



11/24/92 STATE NEBRASKA v. DONALD L. MAUK

1 NCA 2314 (1992) | Cited 0 times | Nebraska Court of Appeals | November 24, 1992

SIEVERS, Chief Judge.

I. INTRODUCTION

Donald L. Mauk appeals his convictions of second-offense driving while under the influence of alcoholic liquor, see Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1990), and disorderly conduct, under § 20-42 of the Omaha Municipal Code. Mauk contends the police officer's investigatory stop leading to these convictions was unlawful due to a lack of reasonable suspicion that Mauk was engaged in any criminal activity. Consequently, Mauk contends that his arrest was the result of an illegal stop and that his motion to suppress the evidence obtained as a result of that stop should have been granted. The county court for Douglas County, sitting without a jury, denied Mauk's motion to suppress, both before trial and when preserved at trial. Mauk was found guilty of both offenses. The Douglas County District Court affirmed. We affirm in part, and in part reverse.

II. FACTUAL BACKGROUND

At about 11 p.m. on January 13, 1991, Omaha police officer David Carlson was operating a radar speedtrap near 90th and Pacific Streets in Omaha, Nebraska. Carlson's patrol car faced east, and Mauk was driving his International Harvester Scout westbound on Pacific. Carlson noted that Mauk was not speeding, but continued to observe Mauk's vehicle in his outside left mirror and rearview mirror as Mauk passed the checkpoint. While watching Mauk's vehicle as it drove farther west, Carlson also noted the approach of several eastbound cars. Carlson testified that at that time, he saw Mauk's taillights go off and on two times, suggesting to Carlson that Mauk was warning eastbound traffic of the radar speedtrap. Carlson made a U-turn to pursue Mauk and stopped him at 105th and Pacific Streets.

Carlson testified that he stopped Mauk for obstructing law enforcement by warning oncoming traffic of the radar speedtrap and for driving without his lights. Carlson did not cite Mauk for obstruction, but, instead, for driving without lights after dark, in violation of Neb. Rev. Stat. § 39-6,138 (Cum. Supp. 1992). During the stop, Carlson detected alcohol on Mauk's breath. The smell of alcohol, combined with Mauk's appearance and speech, led Carlson to conduct field sobriety tests. The record is imprecise, but at some point during or after the tests, Mauk called Carlson an "asshole." Mauk was then placed under arrest and transported to the police station, where an Intoxilyzer test showed Mauk to have a blood alcohol content of .149. The testing and the results were not challenged.



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Mauk was charged with second-offense driving while under the influence of alcoholic liquor and with disorderly conduct for calling Carlson an "asshole."

III. ASSIGNMENTS OF ERROR

On appeal, Mauk argues that the district court erred in affirming the county court's decision that the initial investigatory stop of his vehicle was lawful, which decision made the evidence obtained as a result of that stop admissible.

Mauk also claims that there was insufficient evidence to sustain a conviction for disorderly conduct and, furthermore, that Omaha Mun. Code § 20-42 is unconstitutionally vague and overly broad.

IV. DISCUSSION

1. The Investigatory Stop

The law is clear that a police officer need not establish probable cause to stop a motor vehicle, however, there must be an "objective manifestation, based upon the totality of the circumstances, that the person stopped has been, is, or is about to be engaged in criminal activity." *State v. Ege*, 227 Neb. 824, 826, 420 N.W.2d 305, 308 (1988). The police officer must have a particularized and objective basis for suspecting that the stopped person is engaged in criminal activity, and the reasonableness of that suspicion must be determined on a case-by-case basis. *State v. Mahlin*, 236 Neb. 818, 464 N.W.2d 312 (1991).

