OPINION OF THE NEBRASKA COURT OF APPEALS

(Not Designated for Permanent Publication)

Case Title

STATE OF NEBRASKA, APPELLEE,
V.
SCOTT A. O'DELL, APPELLANT.

Case Caption

STATE V. O'DELL

Filed September 24, 2002. No. A-01-1274.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Reversed.

Anthony S. Troia, of Troia Law Offices, for appellant.

Don Stenberg, Attorney General, and George R. Love for appellee.

STATE V. O'DELL

Filed September 24, 2002. No. A-01-1274.

HANNON, SIEVERS, and MOORE, Judges.

SIEVERS, Judge.

INTRODUCTION

Scott A. O'Dell was found guilty after a stipulated bench trial of possession of a controlled substance with intent to deliver and failure to affix a tax stamp. The principal issue is whether there was a lawful basis for the investigative stop of O'Dell's vehicle, in which illegal drugs were found. We find that there was not.

BACKGROUND

O'Dell was charged by information in the district court for Douglas County, Nebraska, with possession of a controlled substance (methamphetamine or amphetamine) with intent to deliver, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 2000), a Class III felony, and failure to affix a tax stamp, in violation of Neb. Rev. Stat. § 77-4309 (Reissue 1996), a Class IV felony. The charges resulted from an investigatory stop of O'Dell, during which Omaha police officers recovered substances from O'Dell's vehicle and his person believed to be marijuana and methamphetamine.

O'Dell filed a motion to suppress, and the evidence presented at the hearing indicated that on November 10, 2000, at approximately 8:15 p.m., Omaha police officer Joseph M. Sanchez received a radio call or dispatch reporting a domestic disturbance in the vicinity of 8th and Fort Streets. Sanchez testified he understood from the radio dispatch that the domestic disturbance call involved a female victim who complained of either her ex-boyfriend's or her husband's (Sanchez could not remember which) kicking in the back door of her home and fleeing the area in an either black or tan pickup. There was no other description of the suspect vehicle or person. Sanchez testified that he did not hear the actual call to the 911 emergency dispatch service over his radio.

A recording of the actual 911 call, which was played at the suppression hearing, recounts that the suspect vehicle was a brown or tan pickup. Officer Matt Chandler, who arrived at the scene of the investigatory stop to provide backup for Sanchez, testified that he heard the actual 911 call over his radio and the caller stated that the suspect had fled in a brown or tan pickup.

Sanchez, upon getting the dispatch, left "in no less than five minutes" for the vicinity of 8th and Fort Streets. But, the record does not reveal where he started from or how long after the dispatch he encountered O'Dell's black pickup. Sanchez' arrest report, in evidence as exhibit 101, does contain a time of arrest of 8:25 p.m. While traveling east on Fort Street in response to the dispatch, Sanchez observed a westbound black pickup at approximately 11th or 12th and Fort Streets. Sanchez testified that he initiated an investigatory stop of the pickup because it matched the description of the vehicle mentioned in the dispatch. After the pickup pulled over, Sanchez made contact with the driver, later identified as O'Dell. Sanchez then returned to his police cruiser to perform a "data check." Sanchez testified that he was unable to read O'Dell's entire license plate from his vantage point in the driver's seat of his police cruiser while making his data check. At the hearing, Sanchez was unable to recall whether the pickup that he stopped had a front license plate. At one point in his testimony, Sanchez

said one of the reasons for the stop was that he could not read the license plate, in addition to the pickup's "matching the description."

O'Dell testified that in November 2000, he owned a Ford F-150 pickup. O'Dell identified exhibit 1 as a picture of the rear of his pickup bearing the license plate "1 Comm 61141" that was taken shortly after November 2000. O'Dell testified further that while he was not able to see the all of the second "1" on the license plate as depicted in the photograph, he was able to decipher the partially obscured number "1." And, he said that the pickup always had a front plate.

Chandler arrived shortly after the initiation of the investigatory stop. While Sanchez was doing the data check, Chandler stood at the right back corner of the pickup, where he could observe O'Dell through the pickup's mirrors and rear window. Chandler observed that O'Dell became "antsy" and appeared to reach for something. Chandler approached and opened the passenger door of the pickup and observed O'Dell with his hand between the seat and back cushion. Upon hearing Chandler yelling at O'Dell, Sanchez went to the driver's side of the pickup, told O'Dell to exit the pickup, handcuffed him, and placed him in custody. The officers advised O'Dell that they needed to search the area where he had been reaching his hand, for officer safety. In that location, Chandler found a large Ziploc baggie that appeared to contain methamphetamine. Chandler then searched O'Dell and discovered a baggie of marijuana in one of O'Dell's pants pockets. A second baggie in a blue sweater or jacket found on the passenger seat contained a substance which appeared to be methamphetamine.

The district court overruled O'Dell's motion to suppress, finding that Sanchez had "probable cause" to initiate the investigatory stop of O'Dell and that all other actions of the officers thereafter were lawful.

O'Dell entered a plea of not guilty, and a stipulated bench trial was conducted on August 8, 2001. At the trial, the police reports were marked as exhibits and entered into the record and O'Dell's objections to the admissibility of the evidence obtained as a result of the investigatory stop were preserved for this appeal. Following the trial, the district court found O'Dell guilty as charged. O'Dell was sentenced to serve 2 years of intensive supervised probation. O'Dell has perfected his appeal to this court.

ASSIGNMENT OF ERROR

O'Dell asserts that the district court erred in overruling his motion to suppress.

STANDARD OF REVIEW

A trial court's ruling on a motion to suppress evidence, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Manning*, 263 Neb. 61, 638 N.W.2d 231 (2002). The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo, and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000).

ANALYSIS

O'Dell asserts that Sanchez did not have reasonable suspicion to conduct an investigatory stop of O'Dell's vehicle based either on the radio dispatch regarding the domestic disturbance or on the inability of Sanchez to read O'Dell's partially obscured license plate from Sanchez' vantage point in the

police cruiser. The record is unclear exactly when this observation of the license plate was made, but some of Sanchez' testimony suggests that it was after the stop had been made.

Limited investigatory stops are permissible only upon a reasonable suspicion, supported by specific and articulable facts, that the person is, was, or is about to be engaged in criminal activity. *State v. Coleman*, 10 Neb. App. 337, 630 N.W.2d 686 (2001). Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or "hunch," but less than the level of suspicion required for probable cause. *State v. McGinnis*, 8 Neb. App. 1014, 608 N.W.2d 605 (2000). Whether a police officer has a reasonable suspicion based on sufficient articulable facts requires taking into account the totality of the circumstances. *State v. Gutierrez*, 9 Neb. App. 325, 611 N.W.2d 853 (2000).

A reasonably founded suspicion to stop a vehicle cannot be based solely on the receipt by the stopping officer of a radio dispatch to stop the described vehicle, without any proof of the factual foundation for the relayed message. *State v. Soukharith*, 253 Neb. 310, 570 N.W.2d 344 (1997). If a radio dispatch has been issued on the basis of articulable facts supporting a reasonable suspicion that a wanted person has committed or is committing an offense, then a police officer may rely on the dispatch alone to stop the person to check identification, to pose questions to the person, or to detain the person briefly while attempting to obtain further information. *Id.* An investigative stop, like probable cause, is to be evaluated by the collective information of the police engaged in a common investigation. *Id.* See, also, *State v. Burdette, supra* (if police make stop in objective reliance on flyer or bulletin, evidence uncovered in course of stop is admissible if police who issued flyer or bulletin possessed reasonable suspicion justifying stop); *State v. Mays*, 6 Neb. App. 855, 578 N.W.2d 453 (1998), *overruled on other grounds, State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000) (reasonable suspicion to stop vehicle cannot be found when there is no factual foundation explaining source of information being relayed between officers). The collective knowledge of the law enforcement agency for which an officer acts may provide the basis for a search and seizure, but some communication of that knowledge to the officer conducting the search and seizure is required. *State v. Hicks*, 241 Neb. 357, 488 N.W.2d 359 (1992), *cert. denied* 507 U.S. 1000, 113 S. Ct. 1625, 123 L. Ed. 2d 183 (1993). Nonetheless, we state what is probably obvious: "An otherwise invalid Fourth Amendment intrusion upon an individual cannot be cleansed merely by radioing a policeman on patrol to accomplish what the dispatcher or desk officer on the information available to him could not do directly." *State In Interest of H. B.*, 75 N.J. 243, 265, 381 A.2d 759, 770 (1977) (Handler, J., dissenting).

This is a collective knowledge case because Sanchez had no information except what he received in the dispatch. The obvious problem is that the dispatch incorrectly describes the suspect vehicle. Additionally, the dispatch suffers from a lack of identifying detail about either the vehicle or the man. The recording of the 911 call was played at the suppression hearing although the contents of that call were not transcribed in the record and the recording was not admitted into evidence. Thus, we can work only with the testimony of Sanchez about the dispatch call, which he heard, and of Chandler about the 911 call, which he heard.

