In *Cripps*, the record did not show whether the officer asked Cripps for identification because of her appearance or simply because she was present in the bar. *Id.* Here, the officer stopped appellant's vehicle because the officer observed a traffic violation. The officer did not stop appellant's vehicle for an unidentified, random reason; he saw the vehicle cross the fog line twice, which provided an individualized suspicion for stopping the vehicle. Thus, *Cripps* is distinguishable. The district court ruled that the officer identified appellant and that appellant was the only occupant of the vehicle. This finding is supported by the record.

Basis for the Stop

Appellant next argues that there is insufficient evidence to support the stop. A stop is lawful under the Fourth Amendment if an officer can articulate a "particularized and objective basis for suspecting the particular persons stopped of criminal activity." *Berge v. Comm'r of Pub. Safety*, 374 N.W.2d 730, 732 (Minn. 1985) (quotation and emphasis omitted). We review de novo a district court's determination of whether there was reasonable suspicion of unlawful activity to justify a limited investigatory stop. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000). In doing so, this court reviews the district court's findings of fact for clear error, gives due weight to inferences drawn from those facts by the district court, *State v. Lee*, 585 N.W.2d 378, 383 (Minn. 1998), and defers to the district court's assessment of witness credibility. *State v. Miller*, 659 N.W.2d 275, 279 (Minn. App. 2003), *review denied* (Minn. July 15, 2003).

"A brief investigatory stop requires only reasonable suspicion of criminal activity." *State v. Pike*, 551 N.W.2d 919, 921 (Minn. 1996). The reasonable-suspicion standard is not high. *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008). But reasonable suspicion is more than merely a whim, caprice, or idle curiosity. *Pike*, 551 N.W.2d at 921. Articulable, objective facts that justify an investigatory stop are "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." *State v. Schrupp*, 625 N.W.2d 844, 847-48 (Minn. App. 2001), *review denied* (Minn. July 24, 2001). The officer's suspicion may be based on the totality of the circumstances, including "the officer's general knowledge and experience, the officer's personal

observations, information the officer has received from other sources, the nature of the offense suspected, the time, the location, and anything else that is relevant." *Applegate v. Comm'r of Pub. Safety*, 402 N.W.2d 106, 108 (Minn. 1987). "Ordinarily, 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).

Under Minn. Stat. § 169.18, subd. 7(a) (2006), "[a] vehicle shall be driven as nearly as practicable entirely within a single lane." Appellant compares his case to *State v. Brechler*, 412 N.W.2d 367 (Minn. App. 1987). In *Brechler*, officers observed a vehicle swerve within its lane of travel. 412 N.W.2d at 368. This court held that there was no driving conduct suggesting criminal activity because the officers "saw only that a car swerved on the road. The car neither left the road nor crossed the center line, but stayed in its lane." *Id.* In *State v. Ellanson*, the supreme court held that an officer had a right to stop a vehicle that weaved within its lane to investigate the cause of the unusual driving. 293 Minn. 490, 490-91, 198 N.W.2d 136, 137 (1972); *see also State v. Richardson*, 622 N.W.2d 823, 826 (Minn. 2001) ("Even observing a motor vehicle weaving within its own lane in an erratic manner can justify an officer stopping a driver."). And in *State v. Dalos*, this court concluded that "continuous weaving within one's own lane is sufficient by itself to create a reasonable articulable suspicion." 635 N.W.2d 94, 96 (Minn. App. 2001).

The officer here testified that he was traveling approximately 30 feet behind a vehicle when he observed the vehicle cross the fog line two times. He testified that each time he observed the vehicle cross the fog line, both the front and back right side tires

crossed over entirely for approximately two or three seconds. The two line crosses occurred within 30 seconds of each other and within a two-mile range. Because weaving within one's lane of traffic and crossing the fog line is sufficient to provide a reasonable articulable suspicion, this violation justifies the stop.

Affirmed.