

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
TERRENCE JOSEPH HOWELL,
Respondent.

No. 39466

FILED

MAY 06 2003

ORDER OF AFFIRMANCE

JANETTE M. SLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is an appeal from a district court order granting Respondent Terrence Howell's motion in limine to suppress evidence.

On September 22, 2001, during an event known as Street Vibrations in downtown Reno, Officer Charles Robert Sheffield effected a traffic stop of two motorcyclists for an improper pass. The motorcyclists, Frederick Klingler and Terrence Howell, had passed the vehicles in front of them, including the officer's vehicle, on the right-hand side instead of the left-hand side. After checking their identification, Officer Sheffield told Frederick Klingler to leave without issuing him a citation. However, the officer, after having noticed indicia of intoxication in Terrence Howell, performed field sobriety and chemical tests upon Howell and subsequently arrested him for driving under the influence.

At a pre-trial hearing on Howell's motion to suppress, the district court determined that Howell had not engaged in any illegal conduct by passing on the right, and therefore, the traffic stop was not justified. The district court concluded that all evidence flowing from the stop must be suppressed. The State timely filed this interlocutory appeal, arguing that the district court erred by: (1) misapprehending the law allowing drivers to pass on the right under certain circumstances; (2) determining that the motorcyclists were not engaged in illegal conduct when they passed the patrol car on the right; and (3) applying the wrong

standard to determine whether the Terry¹ stop was unreasonable. We disagree.

""[F]indings of fact in a suppression hearing will not be disturbed on appeal if supported by substantial evidence.""² However, because resolution of this issue turns on an interpretation of NRS 484.297, the question also involves one of law, which this court reviews de novo.³ Additionally, we conduct de novo review of the legal consequences of findings of historical facts.⁴

NRS 484.297 provides:

1. The driver of a vehicle may overtake and pass upon the right of another vehicle only under the following conditions:

(a) When the driver of the vehicle overtaken is making or signaling to make a left turn.

(b) Upon a highway with unobstructed pavement, not occupied by parked vehicles, of sufficient width for two or more lines of moving vehicles in each direction.

(c) Upon any highway on which traffic is restricted to one direction of movement, where the highway is free from obstructions and of sufficient width for two or more lines of moving vehicles.

2. The driver of a vehicle may overtake and pass another vehicle upon the right only under conditions permitting such movement in safety.

¹Terry v. Ohio, 392 U.S. 1 (1968).

²State v. Harnisch, 113 Nev. 214, 219, 931 P.2d 1359, 1363 (1997) (quoting State v. Miller, 110 Nev. 690, 694, 877 P.2d 1044, 1047 (1994)).

³Lee v. State, 116 Nev. 452, 453, 997 P.2d 138, 140 (2000).

⁴State v. Lisenbee, 116 Nev. 1124, 1127, 13 P.3d 947, 949 (2000).

3. The driver of a vehicle shall not overtake and pass another vehicle upon the right when such movement requires driving off the paved portion of the highway.

The State contends that a proper reading of the statute would result in NRS 484.297(2) modifying each of the three situations in which a driver may pass on the right, so that a driver may pass on the right only if one of the three situations is applicable and the driver can do so safely. We agree with the State. NRS 484.297 permits a vehicle to pass on the right if one of the three conditions of section 1 is met provided the movement is safely made as required by section 2. However, we believe that the district court found that Howell complied with both sections 1 and 2.

Although the district court did not expressly set forth a finding that the motorcyclists had complied with one of the situations enumerated in NRS 484.279(1), it appears from the hearing transcript that the district court determined that the motorcyclists executed a proper pass under either of the first two circumstances enumerated in NRS 484.297(1). The district court decided that the motorcyclists complied with NRS 484.297(1)(a) because the vehicles in front of the motorcyclists were making a left-hand turn, and the conditions permitted safe passage, or that the motorcyclists complied with NRS 484.297(1)(b) because there was "unobstructed pavement . . . of sufficient width for two or more lines of moving traffic in each direction." The district court also considered the fact that the motorcyclists did so in a safe manner under NRS 484.297(2) because the court stated that there was no evidence that they were

speeding or otherwise being reckless. We conclude that the district court correctly interpreted the statute.⁵

The State next argues that the motorcyclists violated the statute, and therefore Officer Sheffield was justified in effecting a traffic stop. Specifically, the State contends that the motorcyclists did not pass in a lane free of parked vehicles, but squeezed into the narrow space between the officer's moving vehicle and parked vehicles.