The evidence of the 911 call shows that this was a domestic disturbance call involving a female victim who complained of either her ex-boyfriend's or her husband's kicking in the back door of her home and fleeing the area of 8th and Fort Streets in an either brown or tan pickup. Sanchez admitted that the radio dispatch upon which he acted described the suspect vehicle as being a black or tan pickup. Chandler, who heard the actual 911 call played over the radio at the time of the incident and the recording thereof at the hearing, confirmed that the caller stated that the vehicle was a brown or tan pickup. As to the name of the suspect, Sanchez testified at the hearing that he did not receive this information until after O'Dell's arrest. It turned out that O'Dell was not the right suspect in the domestic disturbance case, but that fact is of little or no consequence if there was, nonetheless, a lawful basis

for the stop. The testimony does not indicate whether the information about the suspect's identity was provided in the original 911 call, and again, we do not have the recording or a transcription thereof.

The discrepancy in the description of the color of the suspect vehicle is very significant because there are no other identifying facts about the pickup such as make, model, or year; nor was there any information provided about the man. In both the 911 call and the radio dispatch, the vehicle described was a pickup located in the vicinity of 8th and Fort Streets. But, this was at approximately 8:15 p.m., when other traffic would normally be on the street.

Sanchez arrived in the area of the domestic disturbance shortly after receiving the radio dispatch and observed O'Dell's black pickup at approximately 11th or 12th and Fort Streets, traveling away from the area of the domestic disturbance. But, Sanchez did not testify that it was speeding or being driven recklessly or carelessly. Thus, there was no evidence that the stopped pickup was "fleeing." The police report in evidence shows that O'Dell lived in the area. Sanchez testified that O'Dell's pickup was the first vehicle he viewed as he approached the area of the domestic disturbance and that he did not observe any other pickups in the area.

We have recently extensively discussed the "collective knowledge" doctrine in *State v. Coleman*, 10 Neb. App. 337, 342, 630 N.W.2d 686, 692 (2001). There, we said that the collective knowledge of the law enforcement agency for which an officer acts provides the basis for a search and seizure when some communication of that knowledge to the officer conducting the search and seizure is made. In *Coleman*, we quoted the Nebraska Supreme Court in *State v. Soukharith*, 253 Neb. 310, 570 N.W.2d 344 (1997), which discussed a dispatcher's caution message to an officer and said, "'[I]t is irrelevant whether an officer making a stop in reliance on a radio bulletin is aware of the factual foundation for the bulletin, so long as the factual foundation is sufficient to support a reasonable suspicion.'" 10 Neb. App. at 345, 630 N.W.2d at 694. Thus, the test in the present case becomes, in effect, whether the dispatcher who radioed Sanchez had sufficient information to form articulable suspicion to justify a stop of O'Dell's black pickup. The dispatcher did not testify, so we are left with what Sanchez says he was told.

Here the dispatch, issued in response to the 911 call and relied exclusively upon by Sanchez, is clearly insufficient to justify Sanchez' stop of O'Dell's black pickup because the stopped pickup does not match the description of the suspect vehicle given in the 911 call. The fact that Sanchez stopped a pickup of the wrong color becomes all the more critical given the complete absence in the dispatch of a make, model, year, or condition of the vehicle, as well as the total absence of any physical description of the man driving it. The discrepancy in color might arguably be minor if there were other corroborating and identifying details given to and visible by Sanchez before the stop which could constitute a reasonable suspicion that this was the right pickup driven by the right man who was the suspect in the domestic disturbance, e.g., a 35-year-old white man with a full beard and black baseball cap driving a black pickup with rusted-out rear wheel wells. But, the fact of the matter is that there were absolutely no such details. There were really only two facts upon which to base a stop of a pickup: its color and its location in the area of the crime. But, the color was wrong, and mere proximity, certainly at 8:15 p.m., cannot justify a stop of just anyone the police happen upon without more information. To hold otherwise would subject every pickup driver in the neighborhood to being stopped on the sole basis that he or she was driving a pickup. Thus, the color of the pickup is crucial because it is really the only significant piece of information Sanchez had upon which to determine whom he should look for--but he stopped the wrong-colored pickup with absolutely nothing else pointing toward this vehicle as having been connected to the domestic disturbance.

