STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1173

State of Minnesota,
Respondent,

vs.

Denisse Marie Oliveros,
Appellant.

Filed May 16, 2011
Affirmed
Randall, Judge*
Dissenting, Shumaker, Judge

Dakota County District Court
File No. 19HA-CR-09-2189

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

James C. Backstrom, Dakota County Attorney, Shirley A. Leko, Assistant County Attorney, Hastings, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public Defender, St. Paul, Minnesota; and

Jeffrey A. Muszynski, Special Assistant State Public Defender, Minneapolis, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Shumaker, Judge; and Randall, Judge.

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* 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

RANDALL, Judge

Appellant challenges the district court's denial of her motion to suppress evidence obtained through what she contends was an unlawful investigatory stop of her vehicle. This stop resulted in charges of which she was convicted during a stipulated-facts trial. We conclude the stop was lawful. Affirmed.

FACTS

On April 24, 2009, Burnsville police dispatch received a report from a caller concerned about the safety and well-being of a woman he had encountered at a movie theater. The caller reportedly told dispatch that he saw a woman "acting strangely in a movie theater, talking to herself, driving around in the parking lot, and actually at one point had fallen asleep, apparently, and some other citizens were trying to wake her up by knocking on a window." The caller provided the license-plate number and a physical description of the woman's vehicle, as well as the direction in which the vehicle was headed. Police dispatch relayed the information to Officer Shaun Anselment, who was on patrol nearby.

Officer Anselment soon identified the vehicle and followed it. He observed that the vehicle's windshield was cracked when he pulled up behind the vehicle. At the omnibus hearing, he could not recall "the exact location on the windshield" of the crack, but he testified that it was clearly observable from his position behind the vehicle, that his headlights reflected off of it, and that he could have issued a citation for the cracked

windshield under Minn. Stat. § 169.71, subd. 1(1) (2008). Officer Anselment initiated an investigatory traffic stop based on the cracked windshield.

When Officer Anselment approached the vehicle, he observed three children in the back seat and a child in the front seat. The woman driving the vehicle was unable to produce a driver's license, but identified herself as Denisse Oliveros. Officer Anselment's subsequent interaction with Oliveros resulted in her arrest, and she was charged with fourth-degree assault, first-degree DWI, driving after cancellation, and obstructing legal process.

A contested omnibus hearing was held on November 13, 2009, in Dakota County District Court. The hearing was held to address Oliveros's motion to suppress evidence obtained as a result of the investigatory stop, which she contended was unlawful. The only witness called to testify was Officer Anselment. The district court concluded that Officer Anselment's "observation of a crack in the windshield was a sufficient objective basis for stopping the vehicle." A stipulated-facts trial was held on March 16, 2010, and Oliveros was found guilty of fourth-degree assault, first-degree driving while impaired, driving after cancellation, and obstructing legal process. She now appeals.

D E C I S I O N

Standard of Review

"[W]hen reviewing a pre-trial order suppressing evidence where the facts are not in dispute and the [district] court's decision is a question of law, the reviewing court may independently review the facts and determine, as a matter of law, whether the evidence need be suppressed." *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992). Whether a

stop is valid is a question of law, and we "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).

Investigatory Stop

Both the United States and Minnesota Constitutions protect against "unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. I, § 10. To determine whether this constitutional prohibition has been violated, we examine the specific police conduct at issue. *See State v. Davis*, 732 N.W.2d 173, 176 (Minn. 2007). The conduct at issue here is the investigatory stop of a motor vehicle. "[A]n officer may, consistent with the Fourth Amendment, 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). The state concedes that the concerned citizen's call to police reporting Oliveros's suspicious behavior was an inadequate basis for an investigatory stop. As such, the sole question is whether observation of a cracked windshield provides a reasonable, articulable suspicion of criminal activity sufficient to justify an investigatory stop.

