STATE OF MINNESOTA
IN COURT OF APPEALS
A10-968

State of Minnesota,
Appellant,

vs.

James Irving Dale,
Respondent.

Filed November 9, 2010
Affirmed
Halbrooks, Judge
Dissenting, Stoneburner, Judge

Morrison County District Court
File No. 49-CR-09-1750

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

Brian J. Middendorf, Morrison County Attorney, Amber M. Krause, Assistant County Attorney, Little Falls, Minnesota (for appellant)

Jenny Chaplinski, Special Assistant Public Defender, St. Cloud, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Halbrooks, Judge; and Stoneburner, Judge.

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

HALBROOKS, Judge

Appellant State of Minnesota challenges the district court's suppression of the evidence arising out of the stop of respondent James Irving Dale's vehicle. Because we conclude that the district court did not err by determining that the deputy lacked a reasonable, articulable suspicion of criminal activity, we affirm.

FACTS

On August 24, 2009, at approximately 1:00 a.m., the Morrison County Sheriff's Department responded to an alarm at Eagle's Landing Golf Course and found evidence of a burglary. Although it was not clear whether any items had been stolen, there was evidence of an unauthorized entry and there were two sets of footprints leaving the scene. It appeared that the suspects had entered and fled the premises on foot because the main gate remained closed. Deputy Jason McDonald cleared the scene at approximately 4:00 a.m., about three hours after the alarm had been triggered. As Deputy McDonald was leaving the parking lot, he saw what he described as a minivan at a nearby intersection. As Deputy McDonald drove toward the parking-lot exit he lost sight of the vehicle. He then proceeded east on County Road 49 toward Highway 371. The deputy testified that he could see a vehicle parked on a dead-end street approximately two miles away as he approached the intersection where he had seen the minivan. Deputy McDonald testified that "at that time in the morning, [he] never recalled seeing a vehicle park on there and stop on that road."

Deputy McDonald approached the vehicle, a full-sized van that had its brake lights illuminated but was not moving. As Deputy McDonald turned onto the dead-end road, the van "accelerated rapidly from where it was parked, which also drew [his] suspicion." At that point, Deputy McDonald activated his emergency lights. After Deputy McDonald activated his lights, the van turned into a residential driveway and continued part way down the driveway before stopping. Deputy McDonald testified that this was "very suspicious" and in his "previous experience, it [wa]s usually someone attempting to elude [him]."

Deputy McDonald approached the stopped van on foot and began questioning respondent, who was the driver of the vehicle. A later search of the van revealed a crowbar, a police scanner, and a backpack and baseball hat with a golf logo on it; in addition, respondent's boots matched the footprints left at the scene at the golf course. As a result, respondent was arrested and charged with conspiracy to commit burglary in the second degree, third-degree burglary, and possession of burglary or theft tools.

Respondent moved to suppress the evidence arising out of the stop of the van, arguing that the connection between the van and the earlier burglary was too tenuous to create a reasonable suspicion that he was involved in the break-in. The state argued that respondent's evasive or suspicious conduct created a reasonable, articulable suspicion of criminal activity, independent of the earlier burglary. The district court granted respondent's motion on the ground that there was not a sufficient connection between the earlier burglary and the stop.

The district court found that it would have been impossible "for the deputy to have seen any vehicle on 243rd Street from any position on County Road 49 at or near its junction with highway 371"—a distance of approximately 2.2 miles with rows of trees. In addition, Deputy McDonald described the vehicle he first saw as a minivan. The vehicle he later approached was a full-size van. The district court noted the difference in vehicle types and stated that "[t]his discrepancy was unresolved at the omnibus hearing. The court therefore has some additional reservations as to whether the vehicle spotted at the intersection was the same one that was eventually stopped on 243rd Street."

The district court concluded:

> There are other unanswered questions. True, an officer may "draw inferences and make deductions that might well elude an untrained person," but those inferences and deductions must ultimately be based on "articulable facts" and observations that can be understood by the untrained person (including the court). Here, no evidence was offered regarding how, or why—after the lapse of three hours and an intensive investigation involving numerous officers, a helicopter and canine unit—a suspect vehicle would be observed within two and one half miles of the scene of the crime. Nor is the court able to draw a natural inference linking that vehicle, allegedly observed by the deputy near the golf course's main entrance (which was locked) to the footprints and tire tracks on a field road on the southern side of the golf course.

Because the district court determined that the state lacked probable cause without the suppressed evidence, it dismissed the charges against respondent. This appeal follows.

D E C I S I O N

The state argues that the district court erred by granting respondent's suppression motion. The state may appeal from any pretrial order of the district court. Minn. R.

Crim. P. 28.04, subd. 1(1). When the state appeals a pretrial suppression order, it "must clearly and unequivocally show both that the [district] court's order will have a critical impact on the state's ability to prosecute the defendant successfully and that the order constituted error." *State v. Scott*, 584 N.W.2d 412, 416 (Minn. 1998) (quotation omitted). Critical impact exists when the district court dismisses a complaint for lack of probable cause. *State v. Hanson*, 583 N.W.2d 4, 5-6 (Minn. App. 1998), *review denied* (Minn. Oct. 29, 1998). Here, it is undisputed that the state has demonstrated a critical impact.

A traffic 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). The reasonable-suspicion standard is not high. *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008). But reasonable suspicion is more than a whim, caprice, or idle curiosity. *State v. Pike*, 551 N.W.2d 919, 921 (Minn. 1996).

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." *Appelgate v. Comm'r of Pub. Safety*, 402 N.W.2d 106, 108 (Minn. 1987).

