

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES CLINTON MARSH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73834

FILED

OCT 29 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

James Clinton Marsh appeals from a judgment of conviction entered pursuant to a guilty plea of trafficking in a controlled substance and transporting a controlled substance. Fourth Judicial District Court, Elko County; Alvin R. Kacin, Judge.

Marsh claims the district court erred by denying his pretrial motion to suppress evidence because the law enforcement officers did not possess the reasonable suspicion necessary to justify prolonging the traffic stop.¹ “Suppression issues present mixed questions of law and fact. This court reviews findings of fact for clear error, but the legal consequences of those facts involve questions of law that we review de novo.” *State v. Beckman*, 129 Nev. 481, 485-86, 305 P.3d 912, 916 (2013) (internal quotation marks and citations omitted).

“[T]he United States and Nevada Constitutions both guarantee the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. Temporary detention of individuals during a traffic stop constitutes a seizure of persons within the meaning of these constitutional provisions.” *Id.* at 486, 305 P.3d at 916

¹Marsh reserved his claim for appeal pursuant to NRS 174.035(3).

(internal quotation marks, brackets, and citations omitted). “As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.” *Id.* (quoting *Whren v. United States*, 517 U.S. 806, 810 (1996)).

“[A] police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution’s shield against unreasonable seizures.” *Rodriguez v. United States*, ___ U.S. ___, ___, 135 S. Ct. 1609, 1612 (2015). While a police officer “may conduct certain unrelated checks during an otherwise lawful traffic stop[,] . . . he may not do so in a way that prolongs the stop,” *Id.* at ___, 135 S. Ct. at 1615, unless “the results of the . . . stop provide [him] with reasonable suspicion of criminal conduct,” *Beckman*, 129 Nev. at 489, 305 P.3d at 918. Thus, for example, a dog sniff that is conducted while another officer is in the process of writing a warning ticket does not improperly prolong the duration of the stop, *Illinois v. Caballes*, 543 U.S. 405, 406-09 (2005); whereas, a dog sniff that is conducted after the purpose for the traffic stop has been completed does improperly prolong the duration of the stop, *Rodriguez*, ___ U.S. at ___, 135 S. Ct. at 1613-15.

“Reasonable suspicion is not a stringent standard, but it does require something more than a police officer’s hunch. A law enforcement officer has a reasonable suspicion justifying an investigative stop if there are specific, articulable facts supporting an inference of criminal activity.” *State v. Rincon*, 122 Nev. 1170, 1173, 147 P.3d 233, 235 (2006); see NRS 171.123(1). “In determining the reasonableness of a stop, the evidence is viewed under the totality of the circumstances and in the context of the law enforcement officer’s training and experience.” *Rincon*, 122 Nev. at 1173-74, 147 P.3d at 235. We conclude the police officer lacked reasonable suspicion of criminal activity under the circumstances presented here.

The district court heard argument on the motion, admitted an audio-video recording of the police encounter into evidence, reviewed both the audio-video recording and the preliminary hearing transcript, and made the following factual findings. On June 8, 2016, at approximately 1:30 p.m., Eureka County Deputy Sheriff Evertsen was travelling eastbound on Interstate 80 in his marked patrol vehicle. Near mile marker 286, he noticed a dark-colored SUV with North Dakota license plates was approaching him from the rear.

The SUV was “swerving and driving in an erratic manner,” and it was advancing faster than Deputy Evertsen was driving. It was traveling in an adjacent travel lane, came within 20 feet of Deputy Evertsen’s patrol vehicle, and then slowed down and traveled at the speed limit. It exited the interstate at mile marker 292 but quickly returned to the interstate and caught up with Deputy Evertsen one or two miles later. It continued to swerve and weave in and out of its travel lane. When it passed Deputy Evertsen near Elko, it was traveling about 80 mph in or near a posted 65 mph speed zone.

Deputy Evertsen followed the SUV when it exited the interstate at mile marker 298, and he recorded its movements with his dashboard camera. The SUV drifted onto the right shoulder of the road before resuming its travel lane, it entered a left-hand-turn lane and turned left without signaling, it traveled into the right-turn-traffic-only lane while making its left turn, and it traveled on and off of the broken white line that separated the two northbound travel lanes. It then pulled into a gas station and the driver got out and began pumping gas.

Deputy Evertsen parked his patrol vehicle behind the SUV and continued recording. He turned on his rear red and blue caution lights, but these lights were not visible from the front of his vehicle. He contacted the Elko dispatcher to have an Elko police officer come to his location because

he was concerned about the driver's erratic driving pattern. And he exited his vehicle and made contact with the driver because he was concerned that the driver would drive away before the Elko police officer arrived.

Deputy Evertsen confronted Marsh about his erratic driving pattern. Marsh seemed surprised that "[he] was all over the road," he denied drinking any alcoholic beverages, he admitted that he was tired, and he stated he had slept for three hours that morning and was "on his way from a trip to California." Deputy Evertsen felt that Marsh was nervous, he did not detect any alcohol, and he was concerned "there could be something else in [Marsh's] system to cause the impairment." Deputy Evertsen had some suspicions that Marsh might be transporting narcotics due to the areas Marsh was traveling from and to.

