IN THE THIRD CIRCUIT COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL NO. 27769

STATE OF SOUTH DAKOTA,

PLAINTIFF/APPELLEE,

vs.

STEVEN STANAGE,

DEFENDANT/APPELLANT.

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
BROOKINGS COUNTY, SOUTH DAKOTA

THE HONORABLE GREGORY STOLTENBURG
Circuit Court Judges

APPELLANT'S BRIEF

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	)	
vs.	)	
	)	
STEVEN STANAGE,	)	
	)	
Defendant/Appellant.	)	

PRELIMINARY STATEMENT

References to the Settled Record, consisting of Brookings County Criminal File 14-586, will be designated by (SR) followed by the appropriate page number. Exhibits from any of the hearings will be designated by Exhibit number. References to the Motions Hearing Transcript shall be designated by (HT) followed by the appropriate page number or exhibit.

JURISDICTIONAL STATEMENT

Defendant appeals the Order Affirming the Magistrate Court Decision filed on February 8, 2016. The parties submitted the case to the Magistrate Court by Stipulation for final judgment. The Magistrate filed the judgment on August 27, 2015, and it was dated August 17, 2015. The Defendant timely filed a Notice of Appeal to appeal to the Circuit Court. That Court had jurisdiction over appeals of orders or final judgments from Magistrate Court. *See* SDCL § 16-6-10. The Circuit affirmed in a memorandum opinion and order, which appellant now appeals to this Court. This Court derives its jurisdiction pursuant to Chapter 23A-32 of the South Dakota Codified Law.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests the privilege of oral argument.

LEGAL ISSUES

1. THE COURT ERRED IN CONCLUDING THAT THE STOP AND SEIZURE OF THE DEFENDANT PURSUANT TO AN ANONYMOUS TELEPHONE TIP DID NOT VIOLATE HIS CONSTITUTIONAL RIGHT AGAINST UNREASONABLE SEARCHES AND SEIZURES UNDER THE STATE AND FEDERAL CONSTITUTION.

The Magistrate denied the Defendant's motion to suppress and the Circuit affirmed, improperly concluding that the stop was justified based on reasonable suspicion under the totality of the circumstances.

Most Relevant Authority:

Navarette v. California, 134 S. Ct. 1683, 188 L. Ed. 2d 680 (2014)

State v. Walter, 2015 S.D. 37, 864 N.W.2d 779

State v. Miller, 510 N.W.2d 638 (N.D. 1994)

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

On October 26, 2014, a young employee at the drive through at Hardees in Brookings, South Dakota saw a patron at the window and "assum[ed]" that he was under the influence. HT 6, 7. The employee told his shift manager. HT 7. The shift manager, who never saw the customer, called the police. HT 7.

Brookings County Sheriff's Deputy Jeremy Kriese was a block away from Hardees when he received a call from dispatch. HT 21, 22. He just happened to be in the area. HT 30. Dispatch recorded the manager's call to the police, and Deputy Kriese also ran recording equipment inside his patrol vehicle. HT 40. Dispatch advised of a possible

intoxicated driver with license plate 7CG-082. HT 23. Dispatch advised that Hardees was holding the vehicle. HT 30-31. Deputy Kriese arrived and parked nearby. HT 23.

> "Q: [W]hat specific words were you told about the observations?
>
> A: I had a call being told that there as a possible drunk driver at the Hardee's window." HT 34.

Once parked, the Deputy's dash camera focused on the drive through. HT 31. Deputy Kriese radioed dispatch to instruct the Hardees employee to let the vehicle go. HT 31. Deputy Kriese observed nothing erratic about the vehicle, and he observed nothing at any time that would indicate any violation of the law or potential traffic violations. HT 31, 32. There was nothing unusual about the vehicle at all. HT 35. Deputy Kriese pulled in behind the vehicle, saw the license plate, and initiated a stop. HT 34, 35.

"[T]he sole basis for [Deputy Kriese] to stop the car was whatever the dispatcher told [him] over the radio[.]" HT. 32. The Deputy was unaware at the time that the tipster on the phone had never actually witnessed anything. HT 32. Deputy Kriese did not have any information about the tipster's identity prior to conducting the stop. HT 32. Although Deputy Kriese asked the dispatcher to get the caller's information, it was not obtained at that time. HT 32.

The State's Attorney's office ultimately obtained the tipster's identity much later, a few days before the suppression hearing. The tipster's identity was discovered after the accused, through counsel, moved to suppress the stop.

On Monday, January 26, 2015, a week before the suppression hearing, the government identified and finally contacted Mr. James Debough. HT 16. Mr. Debough worked as the shift manager at Hardees back on October 26. HT 13. Mr. Debough recalled that Adam Hill worked the window at Hardees that night. HT 13. Mr. Hill saw a man with bloodshot eyes and slurred speech who had difficulty grabbing his cup. HT 6. Mr. Hill told Mr. Debough, who called the police. HT 14. Mr. Hill did not listen in or participate in the call. HT 9.

The caller, Mr. Debough, never did observe anything personally, but relied entirely upon Mr. Hill. HT 15. Mr. Debough never had any contact with police except for his brief phone call. HT 16.

Mr. Hill intentionally slowed down the fast-food preparation process to hold the driver there for law enforcement. HT 10. Mr. Hill believed he held up the process for a "significant" amount of time. HT 11, 12.

After Mr. Debough got off the phone with the police, he told Mr. Hill to let the driver go. HT 12. Mr. Hill did not have any contact with law enforcement until four days before the hearing when he was identified and subpoenaed. HT 11.

Deputy Kriese lacked independent reasonable suspicion based on any observations made by him. HT 31, 32. Instead, Deputy Kriese relied entirely on the dispatch message sent to him by the Brookings Police Department. HT 32. The dispatch report was based upon a phone call by a third party, Mr. Debough, who also did not observe the customer, relying instead entirely on Mr. Hill. HT 15.

The call to Brookings dispatch that Deputy Kriese relied on was an anonymous tip. HT at Ex. A. The caller did not identify himself. Id. The caller admitted that he did

not have any personal knowledge. HT 15. The individual who allegedly observed the driver was not identified in the original call to dispatch. HT at Ex. A. Neither the caller, nor the person working the window, were identified prior to the stop and detention of the Defendant. HT 32. They were anonymous until just a few days before the suppression hearing.

The accused moved to suppress the stop and everything afterward. The magistrate judge heard the motion on February 2, 2015 and ruled from the bench. The facts were subsequently submitted to the Magistrate in a stipulated trial. The Magistrate found the defendant guilty of DUI. The Court sentenced the defendant for the record, but stayed the sentence pending appeal.

STANDARD OF REVIEW

It is a well-settled principle that the denial of a Motion to Suppress for a violation of a constitutionally protected right raises a question of law which requires a de novo review. *State v. Hess*, 2004 S.D. 60, ¶ 9, 680 N.W. 2d 314, 319 (citing *State v. Herrman*, 2002 S.D. 119, ¶ 9, 652 N.W.2d 725, 728 (additional citations omitted). Findings of fact are reviewed under the clearly erroneous standard; although the application of a legal standard to those same facts will likewise be reviewed de novo. *State v. Tofani*, 2006 S.D. 63, 719 N.W.2d 391, 398; *State v. Stevens*, 2007 S.D. 54, ¶ 5, 734 N.W.2d 344, 346.

ARGUMENT

In this case, the Circuit Court improperly affirmed the magistrate, which ruled that Deputy Kriese had reasonable suspicion to stop the vehicle. The Circuit relied on an outdated 2001 decision from the Eighth Circuit rather than the recent United States Supreme Court Decision from 2014. The Circuit also disregarded this Court's recent

decision in *State v. Walter*, 2015 S.D. 37, 864 N.W.2d 779, which distilled this Court's history of decisions on the issue. The Circuit imputed certain facts to Deputy Kriese that were never actually relayed to him or anyone else at the time of the stop.

The Circuit further erred in finding that the tipster was not, in fact, anonymous. The magistrate found that the tipster was in fact anonymous at the time of the stop, but that the tip alone provided reasonable suspicion. That is the proper issue for review.

A. Reasonable Suspicion Standard

The Fourth Amendment to the U.S. Constitution and Article VI, § 11 of the Constitution of the State of South Dakota protect individuals from unreasonable searches and seizures. Every stop of an individual raises Fourth Amendment considerations to the extent that the stop is a "seizure." As a general rule, to comply with Constitutional protections, law enforcement must first obtain a warrant based upon probable cause to support a seizure. *State v. Rademaker*, 2012 S.D. 28, ¶ 9, 813 N.W.2d 174, 176. If a warrantless seizure is conducted, it is the State's burden to show that it was justified. *State v. Wright*, 2010 S.D. 91, ¶ 9, 791 N.W.2d 791, 794 (citations omitted).

In the absence of a warrant, courts recognize that an officer may stop an individual if there is reasonable suspicion to believe that criminal activity may be afoot justifying the stop. *Rademaker*, 2012 S.D. at ¶ 9, 813 N.W.2d at 176.

This Court would properly not provide an exact definition of reasonable suspicion, because of the inherent difficulty in defining the term. Reasonable suspicion is satisfied when the stop is based upon "specific and articulable facts which taken together with rational inferences from those facts, reasonably warrant the intrusion." *State v. Herren*, 2010 S.D. 101, ¶ 8, 792 N.W.2d 551, 554 (quoting *Akuba*, 2004 S.D. at 15, 686

N.W.2d at 413). It is a well-settled, undisputable fact that a "stop may not be the product of mere whim, caprice or idle curiosity." *State v. Dahl*, 2012 S.D. 8, ¶ 6, 809 N.W.2d 844, 846.

A stop by an officer must be "justified at its inception . . . ." *Terry v. Ohio*, 392 U.S. 1, 20 (1968). Evidence obtained as a result of an illegal search and seizure falls within the exclusionary rule and cannot be used against the Defendant. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961); *State v. Labine*, 2007 S.D. 48, ¶ 22, 733 N.W.2d 265. Evidence derived from illegal police conduct is inadmissible as "fruits of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471 (1963). When evidence of tangible materials is seized and testimony concerning knowledge is acquired during an unlawful stop and seizure, the exclusionary rule prohibits its introduction. *State v. Boll*, 2002 SD 114, ¶9, 651 N.W.2d 710, 716 (quoting *Murray v. United States*, 487 U.S. 533, 536 (1988)). In addition, derivative evidence, both tangible and testimonial that is a product of the primary evidence or otherwise acquired as an indirect result of such unlawful stop or search, is also prohibited. *Id.* The exclusionary rule is geared toward deterring police misconduct. *Id.* To deter due process violations in the future, suppression of evidence through the application of the exclusionary rule is appropriate. *Herring v. United States*, 129 S.Ct. 695, 700 (2009).

B. <u>Telephone Tip Standard</u>

A number of decisions address whether a telephone tip to police provides reasonable suspicion, including the recent US Supreme Court case of *Navarette v. California*, 134 S. Ct. 1683, 1688, 188 L. Ed. 2d 680 (2014) (emphasis in original):

These principles apply with full force to investigative stops based on information from anonymous tips. We have firmly rejected the argument "that reasonable cause for a[n investigative stop] can only be based on the officer's personal observation, rather than on information supplied by another person." *Adams v. Williams,* 407 U.S. 143, 147, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972). Of course, "an anonymous tip *alone* seldom demonstrates the informant's basis of knowledge or veracity." *White,* 496 U.S., at 329, 110 S.Ct. 2412 (emphasis added). That is because "ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations," and an anonymous tipster's veracity is " 'by hypothesis largely unknown, and unknowable.' " *Ibid.* But under appropriate circumstances, an anonymous tip can demonstrate "sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop." *Id.,* at 327, 110 S.Ct. 2412.

Our decisions in *Alabama v. White,* 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990), and *Florida v. J. L.,* 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000), are useful guides. In *White,* an anonymous tipster told the police that a woman would drive from a particular apartment building to a particular motel in a brown Plymouth station wagon with a broken right tail light. The tipster further asserted that the woman would be transporting cocaine. 496 U.S., at 327, 110 S.Ct. 2412. After confirming the innocent details, officers stopped the station wagon as it neared the motel and found cocaine in the vehicle. *Id.,* at 331, 110 S.Ct. 2412. We held that the officers' corroboration of certain details made the anonymous tip sufficiently reliable to create reasonable suspicion of criminal activity. By accurately predicting future behavior, the tipster demonstrated "a special familiarity with respondent's affairs," which in turn implied that the tipster had "access to reliable information about that individual's illegal activities." *Id.,* at 332, 110 S.Ct. 2412. We also recognized that an informant who is proved to tell the truth about some things is more likely to tell the truth about other things, "including the claim that the object of the tip is engaged in criminal activity." *Id.,* at 331, 110 S.Ct. 2412 (citing *Illinois v. Gates,* 462 U.S. 213, 244, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)).

In *J. L.,* by contrast, we determined that no reasonable suspicion arose from a bare-bones tip that a young black male in a plaid shirt standing at a bus stop was carrying a gun. 529 U.S., at 268, 120 S.Ct. 1375. The tipster did not explain how he knew about the gun, nor did he suggest that he had any special familiarity with the young man's affairs. *Id.,* at 271, 120 S.Ct. 1375. As a result, police had no basis for believing "that the tipster ha[d] knowledge of concealed criminal activity." *Id.,* at 272, 120 S.Ct. 1375. Furthermore, the tip included no predictions of future behavior that could be corroborated to assess the tipster's credibility. *Id.,* at

271, 120 S.Ct. 1375. We accordingly concluded that the tip was insufficiently reliable to justify a stop and frisk.

The Court in *Navarette* held that a 911-emergency tip bore sufficient indicia of reliability to support reasonable suspicion. *Id.* The Court identified several relevant circumstances in its reasoning (emphasis added):

> By reporting that **she** had been **run off the road** by a specific vehicle—a silver Ford F–150 pickup, license plate 8D94925—the caller necessarily claimed eyewitness knowledge of the alleged dangerous driving. That basis of knowledge lends significant support to the tip's reliability. (citation omitted). This is in contrast to *J. L.*, where the tip provided no basis for concluding that **the tipster had actually seen the gun**. 529 U.S., at 271, 120 S.Ct. 1375. Even in *White,* where we upheld the stop, there was scant evidence that **the tipster had actually observed cocaine** in the station wagon. . . . A driver's claim that another vehicle ran her off the road, however, necessarily implies that the informant knows the other car was driven dangerously.
>
> There is also reason to think that the 911 caller in this case was telling the truth. . . . [The] timeline of events suggests that the caller reported the incident soon after she was run off the road. That sort of contemporaneous report has long been treated as especially reliable. . . . A similar rationale applies to a "statement relating to a startling event"—such as getting run off the road—"made while the declarant was under the stress of excitement that it caused." Fed. Rule Evid. 803(2) (hearsay exception for "excited utterances"). . . . There was no indication that the tip in *J. L.* (or even in *White*) was contemporaneous with the observation of criminal activity or made under the stress of excitement caused by a startling event, but those considerations weigh in favor of the caller's veracity here.
>
> Another indicator of veracity is the caller's use of the 911 emergency system [which is recorded]. . . . The 911 system also permits law enforcement to verify important information about the caller. . . . Beginning in 2001, carriers have been required to identify the caller's geographic location with increasing specificity. . . . None of this is to suggest that tips in 911 calls are *per se* reliable. Given the foregoing technological and regulatory developments, however, a reasonable officer could conclude that a false tipster would think twice before using such a system. The caller's use of the 911 system is therefore one of the relevant circumstances that, taken together, justified the officer's reliance on the information reported in the 911 call. *Navarette,* 1689-90.

But in upholding the finding of suspicion, the *Navarette* court contrasted the case with the fact pattern presented here: "The 911 caller in this case reported more than a minor traffic infraction and more than a conclusory allegation of drunk or reckless driving. Instead, she alleged a specific and dangerous result of the driver's conduct . . . ." *Id.* at 1691 (emphasis added). The Circuit Court below disregarded the Supreme Court's holding in *Nevarette*.

The recent South Dakota case of *State v. Walter*, 2015 S.D. 37, 864 N.W.2d 779, also disregarded, involves a conclusory anonymous tip of a man panhandling in Rapid City. The man was stopped, frisked, and arrested for possessing contraband. This Court reversed the trial court's finding of reasonable suspicion. The decision ultimately turned on the important issue of whether a report of panhandling "created reasonable suspicion of an ongoing crime," *Navarette*, 134 S. Ct. at 1690, because panhandling is allowed in Rapid City. But the case is poignant because it discusses South Dakota tipster jurisprudence in light of *Navarette*. In addition, the *Walter* Court reasserted the ruling regarding conclusory allegations of a possible drunk driver as set forth in *Graf* and *Burkett*, as well as a robbery tip in *Mohr*:

> Our own decisions also support the conclusion that Officer Ackland did not have a reasonable suspicion of criminal activity. In *Graf v. South Dakota Department of Commerce & Regulation,* 508 N.W.2d 1 (S.D.1993), we reviewed the sufficiency of a tip to conduct a traffic stop. The tip provided the make, model, and license plate number of the defendant's vehicle, as well as a statement "that the driver was 'possibly' intoxicated." *Id.* at 3–4. However, "[t]he caller described no erratic driving[,]" nor did the officer "observe any erratic driving on [the defendant's] part." *Id.* at 3. We recognized the case was unlike other "cases where ... callers described specific facts concerning driving conduct and gave detailed information which substantiated the tip and gave it greater reliability." *Id.* (citing *Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990)). Thus, because the tip only asserted a

conclusory allegation of drunk driving, and because the officer did not observe any suspicious behavior, we held "[t]he requirement of specific and articulable facts was simply not met." *Id.* at 4.

Similarly, in *State v. Burkett,* we reviewed a traffic stop that resulted, in part, from a tip that provided the color, type, and license plate number of the defendant's vehicle, as well as a statement that the driver was possibly intoxicated. 2014 S.D. 38, ¶ 46 n. 11, 849 N.W.2d at 636 n. 11. Like *Graf,* we said the tip upon which the officer acted was "minimal, almost conclusory in nature[.]" *Burkett,* 2014 S.D. 38, ¶ 56, 849 N.W.2d at 638. However, prior to initiating the stop, the detaining officer observed the defendant stop his vehicle "in the middle of a residential street and rev[ ] its engine for no apparent reason." *Id.* ¶ 8, 849 N.W.2d at 626. Under the totality of the circumstances, the officer's corroboration of the tip by "a brief observation of erratic driving[,]" *id.* ¶ 56, 849 N.W.2d at 638, compensated for an otherwise anemic tip. . . .

In *State v. Mohr,* we reviewed the detention and search of a defendant after a casino attendant triggered a duress alarm. 2013 S.D. 94, ¶ 4, 841 N.W.2d at 443. The only additional information conveyed by dispatch to the responding officers was "that the casino attendant believed the suspect from earlier robberies was in the casino, that Mohr was wearing a hat and sunglasses, and that Mohr was playing video lottery when officers arrived." *Id.* ¶ 15, 841 N.W.2d at 445. We agreed with the defendant that the attendant's phone call "did not relay any articulable facts of her firsthand observation of a crime in progress" and recognized that, "viewed in isolation, [the call] might lack the factual basis for police to have a reasonable suspicion of criminal activity." *Id.* ¶ 22, 841 N.W.2d at 447. However, as in *Burkett,* we upheld the detention and search because the officers were familiar with the circumstances of the prior robberies, the attendant was an identifiable source, and the nature of an emergency call limited the ability of the officers to investigate. *Id.* ¶¶ 18–23, 841 N.W.2d at 445–47. None of these factors are present in Walter's case.

. . . Here, the report Officer Ackland received did not articulate any facts describing illegal conduct or any conduct that would otherwise give rise to an inference of criminal activity. Officer Ackland did not corroborate the report's conclusory assertion by personal observation of Walter. The State has not asserted Officer Ackland had any preexisting knowledge regarding Walter's particular brand of panhandling or that the area in which Officer Ackland found Walter generally suffered from prohibited solicitation. Here, unlike *Navarette, Burkett*, and *Mohr,* the totality of the circumstances upon which to find reasonable suspicion is therefore limited to the simple and conclusory report given to Officer Ackland by the dispatcher. Rather, as in *Graf,* "[t]he requirement of

specific and articulable facts was simply not met." 508 N.W.2d at 4. *Walter*, 2015 S.D. at ¶¶ 9-13, 864 N.W.2d at 783-85

C. Discussion

Regarding this case, this Court does not have any decisions that are factually indistinguishable. However, the ubiquity of drive-through dining guarantees that several cases exist on nearly identical facts. *E.g. State v. Wagner*, 2011 WL 598433 (Ohio App. 2011) (unpublished) (reversing lower court's denial of suppression where employee reported a "drunk" customer to off-duty policeman, who "radioed to dispatch that there was 'a possible drunk driver in the drive-thru' and requested that a marked car respond"). *Cf. State v. Steinbrunner*, 2012 WL 1926395 (Ohio App. May 29, 2012) (unpublished) (reasonable suspicion exists where drive-through tipster gave his name and contact info, the suspect vehicle's make/color/license number, described their lengthy interaction, and where officer spoke briefly with drive-through attendant before stopping suspect).

For another example, in *Sidney v. Stout*, 671 N.E.2d 341 (Mun. Ct. Ohio 1996), the resemblance is uncanny:

> An employee at a drive-thru fast food operation, while serving the defendant, Michael E. Stout, telephoned the Sidney Police to report a possible DUI. The tip was relayed from police dispatch to an officer who happened to be in the vicinity of the fast food restaurant. The officer responded and saw the defendant's car at the drive-thru window. The officer walked up to the driver's window and began to solicit information from the defendant and collected evidence which led to the defendant's arrest. It should be noted that the officer had no other information prior to engaging the defendant. The officer did not know the tipster, nor did he solicit further information from the tipster. *Stout*, 671 N.E.2d at 342.

Citing relevant US Supreme Court authority, the *Stout* decision held that the drive through tip alone did not support reasonable suspicion.

> In this case, the officer approached the defendant before he had sufficiently corroborated the anonymous tip. The officer did not see any

> erratic driving or any suspicious behavior of any type. The officer approached the defendant's vehicle without developing an independent reasonable suspicion of criminal activity. In addition, the officer did not talk to the citizen-informant personally before approaching and questioning the defendant. Where specific details of an anonymous tip are corroborated by police, they have reasonable suspicion to make an investigatory stop. *Alabama v. White, supra.* These specific details to corroborate the tip are missing in the case at bar.
>
> The court finds that the sole basis for the stop of the defendant was supported by an anonymous tip standing alone. This fact sequence does not support the constitutional requirement necessary for an investigative stop, to wit, a reasonable suspicion supported by articulable facts. *Berkemer v. McCarty, supra. Stout,* 671 N.E.2d at 343.

And this Court has twice cited North Dakota's similar driver-through-tipster case of *State v. Miller*, 510 N.W.2d 638 (N.D. 2003). *State v. Satter*, 2009 S.D. 35, ¶ 16, 766 N.W.2d 153, 157; *State v. Scholl*, 2004 S.D. 85, ¶ 9, 684 N.W.2d 83, 87 ("We perceive a distinction between observations at a fast food restaurant such as in *Miller*, . . . and observations at a bar where the likelihood of alcohol consumption is obviously enhanced.").

Here, *Miller* is spot on. In *Miller*, the ND Supreme Court reversed a trial court that found reasonable suspicion existed where a tipster relayed information that the man in the drive through was so drunk that he "could barely hold his head up." Again, the facts are close:

> Shortly before midnight on June 22, 1992, the Bismarck Police Department dispatcher notified Officer James Chase that a caller had reported a possible drunk driver in the Wendy's drive-up lane. The caller identified himself to the dispatcher as "Jody with Wendy's," but the dispatcher did not tell Chase the caller was identified, either by name or his employment. The dispatcher described the vehicle as a red pickup and gave its license plate number and location as second in line in the drive-up lane. The dispatcher also relayed the informant's statement that the driver "could barely hold his head up." Chase was about a mile away from Wendy's and arrived there in a matter of minutes. Chase saw an orange pickup coming out of the drive-up lane. The pickup pulled out of the

> Wendy's parking lot and drove east on Capitol. Chase followed the pickup as it drove north on the frontage road in front of Wendy's at about five to seven miles per hour, and then turned into the Wendy's parking lot and parked. Chase verified that the pickup's license number matched the number reported by the dispatcher, but did not notice anything unusual about the pickup's driving. Chase pulled in behind the pickup and turned on his warning flashers. He then conducted field sobriety tests on Miller and arrested him. *State v. Miller*, 510 N.W.2d 638, 639 (N.D. 1994)

The *Miller* case is valuable because its discussion examines the gradient of circumstances involving tips and the accumulation necessary to support reasonable suspicion. "As a general rule, the lesser the quality or reliability of the tip, the greater the quantity of information required to raise a reasonable suspicion." *Miller*, 510 N.W.2d at 640 (citing *Alabama v. White*, 496 U.S. 325, 330 (1990)).

> The most reliable tip is the one relayed personally to the officer. . . . These cases illustrate the high end of the reliability scale: the quality of the information, provided in person by an informant known to the officer, was enough so that the quantity of the information provided by the tip alone, that the defendant was engaged in criminal activity, was sufficient to raise a reasonable suspicion.
>
> At the low end of the reliability scale are tips from anonymous callers. . . . In *City of Minot v. Nelson*, 462 N.W.2d 460 (N.D.1990), we held that an anonymous tip about a "suspicious" vehicle, without any indication of possible illegal activity from the informant or the officer's observations, was insufficient to raise a reasonable and articulable suspicion.
>
> . . .
>
> "Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. Both factors—quantity and quality—are considered in the 'totality of the circumstances—the whole picture,' *United States v. Cortez*, 449 U.S. 411, 417 (1981), that must be taken into account when evaluating whether there is reasonable suspicion. Thus, if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable. The [*Illinois v. Gates*, 462 U.S. 213 (1983)] Court applied its totality of the circumstances approach in this manner, taking into account the facts known to the officers from personal observation and giving the

> anonymous tip the weight it deserved in light of its indicia of reliability as established through independent police work. The same approach applies in the reasonable suspicion context, the only difference being the level of suspicion that must be established." *Id.* 496 U.S. at 330–31, 110 S.Ct. at 2416–17.
>
> . . .
>
> Because anonymous telephone tips are of lesser quality, *i.e.*, reliability, than face-to-face tips or tips from named callers, a larger quantity of information is required to raise a reasonable suspicion. Where the informant makes no prediction of future behavior indicating "inside information—a special familiarity with [the suspect's] affairs" that the police may corroborate, **the investigating officer must corroborate an anonymous, and therefore presumably unreliable, tip in some other way**. Typically, our impaired driver cases involve tips that give a description and the location of the vehicle—"easily obtained facts and conditions existing at the time of the tip" and available to the general public. Corroboration of this type of information does not increase the reliability of the tip. *See State v. Thompson*, 369 N.W.2d 363 (N.D.1985) [holding that corroboration of facts available to general public was insufficient to establish probable cause]. Therefore, our cases have required that the officer corroborate the tip by observing some behavior on the part of the driver, either illegal or indicative of impairment, that alerts the officer to a possible violation. *See also Wibben, supra* at 332 [stating that an officer's inferences and deductions may constitute part of the basis for reasonable suspicion]. *State v. Miller*, 510 N.W.2d 638, 640-42 (N.D. 1994) (emphasis added)
>
> The anonymous tipster is presumptively unreliable, not the other way around.

This is a case where suppression is the appropriate remedy for a stop based on an uncorroborated telephone tip. From the context of the phone call, the caller himself clearly did not personally observe any factual basis upon which a car could be stopped or detained. The caller never observed the driver. He lacked personal knowledge of the particular situation. Instead, the call indicates that the tipster received information second-hand from an unknown, anonymous third party, alleging that the third party had observed something. Mr. Hill, who allegedly actually observed the driver, had no communication with law enforcement whatsoever and did not talk to dispatch. Mr. Hill

did not listen to, and was absent when the tipster called in the report. This nested hearsay fundamentally undermines the objective reliability of the anonymous tip at the time that of the stop. A stop must be objectively justified at its inception.

The only information the caller provided to law enforcement was through the phone call made to dispatch. The person calling was not told whether the vehicle was a car or a pick up. The caller did not describe the driver. The caller never indicated to law enforcement that the driver was slurring his words, having trouble grabbing his cup or that his eyes were blood shot. The caller did not identify the third party who allegedly observed the driver. All that was provided was a conclusory assumption, which was not based upon any personal observation.

At the Suppression Hearing, the employees from Hardees admitted that they had held the Defendant's vehicle at Hardees waiting for law enforcement to arrive. Mr. Hill and Mr. Debough confirmed that the Police Department told them to hold the individual at Hardees. Both individuals indicated that they did not make the decision to hold the driver, but that the decision was made by law enforcement, who instructed them to let him go once Deputy Kriese was in position. The delay was described as a "significant" one. The employees at Hardees admitted that they intentionally slowed down the process to hold the driver so that law enforcement would arrive. The employees at Hardees admitted that they were informed that law enforcement was prepared and waiting for the vehicle to leave.

No one from law enforcement spoke with Mr. Debough in person on the night the stop took place. Even after the stop was completed by law enforcement, Mr. Hill remained anonymous. Mr. Hill's identity was disclosed for the first time on the date of

the Suppression Hearing. Mr. Hill admitted that he was contacted by law enforcement for the first time only four days prior to the Suppression Hearing.

Law enforcement did not come back to Hardees and identify either the caller or the person the caller was relying on. At the inception of the vehicular stop, they did not know the name of the individual who saw or observed the driver. They simply relied on a conclusory anonymous tip. The arresting officer made no observations indicating that the driver was under the influence of alcohol. The officer acknowledged in his testimony that he arrived at the scene, parked in a parking lot, and then directed the employees from Hardees to release the vehicle. From the dispatch call, the officer knew that the employees at Hardees were holding the vehicle. The officer did not observe any erratic driving. The officer did not observe anything about the vehicle that would indicate that the driver was under the influence of alcohol. The sole basis for the stop of the vehicle was whatever the dispatch told the officer over the radio.

But when the dispatcher reported the information, the dispatcher had not spoken to anyone who actually observed anything. At the point the vehicle was stopped, the officer did not have the name or contact information for the person who called in the report. The person who made the call to dispatch had not actually observed the vehicle or the people in it.

At the time of the stop, the officer did not know that the person who called in the report had not made any personal observations. The information provided to the officer did not include whether the individual who observed the vehicle had seen alcohol or could smell alcohol, or any eyewitness details at all. The information provided to the officer did not indicate that there was even any eyewitness. The report made by the caller

was that there was a possible drunk driver, and gave no other details regarding the occupants of the vehicle. This is exactly the type of conclusory, uncorroborated anonymous tip that fails to provide objective reasonable suspicion. Either independent corroboration or further inquiry with the tipster is required *before* initiating a stop.

The person who allegedly observed the Defendant did not call dispatch. The person who called dispatch did not observe the Defendant or have personal knowledge. The call made to dispatch did not include details as to what was observed, and it did not identify the caller or the person that observed the Defendant. Importantly, Dispatch did not relay all the information provided by the caller to the officer who conducted the stop, and the officer that conducted the stop did not observe anything that could serve as a basis for the stop. The call made to dispatch was vague and the information relayed to the officer provided even less information. "We have found no law to support the proposition that information known to the dispatcher but not communicated to the investigating officer nevertheless should be imputed to the officer." *State v. Miller*, 510 N.W.2d 638, 643 (N.D. 1994). The minimal tipster information relayed from Dispatch to the officer did not provide reasonable suspicion.

Where an anonymous tip gives only a layman's conclusory hypothesis of possible criminal activity, as in this case, the officer is required to observe some corroborating suspicious behavior in addition to the tip. Alternatively, the officer can inquire into the unstated basis of the layman's hypothesis prior to initiating a stop. The tip in this case, is anonymous for the purposes of reasonable-suspicion analysis. Here, looking at the quality of the tip and the quantity of the information provided it does not rise to the level of reasonable suspicion. The quality of the tip determines the quantum of information,

from the tip and the officer's corroboration, needed to raise a reasonable suspicion. An informant's single, inferential hypothesis that there is "possibly" a drunk driver at the window does not approach the precision of the information required for an uncorroborated tip, which is why this exact circumstance is specifically referenced in the dicta in *Navarette*. 134 S.Ct. at 1691 (distinguishing itself from cases involving a mere "conclusory allegation of drunk or reckless driving"). The tip gave only some conclusory allegation of possible criminal activity. The tip required corroboration of suspicious conduct to meet the requirements of reasonable suspicion. No claim of any traffic violations, erratic driving, or anything that he thought was real unusual. Observations of innocent facts do not meet the requirement that there be corroboration of suspicious conduct when a tip, short on reliability, is also short on specifics. The combination of the anonymous tip and the lack of actual observations of facts are insufficient to raise a reasonable and articulable suspicion.

It is critical that the stop be justified at its inception. The Circuit cited *US v. Wheat*, 278 F.3d 722 (8th Cir. 2001). "The tip must also contain a sufficient quantity of information to support an inference that the tipster has witnessed an actual traffic violation that compels an immediate stop." *Id.* at 732. The quantity of information was totally lacking, just an indication of a possible drunk driver with a given license plate number at Hardees. It is undisputed that Mr. Debough witnessed nothing and his tip never indicated that he witnessed anything. Mr. Hill did not participate in the phone tip to ensure that the narrative was being relayed accurately. There was no eyewitness who relayed any information to law enforcement in sufficient quantity. Rather than stop the

vehicle based on the conclusory allegation, the proper course would have been to inquire further into the tip to determine if it would compel an immediate stop.

Also critical is that the lower court improperly considered information that was indisputably never communicated in the tipster's tip. Indeed, the complete information that the court held supported reasonable suspicion was never actually communicated until the Suppression Hearing. The Circuit Court identified several "facts" in support of reasonable suspicion. *See* Memorandum Opinion, pp. 6-7. But these facts came to light at the suppression hearing, and were not communicated to law enforcement at or before the stop's inception. They were not communicated to Deputy Kriese or to dispatch. If they had, the case would be easy. A stop must be justified at its inception, and the Circuit improperly looked to external facts that were simply not communicated to Deputy Kriese until much later. The lower court's reasoning is fundamentally flawed because it allows after-acquired facts to justify any stop, no matter how unconstitutional, which eviscerates the rule that a stop must be justified at its inception. All Deputy Kriese knew was that there was a driver at Hardees, with a certain license plate, who was "possibly" under the influence. Nothing more. That is all the information that was communicated in the tip to the officer, and that is the limit of the analysis. Only the information that was objectively relayed to the officer at the inception of the stop can be considered. This was a minimal conclusory tip at the time that it was made. It did not provide reasonable suspicion.

The standard should not be turned on its head. The Circuit suggested an unusual new rule that anonymous tips are *per se* reliable, unless there is a showing of "pretext or bad faith on behalf of the informants or the officer." Memorandum Opinion at p. 7.

"[T]here certainly is no basis for treating anonymous informants as presumptively reliable." *Illinois v. Gates*, 462 U.S. at 284 (J. Brennan, dissenting).

It is arguably true that Brookings residents are by and large honest folks, but this new rule is directly averse to the unambiguous ruling of the United States Supreme Court. Under the Fourth Amendment, these tips are not to be trusted unless shown otherwise. "That is because ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations, and an anonymous tipster's veracity is by hypothesis largely unknown, and unknowable." *Navarette*, 134 S.Ct. at 1688.

The Circuit Court held that the tip was in fact not anonymous. First, the tip was principally found by the Magistrate to be anonymous. That fact was undisputed, not clearly erroneous, and found by the Magistrate who was in a position to evaluate the credibility of the witnesses. Whatever was relayed to Deputy Kriese, it was not the eyewitness's identity. He remained anonymous until much later. That witness was anonymous to a reasonable officer in the Deputy's position, triggering the analysis that the anonymous tip line of cases apply.

Second, the Circuit held that Mr. Hill was not anonymous because it was theoretically possible for law enforcement to eventually learn his identity. By this rationale, there is no such thing as an anonymous tip, and the *Navarette* rule is irrelevant. The relevant point is that the tipster was anonymous at the inception of the stop, which undermined whether a statement that a driver is "possibly" impaired, by itself, gives reasonable suspicion. A contrary holding encourages law enforcement to *not* gather particularized information about identity prior to stopping citizens.

CONCLUSION

Only on rare occasions may an anonymous hearsay tip of a "possible" impaired driver, standing alone, bear sufficient indicia of reliability to give rise to reasonable suspicion. This Court and the United States Supreme Court have repeatedly held that some corroboration by officer observation is necessary, or else the there is no reasonable suspicion.

This is not a special case. This is a case where a law enforcement officer leaped at a tip without first corroborating it. Reasonable suspicion is required, but based on the doctrine outline above, is not present, and suppression should have been granted.

Dated this _16_ day of March, 2016.

HELSPER, McCARTY & RASMUSSEN, P.C.

/s/ Benjamin Kleinjan

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CERTIFICATE OF SERVICE

The undersigned certifies that on the _16_ day of March, 2016, the foregoing brief and attached appendix were transmitted to Clerk of the Supreme Court electronically, with the original and two photocopies via U.S. mail, and with electronic service upon the following:

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CERTIFICATE OF COMPLIANCE

The undersigned, Don McCarty, attorney for the Appellant in the above-captioned matter, hereby certifies, pursuant to SDCL 15-26A-66(b)(4) that the Appellant's Brief was completed in Times New Roman typeface, 12 point, and according to the automated word count in the word-processing system used to prepare the brief, Microsoft Word 2010, it contains 7,880 words.

Dated this _16_ day of March, 2016.

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APPENDIX

COPY

STATE OF SOUTH DAKOTA) : SS COUNTY OF BROOKINGS)	IN MAGISTRATE COURT THIRD JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff, -vs- STEVEN ALEXANDER STANAGE, Defendant.	File 14-771 TRANSCRIPT OF MOTIONS HEARING

Before
The Honorable Carmen A. Means
Magistrate Court Judge

Brookings County Courthouse
Brookings, South Dakota

February 2, 2015

APPEARANCES:

For the State: Clyde R. Calhoon
Brookings Co. States Attorney
520 Third Street, Suite 330
Brookings, SD 57006

For the Defendant: Donald M. McCarty
Attorney at Law
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Brookings, SD 57006

I N D E X

(The following proceedings were held at 1:36 p.m.)

MR. CALHOON: May it please the Court. Your Honor, we would next have before the Court the matter of the State of South Dakota, Plaintiff, versus Steven Stanage, Defendant. On Information the Defendant is charged with the offense of driving while under the influence.

In the matter the Defendant has been arraigned, entered a plea of not guilty. The Defendant through his attorney has filed with the Court a motion to suppress to which motion the State has filed a resistance and now is the time scheduled for hearing on the State's motion -- or on the defense motion.

The State is represented by Clyde Calhoon, States Attorney.

MR. MCCARTY: May it please the Court. Your Honor, Don McCarty appears on behalf of and with the Defendant and everything indicated by the States Attorney is correct and we are ready to proceed with the motion.

And I would make a motion to sequester.

THE COURT: And that will be granted.

The State may call its first witness.

MR. CALHOON: Deputy Kriese and Mr. Debough, you should leave the courtroom.

The State will call Adam Hill.

MR. MCCARTY: And, Judge, I have -- I know I think I have seen you do it both ways on motions to suppress. We have two -- I got the two recordings from the States Attorney, one is the audio/video which you would normally see from the car and the other is the dispatch recording.

Is the Court going to want to listen to those today as part of the motion hearing or simply have us stipulate to them being admitted and view them later?

THE COURT: I do do it both ways. I think it kind of depends on if I think I'm ready to make the decision at the time of the hearing, I don't really know enough about this case yet.

MR. MCCARTY: Okay.

THE COURT: To know whether that's the case and so we will see how we go and I will let you know as we proceed.

MR. MCCARTY: Fair enough. Thank you, Judge.

THE COURT: Would you raise your right hand. Do you solemnly swear that the testimony that you will give in this matter will be the truth, the whole truth, and nothing but the truth so help you God?

THE WITNESS: Yes.

THE COURT: If you would spell your last name for the court reporter, please.

THE WITNESS: H-I-L-L.

ADAM HILL,

called as a witness on behalf of the State, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CALHOON:

Q Would you please state your name.

A Adam Hill.

Q By whom are you employed, Mr. Hill?

A Hardee's.

Q How long have you worked for Hardee's?

A Since September 15th, 2013.

Q And Hardee's is located here in the City of Brookings?

A Yes.

Q On East Sixth Street?

A Yes.

Q Directing your attention to the early morning of the 26th of October of this year, or last year, 2014, were you working after midnight on that date?

A Yes.

Q And were you then working at around 1:50 or shortly before that time in the morning?

A Yes.

Q At work at Hardee's, Mr. Hill, what were your duties on that early morning?

A Taking the orders and cleaning up.
Q Taking orders, what type of orders?
A Drive-through orders.
Q From the drive-through?
A Yes.
Q And prior to that time had you taken an order from an individual or individuals that had came to the drive in -- drive up?
A Yes.
Q And when you delivered that order, would you relate what you observed?
A During which order?
Q The order that gave rise to this incident.
A I noticed that there was bloodshot eyes, there was very slurred words, and had a hard time grabbing his drinks.
MR. MCCARTY: I'm sorry, I didn't hear the end of your answer.
THE WITNESS: He had slurred words, bloodshot eyes, and he had a hard time grabbing his drinks.
MR. MCCARTY: Okay.
BY MR. CALHOON:
Q And was that the driver of this particular vehicle that was in the drive-through?
A Yes.
Q And seeing that, did you form any type of an opinion,

Mr. Hill?

A Yes.

Q And that was what?

A That I should probably let my manager know what was going on.

Q And your reason for doing so was what?

A I had the assumption that he was under the influence.

Q And did you then tell your manager of that?

A Yes.

Q And your manager was who?

A James Debough.

MR. MCCARTY: I didn't hear you.

THE WITNESS: James Debough.

BY MR. CALHOON:

Q And after you had so notified the manager Mr. Debough, what then took place, Mr. Hill?

A He had told me that he was going to call the police department.

Q To your knowledge that was done?

A Yes.

Q And what then did you observe as this customer drove out of the drive-through?

A Shortly after he got pulled over.

Q By law enforcement?

A Yes.

MR. CALHOON: That would be all.

THE COURT: Cross-examination, Mr. McCarty.

CROSS-EXAMINATION

BY MR. MCCARTY:

Q Mr. Hill, did you yourself have any communication with law enforcement?

A No.

Q And so you didn't talk to dispatch and you didn't talk to the officer that was involved?

A No, sir.

Q I had never seen your name or heard your name before today. Did anybody come and get a written statement from you that night?

A No.

Q Did -- nobody talked with you in any fashion from law enforcement before you saw this vehicle being pulled over at the side of the road?

A No.

Q Correct?

A Yes.

Q Okay. And I received the police reports involved in this case and there is a reference in here that says a manager of Hardee's -- let me ask you this before I go there. Were you standing nearby when the manager called this in to dispatch?

A I had told him and then I went back to take care of other things.

Q Okay. And so you didn't hear him?

A Not entirely, no.

Q And so when you say not entirely, could you hear portions of it?

A I heard him say, yes, his name is James and then I walked away so he could kind of deal with it.

Q Okay. Did you hear anything else?

A No.

Q Did you and your manager agree that you were going to hold this vehicle?

A I think he was told.

Q What's that?

A I think he was told by the police department to hold them until, because they gave him the go ahead to let them go.

Q Okay. Either by the decision of law enforcement --

A That was my impression, yes.

Q It wasn't a decision that you made on your own?

A No.

Q Okay. And so somehow it was conveyed to you to hold this vehicle?

A Uh-huh, yes.

Q Okay. And what did you do to hold the vehicle?

A Well, we had waited on fries in the first place and so I continued to make sure that we had fresh food up for them.
Q Right. But you intentionally slowed down the process to hold them there for law enforcement to get there?
A Yes.
Q Okay. If -- but for you holding them up they would have driven away?
A Yes.
Q Did you watch the vehicle pull away from the building?
A Yes.
Q Did you see the vehicle make, I think it made a right hand turn?
A I believe so, yes.
Q And it was stopped how many yards do you suppose from the Hardee's building to where it stopped?
A I don't know how many yards, I'm not really good with measurements, but I know it was stopped at the stop sign by BP which is gave or take maybe 500 feet from Hardee's.
Q Okay. Do you know where the police officer's vehicle was when they said, okay, let them go?
A No.
Q And so you couldn't see the vehicle?
A No.
Q But you were at least informed that the vehicle was there and waiting?

A Yes.

Q Okay. And nobody came and spoke to you after the stop either?

A No.

Q When was the first time that you were contacted by law enforcement or by the authorities in relation to this case?

A I got a call to get a subpoena maybe four days ago.

Q Okay.

A And then we got a call at Hardee's last Monday for James and so that's when I knew that James was getting subpoenaed.

Q And James Debough is your manager?

A Yes.

MR. MCCARTY: Okay. No further questions, Judge.

THE COURT: Any redirect?

MR. CALHOON: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. CALHOON:

Q Mr. Hill, this vehicle that you waited on and that you had your manager call in, did you delay the process of their leaving for any significant period of time?

MR. MCCARTY: Judge, I will object as leading.

THE COURT: Overruled. He may answer.

THE WITNESS: Yes.

BY MR. CALHOON:

Q What was your answer?

A Yes.

Q And who told you that you could let them go?

A James, James Debough.

Q And was that while he was still on the phone?

A He told me he had just gotten off the phone with them and they told him to let them go.

MR. CALHOON: Nothing further.

THE COURT: Any recross?

MR. MCCARTY: No, Judge.

THE COURT: You may step down.

THE WITNESS: Thank you.

THE COURT: You're welcome.

MR. CALHOON: James Debough.

THE COURT: You can come forward. Raise your right hand. Do you solemnly swear that the testimony that you will give in this matter will be the truth, the whole truth, and nothing but the truth so help you God?

THE WITNESS: I do.

THE COURT: You may be seated. And if you would spell your last name for the court reporter.

THE WITNESS: D-E-B-O-U-G-H.

JAMES DEBOUGH,

called as a witness on behalf of the State, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CALHOON:

Q Please state your name.

A James Debough.

Q By whom are you employed?

A Hardee's.

Q And how long have you worked with Hardee's?

A About five years.

Q You are the manager; is that correct?

A I'm a shift leader, yes.

Q And can you explain what a shift leader is?

A I basically run the shift. I like manage like my crew, the labor, the money.

Q And did you hold that position on the early morning of the 26th of October of last year?

A Yes, sir.

Q And at about 1:45, 1:50 a.m. that morning, were you working?

A Yes, I was.

Q Other than yourself, who was working at that particular time of the morning?

A Adam Hill and Zach Frank.

Q And what, if anything, occurred at about that time,

James?

A I was alerted by Adam of a possible drunk driver at the drive-through.

Q And what information were you given by Adam?

A I was told that he was slurring his words, he had trouble grabbing the cup, and his eyes were bloodshot.

Q And what did you then do with that information?

A I called the police.

Q And prior to calling the police did you give any instruction to Adam?

A I said that we were going to hold him at the window until the police tell us otherwise.

Q And then what did you do?

A I called the police and then I was instructed by the police to hand the food out to them because a police officer was about a block away.

Q And so as soon as you called the police was the vehicle allowed to leave the drive-through?

A Yes, they told me I could let the or hand the food out to the driver.

Q And what information did you give the person that answered the phone at the police department?

A I believe I gave them the license plate and the car description, if I remember correctly.

Q And then what Mr. Hill had told you?

A Yes, sir.

Q And so did the police, the person that you talked to when you called, did that person tell you to hold this vehicle?

A She told me that a police officer was about a block away and so I had permission to hand the food out to them.

Q And so any holding that Mr. Hill did would have been at your direction, not the police?

A Yes, sir.

MR. CALHOON: That would be all.

THE COURT: Cross-examination, Mr. McCarty.

CROSS-EXAMINATION

BY MR. MCCARTY:

Q You never observed the people in the vehicle?

A No, sir.

Q Okay. And so you had no idea at least in terms of personal knowledge what their situation was?

A Yes, sir, I was told by my employee and I trust my employees.

Q Okay. And then you made the phone call, right?

A Yes, sir.

Q And the -- do you remember specifically what you told them as far as what you had been told about the observations of the driver?

A I don't remember exactly what I said because it's been

so long ago.

Q Okay. And nobody spoke to you that night to get your name or any of your identifying information before they did the stop, right?

A No, sir, no one talked to me afterwards or beforehand.

Q Right. And the so either before or afterwards nobody spoke to you about this vehicle?

A That's correct.

Q When was the first time law enforcement made contact with you regarding this case?

A Last Monday I was called by the -- Colleen I believe it is.

Q Okay. And the only information you provided to law enforcement was through the phone call that you made to them, right?

A Yes, sir.

Q Had you been holding the vehicle before you ever made the phone call?

A We were waiting on the food and then after I made the phone call. And so, yeah, if the food was ready I would be holding them until I made the phone call.

Q Right. But when you made the phone call you told law enforcement that you were holding them at that time, right?

A Yes, sir.

Q And then once that information was conveyed to law

enforcement that this car was being held, you held on to them until law enforcement said, go ahead, you can let them go now?

A Yes, sir.

Q Okay. Was your, if you remember, was your worker able to identify the car as to whether it was a car or a pickup?

A I don't remember.

Q Okay. And so the best -- whatever -- were you aware when you called in that your call to law enforcement was recorded?

A Yes, sir.

Q Okay. And so you can't remember if you were able to identify the vehicle as a car as compared to a pickup?

A If I had, like if I was told I would have told the police, but I don't remember if it was or was not.

Q Okay. And so you maybe weren't even told as to whether it was a car or a pickup?

A That could be correct, sir.

Q Okay. And could you -- do you remember what anybody described what the driver looked like?

A They did not describe what the driver looked like.

Q Do you remember whether you even told law enforcement that the stuff that you talked about in terms of slurring words, having trouble grabbing his cup, or that his eyes were bloodshot, do you remember if you even told law

enforcement that?
A Yes, sir.
Q You believe you did tell them that?
A I do believe I told them that.
Q Okay. Would you, again given that your memory isn't very good, if the recording indicated that those things were never said would you have any dispute with the recording?
A I can't dispute facts.
Q Okay. And you would agree that if that entirety of that phone call was recorded, the recording would be the best way to demonstrate what was or was not said?
A Yes, sir.
Q Okay. Did you see the vehicle pull away?
A I do. I did.
Q Okay. And did you see it get pulled over?
A Yes, sir.
Q Okay. Did they get more than a couple hundred yards away from the store before it was stopped?
A It was stopped over by BP if I remember correctly and so I assume that would be about the distance that you are referring to.
Q Okay. You didn't see, as you watched the vehicle drive away, you didn't see any kind of erratic driving, did you?
A Our drive-through window only shows so much and so I

would not see it like drive off erratically or what not so.
Q Right. But you saw where it was actually pulled over?
A Yes, sir.
Q Did you actually watch it leave the building to the point where it got pulled over?
A Yes, sir.
Q Okay. And so during that time, although the drive-through window obstructs to some degree, if you kept an eye on the vehicle you didn't observe any erratic driving, did you?
A I only saw it to right before he got pulled over driving away.
Q Okay. At any time are the things that you saw in terms of the driver, you didn't see any erratic driving, did you?
A I did not observe any, no.
Q Okay. And then law enforcement didn't come back to you, didn't come to you before to identify you and didn't come after to identify you either?
A That's correct.
MR. CALHOON: It's been asked and answered.
THE COURT: That's answered already. That's fine.
MR. MCCARTY: No further questions.
THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. CALHOON:

Q Mr. Debough, when you called the police, did you identify yourself?

A I said I'm James and I'm a shift leader at Hardee's.

Q And how long did you talk to the police before they said that you didn't need to hold the vehicle?

A After I relayed what I told them and they relayed the information to the officer, and so possibly about 30 seconds to a minute at most.

MR. CALHOON: That would be all.

THE COURT: Any recross?

RECROSS-EXAMINATION

BY MR. MCCARTY:

Q Did you give them the name of the person that had reported this information to you?

A I did not.

Q Okay. And so the police had no idea at the point that they pulled the vehicle over the name of the individual who was alleging that they saw something going on with the car, right?

A That would be correct.

Q The only information they had was what you conveyed on that recorded phone call?

A That's correct.

Q Okay. Did you see where the cop car was parked?
A Before the stop?
Q Yeah.
A I did not, sir.
MR. MCCARTY: Okay. No further questions, Judge.
THE COURT: You may step down.
THE WITNESS: Okay. Thank you.
THE COURT: You're welcome.
MR. CALHOON: Do you want to get Deputy Kriese? The State would next call Jeremy Kriese.
THE COURT: Do you solemnly swear that the testimony that you will give in this matter will be the truth, the whole truth, and nothing but the truth so help you God?
THE WITNESS: I do.
THE COURT: You may be seated.

JEREMY KRIESE,

called as a witness on behalf of the State, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CALHOON:
Q Would you please state your name.
A Jeremy Kriese.
Q You are a deputy sheriff for Brookings County?

A Yes.
Q You have been so for how long?
A Since May of 2012.
Q You are then certified as a law enforcement officer?
A Yes.
Q When did you obtain your certification?
A It would have been November of 2012.
Q Directing your attention to the early morning of the 26th of October of last year, 2014, were you on duty?
A Yes.
Q And were you on duty at about 1:50 a.m. that morning?
A Yes.
Q There has been testimony here that dispatch sent out a dispatch regarding an incident at Hardee's. Did you hear that dispatch, Deputy Kriese?
A Yes, I did.
Q And what was your location when that information was dispatched?
A I was approximately one block west of Hardee's at the time.
Q And what street were you on?
A 6th.
Q And which direction were you proceeding?
A East.
Q And receiving that dispatch, Deputy Kriese, what did

you do?
A I then proceeded to the Hardee's location and actually pulled into the KFC parking lot across the street.
Q And then what happened?
A The vehicle at the Hardee's window that I was advised was a possible impaired driver left the drive-through window turning east onto the service street outside of Hardee's.
Q And you saw the vehicle as it left the Hardee's drive-through?
A Yes.
Q What information had you been given by dispatch, Deputy Kriese?
A I was told that the manager at Hardee's had called in with a possible intoxicated driver and they said the license plate would be South Dakota 7-C-G-0-8-2. Gray Chevy Malibu. I was also advised that they would hold the driver there until an officer could get on scene.
Q But you were on scene almost simultaneously with this information being dispatched?
A Yes.
Q And then did you see this vehicle drive away from the drive-through?
A Yes.
Q What did you then do?
A I then pulled in behind it as it passed my patrol

vehicle and activated my emergency lights.

Q And this was on the service road?

A Yes.

Q And where were you then able to get this vehicle stopped?

A The vehicle stopped at the stoplight or stop sign, excuse me, at 25th Avenue.

Q And how far is that from Hardee's?

A Approximately a block.

Q What did you then do upon getting the vehicle stopped?

A I then walked up to the driver's side window and introduced myself and my agency to the driver. I then advised him the reason I had stopped him was because we had a report that he may have been drinking alcohol.

Q Go on then with what occurred.

A I then asked him if he had been drinking alcohol tonight and he stated, yes, he had drank a little. I could also detect an overwhelming odor of alcohol coming from inside the vehicle and I observed his eyes were bloodshot and glassy looking and his speech was very slurred.

Q With those observations and the information which the driver had given you, what then did you do?

A I then asked for his driver's license and proof of insurance which he provided for me and then I asked that he come back to my patrol vehicle.

Q The driver's license identified the driver as whom?
A As Steven Alexander Stanage. DOB of 12/27/92.
Q Is the individual that was driving this vehicle in court this afternoon?
A Yes.
Q Could you describe what he is wearing?
A He is wearing a white shirt and tie.
Q Would you point him out then?
A Yep.

MR. CALHOON: If the witness has done so may the record reflect that he has identified the Defendant?

THE COURT: It may.

BY MR. CALHOON:

Q You then had Mr. Stanage back to your patrol car?
A Yes.
Q And what then did you do?
A I asked him what he had been up to tonight and he said he has been that guy tonight. Stated that he had drank a little and that he was 21. He stated he was not drunk and that he was taking people to parties.

MR. MCCARTY: Judge, I'm going to object as irrelevant. Our motion is, challenges the basis for the stop and all of the information gathered after the stop isn't relevant to the issue before the Court.

THE COURT: I find that you did put something

in your motion about wanting to suppress the blood test and I didn't know if the State was --

MR. MCCARTY: Oh, yep, I will proceed with that as well, Judge, that's true.

THE COURT: All right.

MR. MCCARTY: I will withdraw the objection.

THE COURT: Okay. You may answer.

THE WITNESS: Okay.

BY MR. CALHOON:

Q You did proceed to investigate this matter as a driving while under the influence?

A Yes, I did.

Q And did you ultimately arrest Mr. Stanage for driving while under the influence?

A Yes.

Q What then took place?

A After advising him that he was under arrest for DUI, I then asked for a, if he would consent to a blood draw for me.

Q And Mr. Stanage's response was what?

A He stated he would.

Q You then proceeded with Mr. Stanage to the emergency room of the Brookings Hospital?

A Yeah, I then read Steven his Miranda Warning and Deputy Clifford advised that she would wait for the tow

company to arrive and I then did proceed to the Brookings ER.

Q And a registered nurse drew blood there?

A Yes.

Q And that blood specimen was later placed into the U.S. Mail by you?

A Yes.

Q The location where all of this occurred, Deputy Kriese, was here in the City of Brookings?

A Yes.

Q Which is in Brookings County?

A Yes.

MR. CALHOON: That would be all.

THE COURT: Cross-examination, Mr. McCarty.

CROSS-EXAMINATION

BY MR. MCCARTY:

Q Sir, you are a certified law enforcement officer?

A Yes.

Q And you have received training in order to be certified, right?

A Yes.

Q Part of your training you are trained to do narrative reports of your stops and your arrests, right?

A Yes.

Q And you did that in this case?

A Yep.
Q And your narrative is complete and accurate in terms of what took place?
A Yes.
Q Okay. And it includes all the observations that you would have made of the Defendant that night that indicated to you that he may be under the influence of alcohol?
A Yes.
Q There weren't any observations that you made that you didn't include, right?
A I don't believe so.
Q Okay. I have received the audio/video recording from your vehicle that night, you made an audio/video recording?
A Yes.
Q Okay. And my experience is that those, when you activate those recordings that they back up where they record back about a minute; is that a fair statement?
A I believe it's 30 seconds.
Q Okay. And when I looked at your audio/video recording, it has you, when it starts, you are parked in a parking lot?
A Yes.
Q Where are you parked and which direction are you facing?
A I am parked in the KFC parking lot facing west.

Q Okay. And the vehicle is not moving, it's actually in park, right?
A Yes.
Q Okay. And the only information that you got in this case regarding this particular driver came from dispatch?
A Yes.
Q And you are aware that the calls that are made to you from dispatch and the responses you make to them are recorded by dispatch, right?
A Yes.
Q Have you ever reviewed the dispatch recording between you and the dispatcher that night?
A No.
Q Okay. Did you, you knew -- well, let me ask you this. Did you get the full -- the full front end of the report that was made by dispatch out to an officer?
A I don't understand the question I guess.
Q Okay. When I listen to the audio recording of the dispatch call, dispatch puts it out and I think they must have called for a different officer; do you remember that?
A Yeah, they put it over the Brookings PD channel.
Q Okay. And explain to me the distinction that you just made?
A The Brookings PD channel is an analog radio. We run off digital is our dispatch.

Q Okay.
A We hear both inside the car.
Q Okay. And so the Brookings Police Department Dispatcher called for a Brookings Police Officer?
A They put it out to available police units.
Q Okay. And you remember though that that's -- that there was another officer that either the dispatch asked for or that initially responded to the call by dispatch, right?
A I believe there was another officer that said that he would respond.
Q And then you interjected?
A Yes.
Q Okay. Were you finishing up another stop or what were you doing?
A I was on patrol, just happened to be in that exact area at the time.
Q Okay. And so that goes back to my question before, and I don't think I asked it very well, was do you think you heard the full content of the initial call made by dispatch?
A Yes, I did.
Q Okay. And so you would have known that, that the people at Hardee's, someone at Hardee's was holding this vehicle?
A Yes.
Q And you knew that from the point that the dispatch

reported it to you, right?
A Yes.
Q And as a result of that being reported to you, you, although you were nearby, took the time to rather than pull up to the Hardee's store, you pulled away to a different parking lot, positioned your vehicle so that the camera was on this car, and then said, okay, you can go ahead and let him go, right?
A I advised them to let him go as soon as I received the dispatch transmission since I was already in the area.
Q Okay. The -- you would agree with me that what was said between you and the dispatcher and how it was conveyed would be on the recording, right?
A Yes.
Q Okay. And you agree with me that your car is parked with the camera focused on that vehicle before it's ever, before that car is ever allowed to be -- to go pull away?
A Yes.
Q Okay. And you as a result, we have the benefit of that vehicle being on the camera the entire time, right?
A I believe it is, yes.
Q And you didn't observe anything erratic about the vehicle, did you?
A No.
Q You didn't observe anything about the vehicle that

would indicate to you that the driver was under the influence of alcohol?

A No.

Q The only, the sole basis for you to stop the car was whatever the dispatcher told you over the radio?

A Yes.

Q Were you aware when the dispatcher reported the information to you that the dispatcher hadn't spoken to the person that had actually observed the car?

A I was not aware of that.

Q Okay. You did not -- you did know though when you stopped the vehicle that you didn't have the name or the contact information for the person that had called in the dispatch, right?

MR. CALHOON: Irrelevant.

THE COURT: Overruled. You may answer.

THE WITNESS: I believe I did ask them if they got a name from the reporting party.

BY MR. MCCARTY:

Q You asked the dispatcher to try to get some of that information, right?

A I believe so.

Q But the way it came about you didn't have any of that information before you conducted the stop?

A No.

Q And so you didn't know -- do you know now that the person that called in to dispatch didn't actually observe the vehicle or the people in it?

A Can you repeat the question?

Q Do you know now that the person who called dispatch hadn't observed the vehicle at all or the occupants of it?

MR. CALHOON: Object to the form of the question, it's also irrelevant.

THE COURT: Overruled. He may answer.

THE WITNESS: I know now that the person that called did not observe the vehicle.

BY MR. MCCARTY:

Q Okay. And the -- you didn't know that night either the name of the person that had observed the vehicle or the person that had called dispatch, right?

A No.

Q Didn't have any contact information with regard to them?

A I knew that he was a manager at Hardee's, that's all I knew.

Q You knew somebody from inside Hardee's, you thought that someone inside Hardee's had called who had identified themselves as the manager?

MR. CALHOON: It's been asked and answered.

THE COURT: Sustained.

BY MR. MCCARTY:

Q Okay. The information that you got did not give any indication that the, whoever had saw the vehicle, that they had either seen alcohol in the car or could smell alcohol in the car, right?

A Right.

Q To your recollection what specific words were you told about the observations?

A I had a call being told that there was a possible drunk driver at the Hardee's window.

Q In terms of observations of the driver, nothing else, right?

A No.

Q Is it true that they couldn't identify the vehicle as a pickup or a car?

A I don't recall.

Q Okay. Did you -- were you able to get the license plate number?

A Yes.

Q Did you verify the license plate number before you pulled them over?

A I saw the license plate matched with what I was told.

Q Okay. You were able to see that despite where you were parked at the time?

A When I got behind the vehicle I saw.

Q Okay. Did you turn your lights on before you got behind the vehicle?

A No.

Q Okay. You didn't notice anything unusual about the vehicle at all, I know I asked you about erratic driving, but you didn't notice anything unusual about the vehicle at all in terms of your own observations?

A No.

Q Okay. In terms of the blood alcohol test in this case, you are familiar with what an Implied Consent card is, right?

A Yes.

Q And you are familiar with what a DUI advisement card is, right?

A Yes.

Q And you are aware of what the difference is?

A Yeah.

Q Yes?

A Yes.

Q And as a certified law enforcement officer you were aware on the night that this stop took place you were aware of the McNeely decision from the U.S. Supreme Court?

A Yes.

Q Okay. And again there is an audio/video recording of the stop, right?

A Yes.

Q And your discussions with my client?

A Yes.

Q And you would agree with me that you didn't read a DUI advisement card to him, right?

MR. CALHOON: Irrelevant.

THE COURT: Overruled. He may answer.

THE WITNESS: Yes.

BY MR. MCCARTY:

Q And you would agree with me that you didn't read the South Dakota Implied Consent card to him either, did you?

MR. CALHOON: Irrelevant.

THE COURT: Overruled.

THE WITNESS: Yes.

BY MR. MCCARTY:

Q Okay. And so you didn't, you didn't advise him of his right to refuse the blood test, right?

MR. CALHOON: Irrelevant.

THE COURT: Overruled. He may answer.

THE WITNESS: I did not.

BY MR. MCCARTY:

Q Okay. And you didn't advise him that he could -- you are aware that the Implied Consent card would include an advisement of the defendant that he would have the right to do -- to have a blood draw that night from a technician of

his own choosing, right?

MR. CALHOON: That's irrelevant.

THE COURT: Overruled. He may answer it.

THE WITNESS: What was the question?

BY MR. MCCARTY:

Q You are aware that if you had read an Implied Consent card to my client it would have advised him of his ability to have a technician of his own choosing do a blood draw that night and withdraw blood that he could test?

A Yes.

Q And you chose not to advise him of that?

A Yes.

Q You are aware that that, that that advisement is required by South Dakota Law, right?

MR. CALHOON: Objection.

THE COURT: Sustained. He doesn't have to answer that.

BY MR. MCCARTY:

Q But you made the affirmative choice, knowing what the Implied Consent card reads, to not read that to him?

MR. CALHOON: Objection, that's irrelevant.

THE COURT: Mr. Calhoon, there is a part of the motion that makes the motion to suppress the blood test based on this line of questioning. And so I'm going to consider that evidence when considering that motion.

And so your objection is overruled.

BY MR. MCCARTY:

Q You made the affirmative decision not to read the Implied Consent card?

A I was trained and advised to ask for consent to a blood draw.

Q Well, and so why don't you, why didn't you read the Implied Consent card?

MR. CALHOON: Again that is irrelevant. He didn't read it. Why he did not is irrelevant.

THE COURT: Overruled. He may answer.

THE WITNESS: I was never advised to read the Implied Consent card.

BY MR. MCCARTY:

Q I know there have been a change in the law, McNeely changed things, right?

A Yes.

Q And you were aware of McNeely on that night?

A Yes.

Q Had you been given any instruction or training to not read the Implied Consent card?

A We were instructed to ask for consent and just ask for consent.

Q But nobody instructed you not to read the Implied Consent card?

MR. CALHOON: It's been asked and answered.

THE COURT: Overruled. Or sustained, excuse me.

BY MR. MCCARTY:

Q And so the decision to not read the Implied Consent card was a decision you made an your own?

A Yes.

Q Okay. And to the extent then that the discussion you had with my client that night, to the extent that that discussion is inconsistent with what is normally on an Implied Consent card, that was a decision you made on your own that night to vary from the practice?

MR. CALHOON: It's been asked and answered.

MR. MCCARTY: Okay. And all I'm asking for is a little leeway, Judge, so I understand what the thought --

THE COURT: Overruled. He may answer.

THE WITNESS: I did not read the Implied Consent card.

BY MR. MCCARTY:

Q But to the extent that the discussion that you had with my client that night, to the extent that discussion was inconsistent with what's on the Implied Consent card, that was a decision that you made independently?

A Yes.

Q Okay. Did my client initially resist or question whether he had to do the blood test?

A I don't believe so.

Q Okay. Whatever is on the audio/video recording, you would rely on that recording as to accurately depict the conversation between you and he?

A Yes.

Q Did you review that before you did your narrative report?

A Yes.

Q Okay. And when you read it, when you listened to it you didn't hear anything about him questioning about whether he had to do it?

MR. CALHOON: It's been asked and answered.

THE COURT: Sustained.

MR. MCCARTY: Okay. No further questions, Judge, with the exception of I do want to offer the two recordings, one from dispatch and the recording from the vehicle.

THE COURT: Redirect, Mr. Calhoon?

MR. CALHOON: No, Your Honor.

THE COURT: You may step down.

MR. CALHOON: The State rests. And we have no objection and would also offer those two.

THE COURT: Those will be received. I think

I will take this issue under advisement which means we do not need to play those recordings in the courtroom.

If you would have those marked though and we will admit them as exhibits.

MR. MCCARTY: Okay. And not even in the form of a brief, Judge, but I have some authority relevant to the issues that I have brought up in this motion, can I submit the cases to you, just with the cases and the cites?

THE COURT: Yes.

MR. MCCARTY: So the Court has the benefit of those. And I will copy the States Attorney with them when I do that.

THE COURT: That will be fine. Do you have a receptacle for those?

MR. MCCARTY: I do not.

THE COURT: I don't want to mark the actual CD.

MR. MCCARTY: Can we put both of them in the one envelope?

THE COURT: Just mark the envelope as Exhibits 1 and 2, or A and B, however you did it.

(Defendant's Exhibits A and B were marked for identification.)

MR. MCCARTY: Can I have just a minute then, Judge, if the State rests, to talk to my client.

THE COURT: You may. Exhibits A and B will be received and the State has rested.

MR. MCCARTY: I have no testimony, Judge.

THE COURT: All right. Then I will take this issue under advisement. I will give either side a week to present any authority that they would make on behalf of their -- or on behalf of their positions and then I will issue a decision to counsel.

MR. MCCARTY: Thank you, Judge.

THE COURT: You're welcome.

MR. CALHOON: Your Honor, wouldn't proper procedure to be Mr. McCarty being the moving party would present whatever cases he has and then the State would have an opportunity to respond?

MR. MCCARTY: I don't have any problem with that, Judge.

THE COURT: I will be fine doing that as well. Let's give Mr. McCarty a week for authority and then an additional week for the State to respond.

MR. CALHOON: Thank you, Your Honor.

MR. MCCARTY: Thank you, Judge.

THE COURT: You're welcome.

(The proceedings adjourned at 2:24 p.m.)

STATE OF SOUTH DAKOTA)
: SS TRANSCRIBER'S CERTIFICATE
COUNTY OF BROOKINGS)

I, Patricia J. Hartsel, Official Court Reporter in the Third Judicial Circuit of the State of South Dakota, hereby certify that the transcript of proceedings in the above-entitled action is a true and accurate transcript of the electronic recording of the proceedings.

Dated this 5th day of February, 2015.

Patricia J. Hartsel, RPR
Official Court Reporter

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF BROOKINGS	)	THIRD JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA	)	05 CRI. 14-771
Plaintiff,	)	
v.	)	DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
STEVEN STANAGE,	)	
Defendant.	)	

The above-captioned matter having come on for hearing before the Court on the 2nd day of February, 2015, the State of South Dakota being represented by the Brookings County State's Attorney, Clyde R. Calhoon, and the above named defendant appearing in person and with his attorney, Donald M. McCarty of Helsper, McCarty, Mahlke & Kleinjan, P.C., Brookings, SD; the matter having come before the Court on the Defendant's Motions to Suppress, and the Court having heard and considered the evidence, here by makes and enters the following Findings of Fact and Conclusions of Law:

OBJECTIONS

1. Defendant objects to all Findings of Fact, and specifically Findings of Fact numbers 2-7, to the extent that they infer or imply that either Adam Hill or James Debough were identified either by dispatch or the law enforcement officer before the stop of the Defendant was completed.

2. Defendant also objects to all Findings of Fact, and specifically Findings of Fact 5-7, to the extent that they imply or infer that James Debough actually observed anything with regard to the driver of the vehicle or the vehicle itself. Testimony at the hearing indicated that James Debough did not observe the vehicle or the driver, and he had no personal knowledge upon which he could report the information to law enforcement.

3. Defendant objects to all Findings of Fact, and specifically Findings of Fact 2-7 and 10 to the extent that they imply or infer that the officer who stopped the vehicle personally observed anything that would justify the stop as being constitutional. The undisputed testimony is that the sole basis for the stop was the information which was conveyed to the officer via dispatch, all of which was a second hand report that was first reported to the person that made the call to 911 and then repeated by dispatch to the officer.

4. The Defendant objects to all Conclusions of Law, and specifically Conclusions of Law 14-15, to the extent that they infer or imply that any detailed information was given to the officer, that the tip was not anonymous, or that the officer corroborated the call in any way. Specifically, Defendant objects to any conclusion of law which determines that reasonable suspicion to stop could exists based on the information provided to the officer by dispatch in this case.

Findings of Fact

1. Any Finding of Fact erroneously designated as a Conclusion of Law, and any Conclusion of Law erroneously designated as a Finding of Fact, shall be considered as if properly designated.

2. The Defendant stands charged with the offenses of Driving While Under the Influence SDCL 32-23-1(1).

3. That at approximately 1:50 a.m., Deputy Kriese was called by dispatch regarding a report of a possible drunk driver. The recording of the call to dispatch has been offered and accepted as an exhibit and the content of that recording establishes exactly what was said by the reporting party. The content of that recording is therefore not in dispute.

4. Deputy Kriese had a recording device in his vehicle. The recording from his vehicle was offered and accepted as an exhibit and the content of that recording, along with the dispatch recording referenced above, establish exactly what was said to Deputy Kriese. Further, due to the facts of this case the two recordings encompass all of the evidence which could potentially serve as the basis to stop the vehicle.

5. The call to Brookings dispatch was an anonymous tip. The caller did not identify himself. The caller admitted that he did not have any personal knowledge. The individual who allegedly observed the driver was not identified in the original call to dispatch. Neither the caller, nor the person that allegedly observed the driver of the car, were identified prior to the stop and detention of the Defendant.

6. From the context of the phone call it is clear that the caller did not personally observe any factual basis upon which a car could be stopped or detained. Instead, the call indicates that the individual on the phone received information from a third party, indicating that the third party had observed someone coming through the drive thru at the Hardees restaurant in Brookings.

7. Officer Kriese observed no violations of the law or potential traffic violations when observing the Defendant's vehicle.

8. Officer Kriese did not have independent reasonable suspicion based on any observations made by him. Instead, Officer Kriese relied entirely on the dispatch message sent to him by the Brookings Police Department. That dispatch report to Officer Kriese was based upon a phone call by a third party.

9. At the Suppression Hearing, the employees from Hardees admitted that they had held the Defendant's vehicle at Hardees waiting for law enforcement to arrive.

10. The individual who allegedly observed the vehicle come through the drive thru at Hardees had no communication with law enforcement and did not talk to dispatch.

11. After the stop was completed by law enforcement, the individual who allegedly observed the driver come through the drive thru at Hardees was not identified by law enforcement.

12. The individual who allegedly observed the driver was identified for the first time on the date of the Suppression Hearing.

13. The individual who allegedly observed the driver did not listen to, and was not present when the third party called the report into Brookings dispatch.

14. Both the party who observed the vehicle, and the individual who called into dispatch confirmed that they were told by the Police Department to hold the individual at Hardees until they arrive.

15. Both individuals indicated that they did not make the decision to hold the driver, but that decision was made by law enforcement. The employees at Hardees admitted that they intentionally slowed down the process to hold the driver so that law enforcement would arrive.

16. The employees at Hardees admitted that they were informed that law enforcement was prepared and waiting for the vehicle to leave.

17. The individual who allegedly observed the driver admitted that he was contacted by law enforcement for the first time approximately four days prior to the Suppression Hearing.

18. The employees at Hardees admitted that they delayed the process for the driver to leave for a significant period of time.

19. The individual who called dispatch never observed the people in the vehicle. He had no personal knowledge of their particular situation.

20. No one from law enforcement spoke with the individual who made the call on the night the stop took place. The caller was identified and contacted by law enforcement for the first time a few days before the suppression hearing.

21. The only information the caller provided to law enforcement was through the phone call made to dispatch. The caller was not told whether the vehicle was a car or a pick up. The caller did not describe what the driver looked like. The caller never indicated to law enforcement officer that the driver was slurring his words, having trouble grabbing his cup or that his eyes were blood shot.

22. The caller observed the vehicle drive away and did not see erratic driving.

23. Law enforcement did not come back and identify either the caller or the third party who allegedly observed the driver after stopping the vehicle. The caller did not identify the third party who allegedly observed the driver.

24. At the point law enforcement stopped the vehicle they did not know the name of the individual who saw or observed the driver.

25. The officer who completed the stop acknowledged that he included in his narrative report all of the observations that he made of the vehicle that night. The narrative report confirms that he made no observations indicating that the driver was under the influence of alcohol.

26. The officer acknowledged in his testimony that he arrived at the scene, parked in a parking lot, and then directed the employees from Hardees to release the vehicle.

27. From the dispatch call the officer knew that the employees at Hardees were holding the vehicle.

28. The officer did not observe any erratic driving. The officer did not observe anything about the vehicle that would indicate that the driver was under the influence of alcohol. The sole basis for the stop of the vehicle was whatever the dispatch told the officer over the radio.

29. When the dispatcher reported the information, the dispatcher had not spoken to the person who actually observed the car. At the point the vehicle was stopped,

the officer did not have the name or contact information for the person who called in the report. The person who made the call to dispatch had not actually observed the vehicle or the people in it.

30. At the time of the stop the officer did not know that the person who called in the report had not made any personal observations.

31. The information provided to the officer did not include whether the individual who observed the vehicle had seen alcohol or could smell alcohol in the car.

32. The report made by the caller was that there was a possible drunk driver and no other details regarding the occupants of the vehicle were given.

33. After the officer arrested the driver he did not read the South Dakota implied consent card. The officer did not advise the driver of his right to refuse the blood test. The officer acknowledged that he knew that the implied consent card would include an advisement to the Defendant that he would have the right to do a blood draw by a technician of his own choosing. The officer chose not to advise the Defendant of his right to have a test of his own choosing. He was advised only to ask for consent. The officer admits that he was aware of McNeely on the night of the stop. The officer admitted that he was instructed to ask for consent rather than reading the implied consent card. The officer indicated that he simply made the choice to not read the implied consent card. At the time of the stop, the driver initially resisted and questioned whether he had to do the blood test.

34. The person who allegedly observed the Defendant in this case did not call dispatch. The person who did call dispatch did not observe the Defendant. The call made to dispatch did not include details as to what was observed, and it did not identify the caller or the person that observed the Defendant. Dispatch did not relay all the information provided by the caller to the officer who conducted the stop, and the officer that conducted the stop did not observe anything that could serve as a basis for the stop. The call made to dispatch was vague and the information relayed to the officer provided even less information.

35. Based on the above referenced stop, the Defendant was arrested for DWI. At the time of the stop the officer did not have reasonable suspicion.

CONCLUSIONS OF LAW

1. That the Court has jurisdiction over the parties and the subject matter of this

action.

2. Any Conclusion of Law deemed to be a Finding of Fact or vice versa shall be appropriately incorporated into the Findings of Fact or Conclusions of Law as applicable.

3. The Court concludes that the stop of the Defendant was not a valid and legal stop pursuant to reasonable suspicion and the totality of the circumstances in accordance with the Fourth Amendment of the United States Constitution and the Constitution of the State of South Dakota.

4. The Defendant has a right to be free of unreasonable seizures under the Fourth Amendment to the United States Constitution and Article VI, section 11 of the Constitution of the State of South Dakota.

5. The Fourth Amendment does not protect against all seizures, only those that are unreasonable. Whether a search or seizure is reasonable depends on the surrounding circumstances. An officer may stop any person in a public place when there are specific and articulable facts creating a reasonable suspicion that the person has committed or is about to commit a crime. Reasonable suspicion requires specific and articulable facts that a criminal act has occurred. This principle has been extended to apply to stops of vehicles. The touchstone is not an officer's knowledge that the defendant has committed a crime, but merely a reasonable suspicion. Reasonable suspicion, however, requires the officer to be able to articulate something more than an inchoate and unparticularized suspicion or hunch.

6. Only information available to the officers up to the time of the stop may be considered in assessing the validity of the seizure. The inquiry concerns whether the officer's conduct was reasonable under the circumstances known to the officer at the time the stop was initiated. In evaluating a stop, the relevant inquiry is whether the officer had a reasonable suspicion that criminal activity was afoot. A reasonable suspicion is one based upon articulable facts. Moreover, a seizure is only justified if the officer has an individualized suspicion that the individual seized is committing, has committed, or is about to commit a crime.

7. In detaining the defendant, the Officer's actions constitute a seizure under the Fourth Amendment to the United States Constitution and Article VI, section 11 of the Constitution of the State of South Dakota.

8. The exclusionary rule states that where evidence has been obtained in violation of the search and seizure protection as guaranteed by the constitution the

illegally obtained evidence cannot be used at trial against the Defendant. Evidence obtained as a result of this illegal search and seizure falls within the exclusionary rule and cannot be used against the Defendant. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961); *State v. Labine*, 2007 S.D. 48, ¶ 22, 733 N.W.2d 265; *State v. Tillman*, 2012 S.D. 57. Evidence derived from illegal police conduct is inadmissible as "fruits of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471 (1963). When evidence of tangible materials is seized and testimony concerning knowledge is acquired during an unlawful stop and seizure, the exclusionary rule prohibits its introduction. *State v. Boll*, 2002 SD 114, ¶9, 651 N.W.2d 710, 716 (quoting *Murray v. United States*, 487 U.S. 533, 536, 108 S.Ct. 2529, 2533, 101 L.Ed.2d 472 at 480 (1988)). In addition, derivative evidence, both tangible and testimonial that is a product of the primary evidence or otherwise acquired as an indirect result of such unlawful stop or search, is also prohibited. *Id.* The exclusionary rule is geared toward deterring police misconduct. *Id.* To deter due process violations in the future, suppression of evidence through the application of the exclusionary rule is appropriate. *Herring v. United States*, 129 S.Ct. 695, 700 (2009); *State v. Tillman*, 2012 S.D. 57

9. In conducting a stop an officer must have a particularized and objective basis for suspecting legal wrongdoing under the totality of the circumstances before making an investigatory stop of a vehicle. It must be something more than an general or vague anonymous tip. *State v. Herren*, 2010 S.D. 101, ¶ 6, 792 N.W.2d 551, 553-54,

10. To make a legal investigative stop of a vehicle, an officer must have a reasonable and articulable suspicion that the motorist has violated or is violating the law. North Dakota v. MILLER, 510 N.W.2d 638*E.g., Wibben v. North Dakota State Highway Comm'r*, 413 N.W.2d 329 (N.D.1987). Information from a tip may provide the factual basis for a stop. *State v. Neis*, 469 N.W.2d 568 (N.D.1991). In evaluating the factual basis for a stop, we consider the totality of the circumstances. *E.g., Geiger v. Backes*, 444 N.W.2d 692 (N.D.1989). This includes the quantity, or content, and quality, or degree of reliability, of the information available to the officer. *Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990). Although the totality-of-the-circumstances approach makes categorization difficult, our cases involving reasonable suspicion arising from an informant's tip demonstrate the inverse relationship between quantity and quality, and may be analyzed generally according to the type of tip and, hence, its reliability. As a general rule, the lesser the quality or reliability of the tip, the greater the quantity of information required to raise a reasonable suspicion. *Id.* at 330, 110 S.Ct. at 2416. The most reliable tip is the one relayed personally to the officer.

11. At the low end of the reliability scale are tips from anonymous callers.

"Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. Both factors—quantity and quality—are considered in the 'totality of the circumstances—the whole picture, that must be taken into account when evaluating whether there is reasonable suspicion.' *North Dakota v. Miller*, 510 N.W.2d 638 citing *United States v. Cortez*, 449 U.S. 411, 417 [101 S.Ct. 690, 694, 66 L.Ed.2d 621] (1981). Thus, if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable. In *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) the Court applied its totality of the circumstances approach in this manner, taking into account the facts known to the officers from personal observation and giving the anonymous tip the weight it deserved in light of its indicia of reliability as established through independent police work. The same approach applies in the reasonable suspicion context, the only difference being the level of suspicion that must be established." *Id.* 496 U.S. at 330–31, 110 S.Ct. at 2416–17. The Court concluded that at the time of the stop, the officers sufficiently had corroborated the anonymous tip to raise a reasonable suspicion. *Id.* at 331, 110 S.Ct. at 2416. In so holding, the Court focused on the tip's prediction of future behavior. It is important that the anonymous tip contains a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted.' *Id.* [462 U.S.] at 245 [103 S.Ct. at 2335]. Typically, impaired driver cases involve tips that give a description and the location of the vehicle—easily obtained facts and conditions existing at the time of the tip and available to the general public. Corroboration of this type of information does not increase the reliability of the tip. *See State v. Thompson*, 369 N.W.2d 363 (N.D.1985)

12. Where one officer relays a directive or request for action to another officer without relaying the underlying facts and circumstances, the directing officer's knowledge is imputed to the acting officer. *See Whiteley v. Warden*, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971); *see also State v. Rodriguez*, 454 N.W.2d 726, 729 n. 2 (N.D.1990). Thus, an officer, who is unaware of the factual basis for probable cause, may make an arrest upon a directive. The rationale for the *Whiteley* rule is that the arresting officer is entitled to assume that whoever issued the directive had probable cause. *Whiteley, supra.* The question then becomes whether the directing officer had probable cause. *Id.; United States v. Hensley*, 469 U.S. 221, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985). The same applies in the reasonable-suspicion context. *See Hensley, supra.* However, in the absence of such a directive, information held by other officers but not communicated to the acting officer is not imputed to the acting officer. The scenario set forth by *Whiteley* must in turn be distinguished from the case in which there has been no directive or request but the arresting or searching officer attempts to justify his action on the ground that other officers were at that time in possession of the necessary underlying

facts. In such circumstances, the knowledge of other police cannot ordinarily be imputed to the arresting or searching officer, for to hold otherwise 'would encourage police officers to search on the hope that the total knowledge of all those officers involved in a case will later be found to constitute probable cause if the search is challenged.' " 1 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 3.3(e), at 208 (1984) (quoting *State v. Mickelson,* 18 Or.App. 647, 526 P.2d 583, 584 (1974)).

