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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0652**

State of Minnesota,
Respondent,

vs.

David Michael Bigham,
Appellant.

**Filed January 16, 2018
Affirmed
Rodenberg, Judge**

Ramsey County District Court
File No. 62SU-CR-15-6427

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

Katrina E. Joseph, Falcon Heights City Attorney, Blaine, Minnesota (for respondent)

Charles F. Clippert, Clippert Law Firm, P.L.L.C., St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Worke, Judge; and Reilly,
Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

Appellant David Bigham challenges his conviction of third-degree driving while impaired with an alcohol concentration of 0.08 or more under Minn. Stat. § 169A.20, subd. 1(5) (2014). Appellant argues that the district court erred in denying his motion to

suppress evidence obtained after what he argues was his unconstitutional seizure by law enforcement. He argues that law enforcement seized him based on a tip from an unidentified individual that neither established appellant's identity nor demonstrated that he was driving while impaired. Appellant also argues that he was seized by a reserve deputy who was not legally authorized to detain him. We affirm.

FACTS

On August 30, 2015, appellant was leaving the Minnesota State Fairgrounds at 11:00 p.m. Appellant was driving an SUV in a long line of vehicles waiting to leave the fairgrounds near the intersection of Larpenteur Avenue and Underwood Street in St. Paul. A driver ahead of appellant in the line of vehicles got the attention of one of the two reserve deputies¹ who were directing traffic in the intersection. This driver told Reserve Deputy Kelly Hiner that he suspected another driver behind him (who was later identified as appellant) was impaired. He elaborated that he saw the driver stumbling around the parking lot and having trouble getting into his SUV, and thought that the driver may be intoxicated. The driver gave Reserve Deputy Hiner a description of the SUV (which description the deputy could not specifically recall at trial, but which she remembered as having enabled her to locate appellant's particular vehicle). The reserve deputies then looked for the

¹ Under Minn. Stat. § 626.84, subd. 1(e) (2016), a reserve officer is an “individual whose services are utilized by a law enforcement agency to provide supplementary assistance at special events, traffic, or crowd control, and administrative or clerical assistance, and shall include reserve deputies A reserve officer’s duties do not include enforcement of the general criminal laws of the state, and the officer does not have full powers of arrest or authorization to carry a firearm.” The parties’ briefing refers to the officer here as a “reserve deputy.” We treat the terms as interchangeable.

described SUV in the line of vehicles and identified appellant's SUV as matching the description. They radioed for Ramsey County Sheriff's deputies to respond to their location.

When appellant's SUV reached the intersection, the reserve deputies stopped the vehicular traffic to allow for pedestrians leaving the fairgrounds to cross Underwood Street. Traffic was stopped, with appellant as the first vehicle in line at the intersection, for approximately nine minutes. The reserve deputies stopped the vehicular traffic as they did to give the sheriff's deputies time to respond to the report about appellant's possible impairment. At trial, Reserve Deputy Hiner testified that she knew that she was neither authorized to perform a traffic stop nor to hold the vehicular traffic longer than usual to allow pedestrians to cross, and that eventually she would have allowed appellant to proceed and other traffic to leave the fairgrounds. The reserve deputies did not speak with appellant or personally notice any driving conduct or other sign that he was intoxicated.

Sheriff's Deputy Suchy and three other officers arrived at the fairgrounds. The officers spoke with the reserve deputies. Deputy Suchy approached appellant's SUV. Appellant's window was down, and Deputy Suchy walked up and asked appellant if he had fun at the fair. He observed that appellant seemed to be impaired by alcohol. He had appellant perform a number of field sobriety tests, which appellant failed. Deputy Suchy arrested appellant, and appellant later submitted to a breath test which reported an alcohol concentration of 0.17.

After appellant was charged with gross-misdemeanor offenses, he moved pretrial to suppress evidence obtained following his seizure by law enforcement and to dismiss the

charges against him, arguing that he was illegally seized by Reserve Deputy Hiner and Deputy Suchy. The district court found that the reserve deputies were acting as government agents when they stopped appellant's SUV from crossing the street and their actions were thus subject to Fourth Amendment limitations. The district court also found that, considering the totality of the circumstances, appellant was not seized until Deputy Suchy approached his SUV and began talking to him. The district court found that the reserve deputies directing traffic as they did was permissible under the Fourth Amendment. It found that appellant was seized when Deputy Suchy approached his SUV, because a reasonable person would not have felt free to leave at that point, taking into account the length of the stop and appellant's position at the front of the line.

