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STATE OF MINNESOTA

IN COURT OF APPEALS

JOHN CORTLAND ROBINSON,

APPELLANT,

vs.

COMMISSIONER OF PUBLIC SAFETY,

RESPONDENT.

FORMAL BRIEF OF APPELLANT JOHN CORTLAND ROBINSON

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I. STATEMENT OF THE LEGAL ISSUES

1. Whether the trial court's determination that specific, objective and particularized facts existed to justify the investigatory stop of Appellant's vehicle is supported by sufficient evidence in the record?

2. Whether the trial court abused its discretion or erroneously applied the law in sustaining the revocation of Appellant's driver's license?

How issues were raised in trial court: Within 60 days of the Respondent's revocation of Appellant's driver's license on March 16, 2017, Appellant timely filed and served a Petition for Judicial Review of the Commissioner's actions pursuant to Minnesota Statutes Section 169A.53, Subd. 2. *Doc. Index 1-3.* Appellant's Petition for Judicial Review specifically challenged the propriety of the seizure/stop of Appellant's vehicle. *Doc. Index 3 at paragraph 1.*

Decision of the Trial Court: The trial court concluded that law enforcement had "specific and articulable suspicion of criminal activity to stop" Appellant's vehicle. *Add. at page 3; Doc. Index 13, at page 3.*

Preservation of Issue: The issues were presented to the trial court at the evidentiary hearing and in post-hearing written arguments. The issues were, therefore, properly preserved for appellate review. Appellant timely commenced this appeal within 30 days of the trial court's decision as required by Minnesota Statutes Section 169A.53, Subd. 3(f)(2017). *Doc. Index 14-17.*

Applicable Cases and Statutory Provisions: Minn.Stat. Sections 169A.53, Subds. 2 and 3(b)(1); State v. Harris, 590 N.W.2d 90 (Minn. 1999); State v. Johnson, 444 N.W.2d 824 (Minn. 1989); State v. Schrupp, 625 N.W.2d 844 (Minn.App. 2001), *review denied* (Minn. July 24, 2001); Fourth Amendment, United States Constitution; Article I, Section 10, Minnesota Constitution, as amended.

II. STATEMENT OF THE CASE

This is an appeal of the trial court's order sustaining the revocation of Appellant's driver's license on March 16, 2017. This matter was heard on October 3, 2017, in Hennepin County District Court, Fourth Judicial District, by the Honorable Karen A. Janisch, Judge of District Court. The trial court issued its written Order Sustaining the Revocation of Appellant's Driver's License on November 7, 2017. *Doc. Index 13*.

On November 27, 2017, Appellant timely commenced this appeal seeking review of the decision of Judge Janisch. *Doc. Index. 14-16*.

III. STATEMENT OF THE FACTS

The only witness at the evidentiary hearing conducted on October 3, 2017 was Edina Police Officer Nicholas Donahue. *Tr. 1-3*. The only exhibit introduced at the evidentiary hearing was an aerial photograph of the area in which the events at issue occurred. The exhibit fairly and accurately depicted Edina High School, the adjacent Valley View Middle School and the surrounding residential streets. *Tr. 8; Add. at 1*.

Officer Nicholas Donahue has been a licensed police officer for almost 9 years. He has previously been employed by the Steele County (MN) and Lyon County (MN) Sheriff Departments. For almost two years, he has been employed by the Edina Police Department. *Tr. 3; Add. 2 [Finding of Fact No. 1]*.

With regard to the matter at issue in this proceeding, Officer Donahue began his shift at 6 p.m. on March 15, 2017 and ended his shift at 6 am on March 16, 2017. He was alone on routine patrol in a fully-marked Ford SUV police vehicle. *Tr. 6-7*; *Add. at page 2 [Finding of Fact No. 2]*.

On March 16, 2017, at approximately 12:55 a.m., Officer Donahue was on routine patrol and pulled into the east entrance of Valley View Middle School. *Tr. 9, Exhibit 1 [position marked as "1"]*. He had not received, and was not responding to, a report of suspicious activity or possible theft at either Valley View Middle School or the adjacent Edina High School. *Tr. 7, Add. 2 [Finding of Fact Nos. 3-4]*. As he pulled into the east entrance of the parking lot to the south of Valley View Middle School, Officer Donahue observed a "dark passenger car drive out from near the high school entrance". *Tr.* 4. He could not recall if there were any other cars in that area. *Id.* Officer Donahue admitted, on cross-examination, that when he first observed the dark sedan it was "a couple of hundred yards away" and was driving towards the west exit of the student parking lot. *Tr. 10; See, Exhibit 1 [position marked "2"]*.

Officer Donahue - during cross-examination – acknowledged that when he first observed the dark sedan that its headlights were on and that he could not see the license plate of the vehicle, the gender of the driver, the race of the driver and that he did

not (due to the large distance between the two vehicles) make eye contact with the driver of the sedan. *Tr. 11*. Officer Donahue also admitted that when he first observed the sedan it was not driving unlawfully or inappropriately. *Id.; Add. at 2 [Finding of Fact No. 5]*.

At the time of his initial observation of the moving sedan in the school parking lot, Officer Donahue acknowledged that Edina High School and Valley View Middle School were then in session and that it was "entirely possible" and "just as possible" that the vehicle he observed was custodial or other school staff leaving the school grounds as it was a "suspicious" vehicle. *Tr. 12-13.*

Officer Donahue candidly admitted that he did not immediately pursue, stop or otherwise indicate to the sedan driver - through his use of flashing headlights, siren, spotlight or emergency lights - that he wanted to stop the vehicle. He also did not activate his squad car video camera. *Tr. 11-12; Add. at 2 [Finding of Fact No. 7]*.

Officer Donahue testified that he observed the vehicle stop before it exited the parking lot. He stated that the vehicle then crossed over Valley View Road and proceeded straight ahead onto Chapel Lane. He further testified that the vehicle proceeded one block south on Chapel Lane before signaling a left turn and turning left (heading east) on Chapel Drive. The officer stated that he was behind the vehicle (at various distances) at all times and was able to obtain its license plate number. From his squad car computer search of the license plate, Officer Donahue learned that the vehicle was leased to Appellant and that Appellant resided in the "5500 block" of Goya Lane – a location approximately one mile north of the Valley View Middle School/Edina

High School complex. Officer Donahue also learned that the vehicle was properly licensed, was not reported stolen and that the lessee, Mr. Robinson, did not have any outstanding arrest warrants or any prior criminal history. *Tr. 13-16; Add. at 2 [Finding of Fact Nos. 8-9]*.

