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STATE OF NEBRASKA, APPELLEE, V. SEAN MORRISSEY, APPELLANT.

810 N.W.2d 195

Filed March 13, 2012. No. A-11-625.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Courts: Appeal and Error.** Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record.
3. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion.
4. **Highways.** Under Neb. Rev. Stat. § 39-1801 (Reissue 2008), when a county road is unusually dangerous to travel, it may be temporarily closed by erecting suitable barricades and posting signs warning the public that the road is closed by authority of law.
5. **Rules of the Road: Words and Phrases.** A road closed sign is a traffic control device under Neb. Rev. Stat. § 60-670 (Reissue 2010).
6. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
7. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** If an officer has probable cause to stop a violator, the stop is objectively reasonable, and any ulterior motive on the officer's part is irrelevant.
8. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** Once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop.
9. **Constitutional Law: Search and Seizure: Motor Vehicles.** In determining whether the government's intrusion into a motorist's Fourth Amendment interests was reasonable, the question is not whether the officer issued a citation for a traffic violation or whether the State ultimately proved the violation.
10. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** An officer's stop of a vehicle is objectively reasonable when the officer has probable cause to believe that a traffic violation has occurred.

Appeal from the District Court for Saunders County, MARY C. GILBRIDE, Judge, on appeal thereto from the County Court for Saunders County, MARVIN V. MILLER, Judge. Judgment of District Court affirmed.

W. Randall Paragas, of Paragas Law Offices, for appellant.

Jon Bruning, Attorney General, and Carrie A. Thober for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Sean Morrissey appeals his conviction for first-offense driving under the influence. He contends that the county court erred in overruling his motion to suppress and that the district court erred in affirming that decision. Because Morrissey committed violations of law by failing to obey a barricade and sign marked "Road Closed" and traveling upon a closed road, the arresting officer had probable cause to stop the vehicle. We affirm.

BACKGROUND

On November 28, 2010, at approximately 1:15 a.m., a deputy sheriff stopped the vehicle Morrissey was driving because it was on County Road X, in Saunders County, Nebraska, which road had been closed due to weather and muddy road conditions. The deputy subsequently arrested Morrissey for driving under the influence of alcohol. The State filed a complaint charging Morrissey with first-offense driving under the influence.

Morrissey moved to suppress evidence obtained as a result of the traffic stop. Evidence adduced during the hearing established that County Road X was a minimum maintenance road and that on November 28, 2010, the intersection was marked with a large road closed barricade across the middle of the roadway and a road closed sign was posted in the ditch. There is no dispute that the road was not under construction at the time of the stop. The deputy testified that there was a posted detour, but Morrissey denied seeing any detour signs for County Road X. When the deputy stopped the vehicle and spoke with Morrissey, he noticed that Morrissey's eyes were glassy and bloodshot and detected the odor of an alcoholic beverage

coming from Morrissey. The deputy testified that Morrissey admitted to consuming alcohol prior to the stop. The deputy testified that he told Morrissey the stop was due to his being on a closed road and that Morrissey acknowledged seeing the road closed signs. The deputy ascertained that Morrissey lived in Omaha, Nebraska, and thus, that he did not live along the closed road. Morrissey testified that he was driving his passengers to their home in "Woodcliff," which was "on the other side of the road," and that County Road X was the shortest, most convenient route there.

The county court overruled the motion to suppress, finding that the deputy had probable cause to stop Morrissey based upon an observed violation of law: Morrissey was driving on a closed road which was clearly marked with a barricade. After a stipulated bench trial, the county court found Morrissey guilty. Morrissey appealed to the district court, which affirmed the conviction.

Morrissey timely appeals. Pursuant to authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

ASSIGNMENT OF ERROR

Morrissey assigns only that the county court erred in overruling his motion to suppress, but claims that the court erred for two reasons. First, Morrissey claims that his conduct fell within the exception of Neb. Rev. Stat. § 60-6,115 (Reissue 2010). Second, he argues that the arresting officer was unaware that the exception did not apply.

STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination. *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012).

[2,3] Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record. See *State v. Lamb*, 280 Neb. 738, 789 N.W.2d 918 (2010). In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion. *Id.*

ANALYSIS

Morrissey argues that the county court erred in overruling his motion to suppress. Specifically, he contends that the deputy did not have an articulable suspicion to make the traffic stop because the deputy could not have had an objective belief that Morrissey had committed a crime, was committing a crime, or was about to commit a crime. Morrissey emphasizes that he "did not commit a traffic offense and was exercising great care in his driving." Brief for appellant at 6. He relies upon our decision in *State v. Carnicle*, 18 Neb. App. 761, 792 N.W.2d 893 (2010), and contends that the deputy's observation of Morrissey's driving on the closed road should not have created an objective belief that Morrissey was committing a traffic violation. We disagree.

[4] Morrissey committed a misdemeanor by traveling on the closed road. Under Neb. Rev. Stat. § 39-1801 (Reissue 2008), when a county road is unusually dangerous to travel, it may be temporarily closed by erecting suitable barricades and posting signs warning the public that the road is closed by authority of law. A person violating § 39-1801 commits a Class V misdemeanor. See *id.* Because the road had been temporarily closed and suitable barricades and signs had been posted, Morrissey violated § 39-1801 by proceeding down the closed road.