"[T]he reasonable suspicion standard is not high." *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006). Police officers "must be able to articulate more than an inchoate and unparticularized suspicion or hunch of criminal activity." *Wardlow*, 528 U.S. at 123-24, 120 S. Ct. at 676 (quotation omitted). "A stop is lawful if the officer articulates a particularized and objective basis for suspecting the particular persons stopped of criminal activity." *In re Welfare of G.M.*, 560 N.W.2d 687, 691 (Minn. 1997) (emphasis

omitted) (quotation omitted). "The factual basis required to support a stop is minimal, and an actual violation [of the law] is not necessary." *State v. Haataja*, 611 N.W.2d 353, 354 (Minn. App. 2000) (quotation omitted), *review denied* (Minn. July 25, 2000). A valid traffic stop may not be the product of mere whim, caprice, or idle curiosity. *State v. Baumann*, 616 N.W.2d 771, 774 (Minn. App. 2000), *review denied* (Minn. Nov. 15, 2000).

Cracked Windshield

Officer Anselment stopped Oliveros's vehicle after observing that her windshield was cracked, believing it was in violation of Minn. Stat. § 169.71, subd. 1(1) (2008), which states that "[a] person shall not drive or operate any motor vehicle with a windshield cracked or discolored to an extent to limit or obstruct proper vision." Oliveros contends that her windshield was cracked but that the crack did not obstruct her vision. She contends that because she was not cited for violating this statute and because Officer Anselment could not articulate at her omnibus hearing whether she had violated both elements of the statute, the stop of her vehicle was unlawful. The district court found that:

> There was no testimony [at the omnibus hearing] on the specifics of the crack that Officer Anselment observed in the windshield except that it was noticeable while traveling behind [Oliveros's] vehicle. Officer Anselment did not describe the crack in the windshield because he could not remember where the crack was at the time of the contested hearing almost six months after the incident. In the Statement of Probable Cause attached to the complaint and the Application for Judicial Determination of Probable Cause to Detain An Adult, it was described as a "large crack in the windshield of the vehicle."

The district court concluded that Officer Anselment's "observation of a crack in the windshield was a sufficient objective basis for stopping the vehicle." Officer Anselment testified that (1) when he pulled up behind Oliveros's vehicle, the crack reflected off the headlights of his squad car; (2) the crack was clearly observable from this position; and (3) he could have cited Oliveros for a cracked windshield but did not because he discovered other more serious crimes afoot; further, his police report stated that Oliveros's vehicle had a "large crack" in its windshield.

Oliveros argues vigorously that Office Anselment did not have a reasonable, articulable suspicion to stop her because, although he could see a cracked windshield, he could not tell from the outside if it actually impaired her vision. Oliveros cites *George* as support. *State v. George*, 557 N.W.2d 575 (Minn. 1997). There, an investigatory stop was held to be unlawful because there was no violation of an equipment law, even though the officer thought that there was. *Id.* at 578-79. The officer suspected an equipment violation, but this suspicion was wrong. The officer testified that it was a violation to have three headlights on a motorcycle. George did not have three headlights on his motorcycle, he had one headlight and two permissible "auxiliary passing lamps." *Id.* at 578. The headlight configuration would have been easily visible to the naked eye.

The differences between *George* and the present case are multiple. First, the Minnesota Supreme Court stated that George's headlight configuration "clearly conformed to Minnesota law." *Id.* at 576. Appellant's cracked windshield *does not*

clearly conform to any Minnesota law. A cracked windshield can lead to a discretionary "fix-it ticket" even if it does not "impair" the driver's vision.

Second, in *George*, the supreme court took note of the trial court's finding

> that the stop was "no doubt . . . a pretext stop in that the officer's intention was to seek a consensual search of [George's] motorcycle and belongings." Nevertheless, relying on *State v. Everett*, 472 N.W.2d 864, 867 (Minn. 1991), the trial court concluded that, based upon Vaselaar's belief that the headlight configuration on George's motorcycle violated Minn. Stat. § 169.49 (1994), "the stop was valid."

Id. at 577-78. In this case, the issue of pretext did not arise, it was not offered as a defense theory, and the trial court made no ruling on that issue. That is a large difference between appellant's case and *George*.

The Minnesota Supreme Court said in *George*:

> The front lights on George's motorcycle were standard equipment installed at the factory: one high/low beam headlamp and two low beam auxiliary passing lamps that supplement the lower beam of the standard high/low beam headlamp. State law clearly permits a motorcycle to have two standard high/low beam headlamps and two of the auxiliary passing lamps. There was no *objective* basis in the law for the trooper to reasonably suspect that George was operating his motorcycle in violation of this law.

Id. at 578-79. "Cracked windshields" are not standard equipment installed at a factory.

Finally, the suspected headlight-configuration violation in *George* was a technical equipment violation. In forming articulable suspicion, police officers may draw on their experience and training. *See generally State v. Harris*, 590 N.W.2d 90, 99 (Minn. 1999) (stating that police "may draw inferences and deductions that might elude an untrained

person" (quotation omitted)); *State v. Capers*, 451 N.W.2d 367, 371 (Minn. App. 1990) (noting that officer's experience weighs heavily in determining articulable suspicion), *review denied* (Minn. Apr. 25, 1990). But the consequence of this in *George* was that the police hunch had to be right. *See George*, 557 N.W.2d at 579 (holding that because state law clearly permitted the motorcycle lighting configuration, "[t]here was no *objective* basis in the law for the trooper to reasonably suspect" a violation).

George implies a police duty to know the law. *See also State v. Anderson*, 683 N.W.2d 818, 823-24 (Minn. 2004) (holding that officer's "mistaken interpretation of a statute" cannot provide suspicion justifying a stop). It does not require police to conduct a factual investigation, which in this case would have been impossible, to confirm their suspicions *before* conducting a stop. The very purpose of an investigative stop is to allow for further investigation. *See generally Wilkes v. Comm'r of Pub. Safety*, 777 N.W.2d 239, 244-45 (Minn. App. 2010) (noting police may conduct a stop to "make reasonable inquiries").

Appellant's contention that both the cracked windshield and the impairment of the driver's vision *had to be seen at the same time to justify the stop* would gut the law, virtually ending enforcement of the prohibition against the dangerous combination of a cracked windshield and driver vision impairment. A common-sense look at how that particular statute is enforced proves the point. A squad car going in the opposite direction of another car is one of the two ways an officer can observe a cracked windshield, the other being a squad car going in the same direction. On the highway (if going in opposite directions), if both cars are going the legal speed limit of 65 or 70 miles

per hour, they are closing in on each other at about 130 or 140 miles per hour. That makes it impossible for an officer behind the wheel to put himself into the approaching car's traffic sight and then look straight ahead through the cracked windshield to see whether "impairment" can be observed. If in town, with both cars going 25 to 40 miles per hour, they are closing at a combined speed of 50 to 80 miles per hour—same problem. In the other scenario (going in the same direction), a squad car would have to be tailgating the suspect vehicle or illuminating its windshield to a degree inconsistent with highway safety, and the officer would still not be "in the driver's seat," so as to have a true read on whether the driver's vision was impaired.

There is no reason in fairness or in law to force that scenario onto law enforcement officers. If there is a particularized, objective basis for believing there may be criminal activity, the stop is valid, assuming pretext is not an issue. With any valid stop, it is possible an officer's follow-up investigation may lead him to believe that there is not enough observable evidence to issue a criminal charge, but whether a criminal charge is later issued is irrelevant under Minnesota law. *See Haataja*, 611 N.W.2d at 354.

The dissent's insistence that the officer had to observe *both* the cracked windshield and the "impairment of vision" to make the stop legal is premised on an argument that the officer has to observe a "full" violation of the law. That has never been the case since limited stops short of a formal arrest have been analyzed. *See Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968) and *United States v. Cortez*, 449 U.S. 411, 101 S. Ct. 690 (1981), and all their federal and Minnesota Supreme Court progeny. *See, e.g.*, *State v. Timberlake*, 744 N.W.2d 390, 396-97 (Minn. 2008) (holding police who had tip that

suspect was carrying a gun in a motor vehicle had articulable suspicion to make a stop even without knowing whether the suspect had a permit for the gun).

This case can be contrasted with the supreme court's decision in *State v. Britton*, 604 N.W.2d 84, 88-89 (Minn. 2000), holding that a broken car window does not provide articulable suspicion that the car is stolen. The state of the car window in *Britton* was used to support an inference of a separate crime—motor vehicle theft—and was found to be insufficient for that purpose. The state of the windshield here was used to support an inference of a cracked-windshield violation. It supports that inference.