Officer Donahue continued to follow the Appellant's vehicle for about 3-4 blocks as it proceeded eastbound on Chapel Drive. Appellant's vehicle then stopped at the intersection of Chapel Drive and Antrim Road and signaled a left turn onto Antrim Road. At this time, Officer Donahue activated his squad car video camera. Appellant turned left (north) on Antrim Road and proceeded one block to the intersection with Valley View Road. At Valley View Road, Appellant properly signaled for a right turn to head east on Valley View Road. After approximately two blocks, Officer Donahue activated his emergency lights. Appellant immediately complied and stopped his vehicle at the intersection of Valley View Road and Grace Terrace. *Tr. 13-16; Add. at 3 [Finding of Fact No. 11]; See, also, Exhibit 1*.

During cross-examination, Officer Donahue admitted that he did not observe any equipment or licensing violations with Appellant's vehicle and that he did not observe (or note in his report) any traffic violation(s) committed by Appellant. He further acknowledged that Petitioner always drove within the speed limit, signaled all turns, made complete stops as required and otherwise was law-abiding. *Tr. 13-16; Add. at 3 [Finding of Fact No. 13]*.

When asked for the reason he stopped Appellant's vehicle during cross-examination, Officer Donahue testified as follows:

Q: Okay. At no time from the student parking lot exit you noted on Exhibit 1 through the stop location did you see anything illegal or unlawful or unusual, correct?

A: That is correct.

Q: It was simply the car being in the area at roughly 1:00 a.m., correct?

A: Yes.

Tr. 16, Lines 8-15.

Officer Donahue testified that he told Appellant that he was stopped because his vehicle was "suspicious". Officer Donahue asked Mr. Robinson what he was doing in the parking lot. Appellant informed Officer Donahue that he was out driving around and listening to music so that he did not disturb his sleeping family. Appellant further informed Officer Donahue that he had stopped in the parking lot to "fix" his cell phone because it had stopped streaming music that he wanted to listen to and that he thought it was safer to stop and fix the problem rather than try and do so while driving. Officer Donahue also specifically asked Appellant if he had seen the officer's squad car when he was in the parking lot. Appellant told Officer Donahue that he did not know that the vehicle was a squad car. *Tr. 16-18; Add. at 3 [Finding of Fact No. 12]*.

Officer Donahue testified that he believed that Appellant's vehicle was "suspicious" for the following reasons: (1) lateness of the hour; (2) Appellant's vehicle was in the school parking lot outside of normal business hours; (3) construction sites are the targets of thieves[1]; and (4) because the route driven by Appellant after he left the school parking lot was not the most "direct route" to his home. *Tr. 4-5; Add. at 3*

[11] On March 16, 2017, Edina High School was under construction at the far north end of the school complex. *Exhibit 1*.

[Finding of Fact No. 10]. During cross-examination, Officer Donahue admitted that nothing requires a driver to "take the most direct route to or from his home simply because it's 1:00 a.m. in the morning". *Tr. 20*. Other than Officer Donahue's assumption that Appellant was or should be "driving home" at 1:00 a.m., there was no other evidence introduced of Appellant's actual or intended destination.

IV. STANDARD OF REVIEW

The United States and Minnesota Constitutions prohibit unreasonable searches and seizures by the government. *U.S. Const. amend. IV: Minn. Const. art. 1, Section 10*. Investigative stops and seizures of the person are subject to the prohibitions against unreasonable searches and seizures in the Fourth Amendment to the United States Constitution and Article I, Section 10 of the Minnesota Constitution. United States v. Cortez, 449 U.S. 411 (1981); State v. Askerooth, 681 N.W.2d 353, 359 (Minn. 2004). A warrantless seizure is unreasonable unless it falls under a recognized exception to the warrant requirement. State v. Lemert, 843 N.W.2d 227, 230 (Minn. 2014).

For the purposes of the 4th Amendment, and Article I, Section 10 of the Minnesota Constitution, the "temporary detention of individuals during the stop of an automobile by the police constitutes a seizure under the Fourth Amendment". State v. Fort, 660 N.W.2d 415, 418 (Minn. 2003)(quotations omitted).

To justify an investigatory stop, an officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion". Lemert, *citing*, Terry v. Ohio, 391 U.S. 1, 26-27

(1968); Heien v. North Carolina, 135 S.Ct. 530, 536 (2014). When law enforcement has not directly observed criminal activity, facts required to support an investigatory stop are those "that, by their nature, quality, repetition, or pattern are so unusual and suspicious that they support at least one inference of the possibility of criminal activity". State v. Schrupp, 625 N.W.2d 844, 847-48 (Minn.App. 2001), *review denied* (Minn. July 24, 2001).

A decision to conduct a stop must be based on more than "mere whim, caprice or idle curiosity". Marben v. Minn. Dep't of Public Safety, 294 N.W.2d 697, 699 (Minn. 1980). "Reasonable suspicion" of criminal activity must be based upon "specific, articulable facts that allow the officer to be able to articulate * * * that he or she had a particularized and objective basis for suspecting the seized person" is, or is about to be, engaged in criminal activity. State v. George, 557 N.W.2d 575, 578 (Minn. 1997) (citation omitted); State v. Diede, 795 N.W.2d 836, 842-43 (Minn. 2011). While the reasonable suspicion standard is not high, it requires "at least a minimal *objective* justification for making the stop". State v. Timberlake, 744 N.W.2d 390, 393 (Minn. 2008). (Emphasis added).

Reasonable suspicion must be evaluated from the perspective of a trained police officer under a "totality-of-the-circumstances approach". Lemert, 843 N.W.2d at 230-31. However, the reasonableness test cannot be satisfied by relying on an inchoate and unparticularized suspicion or hunch. State v. Schrupp. s*upra.*

A district court's determination of reasonable suspicion is subject to the *de novo* standard of review, but the district's factual findings are accepted unless they are clearly erroneous. State v. Smith, 814 N.W.2d 346, 350 (Minn. 2012).

V. REQUEST FOR ORAL ARGUMENT

Appellant seeks to present oral argument on the issues raised in this matter.

VI. ARGUMENT

This case presents the Court with the question of whether the "reasonable suspicion" standard that constitutionally requires a "minimal level of objective justification" for an investigatory stop has any actual meaning or limitation beyond simply approving as "credible" an officer's subjective, unparticularized hunch that the person seized – based only upon the officer's "training and experience" – is or is about to be engaged in criminal activity. State v. Harris, 590 N.W.2d 90 (Minn. 1999); State v. Timberlake, 744 N.W.2d 390, 393 (Minn. 1995).