The evidence at the suppression hearing consisted of conflicting testimony. Officer Sheffield testified that there were parked vehicles next to him when the motorcyclists passed and that he was "kind of shocked" that the motorcyclists would attempt to pass in such a situation. Officer Sheffield testified that he felt the motorcyclists' maneuver was unsafe because pedestrian traffic was heavy and because a driver in the driving lane would not expect and therefore would not look for motorcyclists on his right. If he were to make a right-hand turn, he could have collided with the motorcyclists. Frederick Klingler testified there was enough room "for a truck to go through there." Klingler could not recall if there were vehicles parked in the parking lane at the point at which he and Howell passed the patrol car, but he testified that even if there were parked vehicles, there was still plenty of room to pass. In fact, he testified that a car passed on the right of the patrol car before he and Howell did so. Klingler also testified that there was at least one vehicle behind the patrol car and that its left-turn signal was on, indicating the

⁵The district court's reasoning could only be discerned from the hearing transcript, as there were no written findings of fact and conclusions of law to support its order granting the motion to suppress. Although we note that written findings are helpful for judicial review, they are not mandatory.

vehicle was about to make a left-hand turn. He further stated that he did not believe there were cars in front of the patrol car, that the patrol car was slowing, that the patrol car was on the far left side of its lane, and that it appeared the patrol car was also turning left.

Both Officer Sheffield and Klingler testified that the motorcyclists were driving under the speed limit. Officer Sheffield testified that they were passing on the right "not in a reckless manner." Furthermore, Klingler testified that the officer did not give him a citation for any traffic violation, and merely told him to leave after checking his identification.

The district court, after listening to the conflicting testimony, determined that the motorcyclists were passing on the right in a safe manner and that they did so legally under the statute. The district court decided, therefore, that the detention of the motorcyclists was improper because they were not engaged in illegal activity. Therefore, any evidence derived from that detention was inadmissible.

[W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.⁶

Substantial evidence supports the district court's ruling. Officer Sheffield did not cite Klingler for an improper pass, there was testimony that the road was wide enough for a vehicle to pass on the right and that a car passed the patrol vehicle before the motorcyclists did so, and Officer Sheffield testified that the motorcyclists were driving in a safe manner.

⁶Anderson v. Bessemer City, 470 U.S. 564, 575 (1985).

The State contends that the district court judge improperly based his reasoning on his own driving habits; it appears the district court essentially took judicial notice of the width of that portion of Virginia Street by stating that "I know that area well from the standpoint I drive it." The court may take judicial notice of a fact that is "[g]enerally known within the territorial jurisdiction of the trial court" or "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."⁷ Although Officer Sheffield testified that the travel lane was approximately fourteen feet wide, and that a single lane is usually twelve to fourteen feet in width, there was no evidence introduced of the width of the portion of the road from the travel lane to the parking lane or to the sidewalk. The width of that portion of Virginia Street is a fact that could be readily determined by accurate sources. Therefore, we conclude that it was not error for the court to take into account its familiarity with Virginia Street.

The State next contends that the district court incorrectly applied the probable cause standard, rather than the reasonable suspicion standard, to determine that there was insufficient reason to stop the motorcyclists. We agree that the standard for a police officer stopping a vehicle is reasonable suspicion,⁸ but we disagree that the district court applied an incorrect standard. It is true that the district court stated that it did not see any "probable cause to stop," but the court also stated that it saw no facts of "illegal activity in the passing on the right." This court will

⁷NRS 47.130(2).

⁸See NRS 171.123; State v. Sonnefeld, 114 Nev. 631, 633-34, 958 P.2d 1215, 1216-17 (1998); State v. Wright, 104 Nev. 521, 523, 763 P.2d 49, 50 (1988).

make reasonable inferences to support a district court's discretionary ruling.⁹ Here, it is reasonably clear from the district court's remarks that it found that there was no reasonable suspicion to permit the stopping of Klingler. Therefore, we conclude that the district court did not use an incorrect standard when it made its suppression ruling.


Conclusion


In deciding to grant the motion to suppress, the district court focused on whether the officer's stop was justified under the law. The district court heard and weighed the testimony of the officer and Klingler and gave more credit to Klingler's testimony that there was plenty of space to pass. It found that a vehicle in front of the motorcyclists was turning left. Therefore, under NRS 484.297(1)(a) or (b) and NRS 484.297(2), the district court determined that the motorcyclists legally passed on the right, and because their conduct was legal, the officer could not have had a reasonable suspicion to stop them for an improper pass.¹⁰ We conclude that the district court's determination was not clearly erroneous. Accordingly, we


⁹Cf. James Hardie Gypsum, Inc. v. Inquipco, 112 Nev. 1397, 1404, 929 P.2d 903, 907 (1996) (noting that this court may imply findings where the evidence clearly supports the judgment notwithstanding the district court's absence of specific findings).

¹⁰The State also contends that the district court based its decision on a finding that the stop was pretextual. However, there is no evidence in the record to indicate that the district court focused on the officer's subjective state of mind when he effected the stop; rather, the court focused on whether the motorcyclists' conduct violated the law and whether the stop was reasonable. Therefore, the State's contention has no merit.

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Maupin


_____, J.
Gibbons

cc: Hon. Steven R. Kosach, District Judge
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Arnold Brock Jr.
Washoe District Court Clerk