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STATE OF NEBRASKA, APPELLEE, V. RANDALL J. BROMM, APPELLANT.

819 N.W.2d 231

Filed August 7, 2012. No. A-11-718.

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. **Constitutional Law: Warrantless Searches.** Warrantless searches are generally unreasonable under the Fourth Amendment, subject to a limited number of specific exceptions, including (1) searches undertaken with consent or with probable cause, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest.
5. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
6. **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. 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.
7. **Arrests: Police Officers and Sheriffs.** If an adjunct to the law enforcement team supplies erroneous information to a police officer who then makes an arrest based on such information, the good faith exception to the exclusionary rule does not apply.
8. **Warrantless Searches: Proof.** The State bears the burden of proving that the good faith exception to the exclusionary rule applies in the case of unconstitutional warrantless searches and seizures.
9. **Arrests: Police Officers and Sheriffs: Proof.** The State does not meet its burden of proving that the good faith exception to the exclusionary rule set forth in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), applies where it fails to show that erroneous information from dispatch upon which the arresting officer relied did not come from an adjunct to law enforcement.

Appeal from the District Court for Washington County, JOHN E. SAMSON, Judge, on appeal thereto from the County Court for Washington County, C. MATTHEW SAMUELSON, Judge. Judgment of District Court reversed, and cause remanded with directions.

John A. Svoboda, of Gross & Welch, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

INBODY, Chief Judge, and IRWIN and SIEVERS, Judges.

SIEVERS, Judge.

Randall J. Bromm appeals from an order of the district court for Washington County affirming the Washington County Court's order denying Bromm's motion to suppress and finding him guilty of driving under the influence (DUI), pursuant to Neb. Rev. Stat. § 60-6,196 (Reissue 2010). The law enforcement officer's factual basis for the initial traffic stop of Bromm, which produced the evidence upon which he was convicted, was indisputably incorrect. Therefore, the issue becomes whether the good faith exception to the exclusionary rule is applicable, making such evidence admissible. We find that the good faith exception was not applicable and that Bromm's motion to suppress the evidence should have been sustained. Therefore, we reverse the conviction and remand the cause with directions.

BACKGROUND

Sgt. Walter Groves of the Washington County sheriff's office was traveling in his patrol car south on County Road 33 in Washington County, Nebraska, at approximately 11:30 p.m. on May 22, 2010, when he observed a dark-colored Chevrolet utility vehicle traveling north, and he obtained a license plate number on the vehicle. Groves ran a check on the license plate number, and it came back as being issued for a white Chevrolet Suburban. Groves positioned his patrol car behind the dark-colored vehicle and verified the vehicle's license information with his dispatcher. He then conducted a traffic stop and made

contact with the driver, Bromm. Upon doing so, he detected a strong odor of alcohol coming from inside the vehicle. Bromm gave Groves his registration information, and Groves verified that the vehicle identification number on the registration matched the number he received from dispatch. In the video recording of the stop in evidence, Groves can be heard saying to Bromm that "it looks like they got an error when they gave you your new registration, they didn't . . . change the color on there."

Groves testified that he had Bromm get out of his vehicle and sit in the front passenger seat of Groves' patrol car so that he could determine whether the odor of alcohol was coming from Bromm or from the various passengers riding in his vehicle. Groves testified that once the two of them were in the patrol car, he smelled alcohol on Bromm and Bromm admitted to drinking that evening, stating that he had a couple of beers at a friend's birthday party. Groves asked Bromm how many beers he had consumed that evening, and Bromm stated that he had three beers in the last 3 hours. Groves had Bromm turn his head toward him in order to conduct horizontal gaze nystagmus (HGN) testing. Groves testified over foundational objection by Bromm's counsel that he detected six HGN qualifiers in Bromm and that only four HGN qualifiers are necessary to show alcohol impairment. Due to the strong wind blowing that night, Groves did not have Bromm perform any field sobriety testing outside the patrol car. Bromm submitted to a preliminary breath test (PBT), which registered a blood alcohol content of .137. Bromm was taken into custody and transported to the sheriff's office. The probable cause affidavit recites that after waiting the requisite 15 minutes prior to retesting Bromm's blood alcohol content on the DataMaster, his breath tested .116 grams of alcohol per 210 liters of breath. Bromm was charged with DUI.