In *George*, as noted before, the supreme court expressed its concern with police using pretexts, such as equipment violations, to target members of certain groups. 557 N.W.2d at 579-80. This case does not have a pretext issue.

We agree the bar for a permissible stop is low. This court has challenged that low bar when it seemed appropriate. *See Berge v. Comm'r of Pub. Safety*, 370 N.W.2d 75, 78 (Minn. App. 1985) ("[T]he officer's stop was made not on an objective basis, but on assumption."), *rev'd*, 374 N.W.2d 730, 731 (Minn. 1985). I lost. This court acknowledges the bar is low, but the federal courts and the Minnesota Supreme Court have set the bar at a low height. The height of the bar is not unclear. Under no circumstances did Officer Anselment have to get inside appellant's car, examine the cracked windshield from the inside out, or tailgate appellant's vehicle, endangering public safety, to see whether the crack impaired appellant's vision, before conducting a valid stop.

Officer Anselment did not have to issue a citation for a cracked windshield to make this a valid stop. "The factual basis required to support a stop is minimal, and an actual violation [of the law] is not necessary." *State v. Haataja*, 611 N.W.2d at 354.

Our conclusion tracks our decision in *Wright*. *Wright* presented a pretext argument. We do not even have that argument here. "Under these facts an investigatory stop *to determine whether the crack obstructed proper vision* had a particularized and objective basis." *State v. Wright*, 1995 WL 81382, No. C4-94-898, *3 (Minn. App. Feb. 28, 1995) (emphasis added), *review denied* (Minn. April 18, 1995).

The district court did not abuse its discretion in concluding that "[o]fficer Anselment is a credible witness." The district court did not err in its analysis of the law controlling articulable objective facts supporting a traffic stop.

Affirmed.

SHUMAKER, Judge (dissenting)

I respectfully dissent.

A police officer stopped Oliveros's car because she was driving it with a cracked windshield. The officer believed, and so testified, that "it's a violation to have a cracked windshield while driving a motor vehicle in Minnesota." This belief was the sole basis of the officer's stop. But the officer was incorrect in his belief that it is a violation of the law to drive a motor vehicle with a cracked windshield. It is not.

Minn. Stat. § 169.71, subd. 1(a)(1) (2010), states that "[a] person shall not drive or operate any motor vehicle with a windshield cracked or discolored *to an extent to limit or obstruct proper vision*." (Emphasis added.) The law is not violated unless two conditions exist: (1) a cracked windshield and (2) a crack of such an extent that it limits or obstructs the driver's vision. This record is devoid of any facts showing the location of the crack or how and why the crack limited or obstructed Oliveros's vision.

Officer Anselment testified that he noticed the crack after he stopped behind Oliveros's car, which was also stopped for a red light. His headlights revealed a crack that "[y]ou can see . . . a lot easier during the day, because the glass reflects and things . . . ." And although the probable-cause statement in the complaint described the crack as "a very large crack," the officer did not testify to the size, nature, location, or extent of the crack. The reason he did not do so is apparent from his testimony: he believed that a cracked windshield alone violated the law. To him it would be irrelevant where the crack was located or how and why it might interfere with the driver's vision, as required by statute, to

constitute a violation. Nothing in the law makes it illegal to drive a motor vehicle with a cracked windshield or even with a very large crack in a windshield. Rather, a violation occurs only if the crack, large or small, is of such an "extent" that it "limit[s] or obstruct[s] proper vision." Minn. Stat. § 169.71, subd. 1(a)(1). Neither the officer's testimony nor the complaint shows even minimally the "extent" of the crack relative to its effect on the driver's vision.