Deputy Evertsen told Marsh that a local law enforcement officer was responding, he took Marsh's driver's license, and he told Marsh to wait. Elko Police Officer Jeremy Shelley subsequently arrived at the gas station. Officer Shelley had 12 years of law enforcement experience, was a Drug Recognition Expert, and had received training in narcotics interdiction. Deputy Evertsen explained his concerns to Officer Shelley, and Officer Shelley began questioning Marsh about his driving.

Marsh insisted he was simply tired. He admitted his SUV had "kicked up dust" near the airport. He stated he was going to stop to take a nap, he never saw Deputy Evertsen, and "something must not be right." He denied drinking or taking illegal drugs or prescription medication. He said he left the California bay area at 11:30 p.m. the previous night, he slept for a couple of hours in Vallejo and then again in Auburn, and he stopped at a pawnshop in Lovelock. He said that he was going to Montana.

Officer Shelley asked Marsh for consent to search the SUV. After Marsh refused to consent to the search, Officer Shelley questioned him about his sobriety and both law enforcement officers confronted him

with their concerns about his unsafe driving. Although Officer Shelley had a concern that Marsh may have been using an illegal drug to stay awake, he did not observe any signs that Marsh was under the influence of a controlled substance.

Officer Shelley began looking through the windows of the SUV. He observed an ice chest, a tablet computer, a partially eaten candy bar, and some stains on the front seats. Meanwhile, Deputy Evertsen asked Marsh why he exited the interstate at mile marker 292, and Marsh explained he exited the interstate in search of fuel and he returned to the interstate because there was no fuel at that exit.

Officer Shelley learned from Deputy Evertsen that Marsh's driver's license was valid and there were no wants or warrants. Officer Shelley then informed Marsh that a drug detection dog would be sniffing his SUV. Less than 3 minutes later, Officer Jason Checketts arrived with his drug detection dog and the dog alerted to the presence of controlled substances in the SUV. Thereafter, Officer Shelley searched the SUV, found methamphetamine, and had Marsh placed in handcuffs.

The district court further found that Officer Shelley had abandoned the DUI investigation based on his suspicion that Marsh "had made a roundtrip, nonstop journey' to California 'with the sole purpose of transporting narcotics.'" Officer Shelley suspected Marsh was transporting illegal narcotics because "(a) the bay area is a hub for the distribution of illegal narcotics; and (b) [Marsh] gave 'generic answers' to questions and 'claimed that he was tired because he . . . [chose] to leave at 11:30 p.m. . . . but [had] to stop within the first two hours to sleep, again two hours later to sleep, and then being four hours later so tired that he's unable to maintain the roadway.'" Officer Shelley believed that Marsh started his trip in either Montana or North Dakota. And Officer Shelley relied upon

his “training that drug carriers make quick trips to retrieve controlled substances ‘to limit their exposure’ to law enforcement personnel.”

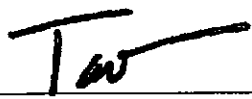
Although the district court’s factual findings are supported by the record and are not clearly wrong, the totality of these findings does not support the district court’s legal conclusion that Officer Shelley possessed the reasonable suspicion necessary to justify prolonging the traffic stop. Officer Shelley articulated *general* facts—the bay area is a hub for the distribution of illegal drugs, drug couriers make quick trips to limit their exposure, Marsh had visited the bay area, and Marsh was driving while tired—he did not articulate *specific* facts that *reasonably* supported his suspicion that Marsh was transporting illegal drugs. *Cf. Reid v. Georgia*, 448 U.S. 438, 440-41(1980) (holding a law enforcement officer did not have reasonable suspicion of criminal activity based solely on his observations that (1) the petitioner had arrived from a city that was a principal place of origin of cocaine sold elsewhere in the country, (2) the petitioner arrived early in the morning when law enforcement activity is diminished, (3) petitioner appeared to conceal the fact he was traveling with a companion, and (4) petitioner and his companion had no luggage other than their shoulder bags); *United States v. Andrews*, 600 F.2d 563, 566 (6th Cir. 1979) (holding that the fact the defendant’s two companions were nervous in airport and the fact the defendant and his companions were traveling from city which was alleged narcotics distribution center was not entitled to any weight in determining whether law enforcement officers were justified in stopping them). Further, Officer Shelley’s observations regarding the ice chest, tablet computer, partially eaten candy bar, and stains on the seats could not provide a basis for finding reasonable suspicion to prolong the traffic stop because the record demonstrates Officer Shelley requested the drug detection dog before he looked through the SUV’s windows.

Accordingly, we conclude the prolonged traffic stop constituted an unreasonable seizure.

The State argues that even if Officer Shelley lacked reasonable suspicion to justify prolonging the traffic stop, the evidence should not be suppressed because the constitutional violation “was not a purposeful or flagrant one, and exclusion of the evidence therefore would be unlikely to appreciably deter police misconduct.” We disagree and conclude the evidence must be suppressed. *See Somme v. State*, 124 Nev. 434, 444, 187 P.3d 152, 159 (2008) (“Unless a recognized exception applies, both physical evidence and a defendant’s statements obtained as a result of an illegal search or seizure should be suppressed.”). Having concluded that the district court erred by denying Marsh’s pretrial suppression motion, we

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court to allow Marsh to withdraw his guilty plea.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Alvin R. Kacin, District Judge
Gary D. Woodbury
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk