STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1066

State of Minnesota,
Appellant,

vs.

Chester Tyrone Jackson,
Respondent.

Filed December 14, 2010
Affirmed
Klaphake, Judge
Dissenting, Harten, Judge*

Hennepin County District Court
File No. 27-CR-10-4970

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

Jeffrey D. Bores, Mark J. Schneider, Chestnut & Cambronne, P.A., Minneapolis, Minnesota (for appellant)

Mark D. Nyvold, Special Assistant State Public Defender, St. Paul, Minnesota (for respondent)

Considered and decided by Klaphake, Presiding Judge; Halbrooks, Judge; and Harten, 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

KLAPHAKE, Judge

In this pretrial appeal, appellant State of Minnesota argues that the district court erred in suppressing evidence obtained after a traffic stop of respondent Chester Tyrone Jackson's vehicle. At the pretrial suppression hearing, the district court rejected the arresting police officer's given reasons for the stop and relied instead on a videotape of respondent's driving conduct that was taken during the period preceding the stop. The videotape contradicted most of the officer's testimony. Because the district court did not err in concluding that the officer lacked reasonable, articulable suspicion of criminal activity to stop respondent's vehicle based on the totality of the circumstances, we affirm.

D E C I S I O N

Critical Impact

When appealing a pretrial suppression order, "the state must clearly and unequivocally show both that the trial 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); *see* Minn. R. Crim. P. 28.04, subd. 1(1) (permitting the state to appeal from any pretrial order). Critical impact exists when suppression of evidence leads to the dismissal of the charges against the defendant. *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008). Suppression of evidence obtained after the stop of respondent's vehicle led to the dismissal of the charges against him; therefore, the suppression ruling had a critical impact on the state's case. *See State v. Ault*, 478 N.W.2d 797, 799 (Minn. App. 1991)

(holding that suppression of a blood test showing an alcohol level in excess of the statutory limit has critical impact in a DWI prosecution).

Suppression of Evidence

Individuals have a constitutional right to be free from unreasonable searches and seizures. U.S. Const., amend. IV; Minn. Const., art. 1, § 10. Although warrantless searches are per se unreasonable, an investigatory traffic stop is a permitted exception to this rule. *State v. Burbach*, 706 N.W.2d 484, 488 (Minn. 2005). Police may make an investigatory traffic stop if they have a reasonable, articulable suspicion that a person is engaged in criminal activity. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000); *see State v. Pike*, 551 N.W.2d 919, 921 (Minn. 1996) (permitting investigatory traffic stop if officer has "a 'particularized and objective basis for suspecting the person stopped of criminal activity'") (quoting *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S. Ct. 690, 695 (1981)). While an actual traffic violation need not occur, police may not stop a vehicle on a "whim, caprice, or idle curiosity," *Pike*, 551 N.W.2d at 921, and must have "'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion.'" *Id.* at 921-22 (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968)). A valid traffic stop requires an "objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997) (quotation omitted).

On review of a pretrial suppression order, this court "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); *Berge v. Comm'r of Pub. Safety*, 374 N.W.2d 730, 732 (Minn. 1985). This court reviews de novo the question of whether police had a reasonable, articulable suspicion of criminal activity on which to base an investigatory traffic stop, *Burbach*, 706 N.W.2d at 487, considering the totality of the circumstances of the stop. *State v. Uber*, 604 N.W.2d 799, 801 (Minn. App. 1999). This court defers to the district court's credibility determinations on the weight and believability of witness testimony. *State v. Miller*, 659 N.W.2d 275, 279 (Minn. App. 2003), *review denied* (Minn. July 15, 2003).

Here, respondent was arrested following a traffic stop on a Golden Valley highway at 1:54 a.m. on January 19, 2010. The arresting police officer's vehicle was equipped with a videotaping device that, according to the officer, captured all of respondent's suspicious driving conduct. The videotape shows that in the course of a minute, respondent weaved or drifted within his lane three times and tapped his brakes once when he encountered a highway exit sign. At the pretrial suppression hearing, the officer testified that respondent was driving 35 miles per hour on a highway with a posted speed limit of 60 miles per hour, that respondent varied his speed "from approximately 35 to 50 miles per hour at numerous points," weaved within his lane "from left to right," and tapped his brakes for no apparent reason.

After listening to the officer's testimony and viewing the videotape, the district court ruled to suppress the evidence of the stop, stating:

> Well, I'm suppressing the evidence. Officer, you're very honest. You're a good officer. Don't get me wrong, I believe everything you said. But I don't see that he was weaving in his lane. He never touched either of the lane markers. And tapping the brakes, he was under a sign and I didn't see much

> varying speed. These are simply not sufficient to establish a reasonable articulation—reasonable articulable suspicion of criminal activity.

The district court has discretion to make factual findings from its independent review of a video recording of a traffic stop even if those findings conflict with the officer's testimony. *State v. Shellito*, 594 N.W.2d 182, 186 (Minn. App. 1999).

The state argues that the district court erroneously suppressed evidence obtained after the stop because the district court incorrectly concluded that weaving within one's lane is insufficient to support an investigatory stop and because the stop was warranted under the totality of the circumstances.

We read the district court's statements to show that it found the arresting officer's observations about respondent's driving conduct genuine but objectively inaccurate. The court's statement that the arresting officer was "honest" and "a good officer" and that the court "believe[d] everything [he] said" was sandwiched between the court's statements that it was going to suppress the evidence and the factual bases for that decision, which were contradictory to the officer's testimony. The district court's observations and conclusions about appellant's driving conduct were very different from the arresting officer's: she "didn't see that he was weaving in his lane," "never touched either of the lane markers," tapped his brakes only once when he was "under a sign," and did not vary his speed "much." The placement and juxtaposition of the district court's statements about the police officer and its statements about its suppression ruling, taken in context, show that the court did not find the officer's testimony credible. The district court may have made the comments to the officer to ameliorate the sting of its suppression ruling.

In a pretrial suppression hearing, the district court "acts as finder of facts, deciding for purposes of admissibility which evidence to believe and whether the state has met is burden of proof." *State v. Kvam*, 336 N.W.2d 525, 528 (Minn. 1983) (quotation omitted). We will not disturb factual findings made during a suppression hearing unless they are clearly erroneous. *Burbach*, 704 N.W.2d at 487.

While under certain circumstances weaving or drifting within one's lane can justify an investigatory traffic stop, it is the nature of the driving conduct, coupled with other circumstances, that determines whether it gives rise to a reasonable, articulable suspicion of criminal activity. Continuous weaving, coupled with reduced speed, can create a reasonable suspicion of criminal activity. *See State v. Engholm*, 290 N.W.2d 780, 784 (Minn. 1980); *State v. Dalos*, 635 N.W.2d 94, 96 (Minn. App. 2001). Likewise, erratic weaving, *Kvam*, 336 N.W.2d at 528, or police observation of erratic weaving coupled with a report of a person "driving all over the road" is sufficient to justify a traffic stop. *State v. Richardson*, 622 N.W.2d 823, 825 (Minn. 2001) (upholding traffic stop when officer independently observed vehicle cross over fog line and turn to center line and police dispatch reported that vehicle was "driving all over the road"). However, a single, isolated swerve is insufficient to support a traffic stop. *State v. Brechler*, 412 N.W.2d 367, 369 (Minn. App. 1987) (ruling investigatory stop not justified when vehicle only swerved on the road, but neither left the road nor crossed the center line). In *Brechler*, this court noted that some driving conduct may, in fact, be "engendered by the presence of a police car" in close proximity to a suspect's vehicle. 412 N.W.2d at 368.

Here, the district court reviewed respondent's driving conduct on the videotape and concluded that it was insufficiently erratic to constitute suspicious driving conduct: the district court commented that "[n]obody drives in a perfectly straight fashion." The court also specifically rejected the arresting officer's other bases for the stop, which included respondent's slow or varying speed and the tapping of his brakes, because they were contradicted by the videotape of the incident. Again, we will not disturb these factual determinations. Under the totality of circumstances presented here, we conclude that the district court did not err in suppressing the evidence obtained after the stop of respondent's vehicle.

Affirmed.

HARTEN, Judge (dissenting)

Because I believe that the district court erred by suppressing evidence and dismissing the state's case, I dissent from the majority's affirmance.

At the pretrial hearing, the district court told the arresting officer, among other things, "I believe everything you said." The majority asserts that the district court "found the arresting officer's observations about respondent's driving conduct genuine but objectively inaccurate" and "did not find the officer's testimony credible." Thus, the majority would create a new finding by radically changing the district court's finding of "I believe everything you said" into "I believe *that you believe* everything you said." This invalid alteration is unsupported by the record.

The verb "believe" means "[t]o feel certain about the truth of; to accept as true." *Black's Law Dictionary* 175 (9th ed. 2009). "Credibility" is "[t]he quality that makes something (as a witness or some evidence) worthy of belief." *Id*. at 423. To believe what someone says does not mean to find it "objectively inaccurate" and cannot mean to find it not "credible." Thus, the majority's puzzling view that "I believe" means "I do not find credible" is, at best, fallacious. The district court said it accepted the officer's statements as true, and the majority is stuck with that because it is a credibility finding. *See, e.g.*, *State v. Miller*, 659 N.W.2d 275, 279 (Minn. App. 2003) (deferring to district court's credibility determinations).

When a district court expressly credits an officer's testimony, we are "to simply analyze the testimony of the officer and determine whether, as a matter of law, his observations provided an adequate basis for the stop." *Berge v. Comm'r of Pub. Safety*,

374 N.W.2d 730, 732 (Minn. 1985). We are also free to independently review the facts and determine whether, as a matter of law, the district court erred in suppressing the evidence. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). Neither an analysis of the officer's testimony nor my personal independent review of the videotape supports the majority's position.

The officer testified that he had been trained in observing and conducting stops of potentially impaired drivers and that indicia of impairment included, among other things, (1) weaving within a lane, (2) driving below the speed limit, (3) tapping the brakes, and (4) varying the speed. He testified further that he observed respondent (1) "weaving within [his] lane from left to right," (2) traveling about 35 miles per hour in a 60 mile per hour zone, (3) tapping his brakes for no apparent reason, and (4) varying his speed between approximately 35 and 50 miles per hour.

An officer needs only "reasonable suspicion of criminal activity" to stop a potentially impaired driver. *State v. Pike*, 551 N.W.2d 919, 921 (Minn. 1996). Reasonable suspicion exists where "the officer can sufficiently articulate the factual basis for his suspicion." *Berge*, 374 N.W.2d at 733. Reasonable suspicion is a minimal standard. *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008). It requires only a showing that the stop was not based on a whim or idle curiosity but rather on specific, articulable facts and the rational inferences they support. *Pike*, 551 N.W.2d at 921-22. "[I]nnocent activity might justify the suspicion of criminal activity." *State v. Johnson*, 444 N.W.2d 824, 826 (Minn. 1989). An actual traffic violation need not occur, *Pike*, 551 N.W.2d at 921, and any violation, "however insignificant, . . . [provides] an objective

basis for stopping the vehicle." *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997). Reviewing courts are to be "deferential to police officer training and experience." *State v. Britton*, 604 N.W.2d 84, 88, 89 (Minn. 2000).

The officer testified that respondent showed four of the indicia of impairment that the officer had been trained to observe and had experience in observing. Particularly in light of our deference to that training and experience, the officer's testimony in my view compels the conclusion that his observations provided an adequate basis for the stop.

The majority claims that the district court "specifically rejected the arresting officer's other bases for the stop, which included respondent's slow or varying speed and the tapping of his brakes, because they were contradicted by the videotape of the incident." The videotape does not "contradict" the officer's testimony as to respondent's speed because it shows only that respondent was traveling more slowly than the squad car, which approached from behind. Moreover, the other bases for the stop were confirmed by the officer's testimony, which the district court said it believed. The officer not only testified as to respondent's speed variations; he explained that he calculated respondent's speed by comparing it with that of his squad car.

Even if the officer's observations had been limited to the weaving, he would have had an adequate basis for the stop: he testified that respondent made more than a single, isolated swerve within his lane. *See, e.g.*, *State v. Kvam*, 336 N.W.2d 525, 528 (Minn. 1983) (erratic weaving within lane sufficient to justify investigatory stop); *State v. Dalos*, 635 N.W.2d 94, 96 (Minn. App. 2001) (continuous weaving within lane sufficient to justify investigatory stop); *see also State v. Richardson*, 622 N.W.2d 823, 825 (Minn.

2001) (officer's independent observation of vehicle crossing fog line and returning to center line, together with police dispatch that vehicle was "driving all over the road," sufficient to justify investigatory stop). As a matter of law, the officer's observations, including his observation that respondent weaved more than once within his lane, justified stopping respondent.

I independently reviewed the videotaped evidence of the incident, which depicts respondent's activity during approximately the last minute before the stop. It shows respondent drifting and weaving at least three times, from one side of his lane to the other, and tapping his brakes as he passed beneath an exit sign.[1] Thus, a review of both the officer's testimony, *see Berge*, 374 N.W.2d at 732, and of the videotape, *see Harris*, 590 N.W.2d at 98, together or separately, compels reversal of the district court's suppression of the evidence.

Finally, the district court's decision to suppress is based neither on the officer's testimony nor on the facts, as the law requires, but rather on the district court's stated belief that "[n]obody drives in a precisely straight fashion." This court has already rejected that belief as a basis for suppressing evidence. *State v. Owens*, No. A10-1155, 2010 WL 4825353, at * ___ (Minn. App. 30 Nov. 2010) (reversing suppression of evidence and remanding where district court explained its conclusion that officer lacked

[1] Neither the exact speed of respondent's car nor the exact speed of the squad car can be inferred from the video.

articulable suspicion by observing that "anyone who's followed for a mile is probably going to swerve in their lane" and "people don't drive at a completely straight line").

I would reverse and remand for trial.