13. Some courts have imputed knowledge between officers in the absence of a directive where the officers were working closely together. *See, e.g., United States v. O'Connell,* 841 F.2d 1408, 1418–19 (8th Cir.1988) [upholding stop where acting officer's knowledge did not constitute probable cause but collective knowledge of investigative team present at scene did constitute probable cause, because "the officers had worked closely together during the investigation" and the complexity of an investigation of a drug organization "may preclude a detaining officer from acquiring or consistently maintaining probable cause or a reasonable suspicion of every party under investigation"]. *But see, e.g., People v. Mitchell,* 185 A.D.2d 163, 585 N.Y.S.2d 759, 761 (1992) [refusing to impute knowledge of arresting officer's partner that object defendant had dropped was crack cocaine and stating that police "cannot be considered to have relied on information possessed by each other without there having been any communication of either the information itself or a direction to arrest"]. There is no caselaw to support the proposition that information known to the dispatcher but not communicated to the investigating officer nevertheless should be imputed to the officer. Accordingly, in the absence of a directive or other circumstances allowing imputation, we do not consider information, known to the dispatcher but not transmitted, at least in summary form, to the stopping officer, in determining whether the officer had a reasonable and articulable suspicion. *Cf. State v. Nelson,* 488 N.W.2d 600, 602 (N.D.1992) [stating that "collective information of law enforcement personnel, known by or transmitted to the stopping officer" is highly relevant in assessing the reasonableness of a stop]. For purposes of reasonable-suspicion analysis involving telephone tips, information not relayed by the dispatcher to the investigating officer will not be considered for purposes of reasonable suspcicion.

14. Where a tip gives only some indication of possible criminal activity, as in this case the officer is required to observe some suspicious behavior in addition to the tip. The tip in this case, is anonymous for the purposes of reasonable-suspicion analysis. Here, looking at the quality of the tip and the quantity of the information provided it does not rise to the level of reasonable suspicion. The quality of the tip determines the quantity of information, from the tip and the officer's corroboration, needed to raise a reasonable suspicion. An informant's single, inferential statement that there is possibly a drunk driver at the window

does not approach the precision of the information required for an uncorroborated tip. The tip gave only some indication of possible criminal activity. The tip required corroboration of suspicious conduct to meet the requirements of reasonable suspicion. No claim of any traffic violations, erratic driving, or anything that he thought was real unusual. Observations of innocent facts do not meet the requirement that there be corroboration of suspicious conduct when a tip, short on reliability, is also short on specifics. The combination of the anonymous tip and the lack of actual observations of facts is insufficient to raise a reasonable and articulable suspicion.

15. A citizen informant's statement that the suspect was "drunk," without more, does not provide reasonable suspicion. Ohio v. WAGNER 2011 WL 598433, 2011 -Ohio- 772. An informant must give some details providing reasonable suspicion of drunk driving. See *State v. Brant*, 10th Dist. No. 01AP–342, 2001–Ohio–3994, 2001 Ohio App. LEXIS 5263, at *8–9

16. An investigatory stop based on reasonable suspicion may be justified by information received from a known informant, City of Sidney v. Stout, 71 N.E.2d 341 (citing *Adams v. Williams* (1972), 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612. A stop may also be based on an anonymous tip, when such information is corroborated by independent police investigation. *Alabama v. White* (1990), 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301. Where specific details of an anonymous tip are corroborated by police, they have reasonable suspicion to make an investigatory stop. *Id.*; see, also, *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889.

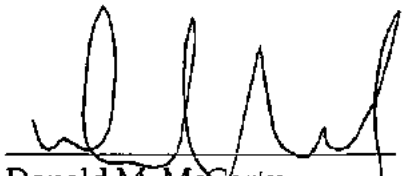
17. The Fourth and Fourteenth Amendments to the United States Constitution generally prohibit warrantless searches and seizures, and any evidence that is obtained during an unlawful search or seizure will be excluded from being used against the defendant. *Mapp v. Ohio*, 367 U.S. 643, 649, 81 S.Ct. 1684 (1961). At a suppression hearing, the State bears the burden of establishing that a warrantless search and seizure falls within one of the exceptions to the warrant requirement, and that it meets Fourth Amendment standards of reasonableness. *City of Xenia v. Wallace*, 37 Ohio St.3d 216 (1988), *State v. Kessler*, 53 Ohio St.2d 204, 207 (1978); *City of Maumee v. Weisner*, 87 Ohio St.3d 295, 297 (1999).

18. The information known by the person who allegedly saw the Defendant cannot be imputed to the officer, unless that specific information was conveyed to the individual conducting the stop and that information was corroborated in some way. The tip in this case must be considered an anonymous tip, because at the time of the stop the person who actually observed the Defendant was not identified, and there was no way to corroborate the information he provided prior to the officer initiating the stop. This series of events cannot give rise to

reasonable suspicion.

Dated this 9th day of June, 2015.

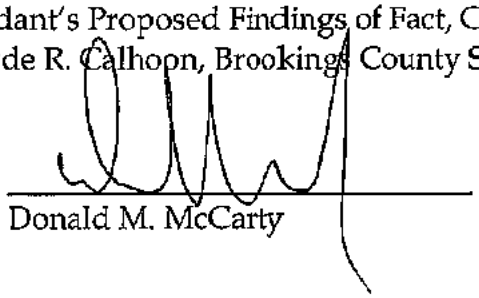
HELSPER, McCARTY, MAHLKE & KLEINJAN, P.C.



Donald M. McCarty
Attorney for the Defendant
415 8th Street South
Brookings, SD 57006

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 9th day of June, 2014, one true and correct copy of the foregoing Defendant's Proposed Findings of Fact, Conclusions of Law, and Order was served upon Clyde R. Calhoon, Brookings County State's Attorney, by File and Serve.



Donald M. McCarty

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF BROOKINGS	)	THIRD JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
	)	CRI.14-771
Plaintiff,	)	
	)	
vs.	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
STEVEN STANAGE,	)	REGARDING DEFENDANT'S
	)	MOTION TO SUPPRESS
Defendant.	)	

The above captioned matter having come on for hearing before the Court on the 2nd day of February, 2015, the State of South Dakota being represented by Clyde R. Calhoon, the duly elected, qualified and acting States Attorney in and for Brookings County, South Dakota, and Defendant Steven Stanage, appearing personally and along with his attorney Don McCarty, of Brookings, South Dakota; the matter coming before the Court upon Defendant's Motion to Suppress and the Court having heard and considered the evidence, and the Court being in all things duly advised, the Court makes and enters the following:

FINDINGS OF FACT

1.

That Defendant stands charged with the offense of Driving While Under the Influence, as defined by SDCL 32-23-1(1).

2.

That Adam Hill is an employee at Hardee's Restaurant in Brookings, South Dakota, and was working on October 26, 2014, at approximately 1:50 a.m. at the drive-up window when he observed a driver that caught his attention.

3.

That Adam Hill observed the driver to have bloodshot eyes, slurred speech and difficulty in taking the drinks he had ordered.

4.

That Adam Hill then notified his manager, James Debough, what he had witnessed at the drive-up window.

5.

That James Debough was working at Hardee's as a shift leader on October 26, 2014, at approximately 1:50 a.m.

6.

That James Debough was alerted by his employee, Adam Hill, of a possible drunk driver at the drive-up window.

7.

That James Debough called the police and advised dispatch of the license plate number and the description of the vehicle that was at the drive-up window.

8.

That Jeremy Kriese is a certified law enforcement officer with the Brookings County Sheriff's Department in Brookings, South Dakota, trained in the detection and apprehension of individuals driving motor vehicles while under the influence of alcohol.

9.

That Deputy Kriese was on duty on the 26th day of October, 2014, in a marked patrol vehicle in Brookings County, South Dakota.

10.

That at approximately 1:50 a.m., Deputy Kriese was alerted by dispatch of a possible drunk driver at the Hardee's drive-up window driving a Gray Chevy Malibu, with a South Dakota license of 7CG082.

11.

That Deputy Kriese was approximately one block west of Hardee's when he received the dispatch call.

12.

That Deputy Kriese observed the vehicle that was described by James Debough leave the Hardee's drive-up window and turn east on a service road.

13.

That having made such observations, Deputy Kriese activated the emergency lights on his patrol vehicle, and initiated a traffic stop on the vehicle.

14.

That upon stopping the vehicle, Deputy Kriese approached the vehicle, identified himself to the driver and indicated the reason he was stopped was because there had been a report that the driver of that vehicle may have been intoxicated.

15.

That Deputy Kriese observed an overwhelming odor of alcohol coming from the vehicle and observed the driver to have bloodshot and glassy eyes and slurred speech.

16.

That Deputy Kriese requested and was provided with a driver's license identifying the driver as the Defendant, Steven Stanage.

17.

That as a result of his observations and after determining that the Defendant had been consuming alcoholic beverages, Deputy Kriese requested that Defendant perform certain field sobriety tests, and based upon Deputy Kriese's observations of Defendant during such tests, Deputy Kriese arrested the Defendant for the offense of Driving While Under the Influence.

18.

That following his arrest, Deputy Kriese asked the Defendant if he would consent to a withdrawal of his blood.

19.

That Defendant agreed to the withdrawal of his blood.

20.

That Defendant was transported to the Brookings Hospital Emergency Room where Registered Nurse Heidi Schultz withdrew the blood sample at approximately 2:28 a.m.

21.

That the results of the blood analysis were a .204% BAC.

22.

That Defendant has filed a Motion to Suppress alleging that the stop by Deputy Kriese was in violation of Defendant's constitutional rights and further moves to suppress the blood test on the grounds that the officer did not obtain valid consent, failed to comply with South Dakota's implied consent statutes and failed to inform the Defendant of his right to a separate blood test pursuant to SDCL 32-23-15.

Based on the foregoing Findings of Fact, the Court now makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1.

That the Court has jurisdiction over the parties and the subject matter of this action.

2.

That the Fourth Amendment to the United States Constitution protects citizens from unreasonable searches and seizures. *U.S. Const. amend. IV.*

3.

That the South Dakota Supreme Court has elaborated on the protections of the Fourth Amendment in *State v. Satter*, 2009 S.D. 35, 766 N.W.2d 153, stating:

> The Fourth Amendment to the United States Constitution protects citizens from unreasonable searches and seizures. Although this protection generally requires probable cause to search, the requisite level of suspicion necessary to effectuate the stop of a vehicle is not equivalent to probable cause necessary for an arrest or a search warrant. All that is required is that the police officer has a reasonable suspicion to stop an automobile. Therefore, the factual basis needed to support a traffic stop is *minimal*. While the stop may not be the product of mere whim, caprice or idol [sic] curiosity, it is enough that the stop is based upon specific and articulable facts which taken together with rational inferences from those facts, reasonably warrants [the] intrusion.

Id. at ¶ 6, 766 N.W.2d at 155 (quoting *State v. Scholl*, 2004 S.D. 85, ¶ 6, 684 N.W.2d 83, 85 (quoting *State v. Chavez*, 2003 S.D. 93, ¶¶ 15-16, 668 N.W.2d 89, 95) (emphasis added)).

4.

That the South Dakota Supreme Court has held on numerous occasions that an informant's tip provides a sufficient basis for an officer's reasonable suspicion to conduct a traffic stop. The Court in *Satter* held as follows:

> An informant's tip may carry sufficient 'indicia of reliability' to justify a [vehicle] stop even though it fails to rise to the level of probable cause needed for an arrest or

> search warrant. All that is required is that the stop not be the product of mere whim, caprice, or idle curiosity.

Id. (quoting *State v. Olhausen*, 1998 S.D. 120, ¶ 7, 587 N.W.2d 715, 717-18).

5.

That "[w]hether an anonymous tip suffices to give rise to reasonable suspicion depends on both the *quantity* of information it conveys as well as the *quality or degree of reliability*, of that information, viewed under the *totality of the circumstances*." *Id.* at ¶ 7 (quoting *Scholl*, 2004 S.D. at ¶ 9, 684 N.W.2d at 86 (quoting *United States v. Wheat*, 278 F.3d 722, 726 (8th Cir. 2001) (emphasis original and added))). However, the Court went on in *Satter* to explain that if a tipster is identified, and not anonymous, that increases the reliability of the tip and weights in favor of the officer's finding of reasonable suspicion. *Id.* at ¶ 12.

6.

That in reviewing the quantity of information provided by a tip, the Court considers a number of identifying facts "such as the make and model of the vehicle, its license plate numbers . . . so that the officer, and the court, may be certain that the vehicle stopped is the same as the one identified by the [tipster]." *Id.* at ¶ 13 (quoting *Scholl*, 2004 S.D. at ¶ 9, 684 N.W.2d at 86-87 (quoting *Wheat*, 278 F.3d at 731)) (emphasis omitted).

7.

That in considering the quality of information or degree of reliability of the information provided in a tip, the Court has held as follows:

> With regard to assessing the quality of degree of reliability of an anonymous tip, the court observed that the primary determinant of a tipster's reliability is the basis of his knowledge and further observed that in erratic driving cases the basis of the tipster's knowledge … [a]lmost always … comes from his eyewitness observations[.] From this, the court concluded that, an anonymous tip conveying a contemporaneous observation of criminal activity whose innocent details are corroborated is … credible[.] Furthermore, [t]he time interval between receipt of the tip and location of the suspect vehicle [goes] principally to the question of reliability.

Satter, at ¶ 14 (internal citations and quotations omitted).

8.

That in cases where erratic driving is not observed, but rather the tip is based upon observations of signs of intoxication while someone is within a vehicle, the Court has come to different conclusions as to the sufficiency of the cause for a vehicle stop. *Id.* at

¶¶ 17-20. Ultimately, "[f]ocusing on the *type* of establishment is not conclusive." *Id.* at ¶ 18.

9.

That a reviewing court must look at the "totality of the circumstances" to determine whether the officer had a "particularized and objective basis" of suspecting criminal activity. *State v. Johnson*, 2011 S.D. 10, ¶ 8, 795 N.W.2d 924, 926.

10.

That "[t]he totality of the circumstances approach allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person." *State v. Mohr*, 2013 S.D. 94, ¶ 16, 841 N.W.2d 440, 445 (internal quotations omitted).

11.

That a brief detention of an individual for identifying and investigative purposes may be reasonable based on the information available to the officer at the time. *See State v. Johnson*, 2011 S.D. 10, 795 N.W.2d 924.

12.

That "[t]he quantum of proof necessary for reasonable suspicion is somewhere above a hunch but less than probable cause." *State v. Burkett*, 2014 S.D. 38, ¶ 53, 849 N.W.2d 624, 637-38 (quoting *State v. Herren*, 2010 S.D. 101, ¶ 21, 792 N.W.2d 551, 557).

13.

That the balancing test that the courts must weigh is an individual's interest to remain free from government intrusion against the government's substantial interest in intercepting vehicles driven by individuals under the influence. *United States v. Wheat*, 278 F.3d 722 (8th Cir. 2001).

14.

That the Defendant was stopped based upon a call to dispatch from concerned employees at a fast food restaurant; those employees made several observations and had the opportunity and time to make a determination that the Defendant appeared under the influence.

15.

That the information which was relayed to law enforcement by the employees including the location, vehicle description, and license plate number was accurate and able to be corroborated by the officer as he was in the immediate vicinity.

16.

That the information which was relayed by the employees was sufficient for Deputy Kriese to find that there was reasonable suspicion to stop the Defendant's vehicle.

17.

That the observations of Deputy Kriese constituted specific and articulable facts, which taken together with the rational inferences from such facts, and under a totality of the circumstances review, supported a finding of reasonable suspicion to initiate contact with the Defendant's vehicle.

18.

That the traffic stop initiated by Deputy Kriese was not the product of mere whim, caprice, or idle curiosity.

19.

That upon initiating a traffic stop on Defendant's vehicle, making contact with the Defendant, and observing that he had been consuming alcohol, Deputy Kriese was entitled to detain Defendant for purposes of further investigation.

20.

That the traffic stop of Defendant's vehicle initiated by Deputy Kriese did not violate Defendant's constitutional rights.

21.

That Defendant's Motion to Suppress evidence obtained as a result of the traffic stop should be denied.

22.

That in *State v. Sheehy*, the South Dakota Supreme Court stated that "[i]t has been said that consent to conduct a search satisfies the Fourth Amendment, thereby removing the need for a warrant or even probable cause." 2001 S.D. 130, ¶ 11, 636 N.W.2d 451, 453.

23.

That in order for a consent-based search to be considered valid, consent must be voluntary under the totality of the circumstances. *State v. Almond*, 511 N.W.2d 572, 573 (S.D. 1994).

24.

That "[i]n deciding whether a consent was voluntary, courts should require the prosecution to prove voluntariness by a preponderance of the evidence." *United States v.*

Chaidez, 906 F.2d 377, 380 (8th Cir. 1990) (citing *United States v. Matlock*, 415 U.S. 164, 177, 94 S.Ct. 988, 996, 39 L.Ed.2d 242 (1974))).

25.

That the burden to establish a preponderance is consistent with the burden applied to establish the voluntariness of a confession. *See State v. Tuttle*, 2002 S.D. 94, ¶ 21, 650 N.W.2d 20, 30-31.

26.

That "[a]n officer does not have to have probable cause to search before requesting consent to search." *State v. Dreps*, 1996 S.D. 142, ¶ 11, 558 N.W.2d 339. The legal standard for determining the voluntariness of consent is whether "the search was the result of free, intelligent, unequivocal and specific consent without any duress or coercion, actual or implied." *Almond*, 511 N.W.2d at 574.

27.

That the Eighth Circuit Court of Appeals has outlined factors to be considered when analyzing voluntary consent:

> Factors relevant in the analysis of voluntary consent include: (1) The individual's age and mental ability; (2) whether the individual was intoxicated or under the influence of drugs; (3) whether the individual was informed of [her] Miranda rights; and (4) whether the individual was aware, through prior experience, of the protections that the legal system provides for suspected criminals. It is also important to consider the environment in which an individual's consent is obtained, including (1) the length of detention; (2) whether the police used threats, physical intimidation, or punishment to extract consent; (3) whether the police made promises or misrepresentations; (4) whether the individual was in custody or under arrest when consent was given; (5) whether the consent was given in public or in a secluded location; and (6) whether the individual stood by silently or objected to the search.

United States v. Golinveaux, 611 F.3d 956, 959 (8th Cir. 2010) (quoting *United States v. Arciniega*, 569 F.3d 394, 398 (8th Cir. 2009) (internal citations omitted).

28.

That the Defendant, Steven Stanage, is a college student enrolled at South Dakota State University with a self-proclaimed 3.5 grade point average.

29.

That the Defendant's interaction with law enforcement portrays him to be an intelligent young man who is capable of deciding whether to consent to a blood draw.

30.

That throughout the course of the stop, the Defendant asks many questions and the Deputy answers them. Although the Defendant is not necessarily knowledgeable of the criminal justice system, he is intelligent enough to question the Deputy as to the consequences of his not consenting to a blood draw. The Deputy explained to the Defendant that if he opted not to consent to the blood draw, a warrant would be sought.

31.

That the interaction was conducted peacefully and there was cooperation on the part of the Defendant, which ultimately led to his consent for the withdrawal of his blood.

32.

That throughout the stop, the Defendant appeared aware of what was going on and was generally cooperative. The Deputy explained and answered the questions of the Defendant.

33.

That the Defendant was aware that he could decline consent to have his blood drawn, and he opted to instead, make a voluntary, conscious choice to allow the Deputy to obtain a sample of his blood.

34.

That the withdrawal of the Defendant's blood was voluntarily given and in no way violated his statutory or constitutional rights.

35.

That Defendant's Motion to Suppress the Defendant's blood test should be denied.

36.

That the Letter Decision issued by the Court on April 2, 2015, following the motion hearing in this matter, is attached hereto, and incorporated herein by this reference.

ORDERED that Defendant's Motion to Suppress be denied.

Dated this 15 day of June, 2015.

BY THE COURT:

Carmen Means

Carmen Means
Magistrate Court Judge

ATTEST:

Clerk of Courts

Third Judicial Circuit Court
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on file in my office on this date:
JUN 17 2015
Judy Kuhlman
Brookings County Clerk of Courts
By

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF BROOKINGS	)	THIRD JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
	)	CRI.14-771
Plaintiff,	)	
	)	
vs.	)	ORDER DENYING
	)	MOTION TO SUPPRESS
STEVEN STANAGE,	)	
	)	
Defendant.	)	

The above captioned matter having come on for hearing before the Court on the 2nd day of February, 2015, the State of South Dakota being represented by Clyde R. Calhoon, the duly elected, qualified and acting States Attorney in and for Brookings County, South Dakota, and Defendant Steven Stanage, appearing personally and along with his attorney Don McCarty, of Brookings, South Dakota; the matter coming before the Court upon Defendant's Motion to Suppress, and the Court having heard and considered the evidence, and the Court having made and entered Findings of Fact and Conclusions of Law, and the Court being in all things duly advised, it is hereby

ORDERED that Defendant's Motion to Suppress be and the same is hereby denied.

Dated this 15 day of June, 2015.

BY THE COURT:

Carmen Means

Carmen A. Means
Magistrate Court Judge

ATTEST:

Clerk of Courts

FILED
JUN 15 2015
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT
By

STATE OF SOUTH DAKOTA
THIRD JUDICIAL CIRCUIT COURT
314 Sixth Avenue, Suite 6, Brookings, South Dakota 57006-2085
FAX (605) 688-4838

CARMEN A. MEANS
Magistrate Judge
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Counties
Beadle, Brookings, Clark
Codington, Deuel, Grant
Hamlin, Hand, Jerauld
Kingsbury, Lake, Miner
Moody and Sanborn

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Donald M. McCarty
Attorney for Defendant
415 8th Street South
Brookings, SD 57006

April 2, 2015

RE: State of South Dakota v. Steven Stanage, Cr. 14-771

Dear Counsel:

This matter comes before the Court on Steven Stanage's Motion to Suppress. A hearing was held on February 2, 2015. Defendant contends that his traffic stop by law enforcement was in violation of the Defendant's Fourth Amendment rights against unreasonable searches and seizures; and also prays for suppression of the blood test on the grounds that the officer did not obtain valid consent-in violation of South Dakota's implied consent statutes and failed to inform the Defendant of his right to a separate blood test, pursuant to SDCL 32-23-15. The Court has reviewed the video of the interaction between the officer and the Defendant as well as the submissions of counsel. The Court hereby denies the Defendant's Motion to Suppress.