[5] The State correctly points out that by failing to obey the road closed barricade and sign, Morrissey also violated the statute requiring drivers to obey traffic signs. A road closed sign is a "[t]raffic control device" under Neb. Rev. Stat. § 60-670 (Reissue 2010). Section 60-670 defines a "traffic control device" as "any sign, signal, marking, or other device not inconsistent with the Nebraska Rules of the Road placed

or erected by authority of a public body or official having jurisdiction for the purpose of regulating, warning, or guiding traffic." Neb. Rev. Stat. § 60-6,119(1) (Reissue 2010) requires drivers to "obey the instructions of any traffic control device applicable thereto placed in accordance with the Nebraska Rules of the Road." And Neb. Rev. Stat. § 60-682 (Reissue 2010) declares that unless otherwise specified, "a violation of any provision of the rules shall constitute a traffic infraction." Thus, in addition to the violation of § 39-1801, Morrissey's violation of the road closed barricade and sign constituted a traffic infraction.

[6,7] Morrissey's failure to heed the road closed barricade and sign provided the deputy with probable cause to stop the vehicle. A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012). If an officer has probable cause to stop a violator, the stop is objectively reasonable, and any ulterior motive on the officer's part is irrelevant. *Id.* Thus, the deputy had probable cause to stop Morrissey for both traveling upon the closed road and failing to obey traffic control devices.

[8] Once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop. This investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, and asking the driver about the purpose and destination of his or her travel. *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011). Thus, once stopped, the deputy was free to inquire of Morrissey about his residence and reason for travel on the road. And during this inquiry, the deputy detected an odor of alcohol coming from Morrissey and noticed that Morrissey's eyes were glassy and bloodshot. These circumstances provided the deputy with a reasonable, articulable suspicion that Morrissey was driving under the influence.

State v. Childs, 242 Neb. 426, 495 N.W.2d 475 (1993), to which Morrissey cites, is inapposite. In that case, a police officer stopped a vehicle solely because of the in-transit stickers displayed. Significantly, the officer saw no deficiency in the

vehicle and nothing unlawful about the driver's operation of it. The in-transit tags were valid, but when the officer asked the driver for a bill of sale and motor vehicle registration, the officer noticed that the driver appeared intoxicated. In *Childs*, the officer lacked an objectively reasonable basis to stop the vehicle. In contrast, in the instant case, the deputy observed a traffic violation, which provided probable cause to stop the vehicle.

Morrissey's reliance on § 60-6,115 is misplaced. That statute states:

> Notwithstanding the provisions of subsection (1) of section 60-6,119, when the Department of Roads, any local authority, or its authorized representative or permittee has closed, in whole or in part, by barricade or otherwise, *during repair or construction*, any portion of any highway, the restrictions upon the use of such highway *shall not apply to persons living along such closed highway or to persons who would need to travel such highway during the normal course of their operations if no other route of travel is available to such person*, but extreme care shall be exercised by such persons on such highway.

(Emphasis supplied.)

Under the plain language of § 60-6,115, Morrissey fails in numerous ways to qualify for the exception. First, there is no dispute that County Road X was closed due to weather and road conditions and that it was not under construction or repair. Second, Morrissey did not live along County Road X. Third, he was in the act of driving passengers to their home (which was *not* along the road) and did not need to travel it in "the normal course of [his] operations." And fourth, another route of travel was available to reach Woodcliff. Thus, § 60-6,115 did not authorize Morrissey to use the closed road.

[9,10] Moreover, even if it could be maintained that Morrissey fell within the exception of § 60-6,115, the stop would still have been reasonable. In *State v. Bowers*, 250 Neb. 151, 548 N.W.2d 725 (1996), the Nebraska Supreme Court reasoned that there may be some circumstances in which wholly lawful conduct might justify the suspicion that criminal activity is afoot; the purpose of an investigative stop is to clarify

ambiguous situations, and even if it is equally probable that the vehicle or its occupants are innocent of any wrongdoing, police must be permitted to act *before* their reasonable belief is verified by escape or fruition of the harm it is their duty to prevent. In determining whether the government's intrusion into a motorist's Fourth Amendment interests was reasonable, the question is not whether the officer issued a citation for a traffic violation or whether the State ultimately proved the violation. *State v. Prescott*, 280 Neb. 96, 784 N.W.2d 873 (2010). Rather, an officer's stop of a vehicle is objectively reasonable when the officer has probable cause to believe that a traffic violation has occurred. *Id.* Because the deputy observed an apparent traffic violation when Morrissey was driving on a road which was clearly marked as being closed, the deputy had probable cause to believe that a violation had occurred and his stop of the vehicle was objectively reasonable.

CONCLUSION

We conclude that Morrissey committed a misdemeanor and a traffic violation by driving on a road which was clearly marked with a road closed barricade and sign. Because the deputy observed this violation, his stop of the vehicle was objectively reasonable. We affirm the district court's order which affirmed the county court's denial of Morrissey's motion to suppress and the conviction and sentence.

AFFIRMED.

NEBRASKA PUBLIC ADVOCATE, APPELLANT, V. NEBRASKA PUBLIC SERVICE COMMISSION, APPELLEE, BLACK HILLS/NEBRASKA GAS UTILITY COMPANY, LLC, DOING BUSINESS AS BLACK HILLS ENERGY, APPELLEE, AND CONSTELLATION NEW ENERGY—GAS DIV., LLC, ET AL., INTERVENORS-APPELLEES.

815 N.W.2d 192

Filed March 20, 2012. No. A-11-341.

1. **Appeal and Error.** In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.