Sanchez' testimony seems to suggest that part of the reason for the stop was his observation that a number on O'Dell's rear license plate was partially obscured by a trailer hitch. But, this observation may have been made after the stop, while Chandler was watching over O'Dell and while Sanchez was doing the data check. The record is very unclear on the timing of the observation. Nebraska statutes require display of license plates. See Neb. Rev. Stat. §§ 60-323 and 60-348 (Reissue 1998) (Class III misdemeanor for violation). A panel of this court has previously said, "The statutory expression requiring 'proper display' of plates and in-transit tags logically implies a display which is visible." *State v. Reiter*, 3 Neb. App. 153, 157, 524 N.W.2d 575, 578 (1994). The law in Nebraska is that a traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *State v. Dallmann*, 260 Neb. 937, 621 N.W.2d 86 (2000). If an officer has probable cause to stop a violator, the stop is objectively reasonable, and any ulterior motivation on the officer's part is irrelevant. *Id.* Thus, this could justify the stop if there was such a crime.

We turn to *State v. Mays*, 6 Neb. App. 855, 578 N.W.2d 453 (1998), *overruled on other grounds, State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000). In *Mays*, the officer who conducted the investigatory stop received information from a second officer that the driver of a red pickup had drugs on his person, was dealing drugs, had a suspended driver's license, and was known by the street name of "'Twin.'" 6 Neb. App. at 856, 578 N.W.2d at 454. The stopping officer also received information from the second officer at some point that the red pickup was either leaving or arriving at a certain housing area. The stopping officer subsequently observed a red pickup driving away from the housing area. The stopping officer testified that he was unable to read the license plate due to a trailer hitch on the back of the pickup, but a tape-recorded radio transmission showed that the stopping officer did call in a partial license number a few moments before stopping the pickup. The stopping officer testified that he observed no traffic violations prior to the stop.

This court concluded in *Mays* that the stopping officer failed to articulate specific and objective facts that would justify an investigatory stop, because the source and reliability of the information the stopping officer received from the second officer was not provided. In short, the *Mays* court concluded that the State did prove a factual foundation for the information conveyed to the stopping officer by the second officer and that it could only speculate as to the source of the second officer's information. The *Mays* court did not specifically address whether the partially obscured license plate was a traffic violation constituting grounds by itself for a stop for a traffic violation. Thus, *Mays* does not resolve our issue.

We reject the State's argument in the case at hand that Sanchez' inability to completely see the rear license plate because of the trailer hitch provided the basis to stop O'Dell for a traffic violation. The State relies on *State v. Reiter*, 3 Neb. App. 153, 524 N.W.2d 575 (1994). The premise of *Reiter* is that a statute "requiring 'proper display' of [license] plates and in-transit tags logically implies a display which is visible." 3 Neb. App. at 157, 524 N.W.2d at 578. But, it appears that *Reiter* bootstraps a holding from statutory language which does not exist.

We have been unable to find any statutory provision which uses the words "proper display" to describe the legal display of license plates. Section 60-323 describes a number of very specific things about the display of license plates, such as that they shall not swing, that they shall have a minimum clearance of 12 inches from the ground to the bottom of the license plate, and that one can neither display a license plate other than the one assigned to a given vehicle nor display a fictitious, altered, or canceled license plate. But, this statute does not contain the open-ended notion of "proper display" of a license plate. Rather, it is more accurate to say that the statute defines what is improper display of license plates, and importantly for our analysis, it criminalizes that conduct.

Due process of law requires that criminal statutes be clear and definite and that the crime be defined with sufficient definiteness, such that there are ascertainable standards of guilt to inform those subject to the statute as to what conduct will render them liable to punishment, and the dividing line between what is lawful and unlawful cannot be left to conjecture. *State v. Pierson*, 239 Neb. 350, 476 N.W.2d 544 (1991). Thus, to the extent that *State v. Rieter, supra*, holds or suggests that there is a crime of "improper display" of plates if a law enforcement officer cannot see 100 percent of the plate, we disagree with *Rieter*. It therefore logically follows that an officer stopping a vehicle for the reason that a trailer hitch partially interferes with his or her view of a number on a rear license plate is acting without legal authority and stopping a citizen for a crime which does not exist.

Thus, while we agree with the notion that a traffic violation, no matter how minor, creates cause to stop the driver of a vehicle, there has to be some criminal activity underlying the stop. The record here fails to show any such activity; nor is there reasonable articulable suspicion that O'Dell was the man wanted for the domestic disturbance. The stop on the basis of the dispatch to Sanchez was plainly without a lawful basis and was beyond the scope of the Fourth Amendment. The seized evidence should have been suppressed. Therefore, we reverse the convictions.

REVERSED.

MOORE, Judge, concurs.