While Appellant acknowledges that the "reasonable suspicion" threshold is low, "it is a standard of *some* degree". State v. DeRoche, Unpublished Decision of the Court of Appeals, Appellate File No. A15-1871 (Filed October 11, 2016)(Dissent of Judge Ross). (Emphasis in original). As eloquently stated by Judge Ross:

> If driving briefly just onto a vacant lot somewhere near a different lot where a theft occurred "maybe a month or two" earlier allows police to force a stop for a police investigation, then the standard is virtually meaningless. I respectfully dissent because we must distinguish between a mere "hunch" (undeveloped and vague speculation), which can

> never justify a police stop, and reasonable, articulable suspicion that a crime has occurred or is about to occur, which does justify a police stop.

In this case, neither the evidence of record nor the proper application of governing precedent establishing the limits of "reasonable suspicion" support the decision of the trial. *Add. 1-6.*

A. <u>The factual record does not support the stop of Appellant's vehicle</u>.

The trial court simply reiterated Officer Donahue's speculative and subjective testimony that he "found the presence of the vehicle at the school suspicious because it was late at night, the schools were closed, and there was a construction site at the high school near where the vehicle was located". *Add. at 2 [Finding of Fact No. 6].* The trial court then compounded its erroneous reliance on the objectively unsupported hunch of Officer Donahue to justify the stop of Appellant upon his unknown "training and experience" that allegedly informed him that construction sites are "often areas of crime such as theft". *Id.*

These findings are unsupported by any evidence in the record.

Officer Donahue did not testify that he knew of any recent actual or reported theft at the high school construction site to provide an objective basis for his claimed suspicion. Officer Donahue also did not provide any facts demonstrating how or if his training and experience as an Edina police officer objectively and reasonably supported or informed his belief that construction sites in Edina are often areas of crime. Instead, he merely stated a subjective, generalized and unsupported belief that "construction sites" are "often" areas of crime. It was nothing more than speculation for the trial

court to find, effectively by judicial notice, that construction sites in Edina, Minnesota are often areas of crime and that Officer Donahue's training and experience as an Edina police officer provided him with this so-called knowledge.

Absent any evidence in the record demonstrating a basis for the officer's reasonable and objective reliance upon the catch-all category of his/her "training and experience" to justify actions that are otherwise devoid of specific, objective and particularized facts, the officer's subjective belief that something is suspicious is an improper method of legitimizing actions based only upon an undeveloped "hunch" that does not satisfy the objectively reasonable analysis required to uphold an investigatory stop under the 4th Amendment. Timberlake, *supra*; Schrupp, *supra*.

Moreover, the trial court's finding that Officer Donahue subjectively "found" that Appellant's vehicle was suspicious is irrelevant. The trial court's obligation was to independently determine – given the absence of any direct observation by the officer of overt illegality – whether the "*objective* facts, by their nature, quality, repetition, or pattern become *so unusual and suspicious* that they support at least one inference of the possibility of criminal activity". State v. Schrupp, 625 N.W.2d 844, 847-48 (Minn.App. 2001), *review denied* (Minn. July 24, 2001).

The trial court did not do so. Instead, the trial court simply accepted the officer's subjective belief that Appellant's actions were "suspicious" without examining or determining if "the activities noted * * * could be consistent with the activities of any multitude of innocent persons". State v. Harris, 590 N.W.2d 90, 100-101 (Minn. 1999), *citing*, State v. Johnson, 444 N.W.2d at 824 [reasonable articulable suspicion established

when motorist makes evasive moves immediately after making eye contact with trooper]. Officer Donahue failed to provide "any facts sufficient to distinguish [Appellant's] conduct from innocent" driver's in the area. *Id.* The absence of any activity by Appellant that was "inconsistent with legal activity" led the Harris court to conclude that the officers were "acting on a mere hunch" that Harris was engaged in criminal activity and, as a result, did not provide a sufficient basis for the investigatory stop. *Id.* The result should be the same in this case.

In this case, Officer Donahue was only on routine patrol and was not responding to any call for assistance, suspicious behavior or possible theft from the construction site located about 1,000 yards north of the school parking lot where Appellant's vehicle was initially observed. The evidence of record, including the aerial map of the area admitted as Exhibit 1, clearly indicates that Appellant's vehicle was moving and was a substantial distance from the area of the construction site when first observed by Officer Donahue. Other than being in the parking lot a substantial distance from the construction site, the record is devoid of any evidence that the officer had any specific, particularized or objective factual basis to believe that Appellant had actually driven to, was departing from or had even been in the vicinity of the construction site rather than simply pulling into the parking lot for a legitimate, innocent reason. Harris, *supra*.

Officer Donahue's failure to immediately conduct an investigatory stop of Appellant's vehicle, despite his alleged belief that Appellant's vehicle was "suspicious" when first observed in the school parking lot, is quite telling. This failure to act is an

admission that he ***knew*** that he did not then possess a specific, particularized and objective basis to lawfully conduct an investigatory stop.

Instead, with the hope of developing sufficient objectively reasonable factual information to actually justify a stop, he allowed the vehicle to proceed for a lengthy distance so that he could continue to observe Appellant's vehicle. He observed Appellant's driving conduct and found nothing improper or unlawful. He ran a computer check on the vehicle's license plates and registered owner and found nothing improper, suspicious or unlawful. He determined that there were no outstanding warrants on the vehicle licensee, that the licensee had a valid driver's license and that the vehicle owner did not have any outstanding arrest warrants. Significantly, he determined that the vehicle and its owner were both registered to an Edina residence about one mile from the school parking lot. Despite his substantial effort to find additional facts upon which to base a stop of the vehicle - and his complete disregard of numerous substantial objective facts which should have reasonably dispelled his initial suspicion - Officer Donahue did not acquire any additional specific or articulable facts which justified the stop of Appellant's vehicle.

Despite the absence of any specific factual information upon which to justify the seizure of Appellant's vehicle, and as candidly admitted by Officer Donahue, he stopped the vehicle simply because it was in the area at 1:00 a.m. *Tr. 16, Lines 8-15*.

Contrary to the subjective belief of Officer Donahue, and contrary to the unsupported finding of the trial court, lawfully driving on local streets rather than on a "main throughway", and/or driving a "route" that the *officer* thinks is not the most direct

route to a driver's home (without knowing whether the driver was going home or to some other destination) is conduct that is entirely consistent with legal activity. Harris, *supra.* Appellant's innocent activities, based upon nothing more than the officer's inchoate or unparticularized hunch of criminal activity, did satisfy the "reasonableness" test or provide any basis for an investigatory stop as found by the trial court.

Even from the perspective of a trained police officer, the record is devoid of any specific, objective evidence that Appellant engaged in any actions or behavior that were "inconsistent with legal activity" or that *were so unusual or suspicious* because of their nature, repetition, quality or pattern, to justify an investigatory stop. Officer Donahue admitted that he and Appellant did not, and could not, make eye contact in the parking lot given the distance and lack of lighting between their vehicles. *Tr. 10-11, 18.* Officer Donahue testified that Appellant told him that he did not see or know that it was a police vehicle entering the parking lot as he exited. *Tr. 18-20.* It is **not** illegal or suspicious for Appellant, an Edina resident, to drive on either main throughways or local streets in his neighborhood at 1:00 a.m. It is **not** illegal, "evasive" or suspicious to drive an allegedly "indirect" route to Appellant's destination, whether that was his home or another location, especially since there was no basis in the record for either the officer or the trial court to determine where Appellant was going or what route was most "direct" or appropriate. *See, Add. at 6 [Trial Court Memorandum].* It is not illegal or suspicious to momentarily pull off the street and stop in a school parking lot to fix one's audio system. In fact, had Appellant not done so he would not only have been unsafely operating his

vehicle, he would have been committing a crime. Minn.Stat. Section 169.475, Subd. 1 (2017).

Instead, as admitted by Officer Donahue, Appellant obeyed all traffic and speed laws and simply proceeded upon his way, listening to music rather than bother his family. Normal driving on a local street, by a resident who lives in the vicinity, does not (and should not) satisfy the "reasonable suspicion" requirement for an investigatory stop under the 4th Amendment simply because of the lateness of the hour or the proximity of the stop to a construction site or school in an affluent suburb. If the reasonable suspicion standard is so easily satisfied, virtually every stop of a motor vehicle can be justified.

It is clear that the purported justifications advanced by Officer Donahue, and improperly accepted by the trial court, were nothing more than a pretext to justify the improper seizure of Appellant based upon nothing more than a "hunch" that some unspecified criminal activity had occurred or was about to occur. Harris, *supra;* State v. Schrupp, *infra*. (Emphasis added).

In the absence of any specific, particularized evidence in the record which objectively justifies the seizure of Appellant, Officer Donahue's delayed investigatory stop of Appellant's vehicle lacked "reasonable suspicion" and was improper.

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B. The trial court erroneously applied the law governing the existence of "reasonable suspicion".

In addition to factual findings that are unsupported by the record, the trial court erroneously applied the law.

Specifically, the trial court relied upon Thomeczek v. Commissioner of Public Safety, 364 N.W.2d 472 (Minn.Ct.App. 1985), for the proposition that a sufficient basis exists for an investigatory stop where a vehicle was parked near an empty lot late in the evening in a construction area. *Add. 5*. Thomeczek is distinguishable. Unlike the facts in Thomeczek, Appellant's vehicle was not parked with the engine running and the lights on *in* a construction zone where thefts had previously been documented. Appellant's vehicle was moving, was a substantial distance from the construction site and there is no evidence in the record that previous thefts were known to have occurred.

Further, the officer's purpose in approaching the parked vehicle in Thomeczek was to conduct a welfare check to determine if the "occupant of the Blazer needed assistance or there was some wrongdoing occurring". 364 N.W.2d at 472. He was not, as in Appellant's case, attempting to justify the stop of a vehicle that was lawfully driving in the general area of, and on the streets surrounding, a school at which construction was occurring a substantial distance from the officer's observation of his vehicle.

The trial court also erroneously relied upon State v. Johnson, 444 N.W.2d 824, 826 (Minn. 1989) to justify the seizure of Appellant's "suspicious" vehicle because the officer could "reasonably infer" that "the driver is deliberately trying to evade the officer" because his route * * * used a residential street rather than the most direct and main throughway of Valley View Road". *Add. at 6*. There was no evidence of record that Appellant was going home, whether via the "direct route" of Valley View Road or that he was going elsewhere while listening to music. As noted above, Appellant

obeyed all speed and traffic laws. And, as is obvious, there is no factual basis in the record - or known legal principle - that in any way supports the trial court's bald assertion that a driver's innocent conduct of failing to take the route that the trial court or police officer subjectively believe is the most "direct route" (to a location that the officer and trial court were completely unaware of!) satisfies the "reasonable suspicion" standard of the 4th Amendment.

The trial court's reliance on Johnson to justify a finding that Appellant's actions were "deliberately evasive" was erroneous. In Johnson, the state trooper was in the process of turning around to assist a disabled vehicle. He made eye contact with the driver of a passing vehicle. The trooper then observed the driver then immediately turn off onto another roadway, pull into a driveway and appear to disappear. Within a minute, the driver re-appeared and continued his travel. The trooper initiated the stop because he inferred that the driver was trying to evade him. Under these specific, objective and particularized facts, the Supreme Court upheld the investigatory stop, reasoning that "if the driver's conduct is such that the officer reasonably infers that the driver is *deliberately trying to evade the officer* * * * then the officer may stop the driver". *Id.*, 444 N.W.2d at 826. (Emphasis added).

In this case, there is no objective basis upon which the trial court could find that Appellant's conduct constituted a deliberate attempt to evade Officer Donahue. The only evidence of record is that Officer Donahue did not, and could not given the darkness and large distance between the vehicles, make eye contact with Appellant. When questioned by Officer Donahue, Appellant denied seeing the officer's vehicle in the

parking lot. The evidence of record also indisputably demonstrates that both vehicles were moving at the same time and that Appellant did not alter his actions or direction of travel when the squad car entered the parking lot that he was already exiting from as if to evade the officer.

Officer Donahue's failure to immediately stop the "suspicious" vehicle demonstrates his knowledge that he lacked the required particularized, specific factual basis to conclude that Appellant was deliberately trying to evade him. Appellant continued upon his desired route. He obeyed all traffic laws. He did not speed up as if to evade the officer. He did not pull into a driveway, turn off his lights and then quickly re-emerge to continue his driving *after making eye contact with the officer* as occurred in Johnson. As Officer Donahue testified, Mr. Robinson was simply driving around his neighborhood and listening to music so he did not disturb his sleeping family. As a result, the facts of Johnson are distinguishable from the current case and its holding does not reasonably support the "deliberately evasive" conclusion reached by either Officer Donahue or the trial court. *State v. Schrupp*, 625 N.W.2d at 844.