Further, the district court found that the seizure was not illegal because the tip from the other driver leaving the fairgrounds informed the reserve deputies about a possible impaired driver behind him and "came pursuant to a face to face conversation" between the informant and one of the reserve deputies. In the district court's judgment, this was a "legitimate basis" to draw the conclusion that appellant was impaired after the other driver had observed him in person. And, although the reserve deputies did not record the license plate of the other driver's car, the informant was subject to being identified at the time he provided the information. The district court denied appellant's motion to suppress the evidence obtained after appellant's seizure by law enforcement.

Appellant waived his right to a jury trial and was convicted after a bench trial of third-degree driving while impaired with an alcohol concentration of 0.08 within two hours, pursuant to Minn. Stat. § 169A.20, subd. 1(5).

This appeal followed.

DECISION

Appellant contends that the district court erred when it denied his motion to suppress evidence. He contends that law enforcement seized him based on a tip from an unidentified individual that failed to establish appellant's identity or that he was driving while impaired by alcohol. In the alternative, appellant argues that he was detained by a reserve deputy who had no authority to detain him, and therefore the evidence obtained following the seizure must be suppressed on that basis.

Appellant first argues that there was not reasonable suspicion to support his seizure by law enforcement while he was attempting to leave the fairgrounds. "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). "[W]e review the district court's factual findings under a clearly erroneous standard and the district court's legal determinations de novo." *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008).

The United States and Minnesota State Constitutions prohibit "unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. 1, § 10. Law enforcement may, however, "conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S. Ct. 673, 675 (2000). We have stated that, in order to comply with the Fourth Amendment, law enforcement "may not stop a vehicle without a specific and articulable

suspicion of a violation.” *Rose v. Comm’r of Pub. Safety*, 637 N.W.2d 326, 328 (Minn. App. 2001). “The factual basis necessary to maintain a routine traffic stop is minimal and need not arise from an officer’s personal observations. A factual basis may also be supplied by information acquired from another person, including an informant.” *Id.* (citation omitted).

Law enforcement may detain an individual based on an informant’s tip, so long as the tip has “indicia of reliability[,]” and that, if law enforcement makes the stop based on the tip alone, the tip “must provide at least some specific and articulable facts to support the bare allegation of criminal activity. Not much is required, especially for a traffic stop for a suspected traffic offense then in progress.” *Olson v. Comm’r of Pub. Safety*, 371 N.W.2d 552, 556 (Minn. 1985). Generally, when considering whether a traffic stop based on an informant tip is permissible under the Fourth Amendment, we consider “(1) [the] identifying information provided by the informant; and (2) the facts supporting the informant’s assertion that a driver is under the influence.” *Rose*, 637 N.W.2d at 328. “Neither factor is separately dispositive,” and we consider the “totality of the circumstances” when considering “whether the officer had a reasonable suspicion of criminal activity at the time of the stop.” *Id.* Further, a tip from an informant, given in a “face-to-face confrontation” with law enforcement when “his identity may easily be traced,” may be found to be reliable regardless of whether the informant is identified at the time of the tip. *State v. Davis*, 393 N.W.2d 179, 181 (Minn. 1986).

Here, the driver who informed Reserve Deputy Hiner about appellant’s suspected intoxication was unidentified. That driver expressed his suspicions about appellant to

Reserve Deputy Hiner in a face-to-face conversation. He described the SUV, including a unique design of some sort, and described the male driver as having been “stumb[ling],” having “difficulty getting in” his SUV, and appearing to the informant to be intoxicated. At trial, Reserve Deputy Hiner could not recall the description of the SUV provided to her, but testified that, at the time, the description was sufficient for her and her partner to identify the vehicle in question. Reserve Deputy Hiner told the responding officers about her conversation with the informant and pointed out appellant’s SUV.

The district court found that the informant provided a reasonable, articulable suspicion that appellant was driving while impaired, justifying the seizure of appellant when Deputy Suchy approached.

In challenging this conclusion, appellant first argues that the tip from the other driver leaving the fairgrounds “lacked identifying information.” Appellant correctly points out that Reserve Deputy Hiner was not able to testify at trial regarding the make, color, model, or plate number of the SUV or give a description of the driver (beyond that he was “male”). He compares the facts of this case with the situation in *Olson*, where an anonymous caller was able to provide law enforcement with the make, color, and plate number of the car which a suspected impaired driver was driving, but the supreme court nonetheless found that the informant’s tip was not reliable. 371 N.W.2d at 553. There, the supreme court stated that “we know nothing about the informant and nothing about what the informant saw which led him or her to believe that the [defendant] was ‘possibly’ drunk.” *Id.* at 556.

Here, despite Reserve Deputy Hiner's inability to recall at trial the description the other driver gave of appellant's SUV, she testified that when that description was given to her it was sufficient to locate appellant's SUV in a line of vehicles. Unlike the facts in *Olson*, the other driver was in the same vicinity as appellant at the time he made the report, the report was made directly and in person to Reserve Deputy Hiner, and the other driver was able to explain to Reserve Deputy Hiner the behavior displayed by appellant which led to his inference that appellant was intoxicated. The facts of this case are more comparable to those in *Davis*, where an informant yelled out of the window of a car that law enforcement should stop a vehicle behind her because it ran a red light. 393 N.W.2d at 180. There, the supreme court held that the officer was justified in stopping the vehicle referenced by the informant, because there was a "face-to-face confrontation" between law enforcement and the informant, and "[c]learly" the informant had witnessed conduct on the part of the suspected impaired driver that justified an investigative stop by law enforcement. *Id.* at 181.

Appellant next argues that the tip lacked facts supporting the other driver's assertion that appellant was impaired. The other driver told Reserve Deputy Hiner that he watched the SUV driver "stumble to his vehicle" in the fairground parking lot and have difficulty getting into his SUV. Appellant argues that this information was too vague to support seizing him, because people can stumble for reasons unrelated to intoxication and the other driver did not observe any erratic driving conduct. As discussed, the supreme court in *Olson* found a tip to be unreliable when the informant provided no information that "led him or her to believe" that the driver was drunk. *Id.* at 556. Here, unlike in *Olson*, the

other driver who reported appellant's behavior to Reserve Deputy Hiner explained to her that he had personally observed appellant's behavior leading him to the conclusion that appellant was intoxicated and was able to describe that behavior in detail. *See City of Minnetonka v. Shepard*, 420 N.W.2d 887, 890 (Minn. 1988) (distinguishing *Olson* where the court inferred that a gas station attendant providing a tip regarding an intoxicated driver had witnessed the driver's conduct inside the station, thus basing his reliable tip "on personal observation of the driver himself").

Under the totality of the circumstances, Reserve Deputy Hiner received enough information from the other driver to form a reasonable and articulable suspicion that appellant was driving while impaired. She communicated this information to Deputy Suchy and the other law enforcement officers, providing a reasonable and articulable suspicion sufficient to justify appellant's seizure in his vehicle.

Appellant next argues that Reserve Deputy Hiner illegally seized him at the point in time when she stopped the vehicular traffic leaving the fairgrounds with his SUV at the front of the line of vehicles, and that she lacked the authority to seize him. Appellant argues that he was "detained by Hiner's show of authority" when Reserve Deputy Hiner held traffic until the sheriff's deputies arrived. Therefore, he argues, evidence obtained from his improper seizure must be suppressed on this basis. But the district court found that Reserve Deputy Hiner did not seize appellant. Instead, it found that Deputy Suchy seized appellant "at the moment [he] approached [appellant's] vehicle on foot and initiated a conversation." The district court found that the actions of the reserve deputies in stopping vehicles to let foot traffic through were "initially . . . permissible." It further found that the

seizure was triggered by the duration of the stop “*and the fact that [appellant] was ultimately singled out by law enforcement.*” (Emphasis added.) The district court found, and we agree, that Reserve Deputy Hiner had no authority to perform a traffic stop. Reserve Deputy Hiner testified that she understood that her authority was so limited and that, despite her wish that law enforcement would arrive while she had appellant stopped in line, she did not intend to hold traffic any longer than usual to allow pedestrians to pass. The district court found that Reserve Deputy Hiner’s actions did not amount to a seizure of appellant. The record evidence supports these findings.

Appellant was not seized until Deputy Suchy, a law enforcement officer, approached his SUV. That seizure was based on Deputy Suchy’s reasonable and articulable suspicion that appellant was impaired. We see no error in the district court’s application of the law to its findings.

Affirmed.