The district court concluded that the stop of respondent's van was unconstitutional. Evidence obtained as the result of a constitutional violation must generally be suppressed. *State v. Jackson*, 742 N.W.2d 163, 177-78 (Minn. 2007). "When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). When the facts are in dispute, we review the district court's findings of fact for clear error. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000). "On appeal, due regard is given to the district court's opportunity to evaluate witness credibility." *See Wilkes v. Comm'r of Pub. Safety*, 777 N.W.2d 239, 245 (Minn. App. 2010).

As an initial matter, we conclude that respondent was stopped for Fourth Amendment purposes when Deputy McDonald activated his lights. At that point, a reasonable person would not have felt free to leave. *See State v. Sanger*, 420 N.W.2d 241, 242-43 (Minn. App. 1988) (discussing how to determine when a stop or seizure has occurred and concluding that a seizure has occurred when a reasonable person would not feel free to leave). Because a stop must be constitutional at its inception, we do not consider respondent's actions after Deputy McDonald activated his lights as support for the stop. *See State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004) (holding that a stop must be constitutional at its inception).

The state argues that, irrespective of the district court's determination that Deputy McDonald's testimony was not credible concerning when and where he saw the vehicle,

the suspicious circumstances or evasive conduct by respondent created a reasonable, articulable suspicion that respondent was engaged in criminal activity. We disagree.

Cases in which stops have been upheld based on suspicious circumstances have involved an officer's articulation of a particular concern about the location of the vehicle. For example, in *Thomeczek v. Comm'r of Pub. Safety*, 364 N.W.2d 471, 472 (Minn. App. 1985), an officer observed an occupied vehicle parked with its lights on in a residential area that was under construction. This court, concluding that the location was one "where a burglary, vandalism or theft might occur," affirmed the district court's determination that the stop was legal. *Thomeczek*, 364 N.W.2d at 472.

Similarly, in *Olmscheid v. Comm'r of Pub. Safety*, 412 N.W.2d 41, 43 (Minn. App. 1987), *review denied* (Minn. Nov. 6, 1987), this court concluded that

> [t]he officer's knowledge of previous theft from Burnsville Dodge and the presence of the vehicle in the early morning hours in a commercial area with no residences on a road that does not connect to another roadway provide an objective and particularized basis for [the officer's] suspicion of criminal activity.

The officers in both *Thomeczek* and *Olmscheid* articulated that the particular areas where the vehicles were located were known for—or vulnerable to—criminal activity.

Conversely, in *Sanger*, we held that there was no reasonable, articulable suspicion when an officer pulled up "beside and behind" a parked car that had fogged windows and people inside. 420 N.W.2d at 242-44. We noted that "nothing was articulated as dangerous or suspicious about the location of [the] car"; it "was simply parked curbside on a residential street." *Id.* at 243-44.

The circumstances in this case are more akin to those in *Sanger*. Although Deputy McDonald testified that he could not recall ever having seen a vehicle parked on 243rd Street at that time of the morning, he did not articulate anything particularly suspicious about this area. The district court did not find credible the deputy's testimony concerning the link between the van and the earlier burglary, and we will not disturb credibility determinations on appeal. *See Wilkes*, 777 N.W.2d at 245. Without this link from the officer's testimony, there was nothing about the particular location of respondent's van that suggested criminal activity.

We do not mean to suggest that a vehicle stopped on a residential road at 4:00 a.m. warrants no police attention. Based on these circumstances, Deputy McDonald was justified in approaching the van to perform a welfare check. *See Kozak v. Comm'r of Pub. Safety*, 359 N.W.2d 625, 628 (Minn. App. 1984) (explaining that "an officer has not only the right but a duty to make a reasonable investigation of vehicles parked along roadways to offer such assistance as might be needed"). But when the van departed, any cause for concern for the occupant's welfare should have been alleviated. Instead, Deputy McDonald proceeded to perform a traffic stop.

The state further argues that respondent's act of driving away constituted evasive conduct sufficient to support a traffic stop. It is well-settled that evasive conduct, even absent other suspicious circumstances, can create the reasonable, articulable suspicion necessary to support a traffic stop. *State v. Johnson*, 444 N.W.2d 824, 827 (Minn. 1989); *State v. Petrick*, 527 N.W.2d 87, 89 (Minn. 1995). But we disagree with the state's assertion that respondent's conduct here was evasive.

In *Johnson*, the supreme court noted that

> the trooper did not base his decision to stop solely on the fact that the defendant made a quick turn off the highway seconds after he looked the trooper in the eye. The trooper also observed the defendant turn off the secondary street into a driveway or side street and then resume his driving on the highway within a minute after turning off the highway.

Johnson, 444 N.W.2d at 827. *Johnson* is thus consistent with other cases wherein "stops have been upheld when the individual made repeated efforts to avoid police contact, when he engaged in a combination of several different possibly furtive actions, and . . . engaged in a rather extreme means of avoidance such as high-speed flight." *Id.* at 826 (quoting 3 W. LaFave, *Search and Seizure* § 9.3(c), at 448-51 (2d ed. 1987)). That level of evasive conduct is not present here. Respondent simply drove away when Deputy McDonald's car approached. There was nothing repetitive or particularly unusual about this conduct. *Cf. Schrupp*, 625 N.W.2d at 848 (concluding that the "evasive act" must include some type of unusual behavior, such as repetitive conduct).

We conclude that the deputy's decision to stop respondent's vehicle was not based on a reasonable, articulable suspicion of criminal activity. As a result, the stop violated respondent's constitutional right to be free from unreasonable seizure. We therefore affirm the district court's suppression of the evidence arising out of the stop.

Affirmed.

STONEBURNER, Judge dissenting

I respectfully dissent and would hold that the officer articulated a particularized and objective basis for the stop through testimony that the van was parked at 4:00 a.m. on a dead-end road where no one usually parked and accelerated rapidly from where it was parked as soon as the officer turned onto the road.