The current case is most similar to the facts recently addressed by this Court in State v. Boline, Unpublished Decision of the Minnesota Court of Appeals, Appellate File No. A16-1290 (filed February 6, 2017), wherein this Court affirmed the trial court's determination that an investigatory stop at 1:30 a.m. was improper because the driver's conduct was not a "deliberate attempt to evade the officer". The Boline court held that the facts in Johnson were distinguishable and compelled the conclusion that the driver was not deliberately evading the officer because – just as in the present case – there was

no eye contact between the driver and the officer, there was no evidence that the driver was aware of a police vehicle observing her driving conduct and the driver continued driving at or below the posted speed limit. The trial court's contrary conclusion in this case is erroneous as a matter of law and requires reversal by this Court.

VII. CONCLUSION

The "reasonable suspicion" standard required by the 4th Amendment to conduct an investigatory stop is admittedly minimal, but it is not non-existent.

The failure to reverse the trial court's affirmance of the Commissioner's revocation of Appellant's driver's license would require this Court to effectively render as meaningless the minimal constitutional safeguards that exist to prohibit random stops of vehicles that are engaged in nothing more than innocent conduct simply because law enforcement trots out the magic phrase of "training and experience" to provide cover for its inability to otherwise articulate specific, particularized and *objectively reasonable* facts that are so unusual or suspicious to justify its actions. Both Harris and Scrupp clearly prohibit the stop of a motor vehicle based upon the inchoate, speculative hunch of law enforcement.

The totality of the circumstances clearly indicate that the minimum constitutional threshold of "reasonable suspicion" was not factually or legally satisfied in this case. The trial court's decision must be reversed and the Commissioner's revocation of Appellant's driver's license must be reversed.

Dated: February 2, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to Rule 132.01, Subd. 3, *Minnesota Rules of Civil Appellate Procedure*, for a brief produced using the following font: Times New Roman, 13-point. The length of this brief is 5,097 words and consists of 816 lines. The brief was prepared using Microsoft Word 2016.

Dated: February 2, 2018

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ADDENDUM – TABLE OF CONTENTS

MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

John Cortland Robinson,

Petitioner,

v.

Commissioner of Public Safety,

Respondent.

ORDER SUSTAINING REVOCATION OF DRIVER'S LICENSE

Court File 27-CV-17-3670

This matter came before Judge Karen A. Janisch on October 3, 2017 pursuant to Petitioner's request for a hearing pursuant to Minn. Stat. § 169A.53. As requested and ordered at the hearing, the parties made additional submissions on or before October 24, 2017, and the matter was then taken under advisement.

Scott J. Strouts, Esq., appeared on behalf of and with Petitioner.

Cory B. Monnens, Assistant Attorney General, appeared on behalf of Respondent Commissioner of Public Safety.

The issue identified for the hearing was whether the police officer lawfully stopped Petitioner's vehicle. Petitioner argued, based upon the above the issue, that his driver's license should be reinstated.

Edina Police Officer Nicholas Donahue testified at the hearing. The Court received into evidence as Exhibit 1 an aerial photograph of the area where Petitioner was stopped.

Based on the files, records, and proceedings herein, the Court makes the following:

FINDINGS OF FACT

1. Officer Nicholas Donahue has been a licensed police officer for approximately nine years. He previously worked for the Steele County and Lyon County Sheriff' Departments. For almost two years, he has worked for the Edina Police Department.

2. Officer Donahue was on routine patrol from 6:00 p.m. on March 15, 2017 to 6:00 a.m. March 16, 2017. He was alone in a marked squad vehicle.

3. At approximately 12:55 a.m., Officer Donahue was checking the Edina High School and adjacent Valley View Middle School area. He was on routine patrol of the area and was not at that time responding to any report of suspicious activity or crime.

4. As Officer Donahue pulled into the east entrance of the parking lot to the east of Valley View Middle School, he saw a dark sedan leave the back area of the parking lot where there was a construction project and drive out of the west exit of the parking lot.

5. School was not in session and there were no other cars in the parking lot. The parking lot was dark and the car's lights were on. Officer Donahue could not see the driver.

6. Officer Donahue credibly testified that he found the presence of the vehicle at the school suspicious because it was late at night, the schools were closed, and there was a construction site at the high school near where the vehicle was located. In Officer Donahue's training and experience, construction sites are often areas of crime such as theft.

7. Officer Donahue did not activate his emergency lights or otherwise signal for the vehicle to stop in the school parking lot.

8. Officer Donahue began following the vehicle. The car headed south and crossed over Valley View Road and proceeded onto Chapel Lane, which is a residential road. The car then turned left and drove east on Chapel Drive, a residential street that runs parallel to Valley View Road, which is the more primary road. The vehicle then turned north on Antrim Road and then turned eastbound on Valley View Road.

9. While behind Petitioner's vehicle, Officer Donahue conducted a computer search of the license plate number. The result showed that the vehicle was owned by a lease company and Petitioner John Robinson ("Robinson") was the lessee. Robinson's registered address is in the 5500 block of Goya Lane, which Officer Donahue knows is approximately one mile north of the Edina High School area.

10. Officer Donahue credibly testified that he also found the route driven by Petitioner to be suspicious because it was not a direct route, especially in light of a residence on Goya Lane.

11. Officer Donahue activated his emergency lights and initiated a traffic stop approximately two blocks after the vehicle turned onto Valley View Road.

12. The vehicle came to a stop and Officer Donahue identified the driver as Robinson. When asked about his conduct and presence in the school parking lot, Robinson stated that he wanted to listen to music and did not want to wake his family. He stopped in the parking lot because he was having a problem streaming music from his phone to the car.

13. Officer Donahue did not observe any equipment or traffic violations.

CONCLUSION OF LAW

1. Officer Donahue had a specific and articulable suspicion of criminal activity to justify the stop of Robinson's vehicle.

2. The attached Memorandum is incorporated herein by reference.

IT IS HEREBY ORDERED

1. The revocation of Petitioner's driving privileges under authority of Minn. Stat. § 169A.53 is **SUSTAINED**.

BY THE COURT:

Janisch, Karen
2017.11.07
09:49:22 -06'00'

Dated: November 7, 2017

Karen A. Janisch
Judge of District Court

MEMORANDUM

Robinson seeks judicial review of the revocation of his driver's license. *See* Minn. Stat. §§ 169A.53, subd. 2. The implied consent law limits the scope of the hearing to those issues enumerated in the statute for the Court's consideration. Minn. Stat. § 169A.53, subd. 3(b). Upon determination of any of those contested issues, the Court may order that the driver's license revocation be rescinded or sustained. Minn. Stat. § 169A.53, subd. 3(e). An implied

consent hearing is a civil proceeding, not a criminal prosecution. *State v. Wagner*, 637 N.W.2d 330, 337 (Minn. Ct. App. 2001). The civil nature of the implied consent proceeding means the presumptions, burdens of proof, and evidentiary rules are different from a criminal proceeding. *Id*. The Commissioner must demonstrate by a preponderance of the evidence that the license revocation is appropriate. *Ellingson v. Commissioner of Pub. Safety*, 800 N.W.2d 805, 806 (Minn. Ct. App. 2011), *review denied* (Minn. Aug. 24, 2011).

Robinson challenges the reasonableness of the initial traffic stop. Both the United States Constitution (Fourth Amendment) and the Minnesota Constitution (Article 1, Section 10) protect against unreasonable searches and seizure. U.S. Const. amend. IV; *accord* Minn. Const. art. I, § 10. Under the principles set out by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), a police officer may conduct an investigatory stop of a vehicle when the officer has a specific and articulable basis to believe that criminal activity is taking place. *See State v. Diede*, 795 N.W.2d 836, 842 (Minn. 2011) (citations omitted); *State v. Johnson*, 444 N.W.2d 824, 825 (Minn. 1989). Reasonable suspicion must be based on specific and articulable facts that allow the officer to state "that he or she had a particularized and objective basis for suspecting the seized person of criminal activity." *State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995). The reasonable-suspicion standard is "not high," but requires "at least a minimal level of objective justification for making the stop." *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008) (internal quotation marks omitted). A stop must not be the product of whim, caprice, or idle curiosity. *State v. Pike*, 551 N.W.2d 919, 921-922 (Minn. 1996). The officer may make his assessment on the basis of all of the circumstances and may draw inferences and deductions from those circumstances. *Berge v. Commissioner of Pub. Safety*, 374 N.W.2d 730, 732 (Minn. 1985).

In this case, Respondent indicates the basis for the stop was Robinson's suspicious activity of being in an empty parking lot of a closed school, late at night, near a construction site. Where an officer does not observe any overt illegality but finds behavior suspicious, "[a]rticulable, objective facts that, by their nature, quality, repetition, or pattern become so unusual and suspicious that they support at least one inference of the possibility of criminal activity, are what will be necessary to justify an investigatory stop of a motor vehicle." *State v. Schrupp*, 625 N.W.2d 844, 847–48 (Minn. Ct. App. 2001). "An officer may be justified in investigating a vehicle because it is parked in an unusual or suspicious manner, because the officer could infer wrongdoing." *Norman v. Commissioner of Pub. Safety*, 409 N.W.2d 544, 546 (Minn. Ct. App. 1987).

This matter is similar to the case of *Thomeczek v. Commissioner of Pub. Safety*, 364 N.W.2d 471 (Minn. Ct. App. 1985), where the Court found a sufficient basis for an investigatory stop where a vehicle was "parked near an empty lot late in the evening in an area undergoing construction, where a burglary, vandalism or theft might occur." *Id*. at 472. Here, Officer Donahue observed a vehicle in the parking lot of a high school around 1:00 a.m. Despite the acknowledgement that there may be times that sporting events go late or staff stay late at the school, Officer Donahue testified that there did not appear to be any events going on and no other cars in the parking lot. He also testified that based on his training and experience, theft and vandalism are more likely to occur near construction sites.

Respondent also argues that Robinson's driving conduct upon exiting the parking lot was also a sufficient basis for the stop. "[I]f the driver's conduct is such that the officer reasonably infers that the driver is deliberately trying to evade the officer and if, as a result, a reasonable

police officer would suspect the driver of criminal activity, then the officer may stop the driver." *State v. Johnson*, 444 N.W.2d 824, 827 (Minn. 1989). Officer Donahue testified that Robinson's route was suspicious because it used a residential street rather than the more direct and main throughway of Valley View Road. Officer Donahue knew from the registered address that the residential area was not the driver's personal neighborhood. In addition, the route was taken immediately upon exiting an empty school parking lot at 1:00 a.m. as a police officer approached. Although Officer Donahue did not observe any traffic violations when he followed Robinson, the driving conduct could reasonably be seen as evasive and give rise to an inference of criminal activity. When coupled with the vehicle's presence in the empty school parking lot, this driving conduct contributes to a reasonable inference of criminal activity. Accordingly, based on a totality of the circumstances and inferences drawn therefrom, the Court finds that the facts observed by Officer Donahue were by their nature, quality, repetition, or pattern so unusual or suspicious to support an inference of criminal activity in this case. For all of these reasons, the revocation of Robinson's driver's license is sustained.

K.A.J.

No. A17-1875

STATE OF MINNESOTA

IN COURT OF APPEALS

John Cortland Robinson,

Appellant,

vs.

Commissioner of Public Safety,

Respondent.

RESPONDENT'S BRIEF

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LEGAL ISSUES

I. Did the officer lawfully stop Appellant's vehicle?

The district court held: In the affirmative. (ADD1). [1]

Most Apposite Authorities:

State v. Johnson, 444 N.W.2d 824 (Minn. 1989);

Thomeczek v. Comm'r of Pub. Safety, 364 N.W.2d 471 (Minn. Ct. App. 1985); and

Hayes v. Comm'r of Pub. Safety, No. C8-02-1535, 2003 WL 1875490 (Minn. Ct. App. Apr. 15, 2003) (unpublished).

[1] "ADD" references are to Appellant's Addendum.

STATEMENT OF THE CASE AND FACTS

This is an appeal of a driver's license revocation hearing held pursuant to Minn. Stat. §§ 169A.50-.53 (2016), the Implied Consent Law. It arises from Appellant's arrest on March 15, 2017, and the subsequent revocation of his driver's license.

By a Petition for Judicial Review dated March 21, 2017, Appellant sought judicial review of the revocation of his driving privileges. The matter came before the district court for an implied consent hearing on October 3, 2017. The Honorable Karen A. Janisch, Judge of District Court, Fourth Judicial District, presided.

At the implied consent hearing, Appellant challenged whether the stop of his vehicle was lawful. The district court received into evidence an aerial photograph of the area where Appellant was stopped as Exhibit 1. T. 8.[2] The district court heard testimony from Officer Nicholas Donahue. Upon conclusion of the hearing and after post-hearing submissions, the district court took the matter under advisement.

In an Order and Memorandum dated November 7, 2017, the district court concluded that the stop of Appellant's vehicle was lawful. *See generally*, District Court Order and Memorandum reproduced in Appellant's Addendum at ADD1. From that Order, Appellant takes the present appeal, challenging the district court's findings of fact and conclusion that the stop was lawful.

On March 15, 2017, at 12:55 a.m., Edina Police Officer Nicholas Donahue—a nine-year veteran peace officer—was on routine patrol near the Edina High School and

[2] "T." references are to the pages of the transcript of the proceedings held on October 3, 2017.