STATEMENT OF THE FACTS

On October 26, 2014, in the County of Brookings, State of South Dakota, Steven Stanage (Defendant) was charged by Information for the public offense of Driving Under the Influence in that he did drive or was in actual physical control of a motor vehicle in said County and that there was 0.08 percent or more by weight of alcohol in said Defendant's blood; and said Defendant did thereby and by said means commit the offense of Driving While Under the Influence of an alcoholic beverage, as defined by SDCL 32-23-1(1).

In the early morning hours of October 26, 2014, Defendant ordered food from Hardee's restaurant through the drive-up window. The employee taking orders, Adam Hill, noticed that the Defendant had bloodshot eyes, slurred speech, and had a hard time grabbing the beverages he had ordered. Mr. Hill informed his manager, James DeBough of the situation, and Mr. DeBough

called the police department. As a result of the phone call, the Defendant was stopped by Deputy Sheriff Jeremy Kriese (Deputy) who arrested the Defendant for Driving Under the Influence.

ISSUES

1. **Whether the Defendant's Fourth Amendment right against unreasonable searches and seizures was violated by traffic stop.**

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

> The Fourth Amendment to the United States Constitution protects citizens from unreasonable searches and seizures. Although this protection generally requires probable cause to search, the requisite level of suspicion necessary to effectuate the stop of a vehicle is not equivalent to probable cause necessary for an arrest or a search warrant. All that is required is that the police officer has a reasonable suspicion to stop an automobile. Therefore, the factual basis needed to support a traffic stop is *minimal*. While the stop may not be the product of mere whim, caprice or idol [sic] curiosity, it is enough that the stop is based upon specific and articulable facts which taken together with rational inferences from those facts, reasonably warrant [the] intrusion.

State v. Satter, 2009 S.D. 35, ¶ 6 , 766 N.W.2d 153 155 (quoting State v. Scholl, 2004 S.D. 85, ¶ 6, 684 N.W.2d 83, 85, State v. Chavez, 2003 S.D. 93, ¶¶ 15-16, 668 N.W.2d 89, 95)(emphasis added).

> An informant's tip may carry sufficient 'indicia of reliability' to justify a [vehicle] stop even though it fails to rise to the level of probable cause needed for an arrest or search warrant. All that is required is that the stop not be the product of mere whim, caprice, or idle curiosity.

Id. (quoting State v. Olhausen, 1998 S.D. 120, ¶ 7, 587 N.W.2d 715, 717-18.

In reviewing the quantity of information provided by a tip, both Scholl and Wheat considered a number of identifying facts provided by the tipster "such as the make and model of the vehicle, its license plate numbers . . . so that the officer, and the court, may be certain that the vehicle stopped is the same as the one identified by the [tipster]." Id. at ¶ 9, (quoting United States v. Wheat, 278 F.3d 722, 731 (8thCir. 2001)(emphasis added). "[t]he time interval between receipt of the tip and location of the suspect vehicle [goes] principally to the question of reliability. Id. (citing Wheat at 731). In Scholl, the South Dakota Supreme Court observed that Courts have come to different conclusions as to the sufficiency of the cause for a vehicle stop based solely upon an informant's observations of the *non-driving* behavior of a suspect. Id. at ¶

13 (emphasis added). "Focusing on the *type* of establishment is not necessarily conclusive." Satter, 2009 S.D. 35, ¶ 18, 766 N.W.2d 153, 158 (emphasis added).

A reviewing court must look at the "totality of the circumstances" to determine whether the officer had a "particularized and objective basis" of suspecting criminal activity." State v. Johnson, 2011 S.D. 10, ¶ 8, 795 N.W.2d 924, 926. The totality of the circumstances approach "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that "might well elude an untrained person." State v. Mohr, 2013 S.D. 94, ¶ 16, 841 N.W.2d 440, 445 (quoting United States v. Arvizu, 534 U.S. 266, 273, 122 S.Ct. 744, 750-51, 151 L.Ed.2d 740 (2002). "A brief stop of a suspicious individual, in order to determine his identity and maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." Johnson, 2011 S.D. 10, ¶ 16, 795 N.W.2d 924 at 928 (quoting State v. Boardman, 264 N.W.2d 503, 506 (S.D. 1973). "[t]he quantum of proof necessary for reasonable suspicion is somewhere above a hunch but less than probable cause." State v. Burkett, 2014 S.D. 38, ¶ 53, 849 N.W.2d 624, 638 (quoting State v. Herren, 210 S.D. 101, ¶ 21, 792 N.W.2d 551, 557). One must balance an individual's interest to remain free from government intrusion with the government's substantial interest in intercepting vehicles driven by individuals under the influence. Wheat, 278 F.3d at 736-37.

Here, the Defendant was stopped due to a call from concerned employees at a fast food restaurant. The employees making the initial call to law enforcement made several observations and they had the opportunity and time to make a determination that the Defendant appeared under the influence. An accurate license plate number was given to the dispatch, along with a description of the vehicle. The officer was also able to corroborate the information about location, make and model of the vehicle described because he was in the immediate vicinity. The information which was relayed by the employees was sufficient to make a stop based on reasonable suspicion. This court believes that the decision to stop the Defendant was not made with caprice, mere whim, or idle curiosity. In light of the totality of the circumstances, the stop was made with reasonable suspicion and the Defendant's Motion to Suppress is denied.

2. Whether the Defendant's consent to a blood draw was validly obtained.

The Defendant asserts that his consent to the blood draw was in violation of the implied consent statute of the State of South Dakota and, therefore, the sample obtained should be suppressed.

> Factors relevant in the analysis of voluntary consent include: (1) The individual's age and mental ability; (2) whether the individual was intoxicated or under the influence of drugs; (3) whether the individual was informed of [her] Miranda rights; and (4) whether the individual was aware, through prior experience , of the protections that the legal system provides for suspected criminals. It is also important to consider the environment in which an individual's consent is obtained, including (1) the length of detention; (2) whether the police used threats, physical intimidation, or punishment to extract consent; (3) whether the police made promises or misrepresentations; (4) whether the individual was in custody

or under arrest when consent was given; (5) whether the consent was given in public or in a secluded location; and (6) whether the individual stood by silently or objected to the search.

United States v. Golinveaux, 611 F.3d 956, 959 (8th Cir. 2010).

"It has been said that consent to conduct a search satisfies the Fourth Amendment, thereby removing the need for a warrant or even probable cause." State v. Sheehy, 2001 SD 130, ¶ 11, 636 N.W.2d 451, 453. "For consent to a search to be valid, the totality of the circumstances must indicate that it was voluntarily given." State v. Almond, 511 N.W.2d 572, 573 (S.D. 1994). "[i]n deciding whether a consent was voluntary, courts should require the prosecution to prove voluntariness by a preponderance of the evidence." United States v. Chaidez, 906 F.2d 377, 380 (8th Cir. 1990)(citing United States v. Matlock, 415 U.S. 164, 177, 94 S.Ct. 988). "We finally note that the preponderance burden is consistent with the burden we have applied in the closely related issue of the voluntariness of a confession." State v. Tuttle, 2002 SD 94, ¶ 21, 650 N.W.2d 20, 30-31. "[a]n officer does not have to have probable cause to search before requesting consent to search." State v. Dreps, 1996 SD 142, ¶ 11, 558 N.W.2d 339. Our legal standard for determining whether consent was voluntary is whether "the search was the result of free, intelligent, unequivocal and specific consent without any duress or coercion, actual or implied." Almond, 511 N.W.2d at 574.

In the present case, the Defendant college student enrolled at South Dakota State University with a self-proclaimed 3.5 GPA. His interaction with law enforcement portrays him to be an intelligent young man who is capable of deciding whether to consent to a blood draw. In watching the video of the stop, the Defendant asks many questions and the Deputy answers them; there is a dialogue. The Defendant is not, perhaps, knowledgeable of the criminal justice system, but he is intelligent enough to question the Deputy as to the consequences of his not consenting to the search. The Deputy told Defendant that if he did not consent to the blood draw, the Deputy would seek a warrant. The situation was conducted peacefully and there was cooperation on the part of the Defendant. The Defendant's cooperation ultimately led to his consent to the blood draw. Throughout the stop, the Defendant appeared aware of what was going on and was generally cooperative. The Deputy explained and answered the questions of the Defendant. The Defendant was aware that he could say no to the blood draw. The Defendant in this case made a voluntary, conscious choice to allow the Deputy to obtain a sample of his blood. The Defendant was aware of what he was doing when consenting. The claim that the Defendant's rights were violated for failure to comply with the Implied Consent statute fails. The Defendant's Motion to Suppress the evidence obtained from the search is denied.

CONCLUSION

After careful consideration of the testimony and evidence in this matter, the Court concludes that the stop of the Defendant was a valid and legal search pursuant to reasonable suspicion and the totality of the circumstances in accordance with the Fourth Amendment of the United States Constitution and the Constitution of the State of South Dakota. Likewise, the

Defendant's consent to a blood draw was a valid, voluntary consent. The Defendant's Motion to Suppress is hereby denied.

Unless waived, counsel for the State is directed to draft proposed Findings of Fact, Conclusions of Law, and an Order consistent with this decision and submit to the court and counsel within ten (10) days.

BY THE COURT:

Carmen Means

Carmen Means
Third Circuit Magistrate Judge

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF BROOKINGS	)	THIRD JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
Plaintiff,	)	CRI14-771
vs.	)	JUDGMENT OF CONVICTION DRIVING WHILE UNDER THE INFLUENCE
STEVEN STANAGE,	)	
Defendant.	)	

An Information was filed with this Court on the 1st day of December, 2014, charging the Defendant with the crime of Driving While Under the Influence, (SDCL 32-23-1(1)).

The Defendant was arraigned on said Information and received a copy thereof on the 1st day of December, 2014. The Defendant, appearing through his attorney, BENJAMIN KLEINJAN, who was appearing for DONALD MCCARTY of Brookings, South Dakota and CLYDE R. CALHOON, prosecuting attorney, appeared at the Defendant's arraignment. The Court advised the Defendant of all constitutional and statutory rights pertaining to the charge that had been filed against the Defendant, including but not limited to the right against self-incrimination, the right of confrontation, and the right to a jury trial, and the Defendant on said date having entered a plea of not guilty to the offense charged in the Information, to-wit: Driving While Under the Influence (SDCL 32-23-1(1)), and having waived his right to a jury trial. Thereafter on the 17th day of August, 2015, a trial to the Court having been held and both the State and the Defendant having presented evidence and the Court having heard and considered the same along with all of the papers and pleadings on file herein, and the Court having found said Defendant guilty of the offense of Driving While Under The Influence;

IT IS THEREFORE, The JUDGMENT of this Court that the Defendant is guilty of Driving While Under the Influence, in violation of SDCL 32-23-1(1).

SENTENCE

On the 17th day of August, 2015, the Court asked the Defendant if any legal cause existed to show why Judgment should not be pronounced, there being no cause offered, the Court thereupon pronounced the following sentence: it is hereby

ORDERED that the Defendant pay a fine in the amount of $516.00 plus court costs in the amount of $84.00 for a total of $600.00; and that you be confined in the Brookings County Detention Center for a period of thirty (30) days; provided, however that all of said jail sentence shall be suspended upon the following terms and conditions:

1. That said Defendant pay the fine and costs imposed.

2. That said Defendant demean himself as a law-abiding citizen for a period of one (1) year.

3. That said Defendant shall contact an approved alcohol treatment center, complete and pay for an alcohol evaluation, and thereafter complete the Driving While Under the Influence First Offender classes at Defendant's expense and provide verification to Court Services within ninety (90) days.

4. That $136.00 of said fine shall be suspended upon the condition that the Defendant reimburse Brookings County for the cost of his blood test and analysis; it is further

ORDERED that the driving privileges of the Defendant be and the same are hereby revoked for a period of thirty (30) days; it is further

ORDERED that the sentence herein imposed shall be stayed pending an Appeal.

Dated this 17th day of August, 2015, at Brookings, South Dakota.

BY THE COURT:

Magistrate Court Judge

ATTEST:

Clerk of Courts

STATE OF SOUTH DAKOTA
THIRD JUDICIAL CIRCUIT COURT
BROOKINGS COUNTY COURTHOUSE
314 6th Avenue, Suite 6, Brookings, SD 57006-2085
FAX Number (605) 688-4838

HON. GREGORY J. STOLTENBURG
Circuit Judge
(605) 688-5705
Gregory.Stoltenburg@ujs.state.sd.us

PATRICIA HARTSEL
Court Reporter
(605) 688-5713
Patricia.Hartsel@ujs.state.sd.us

February 3, 2016

Clyde Calhoon
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520 3rd Street #330
Brookings, SD 57006

Donald M. McCarty
Attorney for Defendant/Appellant
415 8th Street South
Brookings, SD 57006

RE: *State v. Steven Alexander Stanage*; Brookings County CR114-771

Dear Counsel:

Following a stipulated trial to the Magistrate Court, Steven Alexander Stanage was found guilty of Driving While Under the Influence in violation of SDCL § 32-23-1. Stanage timely filed a Notice of Appeal regarding a Motion to Suppress that was previously denied by Magistrate Judge Carmen A. Means. The Magistrate Court's decision is affirmed.

PROCEDURAL HISTORY

Steven Stanage ("Stanage") was charged by Information on December 1, 2014, with the offense of Driving While Under the Influence, a violation of SDCL § 32-23-1(1). On December 1, 2014, Stanage appeared through counsel and entered pleas of not guilty and a jury trial was requested.

On January 9, 2015, Stanage filed a Motion to Suppress Evidence. The State filed a resistance to the Motion on January 12, 2015. An evidentiary hearing was held on February 2, 2015 before Magistrate Judge Carmen A. Means. (MH 1-25). Judge Means subsequently signed the Findings of Fact and Conclusions of Law, as well as an Order Denying Defendant's Motion to Suppress.

The parties submitted the case to the Court by Stipulation. Judge Means found Stanage guilty of Driving While Under the Influence. The Judgement of Conviction dated August 17, 2015 was filed on August 27, 2015. Stanage filed a written Notice of Appeal on August 28, 2015. This Court has jurisdiction pursuant to SDCL § 16-6-10.

ISSUE

Whether the Magistrate Court erred in denying Defendant's Motion to Suppress Evidence based on the determination that there was reasonable suspicion to stop Defendant's vehicle.

STANDARD OF REVIEW

Appellate review of motions to suppress for asserted constitutional violations are reviewed de novo. *State v. Morato*, 2000 S.D. 149, ¶ 10, 619 N.W.2d 655, 659 (citing *State v. Stanga*, 2000 S.D. 129, ¶ 8, 617 N.W.2d 486, 488). *See also State v. Hess*, 2004 S.D. 60, ¶ 9, 680 N.W.2d 314, 319; *State v. DeLaRosa*, 2003 S.D. 18, ¶ 5, 657 N.W.2d 683, 685; *State v. Condon*, 2007 S.D. 124, ¶ 14, 742 N.W.2d 861, 866. Although factual findings are reviewed under a clearly erroneous standard of review, once the facts have been determined, the application of the legal standard to those facts is a question of law reviewed de novo. *Hess*, 2004 S.D. at ¶ 9, 680 N.W.2d at 319 (citing *State v. Lamont*, 2001 S.D. 92, ¶ 12, 631 N.W.2d 603, 607). At issue is the application of the law to the facts found by the Magistrate Court; therefore, the Defendant is entitled to a de novo review.

FACTS

The following Findings of Fact, dated June 15, 2015, were entered by the lower court and are supported by the record:

On October 26, 2014, at approximately 1:50 AM, Hardee's Restaurant employee, Adam Hill ("Hill"), observed a driver at the drive-thru window with bloodshot eyes, slurred speech, and difficulty handling the drinks he had ordered. Based on these observations, Hill alerted his shift leader, James Debough ("Debough"), of a possible drunk driver at the drive-thru window. Debough called the police and advised dispatch of the license plate number, 7CG082, and the description of the vehicle, a gray Chevy Malibu, that was at the drive-thru window.

Dispatch communicated this information to Deputy Jeremy Kriese ("Kriese") who was on duty that day. Kriese was approximately one block west of Hardee's when he received the dispatch call. Kriese observed the vehicle that was described leaving Hardees and turn east on a service road.

As a result of the phone call, Kriese conducted a traffic stop of the vehicle. Kriese approached the vehicle, identified himself, and indicated the reason for the stop was a report that the driver may be intoxicated. Kriese observed an overwhelming odor of alcohol coming from the vehicle, as well as the driver's bloodshot, glassy eyes and slurred speech.

Stanage was identified as the driver. An investigation resulted in Stanage's arrest for the offense of Driving While Under the Influence.

Prior to trial, Stanage filed a Motion to Suppress Evidence alleging that the stop by Kriese was in violation of Stanage's constitutional rights. Magistrate Judge Carmen A. Means denied Stanage's motion, concluding that the information relayed by the Hardee's employees was sufficient for Kriese to have reasonable suspicion to stop Stanage's vehicle. Kriese was constitutionally permitted to detain Stanage for further investigation after initiating the traffic stop and making contact with the driver.

ANALYSIS

The Magistrate Judge found that under the totality of the circumstances, the stop was a valid and legal search pursuant to reasonable suspicion. The scope of review in this appeal is therefore limited to the reasonable suspicion analysis of the Magistrate Court.

When a law enforcement officer directs a motor vehicle to stop and detains its occupants for questioning, such an investigatory stop constitutes a search and seizure under the United

States Constitution and the Constitution of the State of South Dakota. *See* U.S. Const. amend. IV.; S.D. Const. art. VI, § 11.

The requirement of reasonable suspicion to support a traffic stop has been set forth as follows:

> The Fourth Amendment to the United States Constitution protects citizens from unreasonable searches and seizures. Although this protection generally requires probable cause to search, the requisite level of suspicion necessary to effectuate the stop of a vehicle is not equivalent to probable cause necessary for an arrest or a search warrant. All that is required is that the police officer has a reasonable suspicion to stop an automobile. Therefore, the factual basis needed to support a traffic stop is minimal.
>
> While the stop may not be the product of mere whim, caprice or idol curiosity, it is enough that the stop is based upon specific and articulable facts which taken together with rational inferences from those facts, reasonably warrant the intrusion. Under these standards, it is well established that a traffic violation, however minor, creates sufficient cause to stop the driver of a vehicle.

State v. Scholl, 2004 S.D. 85, ¶ 6, 684 N.W.2d 83, 85 (citation omitted).

Reasonable suspicion "is a common-sense and non-technical concept dealing with the practical considerations of everyday life." *State v. Dahl*, 2012 SD 8, ¶ 6, 809 N.W.2d 844, 845 (citation omitted). Reviewing courts should make reasonable suspicion determinations under the totality of the circumstances of each case to see whether the detaining officer had a particularized objective basis to support the stop. *State v. Herren*, 2010 SD 101, ¶ 7, 792 N.W.2d 551, 554.

Reasonable suspicion is less demanding than probable cause; therefore, it can arise from information that is less reliable than that required to show probable cause, including an informant's tip. *United States v. Wheat*, 278 F.3d 722, 726 (8th Cir. 2001) (citation omitted).

In *Wheat*, an informant called a local police department to report the erratic driving of another driver. *Id.* at 724. The informant described the vehicle's color, make, model and the first three letters of its license plate. *Id.* Shortly thereafter, patrolling officers located the vehicle and conducted a traffic stop without having observed any incidents of erratic driving. *Id.* The Eighth Circuit validated the stop in *Wheat*. *Id.* at 737. The Court found that the officer corroborated all the innocent details of the anonymous tip and conducted the stop seconds after the tip was received. *Id.* Based on the totality of the circumstances, the officer in *Wheat* had

reasonable suspicion to conduct a traffic stop and was within the parameters of the Constitution. *Id.*

In determining whether the informant's tip provided the officers with reasonable suspicion to stop the vehicle, the Eighth Circuit defined the following test:

> Whether an anonymous tip suffices to give rise to reasonable suspicion depends on both the quantity of information it conveys as well as the quality, or degree of reliability, of that information, viewed under the totality of the circumstances. If a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable.

Id. at 726 (citation omitted).

The Court in *Wheat* "found the following considerations integral to determining 'whether an anonymous tip of erratic driving may justify an investigatory stop.'" *Scholl*, 2004 SD at ¶ 9 (quoting *Wheat*, 278 F.3d at 731).

> First, the anonymous tipster must provide a sufficient quantity of information, such as the make and model of the vehicle, its license plate numbers, its location and bearing, and similar innocent details, so that the officer, and the court, may be certain that the vehicle stopped is the same as the one identified by the caller. The time interval between receipt of the tip and location of the suspect vehicle, though going principally to the question of reliability, may also be a factor here.
>
> ***
>
> The tip must also contain a sufficient quantity of information to support an inference that the tipster has witnessed an actual traffic violation that compels an immediate stop. A law enforcement officer's mere hunch does not amount to reasonable suspicion.

Wheat, 278 F.3d at 731–732.

"The second and far more difficult consideration concerns the quality, or degree of reliability of the information conveyed in an anonymous tip." *Id.* at 732. The "primary determinant of a tipster's reliability is the basis of his knowledge." *Id.* at 734. A tip that conveys observations of criminal activity whose innocent details are corroborated is credible. *Id.* at 735.