The majority states that "[t]he district court apparently inferred that the position of the crack on the windshield violated the second element of the statute." Although the district court is entitled to draw inferences from facts in evidence, no inference is proper unless it is rationally related to the facts. The only two facts in evidence from which the district court could have drawn an inference that there was a violation sufficient to support a traffic stop are that the windshield was cracked and that the crack was very large. But those two facts do not allow a rational inference as to the extent to which the crack might have limited or obstructed Oliveros's vision. Without some information as to the location of the crack relative to the driver's field of vision, the district court's inference was mere speculation. Because the district court's conclusion that the second condition of the statute existed was based purely on speculation, the court clearly erred in ruling that the officer made a legal traffic stop.

This case is controlled by *State v. George*, 557 N.W.2d 575 (Minn. 1997). In *George*, a law-enforcement officer stopped a motorcycle because it appeared to have three headlights. The officer believed that it was a violation of the law for a motorcycle to have

three headlights. It was not, and the supreme court held that the stop, based on an incorrect belief that the law had been violated, was illegal. *George*, 557 N.W.2d at 579.

The stop here was based on the officer's incorrect belief that a cracked windshield alone was a violation of the law. The stop, the arrest, the charges, and the state's case-in-chief at the omnibus hearing were premised on the incorrect notion that a cracked windshield per se violates the law. Even on appeal, the state maintains that erroneous belief in its brief: "Unlike the officer in *George*, Officer Anselment had an objective legal basis for suspecting that appellant was in violation of a traffic law. *After all, a cracked windshield is a violation of Minnesota law*. Therefore, *State v. George* is distinguishable and not similar in facts." (Emphasis added.)

The majority here goes astray in three ways. First, in attempting to distinguish *George*, the majority contends that, in that case, the officer misapprehended the law and there was no statutory prohibition against three headlights. But here, according to the majority, there was a violation of the law. In that conclusion, the majority begs the question. It assumes that which has not been shown by the evidence, namely, that the crack was of such an extent that it limited or obstructed Oliveros's vision. Furthermore, Officer Anselment also misapprehended the law for, as he testified, his sole basis for the stop was his belief that a cracked windshield per se violates the law. Thus, this case is not distinguishable from *George.*

The majority's second error is its unwarranted reliance on the unpublished decision in *State v. Wright*, No. C4-94-898, 1995 WL 81382 (Minn. App. Feb. 28, 1995), *review*

denied (Minn. Apr. 18, 1995). As an unpublished case, *Wright* has no authoritative or persuasive value here. Additionally, the facts in *Wright* are not sufficiently developed to show a reliable similarity to this case. The factual issue there appeared to be one of credibility relating to an alleged pretextual traffic stop. We have no credibility issues here. Oliveros agrees that Officer Anselment testified honestly and accurately about the stop. Oliveros does not contend that the stop was pretextual and, at least implicitly, concedes that Officer Anselment was at all times acting in good faith and with an honestly held belief that a cracked windshield violated the law.

Of particularly serious concern is the majority's apparent acceptance of the statement in *Wright* that it is proper for an officer to make "an investigatory stop to determine whether the crack obstructed proper vision had a particularized and objective basis." *Id.* at *1. The proposition the majority appears to endorse is that, if a law-enforcement officer observes a cracked windshield but is not able to conclude that the crack violates the second condition of the statute, the officer may stop the vehicle and then develop an articulable, objective basis for the stop. At least as to cracked windshields, the majority would seem to condone a stop on some evidence (an observed crack) coupled with a hunch (that the crack might violate the law). But, as the majority notes, "an officer may, consistent with the Fourth Amendment, 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, 675-76 (2000). The "reasonable, articulable suspicion" must precede the stop because without it the stop is not justified. A cracked windshield alone can never

justify a brief, investigatory stop because it simply provides no basis for a belief that "criminal activity is afoot."

Finally, the majority—as well as the state and the district court—appears to give credit to the officer's belief that "he could have cited Oliveros for a cracked windshield." That is not a fact that deserves credit in assessing the validity of this stop because Officer Anselment was incorrect in his belief that he could issue a citation merely for a cracked windshield.

The state failed to show that Officer Anselment had a reasonable, articulable suspicion that Oliveros was in violation of the law when he stopped her car, and the district court clearly erred when it speculated that the essential second condition of the statute was satisfied, despite the lack of any evidence whatsoever addressing that condition. The majority now perpetuates the district court's error, and I would reverse.