Valley View Middle School area. T. 3. Officer Donahue was doing a "direct patrol" checking the high school area. T. 4. Officer Donahue is familiar with the area of the school and the surrounding streets. T. 7. As he checked the school area, he saw a dark sedan leave the back area of the parking lot. T. 4. The school was dark and unlit, and appeared closed. *Id.* The school was under construction, and there was a large construction site near the area of the school parking lot where Appellant was driving his car. T. 4. School was not in session, and there were no other cars in the parking lot. *Id.* The car's lights were on, and Officer Donahue could not see the driver, who was later identified as Appellant John Robinson. T. 11. The car's presence in the parking lot under these circumstances "concerned" Officer Donahue. T. 4.

Officer Donahue thought the vehicle's presence in the parking lot to be suspicious because it was 12:55 a.m., the schools were closed, there were no other vehicles nearby, and there was a construction site near that part of the school parking lot where Appellant's car came from. T. 4. In Officer Donahue's training and experience, construction sites are often a target for theft and damage-related criminal activity. T. 5. Officer Donahue followed the vehicle. *Id.*

Appellant drove across Valley View Road to turn south on Chapel Lane, a residential street. T. 5; Ex. 1. Appellant then turned left to go east on Chapel Drive, another residential street that runs parallel to Valley View Road, which is the more primary road. *Id.* When Appellant turned onto Chapel Drive, Officer Donahue ran a license plate check and quickly learned that Appellant's car was registered to an address in the 5500 block of Goya Lane in Edina. T. 5. Because he is familiar with the area,

Officer Donahue knew Appellant's car was nowhere near Goya Lane. T. 6. Officer Donahue followed the suspicious car as Appellant turned left to go north on Antrim Road and turned right to go east on Valley View Road. T. 6. Appellant had crossed over the main road, took turns through residential side streets, then made his way back up to the main road. *Id.* Officer Donahue believed this to be an indirect route because Appellant could have turned directly onto Valley View Road from the school parking lot rather than drive through less-traveled residential streets before returning to Valley View Road. T. 19. Officer Donahue initiated a stop to investigate Appellant's conduct. T. 6. Appellant eventually told Officer Donahue that he was listening to music, did not want to wake his family, and stopped in the parking lot to fix the streaming music. T. 18. Officer Donahue saw signs of impairment and arrested Appellant for driving while impaired.

ARGUMENT

I. STANDARD OF REVIEW

The trial court's findings of fact are entitled to the same weight as the verdict of a jury, and cannot be reversed if the court can reasonably make the findings of fact based upon the evidence adduced at trial. *See State v. Gardin*, 251 Minn. 157, 86 N.W.2d 711 (1957); *State v. Thurmer*, 348 N.W.2d 776 (Minn. Ct. App. 1984); *State v. Nash*, 342 N.W.2d 177 (Minn. Ct. App. 1984). Because the trial court has the opportunity to judge the credibility of witnesses, findings of fact will not be set aside unless clearly erroneous. *State, Dep't. of Highways v. Beckey*, 291 Minn. 483, 192 N.W.2d 441 (1971); *Thorud v. Comm'r of Pub. Safety*, 349 N.W.2d 343 (Minn. Ct. App. 1984).

Great deference is given to factual findings made by a district court because the district court has "the advantage of hearing live testimony, assessing the credibility of the witnesses and acquiring a thorough understanding of the circumstances unique to the matter before them." *Hasnudeen v. Onan Corp.*, 552 N.W.2d 555, 557 (Minn. 1976) (reversing and reinstating district court's judgment because resolution of the case depended largely on credibility of witnesses).

Conclusions of law, on the other hand, can be overturned upon a showing that the trial court has erroneously construed and applied the law to the facts of the case. *Berge v. Comm'r of Pub. Safety*, 374 N.W.2d 730 (Minn. 1985); *State v. Speak*, 339 N.W.2d 741 (Minn. 1983); *State v. Kvam*, 336 N.W.2d 525 (Minn. 1983); *State v. Olson*, 342 N.W.2d 638 (Minn. Ct. App. 1984).

The legality of an investigatory stop is a mixed question of fact and law. *Berge*, 374 N.W.2d at 732. Once the facts are established, the reviewing court conducts a *de novo* review to determine whether, as a matter of law, there was a valid basis for the investigatory stop. *Id.*

II. THE DISTRICT COURT CREDITED OFFICER DONAHUE'S TESTIMONY REGARDING HIS SUSPICIONS ABOUT APPELLANT'S PRESENCE IN THE SCHOOL PARKING LOT AND SUBSEQUENT DRIVING ACTIVITY AND CORRECTLY HELD THAT APPELLANT'S VEHICLE WAS LAWFULLY STOPPED.

Appellant challenges the district court's Order, claiming the findings are unsupported by any evidence in the record and that it erroneously applied the law to conclude that Officer Donahue lawfully stopped Appellant's vehicle. Based upon Officer Donahue's unrebutted and credible testimony, the district court's findings of fact

are not clearly erroneous. The district court also correctly applied controlling legal authority. Accordingly, its decision should be affirmed.

To conduct a limited investigatory stop of a motor vehicle, an officer must have reasonable, articulable suspicion of criminal activity based on a totality of the circumstances. *United States v. Arvizu*, 534 U.S. 266, 273, 122 S. Ct. 744, 750 (2002). In determining whether a stop was valid, a court considers the totality of the circumstances surrounding the stop, including the trained perspective of the officer initiating the stop. *Kvam*, 336 N.W.2d at 528.

The factual basis necessary to justify a stop is minimal. *Marben v. State, Dep't. of Pub. Safety*, 294 N.W.2d 697, 699 (Minn. 1980). "All that is required is that the stop be not the product of mere whim, caprice, or idle curiosity." *Id.* The stop must be based upon specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion inherent in a very brief investigatory stop. *United States v. Cortez,* 449 U.S. 411 (1981); *State v. McKinley,* 232 N.W.2d 906 (Minn. 1975). The officer makes his or her assessment on the basis of "all of the circumstances" and "draws inferences and makes deductions—inferences and deductions that might well elude an untrained person." *Cortez,* 449 U.S. at 418. The sufficiency of the basis for the stop is based upon an objective review of the facts known to the officer at the time. *Whren v. United States*, 517 U.S. 806, 812, 116 S. Ct. 1769, 1774 (1996). A "divide-and-conquer analysis" whereby a reviewing court evaluates and rejects facts in isolation is inconsistent with the totality of the circumstances test. *Arvizu*, 534 U.S. at 274. *See also State v. Eichers*, 840 N.W.2d 210, 221 (Minn. Ct. App. 2013) ("We do

not examine each factor individually to determine its appropriate weight; instead, we look at the totality of the circumstances of the case."). The ultimate determinative issue is whether the officer reasonably suspected illegal conduct based upon what he observed. *Berge*, 374 N.W.2d at 733.