Utilizing the *Wheat* analysis, the South Dakota Supreme Court, in *Scholl*, determined that law enforcement had reasonable suspicion based solely on an informant's information to conduct an investigatory stop on a vehicle. *Scholl*, 2004 SD at ¶ 18. The Court reasoned that the tipster

provided an extensive description of a vehicle based on his eyewitness observations that a vehicle was being operated dangerously. *Id.* at ¶ 12. The description included the color, make, model, and license plate of the vehicle. *Id.* The details also included the location of the vehicle. *Id.* After corroborating these innocent details, law enforcement effected an investigatory stop. *Id.* Neither the tipster nor law enforcement observed specific examples of moving violations. *Id.* at ¶ 13. Rather the tipster observed Scholl stumbling when leaving the bar and having problems getting into his vehicle. *Id.* The Court stated that although "the tipster did not describe specific driving conduct as a basis for the stop . . . he did describe non-driving conduct that yielded a reasonable suspicion that the driver was driving while under the influence of alcohol." *Id.* at ¶ 17.

The *Scholl* Court weighed the risk of a tip being fiction against the public interest in investigating possibly intoxicated drivers. *Scholl*, 2004 SD at ¶ 10. The Court determined that "the risk of false tips is slight compared to the risk of not allowing the police to immediately conduct investigatory stops of potentially impaired drivers." *Id.* Impaired drivers pose an imminent threat to public safety with potentially devastating results; therefore, the government has a substantial interest in effecting such stops as quickly as possible. *Id.*

Stanage urges this Court to follow the rationale and holding in *State v. Miller*, 510 N.W.2d 638 (N.D. 1994). In *Miller*, the North Dakota Supreme Court invalidated a traffic stop based upon a tip from a Wendy's employee. *Id.* at 639. The Court in *Miller* found the tip lacked quality because the informant's tip included a statement that the driver "could barely hold his head up," the wrong description of the pickup's color, and the pickup's location and license plate number. *Id.* at 644. Further, the tip was "short on reliability" due to the informant's single, inferential statement that the driver "could barely hold his head up." *Id.*

Simply put, this case has more articulable reasons to support the stop than that found in *Miller*. The articulated reasons for the stop, as provided by the tipster, included:

1. A possible drunk driver;
2. Located at the drive-thru window at Hardees at approximately 1:50 AM;
3. Observed by the drive-thru window employee to have bloodshot eyes, slurred speech, and exhibiting difficulty handling the drinks he ordered;
4. Driving a Gray Chevy Malibu, as described by the shift manager;
5. Identified by license plate 7CG082.

Analyzing the articulated reasons for the stop under *Wheat* and *Scholl*, the tip was sufficient in both quantity and quality.

First, the tip included sufficient identifying facts relayed by the tipsters to provide the officer, and the court, certainty that the vehicle stopped was the same as the one identified by the Hardees employees. The location, vehicle description, and license plate were corroborated by Kriese as he was only a block away when dispatch relayed the information. The record is silent as to any pretext or bad faith on behalf of the informants or the officer. *See Graf v. State, Dep't of Commerce & Regulation*, 508 N.W.2d 1, 6 (S.D. 1993) (Sabers, J., dissenting).

Second, the timing of the tip provided Kriese with a sufficient basis for believing that the car he observed in the drive-thru lane at Hardees and watched drive onto the service road was the vehicle the tipster had called about. The time interval between Kriese's receiving the tip and his locating the suspect car could hardly have been smaller as Kriese was only one block away when dispatch communicated the information.

Third, the tip clearly was based upon eyewitness observations by the Hardees' employee at the drive-thru window. Hill stated that the driver had bloodshot eyes, slurred speech, and difficulty handling the drinks ordered. The tip was sufficiently detailed to permit a reasonable inference that the tipster had actually witnessed what he described. On this point, the Court notes that the transaction between an individual at the drive-thru window and the employee occurs at close proximity as there is a hand-to-hand exchange of food and money. The closeness of the transaction supports the reliability of the employee's observations.

Additionally, the tipster in this case was not "truly" anonymous. *See State v. Satter*, 2009 SD 35, ¶ 10, 766 N.W.2d 153, 156 (citing *Scholl*, 2004 SD at ¶ 12, n. 4) (The police's failure to take the time to obtain the tipster's personal information does not mean she was anonymous). "A reasonable person . . . would realize that in all likelihood the police could, if they so choose, determine the person's identity, and could hold him responsible if his allegations turned out to be fabricated." *Id.* (quoting *United States v. Jenkins*, 313 F.3d 549, 554 (10th Cir. 2002)). It was relayed to dispatch that the individuals were employees at Hardees. With only one Hardees in Brookings County, the location of the particular restaurant is not at issue. There is a strong

presumption from this information alone that these informants could be located in the event that their tip was determined to be false or motivated by ill will.

Law enforcement officers are not required to point to a single factor which, standing alone, signals a potential violation of law. Rather, officers are to assess the situation as it unfolds and make determinations based upon inferences and deductions drawn from their experience and training. Common sense must illuminate the Court's review of whether law enforcement had the requisite suspicion to justify the stop. The totality of the circumstances in this case created a reasonable suspicion that criminal activity was afoot to support Kriese's investigatory stop of Stanage.

CONCLUSION

Officer Kriese had reasonable suspicion to conduct a vehicle stop. The stop was based on specific and articulable facts provided by a reliable tip. The stop was valid despite the fact that the arresting officer did not personally observe Stanage commit a traffic violation. The stop was objectively reasonable and not the product of mere whim, caprice, or idle curiosity. Therefore, the Magistrate Court did not err in denying Stanage's Motion to Suppress and the Judgement of Conviction is affirmed. The State shall prepare and submit an Order consistent with this Court's decision.

Sincerely,

Gregory J. Stoltenburg
Circuit Court Judge
Third Judicial Circuit

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF BROOKINGS)

IN CIRCUIT COURT

THIRD JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,

Appellee,

vs.

ALEXANDER STANAGE,

Appellant.

CRI. 14-771

ORDER AFFIRMING MAGISTRATE COURT DECISION

STATE OF SOUTH DAKOTA
Third Judicial Circuit Court
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on file in my office on this date:
FEB 08 2016
Anette Beasley
Brookings County Clerk of Courts
By: Emily Mosley

The above captioned matter having come before the Court on the pleadings contained on file herein, the State of South Dakota being represented by CLYDE R. CALHOON, the duly elected, qualified and acting States Attorney for Brookings County, South Dakota, and Defendant Alexander Stanage, appearing by and through his attorney DON MCCARTY, of Brookings, South Dakota; the matter coming before the Court upon an appeal by Appellant from a Judgment of Conviction DWI, signed by the Honorable CARMEN MEANS, Magistrate Court Judge, filed on August 17, 2015, such Judgment and Conviction convicting the Defendant of the offense of Driving While Under the Influence of Alcohol, and the Court having reviewed the file de novo, including the transcripts of the Motion Hearing and the Stipulated Court Trial, and the briefs of both parties, and having in writing rendered its decision concluding that the Magistrate Court did not err in denying the Appellant's Motion to Suppress and affirming the finding of guilt, and the Court being in all things duly advised and good cause appearing therefore, it is hereby

ORDERED the Judgment of Conviction DWI, signed by the Honorable CARMEN MEANS, Magistrate Court Judge, filed on August 17, 2015, which Judgment and Conviction convicted Appellant of the offense of Driving While Under the Influence of Alcohol, is affirmed in all respects and the decision of the Court dated the 3rd day of February, 2016, is incorporated herein by this reference.

BY THE COURT:
Signed: 2/8/2016 3:39:39 PM

Gregory J. Stoltenburg
Circuit Court Judge

Attest:
EMILY MOSLEY , Clerk/Deputy

2011 WL 598433

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Eleventh District, Portage County.

STATE of Ohio, Plaintiff–Appellee,
v.
Mark T. WAGNER, Defendant–Appellant.

No. 2010–P–0014. | Decided Feb. 18, 2011.

Criminal Appeal from the Portage County Municipal Court, Kent Division, Case No. K 2009 TRC 3624.

Attorneys and Law Firms

Victor V. Vigluicci, Portage County Prosecutor, Kimberly Quinn, Assistant Prosecutor, and Mordechai Osina, Assistant Prosecutor, Ravenna, OH, for plaintiff-appellee.

Robert C. Kokor, Ronald James Rice Co., L.P.A., Hubbard, OH, for defendant-appellant.

Opinion

DIANE V. GRENDELL, J.

*1 {¶ 1} Defendant-appellant, Mark T. Wagner, appeals the Judgment Entry of the Portage County Municipal Court, Kent Division, in which the trial court denied Wagner's Motion to Suppress. For the following reasons, we reverse and remand the decision of the trial court.

{¶ 2} On September 11, 2009, Lieutenant John Altomare of the Kent Police Department was working as an off duty officer for a Taco Bell restaurant in Kent, Ohio. At approximately 2:56 a.m., Altomare was informed by a Taco Bell employee, Michael Stumpf, that a driver at the drive-thru window was "drunk." Altomare radioed to dispatch that there was "a possible drunk driver in the drive-thru" and requested that a marked car respond. The marked car, driven by Officer Jerry Schlosser of the Kent Police Department, responded and stopped the vehicle after it had exited the drive-thru and had turned from East Main Street onto Linden Street. The driver of this vehicle was Wagner.

{¶ 3} Wagner was subsequently arrested and charged with Operating a Vehicle While Intoxicated (OVI), in violation of R.C. 4511.19(A)(1). The summons issued did not contain any traffic violations.

{¶ 4} Altomare testified at the suppression hearing that after he received the information from Stumpf about the possible drunk driver and had radioed dispatch, he saw Wagner exit the Taco Bell parking lot, enter East Main Street, and then make a "wide right turn going into the other lane of travel." Altomare stated that he informed Officer Schlosser of this wide turn at some point but that he could not remember if he informed Schlosser or dispatch of the turn before Schlosser committed the stop of the vehicle or if he told Schlosser later, while Schlosser was writing his report of the incident. Altomare also testified that he did not actually witness Wagner face to face and therefore did not observe any behavior that indicated to him whether Wagner was intoxicated.

{¶ 5} Wagner filed a Motion to Suppress, contending, among other arguments, that there was no probable cause to conduct a stop of Wagner's vehicle, that Wagner did not receive *Miranda* warnings, and that the sobriety tests were not administered properly.

{¶ 6} A hearing on the motion was held on December 17, 2009. At the beginning of the hearing, Wagner's counsel indicated that the parties had agreed to limit the scope of the hearing to the issue of the probable cause of the stop of the vehicle only. During the hearing, the only testimony offered was that of Lieutenant Altomare. Officer Schlosser and Stumpf did not testify. During the hearing, a video from Schlosser's police cruiser was played but was not admitted into evidence. Judge Plough, the trial court judge, stated during the hearing that the tape "really doesn't show the turn" onto Linden Street.

{¶ 7} After the hearing, the trial court found Schlosser's stop was based upon Wagner travelling left of center. The court held that this gave Schlosser reasonable and articulable suspicion to believe that Wagner was violating a traffic law and denied the Motion to Suppress.

*2 {¶ 8} On February 10, 2010, Wagner entered a plea of no contest and the court found him guilty of OVI. Wagner was sentenced to 90 days in jail, with 87 suspended and 3 days to serve in the Driver Intervention Program. Walker was also required to pay a $750 fine, with $375 suspended, and had his driver's license suspended for 1 year.

Next

{¶ 9} Wagner made an oral motion to the trial court for a stay of execution of his sentence, pending appeal. This motion was denied by the trial court. On March 9, 2010, Wagner filed a Motion for a Stay of Execution of Sentence with this court. This court granted Wagner a stay of his 3–day Driver Intervention Program and of his $375 fine, pending the outcome of this appeal.

{¶ 10} Wagner timely appeals and raises the following assignment of error:

{¶ 11}"The trial court committed reversible error when it denied the appellant's motion to suppress evidence."

{¶ 12}"The trial court acts as trier of fact at a suppression hearing and must weigh the evidence and judge the credibility of the witnesses."*State v. Ferry*, 11th Dist. No.2007–L–217, 2008–Ohio–2616, at ¶ 11 (citations omitted)."[T]he trial court is best able to decide facts and evaluate the credibility of witnesses."*State v. Mayl*, 106 Ohio St.3d 207, 833 N.E.2d 1216, 2005–Ohio–4629, at ¶ 41. "The court of appeals is bound to accept factual determinations of the trial court made during the suppression hearing so long as they are supported by competent and credible evidence."*State v. Hines*, 11th Dist. No.2004–L–066, 2005–Ohio–4208, at ¶ 14. "Once the appellate court accepts the trial court's factual determinations, the appellate court conducts a de novo review of the trial court's application of the law to these facts."*Ferry*, 2008–Ohio–2616, at ¶ 11 (citations omitted); *Mayl*, 2005–Ohio–4629, at ¶ 41, 106 Ohio St.3d 207, 833 N.E.2d 1216 ("we are to independently determine whether [the trial court's factual findings] satisfy the applicable legal standard") (citation omitted).

{¶ 13} First, Wagner argues that the trial court's factual findings were not supported by competent, credible evidence. Wagner asserts that the "trial court's ruling fundamentally misrepresents the record" and relies upon mistaken facts.

{¶ 14} The trial court found that Officer Schlosser saw Wagner make a wide right hand turn and that Schlosser conducted the stop of Wagner based on this traffic violation, providing reasonable, articulable suspicion to stop Wagner. However, the evidence in the record does not support this factual finding. Schlosser did not testify at the suppression hearing and therefore did not indicate what he observed or why he performed the stop of Wagner's vehicle. Additionally, although the video from Officer Schlosser's police cruiser was not admitted into evidence and is not in the record, Judge Plough stated during the hearing that whether Wagner travelled left of center was not visible in the video. The only person who testified as to seeing Wagner travel left of center was Lieutenant Altomare. As several of the court's factual determinations were not supported by competent and credible evidence, we must conduct a further review to determine if, based on the facts in the record, denial of Wagner's Motion to Suppress was proper.

*3 {¶ 15} Wagner also argues that there was no probable cause or reasonable suspicion to justify the stop of Wagner's vehicle because the only information Officer Schlosser had at the time he conducted the traffic stop was an informant's tip that Wagner was driving while "drunk." We agree.

{¶ 16}"A police officer may stop an individual if the officer has a reasonable suspicion, based on specific and articulable facts that criminal behavior has occurred or is imminent. *Terry v. Ohio* (1968), 392 U.S. 1, 21 * * *. Moreover, detention of a motorist is reasonable when there exists probable cause to believe a crime, including a traffic violation, has been committed. *Whren v. United States* (1996), 517 U.S. 806, 810, 116 S.Ct. 1769, 135 L.Ed.2d 89."*State v. McNulty*, 11th Dist. No.2008–L–097, 2009–Ohio–1830, at ¶ 11. The determination of whether a reasonable suspicion exists "involves a consideration of 'the totality of the circumstances.' "*Hines*, 2005–Ohio–4208, at ¶ 16, citing *Maumee v. Weisner*, 87 Ohio St.3d 295, 299, 720 N.E.2d 507, 1999–Ohio–68 (citation omitted).

{¶ 17}"Where an officer making an investigative stop relies solely upon a dispatch, the state must demonstrate at a suppression hearing that the facts precipitating the dispatch justified a reasonable suspicion of criminal activity."*Weisner*, 87 Ohio St.3d 295, 720 N.E.2d 507, at paragraph one of the syllabus. "The United States Supreme Court has reasoned, then, that the admissibility of the evidence uncovered during such a stop does not rest upon whether the officers *relying upon a dispatch or flyer* 'were themselves aware of the specific facts which led their colleagues to seek their assistance.' It turns instead upon 'whether the officers who *issued* the flyer' or dispatch possessed reasonable suspicion to make the stop."*Id.* at 297, 720 N.E.2d 507, citing *United States v. Hensley* (1985), 469 U.S. 221, 231, 105 S.Ct. 675, 83 L.Ed.2d 604 (emphasis sic). If the dispatch "has been issued in the absence of a reasonable suspicion, then a stop in the objective reliance upon it violates the Fourth Amendment."*Hensley*, 469 U.S. at 232.

Next

{¶ 18} In this case, there were two potential justifications that could have provided probable cause or reasonable suspicion to conduct a stop of Wagner's vehicle. We will first address the State's assertion that there was a traffic violation, that Wagner travelled left of center.

{¶ 19}"It is well established that an officer may stop a motorist upon his or her observation that the vehicle in question violated a traffic law."*McNulty*, 2009–Ohio1830, at ¶ 13 (citations omitted)."This court has repeatedly held that a minor violation of a traffic regulation * * * that is witnessed by a police officer is, standing alone, sufficient justification to warrant a limited stop for the issuance of a citation."*State v. Yemma*, 11th Dist. No. 95–P–0156, 1996 Ohio App. LEXIS 3361, at *6–*7, 1996 WL 495076 (citations omitted). A stop may be based solely upon driving a car left of center, in violation of R.C. 4511.25. *State v. Gibson–Sweeney*, 11th Dist. No.2005–L–086, 2006–Ohio–1691, at ¶ 16; R.C. 4511.25 ("Upon all roadways of sufficient width, a vehicle * * * shall be driven upon the right half of the roadway.")

*4 {¶ 20} An officer typically has sufficient justification to effectuate a stop based on a violation such as travelling left of center, as occurred in this case. However, the failure of the state to prove that Schlosser either personally witnessed the traffic violation or that Altomare conveyed this information to Schlosser via dispatch prior to Wagner being stopped, prevents the stop from being valid.

{¶ 21} Since Officer Schlosser did not testify as to what he saw, any basis for reasonable suspicion must arise from Altomare's testimony as to the information dispatched to Schlosser. As stated in *Weisner*, the facts *precipitating* the dispatch must justify the reasonable suspicion of criminal activity. In this case, there is no evidence that Schlosser conducted the stop of Wagner based on the left of center violation. The state had the burden of presenting such evidence. When "an officer making an investigative stop *relies solely upon a dispatch*, the state must demonstrate at a suppression hearing that the facts precipitating the dispatch justified a reasonable suspicion of criminal activity."*Weisner*, 87 Ohio St.3d at 298, 720 N.E.2d 507.

{¶ 22} There was no evidence presented at the suppression hearing as to whether Schlosser had seen or even been informed that Wagner was driving left of center. While Altomare testified that he saw Wagner travel left of center, he also testified that he was unable to recall whether he dispatched this information to Schlosser *before* Schlosser performed the stop of Wagner. The record indicates that Altomare's observation occurred *after* he issued the original dispatch and *after* Schlosser had arrived at Taco Bell to wait for Wagner to exit the drive-thru. Since the state presented no evidence that a dispatch regarding the traffic violation was issued to Schlosser prior to conducting the stop of Wagner, no reasonable suspicion existed for a stop on these grounds.

{¶ 23} We must now consider whether the stop was valid because of Stumpf's assertion, conveyed to Schlosser through dispatch, that Wagner was driving while intoxicated.

{¶ 24}"A citizen-informant who is the victim of or witness to a crime is presumed reliable."*State v. Livengood*, 11th Dist. No.2002–L–044, 2003–Ohio–1208, at ¶ 11 (citation omitted). When determining the validity of such an informant's tip, we should consider whether the "tip itself has sufficient indicia of reliability to justify the investigative stop" by considering the "informant's veracity, reliability, and basis of knowledge."*Weisner*, 87 Ohio St.3d at 299, 720 N.E.2d 507.

{¶ 25} Stumpf was a Taco Bell employee who relayed information that he believed Wagner was drunk to Lieutenant Altomare. Because Stumpf is a citizen-informant, we presume that he was generally reliable. However, we must also consider whether the information relayed by Stumpf to Altomare, and ultimately to Schlosser, had sufficient indicia of reliability and a basis of knowledge that would justify a stop of Wagner's vehicle.

*5 {¶ 26} Altomare, the only witness to testify at the suppression hearing, stated that Stumpf informed him that Wagner, who was at the drive-thru window, was "drunk." Altomare did not testify as to any other statements made by Stumpf, or explain any additional details as to why Stumpf believed Wagner was drunk. Additionally, Altomare never observed Wagner face to face on that night and had no personal knowledge of whether Wagner was drunk. Upon receiving information only that Wagner was "drunk," Altomare informed dispatch of a possible drunk driver.

{¶ 27} A citizen informant's statement that the suspect was "drunk," without more, does not provide reasonable suspicion. An informant must give some details providing reasonable suspicion of drunk driving. See *State v. Brant*, 10th Dist. No. 01AP–342, 2001–Ohio–3994, 2001 Ohio App. LEXIS 5263, at *8–9 (where a tip given by a citizen indicated that the suspect "was honking his horn for ten minutes, his

shirt was on backwards and inside out and his speech was very slow," and the citizen did not indicate that he "witnessed any traffic violations, unlawful behavior, or evidence of impaired driving," there was not reasonable suspicion of OVI to stop the suspect); *State v. Morgan*, 11th Dist. No.2008–P–0098, 2009–Ohio–2795, at ¶ 22 (the odor of alcohol, strange behavior, and comments made about not being sober provided reasonable suspicion for a stop to be conducted).

{¶ 28} Stumpf's information that Wagner was drunk, without any additional description of signs of intoxication such as slurred speech, odor of alcohol, or erratic driving, does not provide reasonable suspicion to conduct a stop. Although an informant's tip may be considered reliable, the tip must also provide some facts that create a reasonable suspicion of criminal activity.

{¶ 29} Wagner's sole assignment of error is with merit.

{¶ 30} For the foregoing reasons, the Judgment Entry of the Portage County Municipal Court, Kent Division, denying Wagner's Motion to Suppress, is reversed and remanded for further proceedings consistent with this opinion. Costs to be taxed against appellee.

TIMOTHY P. CANNON, P.J., and MARY JANE TRAPP, J., concur.

All Citations

Slip Copy, 2011 WL 598433, 2011 -Ohio- 772

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2012 WL 1926395

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Third District, Auglaize County.