Bromm filed an amended motion to suppress on September 10, 2010, in which he alleged that law enforcement did not have a reasonable, articulable suspicion to stop his vehicle and that his arrest was based on a PBT which was not conducted according to the methods approved by the Nebraska Department of Health and Human Services under title 177

of the Nebraska Administrative Code. A hearing was held on the amended motion to suppress on October 25. Groves testified, and four exhibits were received into evidence: a copy of title 177, Groves' PBT checklist for Bromm, Groves' narrative police report, and a video recording of the traffic stop. Part of Bromm's theory at the hearing was that Groves did not administer the PBT properly because Bromm burped during the 15-minute observation period prior to the test, which he now claims should have started the waiting period anew. However, given the result we ultimately reach, we dispense with additional discussion of the "burp issue." We adopt the same approach with respect to Bromm's claim that the HGN test was not properly administered.

In its November 9, 2010, order, the county court found that Groves had probable cause to arrest Bromm because he "observed violations of law, to wit: Fictitious Plates." The order recites that Groves observed a dark-colored utility vehicle, Groves ran a check on the license plate number, and the information came back that those plates should be affixed to a white-colored vehicle. The county court found that even though the plates were actually for the vehicle Bromm was driving, Groves had a reasonable suspicion to stop the vehicle. Thus, Bromm's motion to suppress was overruled.

According to a February 28, 2011, order of the county court, a bench trial on stipulated facts was held on February 14, at which trial the parties stipulated that the court could consider all testimony and exhibits from the suppression hearing. The order recites that exhibit 5 was received into evidence at trial and that the matter was taken under advisement. The court's order of February 28, without comment, finds Bromm guilty of DUI.

Bromm appealed to the district court for Washington County, and the matter came before that court on May 4, 2011. The evidence from the county court proceedings was received, and the parties were given the opportunity to submit briefs. The issues identified in the district court's 14-page August 15 order are whether Groves (1) had reasonable suspicion to stop Bromm's vehicle, (2) followed proper procedures in administering the PBT, and (3) had probable cause to arrest Bromm.

The court found that although the reason for the traffic stop was "fallacious," the good faith exception to the exclusionary rule should apply because there was no evidence of who actually made the registration error—Bromm or a clerk of the Burt County treasurer's office—and thus, there is "no evidence that the error was made by an adjunct to the law enforcement team." See *State v. Hisey*, 15 Neb. App. 100, 723 N.W.2d 99 (2006).

In *Hisey*, we discussed how the exclusionary rule would provide incentives to the Department of Motor Vehicles (DMV), which we held was an adjunct to law enforcement, to perform its duties and functions correctly. Further, in *Hisey*, we held that the good faith exception to the exclusionary rule was inapplicable to mistakes by the DMV so as to validate an otherwise baseless stop of a motorist. However, in the present case, the district court found that *Hisey* was not controlling by reasoning as follows:

> The application of the exclusionary rule would have little effect on the person completing the application for motor vehicle title or on the operations of the Burt County Treasurer. Therefore, the good-faith exception to the exclusionary rule applies to the initial stop of [Bromm's] vehicle and the County Court was correct in its denial of this portion of [Bromm's] Motion to Suppress.

The district court found that the odor of alcohol emanating from Bromm, Bromm's admission that he had been drinking, and the results of the HGN and PBT tests amounted to sufficient probable cause to arrest him. In sum, the district court found that the county court did not err in overruling Bromm's motion to suppress or in finding him guilty of DUI. Bromm now appeals.

ASSIGNMENTS OF ERROR

We reduce Bromm's four assignments of error to their essence, which is that the county court erred in (1) overruling his motion to suppress all evidence obtained by law enforcement because there was not reasonable suspicion for the traffic stop and (2) finding him guilty of DUI because there was not probable cause for his arrest.

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

[4-6] Warrantless searches are generally unreasonable under the Fourth Amendment, subject to a limited number of specific exceptions, including (1) searches undertaken with consent or with probable cause, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest. See *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006). A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *Nolan, supra*. 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. *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011). 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. *Id.*

Bromm argues that Groves did not have reasonable suspicion to stop his vehicle because the rationale for the stop, fictitious license plates in violation of Neb. Rev. Stat. § 60-399 (Reissue 2010), was due to a clerical error related to the registration of

his vehicle. Bromm likens the present case to *State v. Hisey*, 15 Neb. App. 100, 723 N.W.2d 99 (2006), in which we found that because the arresting officer relied on erroneous information contained in Richard Hisey's DMV records in making a traffic stop of his vehicle, the officer did not have probable cause to arrest him for DUI and driving with an open container of alcohol in his vehicle. In that case, the arresting officer observed Hisey driving his vehicle and parking it in front of his home. The officer had earlier attended a trial where Hisey's driver's license was impounded. Because the officer was under the impression Hisey's license was still impounded, she then called to check the status of his license with her dispatcher. The dispatcher told the officer that Hisey's license was currently impounded. The officer then arrested Hisey for driving with a suspended license. Hisey was also charged with having an open container of alcohol in his vehicle and, after a series of sobriety tests were performed, with DUI.

Before disposition of the charges against Hisey, it was discovered that his license was not actually under impoundment at the time of his arrest. The information conveyed by the police dispatcher to the arresting officer was erroneous. Our opinion in *Hisey* states that "the mistake occurred in the records of the DMV," 15 Neb. App. at 111, 723 N.W.2d at 109, which mistake was passed on by the dispatcher to the officer in the field, and the officer relied upon that information.

Because Hisey was not driving on a suspended license, the driving under a suspended license charge was dropped and a jury trial was held with respect to the other two charges. After trial, a jury found Hisey guilty of the open container and DUI charges, and the county court entered judgment accordingly. Hisey appealed to the district court, which found that all evidence received by law enforcement after the factually baseless stop of Hisey should have been suppressed. Thus, the district court vacated his convictions and sentences, and remanded the cause to the county court. The State appealed to this court.

In our *Hisey* opinion, we discussed a similar scenario that had been before the Nebraska Supreme Court in *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005), *disapproved on other*

grounds, State v. McCulloch, 274 Neb. 636, 742 N.W.2d 727 (2007). In *Allen*, a police officer requested dispatch to check the registration on a minivan. The dispatcher mistakenly ran a check on the wrong license plate number, causing the officer to stop the minivan and discover that the driver was operating the minivan on a suspended license. The *Allen* court held that there was an unreasonable seizure in violation of the Fourth Amendment, explaining:

> This is not a case in which police possess factual information supporting a reasonable suspicion of criminal activity which, upon further investigation, proves to be unfounded. Here, there was no factual foundation for the information which the dispatcher transmitted to [the officer], as it is undisputed that the information was false due to the dispatcher's mistake in running the wrong license plate number. [The officer] had no other reason for initiating the stop. Thus, the record reflects that neither [the officer] nor any other law enforcement personnel possessed any true fact which would support the reasonable suspicion necessary to justify an investigative stop. The stop was therefore an unreasonable seizure in violation of the Fourth Amendment.

269 Neb. at 77-78, 690 N.W.2d at 590.

[7] In this court's opinion in *State v. Hisey*, 15 Neb. App. 100, 723 N.W.2d 99 (2006), we found that there was not probable cause for the arrest because, similar to *Allen, supra*, the fact relied upon to establish probable cause—that Hisey's driver's license was under impoundment—was false. We then analyzed whether the exclusionary rule was the proper remedy or whether the good faith exception to that rule should apply. See *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) (setting forth good faith exception to exclusionary rule). In *Hisey*, we cited *Arizona v. Evans*, 514 U.S. 1, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995), in which the U.S. Supreme Court determined that if a court employee supplies erroneous information to a police officer who then makes an arrest based on such information, the good faith exception to the exclusionary rule applies "'[b]ecause court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of

ferreting out crime . . . they [court clerks] have no stake in the outcome of particular criminal prosecutions.'" 15 Neb. App. at 110, 723 N.W.2d at 109. We concluded in *Hisey* that the converse of the holding of *Evans* was controlling in *Hisey* because the DMV could be "fairly characterized as '"adjuncts to the law enforcement team."'" 15 Neb. App. at 111, 723 N.W.2d at 109, quoting *Shadler v. State*, 761 So. 2d 279 (Fla. 2000). See, also, *Evans, supra*.

In *Hisey*, we found that the DMV is closely related to law enforcement in the State of Nebraska, that it is integral to enforcement of the laws concerning motor vehicles and persons who operate vehicles, that the duties of the DMV are clearly interrelated with law enforcement duties, and that the DMV helps regulate and enforce the laws pertaining to licensing and driving in Nebraska. Further, we found that "the threat of exclusion of evidence will likely encourage DMV employees charged with recording and transmitting information on license impoundments to exercise greater caution. The purpose of the exclusionary rule will therefore be served if the evidence from the arrest in this case is suppressed." *Hisey*, 15 Neb. App. at 113, 723 N.W.2d at 111.