Valid stops can occur when a vehicle is seen at an unusual time in an area with potential for crimes, even when no crime is currently reported. In these cases, it is important that the officer be able to articulate what about the vehicle was suspicious. *See, e.g., Thomeczek v. Comm'r of Pub. Safety*, 364 N.W.2d 471 (Minn. Ct. App. 1985) (holding that the stop of a legally-parked vehicle with headlights on near an area of ongoing development and construction was lawful); *Hayes v. Comm'r of Pub. Safety*, No. C8-02-1535, 2003 WL 1875490 (Minn. Ct. App. Apr. 15, 2003) (unpublished) (holding that the stop was valid when an officer observed an unfamiliar vehicle parked in a business parking lot late at night with motor running, and stated that it was unusual for a vehicle to be in that lot at that time of night). An officer may take into account suspicious or evasive driving in his decision to stop a car. *State v. Johnson*, 444 N.W.2d 824 (Minn. 1989). Where an officer does not observe any overt illegality but finds behavior suspicious, "[a]rticulable, objective facts that, by their nature, quality, repetition, or pattern become so unusual and suspicious that they support at least one inference of the possibility of criminal activity, are what will be necessary to justify an investigatory stop of a motor vehicle." *State v. Schrupp*, 625 N.W.2d 844, 847-48 (Minn. Ct. App. 2001).

Here, Officer Donahue saw a car in an otherwise dark and empty parking lot near a closed school at 12:55 a.m. Officer Donahue knew that the school was under construction and that construction sites are often a target of thefts and damage-related crimes, which heightened Officer Donahue's suspicions that Appellant might be involved in criminal activity. As Officer Donahue drove into the school parking lot, Appellant drove out of the school parking lot, across Valley View Road, and then south on Chapel Lane. Appellant turned to go east on Chapel Drive, then made his way back up to Valley View Road to travel east again. Appellant's circuitous route through residential side streets, combined with the car's presence in a suspicious circumstance in the school parking lot, led Officer Donahue to reasonably suspect criminal activity that he should investigate further. The stop was not the product of whim, caprice, or idle curiosity. Officer Donahue clearly and credibly articulated for the district court his suspicion and the concerns that led him to stop Appellant to investigate why he was in the parking lot of a closed school near a construction area that Office Donahue knew from his training and experience to be a target for thefts and property damage crimes. Officer Donahue's suspicions about potential criminal activity were heightened by Appellant's circuitous path through side streets, which Officer Donahue knew was not the most direct route to drive eastbound on Valley View Road. The district court rightly determined that Officer Donahue was justified in conducting a brief investigatory seizure on these facts.

The district court concluded that the stop was valid based on the officer's reasonable suspicion that Appellant might be committing a crime. ADD5. Specifically, the district court credited Officer Donahue's unrebutted testimony regarding his

observation of Appellant's car in the closed school parking lot, in the early morning hours, near a construction site where theft and vandalism might occur, and independently found that those facts "by their nature, quality, repetition, or pattern" were unusual or suspicious enough "to support an inference of criminal activity in this case." ADD6. The district court further found that Appellant's driving conduct, although not overtly illegal, "could reasonably be seen as evasive and give rise to an inference of criminal activity," particularly "when coupled with the vehicle's presence [Appellant's] in the empty school parking lot" near the construction site. *Id.*[3] Because the record supports the district court's findings, and the district court did not err in concluding that the stop was valid, this Court should affirm.

This Court has upheld stops under substantially similar circumstances. In *Thomeczek*, the officer found a Chevy Blazer parked near an empty lot late in the evening in an area undergoing residential construction. 364 N.W.2d 471. The officer saw the truck's headlights on and that the truck was occupied and running. *Id.* at 472. The officer thought these facts were unusual and required further investigation. *Id.* In upholding the stop, the *Thomeczek* Court did not rely on evidence of recent criminal activity in the area, but rather relied on the fact that vandalism or theft "might" occur in a

[3] Appellant argues that the district court impermissibly relied on *State v. Johnson*, 444 N.W.2d 824, 827 (Minn. 1989) to uphold the stop here, where Officer Donahue did not make eye contact with Appellant before Appellant took a circuitous route through residential side streets to get back to Valley View Road. Appellant ignores that the district court did not rely on Appellant's driving conduct alone to uphold the stop, but rather specifically stated that "[Appellant's] driving conduct *contributes* to a reasonable inference of criminal activity . . . based on a *totality of the circumstances and inferences* drawn therefrom." ADD6.

construction area "late in the evening" in affirming the reasonableness of the officer's inquiry. *Id.* Like this case, *Thomeczek* involved a lone car seen running late at night near a construction site where an officer testified that thefts and other crimes might occur. The facts here are even more compelling. Here, Officer Donahue saw Appellant at 12:55 a.m. in the parking lot of a closed school that was under construction. Officer Donahue saw Appellant leave the parking lot as the officer entered it and take a circuitous route away from the scene. Under *Thomeczek*, the stop here was valid.

Appellant attempts to distinguish *Thomeczek* by saying that his vehicle was moving rather than parked and that he was a substantial distance from the construction site. Whether Appellant's vehicle was moving or parked, it was still in the parking lot of a closed school near a construction site early in the morning. Appellant also tries to distinguish *Thomeczek* by asserting that Appellant was a "substantial distance" from the construction area, but the record establishes that Appellant was "near" the construction site. T. 4. The early morning hour that Appellant was present in a closed school's parking lot near a construction site that might be subject to theft and vandalism, and the officer's determination that this was unusual, squarely aligns this case with *Thomeczek*.

The findings of fact from the district court focused on the officer's credible and unrebutted testimony. The district court found it reasonable that the officer would conclude Appellant's conduct was suspicious in light of the officer's experience and observations, along with the inferences drawn from the observations. ADD2-6. Officer Donahue articulated objective facts that, by their nature, were unusual and suspicious enough to support his inference of the possibility of criminal activity. ADD5

(citing *State v. Schrupp*, 625 N.W.2d 844, 847-48 (Minn. Ct. App. 2001). The district court's findings of fact, including credibility determinations, are not clearly erroneous and support its conclusion that the stop was valid. This Court should affirm the district court's order.

CONCLUSION

Based on the foregoing, Respondent Commissioner of Public Safety respectfully requests this Court to affirm the district court's Order sustaining the revocation of Appellant's driving privileges.

Dated: March 5, 2018

Respectfully submitted,

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