Mauk argues that no criminal activity existed to justify Carlson's intrusion. Mauk testified that he turned his headlights off and on, as Carlson said he had observed, but contends that such flashing of headlights at night does not constitute criminal activity. However, Nebraska law specifically requires cars to be equipped with lighted front and rear lamps from one-half hour after sunset to one-half hour before sunrise. § 39-6,138. It follows, therefore, that since this incident occurred at approximately 11 p.m., Carlson was justified in making the stop based on an objective manifestation of a potential violation of § 39-6,138. Furthermore, in addition to the requirement that front and rear lamps be lit after dark, § 39-6,138 also makes it unlawful to operate a motor vehicle unless "the condition of the lamps and electric circuit is such as to give substantially normal light output" and "the taillight shows red directly to the rear, the glass in the taillight is unbroken, the lamp is securely fastened, and the electric circuit is free from grounds or shorts." § 39-6,138(5). Based on the language of the statute, a police officer would also be justified in stopping a vehicle for broken headlights or taillights, as well as for potential electrical shorts in the lighting system, which shorts could also account for the flashing Carlson observed. Thus, the statute provides several grounds upon which a police officer could reasonably suspect a road violation upon seeing taillights flicker off and on, as in this case.



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Although Carlson testified that he suspected Mauk of warning oncoming traffic of the radar speedtrap, that was not the only basis for which he conducted the investigatory stop. However, even if Carlson subjectively proceeded on an obstruction of law enforcement theory only, a court is not limited to reviewing only the police officer's subjective intentions. Rather, it is well settled that the test for probable cause is ""not the articulation of the policeman's subjective theory but the objective view of the facts."" Warren v. City of Lincoln, Neb., 864 F.2d 1436, 1439 (8th Cir. 1989), cert. denied 490 U.S. 1091, 109 S. Ct. 2431, 104 L. Ed. 2d 988 (quoting U.S. v. O'Connell, 841 F.2d 1408 (8th Cir. 1988)). The test for reasonable suspicion should likewise follow this same standard. Therefore, Carlson's subjective reasons for stopping Mauk must give way to an objective view of the facts by the court.

In this case, Carlson testified that he stopped Mauk for impeding law enforcement, as well as for driving without his lights. An objective view of the facts supports a finding of reasonable suspicion that Mauk was engaged in a road violation by turning off his headlights when they were required to be on. Mauk admitted turning off his lights, and he was cited for driving without his lights, in violation of § 39-6,138. Since Mauk was driving his vehicle under a condition that when observed potentially violated the law, Carlson possessed an articulable and reasonable suspicion to stop Mauk. An investigatory stop is lawful and justifiable when the police officer can ""point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."" State v. Ege, 227 Neb. 824, 826, 420 N.W.2d 305, 308 (1988) (quoting Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). See, also, State v. Ebberson, 209 Neb. 41, 305 N.W.2d 904 (1981); Neb. Rev. Stat. § 29-829 (Reissue 1989).

A lesser quantum of proof is required for an investigatory stop than is necessary for arrest and conviction. A police officer may approach a person for purposes of investigating criminal behavior even though there is no probable cause to make an arrest. See, Terry v. Ohio, supra; State v. Patterson, 237 Neb. 198, 465 N.W.2d 743 (1991); State v. Caples, 236 Neb. 563, 462 N.W.2d 428 (1990). The purpose of an investigatory stop is to clarify ambiguous situations even if it is probable that the vehicle or its occupants are innocent of any wrongdoing. State v. Bridge, 234 Neb. 781, 452 N.W.2d 542 (1990).

Mauk relies on an Ohio case which reversed a defendant's conviction for obstructing the performance of a police officer's duty, in violation of a local ordinance, by flashing his headlights during daylight to warn traffic of a radar speedtrap. City v. Wason, 50 Ohio App. 2d 21, 361 N.E.2d 546 (1976). The Ohio Court of Appeals determined that warning drivers of a radar speedtrap does not by itself sustain a conviction for obstruction, especially where there was no evidence that the drivers being warned were breaking the law by speeding.

Here, however, Mauk was not charged with obstructing law enforcement. He was cited for driving without his lights at night. In the Ohio case, the incident occurred during daylight, and thus, the factual settings are materially different. Accordingly, we believe Wason to be distinguishable.



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Whether Mauk was warning oncoming traffic of a radar speedtrap or merely signaling a driver to turn on his car's headlights, as he testified, is not determinative of whether the officer had reasonable suspicion of unlawful activity to justify a Terry stop. Carlson saw Mauk's taillights go off when the law required them to be on and free of electrical shorts.

In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold a trial court's findings of fact unless those findings are clearly erroneous. *State v. Pope*, 239 Neb. 1009, 480 N.W.2d 169 (1992).

We hold that the evidence supports the trial court's order denying Mauk's motion to suppress. Carlson observed a potential road violation which prompted him to stop the Mauk vehicle. His subsequent field sobriety testing was based upon observations made following a legitimate stop. In *State v. Halligan*, 222 Neb. 866, 387 N.W.2d 698 (1986), the Nebraska Supreme Court held that a police officer's observations of a motorist's bloodshot eyes, slurred speech, and alcohol-tainted breath constituted probable cause for a valid warrantless arrest for driving while under the influence. Once probable cause was present that Mauk was driving while under the influence of alcoholic liquor, Carlson justifiably arrested Mauk and took him to the police station for further testing. Mauk did not challenge whether there was probable cause for the arrest or whether the Intoxilyzer test was valid, but sought only to exclude evidence by challenging the initial stop. Since we have concluded the investigatory stop was lawful, Mauk's conviction for driving while under the influence of alcoholic liquor is affirmed.

2. Disorderly Conduct

Mauk was also convicted of disorderly conduct because he called Carlson an "asshole," in violation of § 20-42 of the Omaha Municipal Code (which is in evidence), which provides:

It shall be unlawful for any person purposely or knowingly to cause inconvenience, annoyance or alarm or create the risk thereof to any person by:

- (a) Engaging in fighting, threatening or violent conduct; or
- (b) Using abusive, threatening or other fighting language or gestures; or
- (c) Making unreasonable noise.

We set forth all of the evidence from the record which forms the basis for the conviction. Carlson's testimony regarding the alleged disorderly conduct incident was as follows: "Q- Did he ever use profanity to you at that location? A- Yes, sir. He did. Q- And what did he say to you? A- He called me an ass hole."



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There was no evidence in the record that Mauk engaged in any fighting, threatening, or violent conduct. The evidence was clearly insufficient to support Mauk's conviction for disorderly conduct under the Omaha ordinance. The use of the word "asshole" by itself does not constitute abusive, threatening, or fighting language.

"Abusive language" and similarly broad terms have been held to pass constitutional muster under First Amendment scrutiny only if they are construed to mean "fighting words." *State v. Boss*, 195 Neb. 467, 238 N.W.2d 639 (1976). Fighting words are those words which "'by their very utterance inflict injury or tend to incite an immediate breach of the peace.'" *Id.* at 471, 238 N.W.2d at 643 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942)). Fighting words depend not only upon the words, but upon the circumstances as well. *State v. Boss*, *supra*.

There was no evidence that Carlson was injured by virtue of Mauk designating him as an "asshole," nor did the utterance incite an immediate breach of the peace. The same word and the same ordinance were scrutinized in *Buffkins v. City of Omaha, Douglas County, Neb.*, 922 F.2d 465 (8th Cir. 1990). In that case, Buffkins was stopped and searched for drugs at an airport. Upon her release, she was told to "'have a nice day.'" *Id.* at 467. Her response was either "'I will have a nice day, asshole,'" or a reference to an "'asshole system.'" *Id.* She was then arrested for violating the same municipal ordinance involved here. The U.S. Court of Appeals for the Eighth Circuit found that there was no evidence that Buffkins' speech incited immediate lawless action. Neither of the police officers involved contended that Buffkins became violent or threatened violence.

The Buffkins court also noted that the U.S. Supreme Court in *Houston v. Hill*, 482 U.S. 451, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987), recognized that the fighting words doctrine may be limited where speech is directed toward police officers because "police officers are expected to exercise greater restraint in their response than the average citizen." *Buffkins*, 922 F.2d at 472.

The First Amendment protects a significant amount of verbal criticism and challenge directed at police officers. . . . The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.

Buffkins, 922 F.2d at 472 (quoting *Houston v. Hill*, *supra*).

Although we do not condone abusive language directed toward law enforcement officers, an occasional colorful or crude designation by an arrestee is quite probably the least of the street officer's present-day worries. Mauk's use of the word "asshole," without more being shown, which was not, is not a violation of the Omaha disorderly conduct ordinance.

Since this court finds insufficient evidence to support the conviction, we do not address Mauk's claim that the ordinance is unconstitutional.



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AFFIRMED IN PART, AND IN PART REVERSED.