[8] In this case, similar to *Hisey, supra*, and *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007), we have a scenario where the basis for the traffic stop of Bromm—fictitious license plates—was caused by erroneous information provided to the arresting officer by the dispatcher. Although the sole basis for the stop of Bromm was "fallacious," to use the district court's term, the arresting officer's actions were clearly objectively reasonable. Therefore, we must determine whether the good faith exception to the exclusionary rule applies. In doing so, the question appears to be whether the identification of Bromm's vehicle as white on his vehicle's registration—which is the reason Groves suspected fictitious license plates, since Bromm's vehicle was dark in color—is attributable to an entity that can be categorized, like the DMV in *State v. Hisey*, 15 Neb. App. 100, 723 N.W.2d 99 (2006), as an adjunct to law enforcement. Bromm asserts, citing *Hisey*, that the State bears the burden of proving that the good faith

exception to the exclusionary rule applies in the case of unconstitutional warrantless searches and seizures, a proposition with which we agree. See *Allen, supra*. By implication, we assume his argument is that the State failed to meet its burden of proof and that thus, *Hisey* controls.

On the other hand, the State argues that the record is devoid of any suggestion that the DMV is the party responsible for the error. A copy of Bromm's vehicle registration was received at trial as part of exhibit 5. The registration lists the color of Bromm's vehicle as white. We note, for completeness, that there is evidence that Bromm's previous vehicle was white. The State argues that "[m]otor vehicle registrations are issued by the treasurer[']s office in most counties, Neb.Rev.Stat. §60-389 and §60-390, and plainly was done so in this case." Brief for appellee at 10. The State argues that the mistake on the registration was made by the Burt County treasurer's office, which is listed at the top of Bromm's registration, either through its own error or through Bromm's supplying it with the wrong information and that, unlike the DMV, the Burt County treasurer's office is not "'essentially a law enforcement agency.'" Brief for appellee at 11, quoting *Hisey, supra*. The State reasons as follows:

> Treasurers['] offices should not be considered an adjunct of law enforcement because they are not involved in promulgating rules and regulations that law enforcement must enforce, nor are they "integral to the laws concerning motor vehicles and persons who operate vehicles." *Hisey*, supra at 112. A county treasurer[']s office collects revenues for a county, collects all real estate and personal taxes in the county, disburses those moneys to the appropriate political entities, and registers motor vehicles in that county. In short, the treasurer[']s office is not "a vital part of the law enforcement infrastructure" of the state and [is not] "essentially a law enforcement agency." *Hisey*, supra at 113.

Brief for appellee at 10-11.

In *Hisey*, we said that "[t]he dispatcher received this erroneous information from the DMV's driver and vehicle records division's records, which mistakenly indicated that Hisey was

not eligible to get his impounded license back until May 2, 2004." 15 Neb. App. at 103, 723 N.W.2d at 104. However, this case is different in the sense that while the officer, Groves, got his information suggesting that Bromm's vehicle did not have proper license plates from his dispatcher, who has to be seen as "law enforcement" and not merely an "adjunct" thereto, there is no direct evidence as to where the dispatcher got the erroneous information such as was outlined in *Hisey*.

[9] As said earlier herein, the burden of proof is on the State to prove the applicability of the good faith exception to the exclusionary rule set forth in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). But, it is clear that the State has not proved that the erroneous information upon which Groves acted came from the Burt County treasurer's office—either through its mistake or because of Bromm's error when he registered his vehicle. Rather, we must conclude that the dispatcher got the information that Groves used to stop Bromm from the DMV. Therefore, we conclude that *State v. Hisey*, 15 Neb. App. 100, 723 N.W.2d 99 (2006), controls and that the good faith exception does not apply. Consequently, the county court, and in turn the district court, erred in not sustaining Bromm's motion to suppress the evidence gained as a result of the traffic stop. When such evidence is suppressed, it is clear that the conviction cannot stand.

CONCLUSION

Accordingly, we reverse the district court's order and remand the cause to that court with directions to reverse the county court's order and to direct the county court to vacate Bromm's conviction and sentence. Because of the result we reach, we need not address Bromm's other assignments of error.

REVERSED AND REMANDED WITH DIRECTIONS.