STATE of Ohio, Plaintiff–Appellee,
v.
Blake STEINBRUNNER, Defendant–Appellant.

No. 2–11–27. | Decided May 29, 2012.

Appeal from Auglaize County Municipal Court Trial Court No. 2010 TRC 07016.

Attorneys and Law Firms

Andrew R. Bucher for Appellant.

R. Andrew Augsburger for Appellee.

Opinion

SHAW, P.J.

*1 {¶ 1} Defendant-appellant Blake Steinbrunner ("Steinbrunner") appeals the October 24, 2011 judgment of the Auglaize County Municipal Court sentencing him upon his conviction of operating a vehicle while under the influence of drugs and/or alcohol (also known as an "OVI"), in violation of R.C. 4511.19(A)(1)(d), a misdemeanor of the first degree.

{¶ 2} The facts relevant to this appeal are as follows. On December 4, 2010, shortly before 4 a.m., Mark Johns ("Johns") was in line at a McDonald's drive-thru in Wapakoneta behind a blue Hyundai later identified to be driven by Steinbrunner. While in line, Johns observed that the person in the vehicle in front of him was yelling and giving the employees at McDonald's a "hard time." Thinking that this person sounded drunk, and feeling sorry for the McDonald's workers, Johns decided to call the police.

{¶ 3} When Johns called the police, he identified himself giving his name and contact information. Johns further provided a description of the vehicle in front of him, which included the license plate number. Johns then told the dispatcher that he had observed the person in front of him in the McDonald's drive-thru for approximately fifteen minutes, that he "sound[ed] drunk as hell" and that he was "cussing" and "yelling."

{¶ 4} Officer Justin Marks ("Officer Marks") received a call from the dispatcher at roughly 3:52 a.m. alerting him to a possible impaired driver at McDonald's who was "yelling." When Officer Marks arrived at the McDonald's he pulled up past Johns while Johns was still on the phone with the dispatcher and identified the Steinbrunner vehicle. Shortly thereafter Steinbrunner pulled out of the McDonald's in the blue Hyundai. When Steinbrunner pulled out, Officer Marks quickly got the attention of the drive-thru attendant and asked the attendant whether the person in the car who had just pulled out was drunk or had been drinking. The drive-thru attendant responded, "oh yea."

{¶ 5} Officer Marks pulled out of the McDonalds and almost immediately turned on his lights and initiated an investigatory stop of Steinbrunner. Steinbrunner's blood alcohol concentration ("BAC") registered at .152, in excess of the legal limit. Steinbrunner was subsequently cited with operating a vehicle while under the influence of alcohol and/or drugs, in violation of R.C. 4511.19(A)(1)(a), and operating a vehicle with a concentration of eight-hundredths of one gram or more but less than seventeen hundredths of one gram by weight of alcohol per two hundred ten liters of breath (hereinafter "operating a vehicle with a prohibited BAC"), in violation of R.C. 4511.19(A)(1)(d), both misdemeanors of the first degree.

{¶ 6} On December 8, 2010, Steinbrunner entered pleas of not guilty to both charges. On April 14, 2011 Steinbrunner filed a motion to suppress alleging several reasons that evidence should be suppressed. A hearing was set on the motion for July 1, 2011. Prior to the hearing on the motion to suppress, the State and Steinbrunner agreed that there would only be one issue at the hearing, namely, whether there was a reasonable articulable suspicion to stop Steinbrunner based upon the citizen-informant call.

*2 {¶ 7} On July 1, 2011 the hearing on the motion to suppress was held. At the hearing the State called Johns and Officer Marks. The State also entered into evidence the audio recording of Johns' call to the police and the recording of the traffic stop of Steinbrunner. Steinbrunner cross-examined both of the State's witnesses but did not put forth any evidence.

{¶ 8} On July 18, 2011 the trial court entered its judgment overruling Steinbrunner's motion to suppress.

{¶ 9} On October 24, 2011, Steinbrunner changed his plea to no contest to the charge of operating a vehicle with a prohibited BAC, in violation of 4511.19(A)(1)(d), and the State dismissed the remaining charge without prejudice. On that same date, Steinbrunner was found guilty of Operating a Vehicle with a prohibited BAC. Steinbrunner was subsequently sentenced to 20 days in jail, ordered to pay a fine of $875 and court costs, and his license was suspended for three months. [1] The sentence was stayed pending appeal. It is from this judgment that Steinbrunner appeals asserting the following assignment of error for our review.

ASSIGNMENT OF ERROR

THE TRIAL [COURT] ERRED IN WHEN (sic) IT FOUND THE SEIZURE OF MR. STEINBRUNNER DID NOT VIOLATE THE FOURTH AMENDMENT, [OF THE] UNITED STATES CONSTITUTION OR ARTICLE I, § 14 OF THE OHIO CONSTITUTION[.]

{¶ 10} In his sole assignment of error, Steinbrunner contends that Officer Marks lacked reasonable suspicion to perform an investigatory stop and that therefore the trial court erred in overruling his motion to suppress. Specifically Steinbrunner claims Johns referred to a non-specific 'he' in his call to the police, that Johns' statement that the person in front of him in the drive-thru "sounds drunk as hell" was insufficient to justify an investigatory stop and that Officer Marks did not personally observe any traffic violation before stopping Steinbrunner.

{¶ 11} Appellate review of a decision on a motion to suppress evidence presents mixed questions of law and fact. *United States v. Martinez*, 949 F.2d 1117, 1119 (11th Cir.1992). At a suppression hearing, the trial court assumes the role of trier of fact, and is, therefore, in the best position to resolve questions of fact and evaluate witness credibility. *State v. Carter*, 72 Ohio St.3d 545, 552 (1995). As such, a reviewing court must accept a trial court's factual findings if they are supported by competent, credible evidence. *State v. Guysinger*, 86 Ohio App .3d 592, 594 (4th Dist.1993). The reviewing court then applies the factual findings to the law regarding suppression of evidence. *State v. Devanna*, 3d Dist. No 2–04–12, 2004–Ohio–5096, ¶ 9. An appellate court reviews the trial court's application of the law *de novo*. *State v. Anderson*, 100 Ohio App.3d 688, 691 (4th Dist.1995).

{¶ 12} The Fourth and Fourteenth Amendments to the United States Constitution generally prohibit warrantless searches and seizures, and any evidence that is obtained during an unlawful search or seizure will be excluded from being used against the defendant. *Mapp v. Ohio*, 367 U.S. 643, 649, 81 S.Ct. 1684 (1961). At a suppression hearing, the State bears the burden of establishing that a warrantless search and seizure falls within one of the exceptions to the warrant requirement, and that it meets Fourth Amendment standards of reasonableness. *City of Xenia v. Wallace*, 37 Ohio St.3d 216 (1988), at paragraph two of the syllabus; *State v. Kessler*, 53 Ohio St.2d 204, 207 (1978); *City of Maumee v. Weisner*, 87 Ohio St.3d 295, 297 (1999) (Citation omitted).

*3 {¶ 13} One exception to the warrant requirement is that a police officer may conduct an investigative stop if there is a reasonable articulable suspicion of criminal activity. *State v. Keck*, 3d. Dist. No. 5–03–27, 2004–Ohio–1396, ¶ 11; *State v. Bobo*, 37 Ohio St.3d 177, 179 (1988); *Berkemer v. McCarty*, 468 U.S. 420, 439–440, 104 S.Ct. 3138 (1984). Notably the threshold is lower to justify an investigatory stop than it is for probable cause to arrest. *See State v. Devanna*, 3d. Dist. No. 2–04–12, 2004–Ohio–5096, ¶ 21.For an investigatory stop, an officer needs only " 'specific and articulable facts which, taken together with rational inferences from those fac[ts], reasonably warrant [the] intrusion.' " *Maumee*, 87 Ohio St.3d at 299, quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

{¶ 14} In determining whether reasonable articulable suspicion exists, a reviewing court must look to the totality of the circumstances. *State v. Andrews*, 57 Ohio St.3d 86, 87–88 (1991). Under this analysis, a court should consider "both the content of the information possessed by police and its degree of reliability."*Maumee*, 87 Ohio St.3d at 299, quoting *Alabama v. White*, 496 U.S. 325, 330, 110 S.Ct. 2412 (1990).

{¶ 15} An officer does not have to have personally observed a traffic violation or criminal activity to justify detaining someone; rather, an officer can rely on information transmitted to him through a dispatch or a flyer.*Maumee* at 297, quoting *United States v. Hensley*, 469 U.S. 221, 231, 105 S.Ct. 675, 681 (1985); *State v. Bailey*, 3d. Dist. No. 8–07–02, 2008–Ohio–2254, ¶ 17; *Devanna, supra*, at ¶ 13.Moreover, "[a] telephone tip can, by itself, create reasonable suspicion justifying an investigatory stop where the tip has sufficient indicia of reliability."*Maumee, supra*, at paragraph two of the syllabus. In expanding upon this issue, the Ohio Supreme Court held in *City of Maumee v. Weisner* that

> **the admissibility of the evidence uncovered during * * * a stop does not rest upon whether the officers *relying upon a dispatch or a flyer*"were themselves aware of the specific facts which led their colleagues to seek assistance."It turns instead upon "whether the officers who *issued* the flyer" or dispatch possessed reasonable suspicion to make the stop.**

Id. at 297, quoting *Hensley, supra* at 231.(Emphasis sic.)

{¶ 16} In this case, on December 4, 2010 shortly before 4 a .m. Mark Johns was in line at a McDonald's drive-thru in Wapakoneta behind a vehicle later identified to be driven by Steinbrunner. (Tr. at 11). While in line Johns observed the person in front of him giving the McDonald's employees a "hard time." (*Id.*) Johns said that the person was "out of control" and sounded drunk so Johns called the police. (State's Ex. A).

{¶ 17} When Johns called the police, he spoke with a dispatcher and gave the dispatcher his name and contact information. (State's Ex. A). Johns identified the vehicle that was still in front of him in the McDonald's drive-thru as a blue Hyundai and provided the license plate number. (*Id.*) Johns told the dispatcher that the person in front of him was "cussing and yelling up a storm" and that the person "sounds drunk as hell." (*Id.*) Johns said that he had been observing the person in front of him for approximately fifteen minutes and further described the person in front of him as "out of control." (*Id.*) Johns never specifically said "the driver" of the blue Hyundai on the call to the police; however, Johns did testify at the suppression hearing that he was aware another person was in the Hyundai when he made the call. (Tr. at 11).

*4 {¶ 18} While Johns was still speaking with the dispatcher, the dispatcher notified Officer Marks, who was in the area, of a possible ".19," meaning a possible impaired driver, and that the person was "yelling." (Tr. at 15–16) In addition, the dispatcher relayed the vehicle's description and its license plate number to Officer Marks. (Id.) Less than two minutes later, while Johns was still on the phone with the dispatcher, Officer Marks arrived at the McDonald's. (State's Ex. A). When Johns saw the officer arrive he got off the phone. (*Id.*)

{¶ 19} Officer Marks waited while Steinbrunner's car exited the drive-thru. (Tr. at 16). Officer Marks then pulled up to the drive-thru window and got the attention of the drive-thru attendant and asked if the driver of the blue Hyundai was drunk or if he had been drinking. (*Id.*) The drive-thru attendant responded, "oh yea." (Tr. at 17). At that point, Officer Marks left the McDonald's and pursued Steinbrunner. (Tr. at 18). Almost immediately Officer Marks turned on his overhead lights and initiated an investigatory stop.(*Id.*) Officer marks testified that he stopped Steinbrunner's vehicle within 100 yards of the McDonald's. (Tr. at 30).

{¶ 20} On appeal, Steinbrunner specifically challenges the validity of the investigatory stop, not his subsequent arrest. Steinbrunner claims Johns referred to a non-specific 'he' in his call to the police, that Johns' statement that the person in front of him in the drive-thru "sounds drunk as hell" was insufficient to justify a stop and that Officer Marks did not personally observe any traffic violation before stopping Steinbrunner.

{¶ 21} Despite Steinbrunner's claims to the contrary, there is more evidence than Johns' statement that the person in front of him in the drive through "sounds drunk as hell" to create a reasonable articulable suspicion of criminal activity. On Johns' call to the dispatcher, which was entered into evidence at the suppression hearing, Johns specifically identified himself and the car in front of him.[2] (State's Ex. A). In addition, Johns said the person in front of him was "out of control," "cussing" and "yelling" for approximately fifteen minutes prior to Johns making the call. (State's Ex. A). Moreover, Officer Marks came to the McDonald's drive-thru while Johns was still speaking with the dispatcher and was able to observe where Steinbrunner's vehicle was in line. (Tr. at 16). Then, when Steinbrunner exited the McDonald's, Officer Marks quickly got the attention of the drive-thru attendant and asked if the driver was drunk or had been drinking. (Tr. at 17). The attendant responded "oh yea." (*Id.*) Later, Officer Marks returned to the McDonalds and identified the McDonalds employee. (*Id.*)

{¶ 22} The record makes clear that the tip itself contains more information than Steinbrunner argues; however, the record also makes clear that Officer Marks was not relying solely on the tip. Officer Marks was also able to get some corroboration from the McDonald's attendant that the tip was accurate. It was only after this corroboration that Officer Marks initiated the investigatory stop. Based on the foregoing, under the totality of the circumstances, we hold that there was a reasonable articulable suspicion of criminal activity for Officer Marks to conduct an investigatory stop.

Next

*5 {¶ 23} For the foregoing reasons, Steinbrunner's assignment of error is overruled and the judgment of the Municipal Court of Auglaize County is affirmed.

Judgment Affirmed

PRESTON, J., concurs.

WILLAMOWSKI, J., concurs in Judgment Only.

All Citations

Slip Copy, 2012 WL 1926395, 2012 -Ohio- 2358

Footnotes

1 The court ordered all of the jail time and $500 of the fine suspended on the conditions that Steinbrunner complete a 72 hour driver intervention program, comply with any and all recommendations of the program, submit to alcohol testing whenever requested in conjunction with the operation of a vehicle, and that he not commit any criminal or jailable traffic offenses.

2 It was conceded by Steinbrunner in his brief that Johns was an identified citizen informant.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27769

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

STEVEN ALEXANDER STANAGE,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
BROOKINGS COUNTY, SOUTH DAKOTA

THE HONORABLE GREGORY J. STOLTENBURG
Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal filed February 18, 2016

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27769

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

STEVEN ALEXANDER STANAGE,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, the State calls Defendant and Appellant, Steven Alexander Stanage, "Defendant." The State calls itself, Plaintiff and Appellee, "State."

The settled record in this matter consists of the Odyssey E-Record, which the State calls "SR." There is one transcript in the record, the transcript of motions hearing, February 2, 2015, before the Honorable Carmen A. Means, at the time of the hearing a magistrate judge. The State calls this transcript "MH," and it consists of SR pages 21-63. The State will add page designations to all record references.

JURISDICTIONAL STATEMENT

Defendant appeals from his conviction for first offense driving under the influence. The Judgment of Conviction is dated August 17, 2015, but was attested and filed August 27, 2015. SR 159. Defendant

filed his Notice of Appeal to circuit court on August 28, 2015. SR 161. The circuit court affirmed the magistrate court's decision in an Order dated February 3, 2016, filed and attested February 8, 2016. SR 172. Defendant filed his Notice of Appeal to this Court on February 18, 2016. SR 175. Jurisdiction arises under SDCL §§ 23A-32-2 and 23A-32-15.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

DID THE LAW ENFORCEMENT OFFICER WHO ARRESTED DEFENDANT FOR DRIVING UNDER THE INFLUENCE HAVE REASONABLE SUSPICION THAT CRIMINAL ACTIVITY WAS AFOOT, THEREBY JUSTIFYING THE INITIAL TRAFFIC STOP?

The trial court held there was reasonable suspicion for this traffic stop.

Navarette v. California, ___ U.S. ___, 134 S.Ct. 1683, 188 L.Ed.2d 680 (2014)

State v. Olson, 2016 S.D. 25, ___ N.W.2d ____

State v. Satter, 2009 S.D. 35, 766 N.W.2d 153

State v. Scholl, 2004 S.D. 85, 684 N.W.2d 83

STATEMENT OF THE CASE AND FACTS

This is a criminal case in which the State accused Defendant of driving under the influence, first offense. The case proceeded initially before then Magistrate Judge Carmen A. Means, Third Judicial Circuit Court, Brookings County, South Dakota. The appeal to circuit court proceeded before the Honorable Gregory J. Stoltenburg, Circuit Court Judge, Third Judicial Circuit, Brookings County, South Dakota.

Judge Means found Defendant guilty of first offense driving while under the influence by Judgment of Conviction dated August 17, 2015, attested and filed August 27, 2015. SR 159. After an appeal to circuit court, Judge Stoltenburg affirmed the conviction in an Order dated February 3, 2016, attested and filed February 8, 2016. SR 172.

The State charged Defendant with driving under the influence, occurring October 26, 2014. SR 3-4. The State filed an Information December 1, 2014. SR 8. Defendant moved to suppress on January 9, 2015, and he alleged that there was no reasonable suspicion for the stop. SR 14. Magistrate court held its motion hearing to consider this suppression motion on February 2, 2015. SR 21.

The court permitted both sides to file additional authorities for the court's consideration (SR 65-102), and both sides submitted proposed Findings of Fact and Conclusions of Law. SR 103-13; 120-31. The magistrate court filed its Memorandum Decision. SR 114. Thereafter, the magistrate court entered Findings of Fact and Conclusions of Law on June 15, 2015. SR 132. Likewise, the court entered Judgment of Conviction on August 17, 2015, after Defendant waived his right to a jury trial. SR 157.

Defendant then appealed to the circuit court on August 28, 2015 (SR 161), and the circuit court entered its Memorandum Decision affirming on February 4, 2016, followed by an Order affirming the

magistrate's decision. SR 172. The court entered this Order February 8, 2016, and Defendant filed his Notice of Appeal to this Court on February 18, 2016. SR 175. This Court has appellate jurisdiction over the case under SDCL 23A-32-2 and SDCL 23A-32-15.

ARGUMENT

THE ARRESTING OFFICER HAD REASONABLE SUSPICION TO STOP DEFENDANT'S CAR FOR INVESTIGATION OF POSSIBLE CRIMINAL ACTIVITY.

A. Introduction.

Defendant challenges the trial court's ruling that there was reasonable suspicion justifying the traffic stop that led to his arrest for driving under the influence, first offense. *See* Defendant's Brief (DB) generally. The State responds that there was reasonable suspicion to stop Defendant's car because of a tip from an identified, non-anonymous citizen. The tip was concise and reported a threat to public safety to which the law enforcement officer appropriately responded.

B. Standard of Review.

This Court reviews de novo a Motion to Suppress based on alleged violation of a constitutionally protected right. *State v. Olson*, 2016 S.D. 25, ¶ 4, ___ N.W.2d ____ (citing *State v. Rademaker*, 2012 S.D. 28, ¶ 7, 813 N.W.2d 174, 176). The Court, however, reviews the trial court's factual findings under the clearly erroneous standard. Once the facts have been determined, the application of a legal

standard to those facts is a question of law that the Court reviews de novo. The Court is not restricted by the trial court's legal rationale. *Olson*, 2016 S.D. 25, at ¶ 4 (citing *Rademaker*, 2012 S.D. 28, at ¶ 7, 813 N.W.2d at 176; *State v. Wright*, 2010 S.D. 91, ¶ 8, 791 N.W.2d 791, 794). *Olson* was a case dealing with reasonable suspicion to stop. In *State v. Satter*, 2009 S.D. 35, ¶ 4, 766 N.W.2d 153, 154, the Court stated that the ultimate determination of the existence of a reasonable suspicion to stop a vehicle is a question of law reviewed de novo (citing *State v. Olhausen*, 1998 S.D. 120, ¶ 7, 587 N.W.2d 715, 717-18, also citing *State v. Faulks*, 2001 S.D. 115, ¶ 8, 633 N.W.2d 613, 617).

C. Vehicle Stops and the Reasonable Suspicion Standard.

United States Supreme Court precedent goes back to *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Applicable cases hold that law enforcement officers may conduct an investigatory stop if they have a reasonable suspicion, based upon specific and articulable facts taken together with rational inferences from the facts, sufficient to reasonably warrant an intrusion. *Id.* at 20-21, 88 S.Ct. at 1879-80. While *Terry* involved stopping an individual walking down the street, the standard requiring a reasonable suspicion based upon specific and articulable facts applies as well to traffic stops of a vehicle. *See, e.g.*, *Navarette v. California*, ___ U.S. ___, 134 S.Ct. 1683, 1687, 188 L.Ed.2d 680 (2014); *United States v. Arvizu*, 534 U.S. 266, 273-74, 122 S.Ct. 744, 751, 151 L.Ed.2d 740 (2002).

The issue has been a familiar one in this Court as well. In *Olson*, 2016 S.D. 25, at ¶ 5, ____ N.W.2d at ____, the Court stated that an investigatory traffic stop must be based on objectively reasonable and articulable suspicion that criminal activity has occurred or is occurring. *State v. Herren*, 2010 S.D. 101, ¶ 7, 792 N.W.2d 551, 554; *State v. Bergee*, 2008 S.D. 67, ¶ 10, 753 N.W.2d 911, 914. In making this determination, the Court is required to look at the totality of the circumstances in each case. *Olson*, 2016 S.D. 25 (citing *Arvizu*, 534 U.S. at 273, 122 S.Ct. at 750).

The present case involves a vehicle stop based on an informant's tip. *See, e.g.*, *State v. Mohr*, 2013 S.D. 94, ¶¶ 20-21, 841 N.W.2d 440, 446-47; *State v. Burkett*, 2014 S.D. 38, ¶ 45, 849 N.W.2d 624, 635-36; *Herren*, 2010 S.D. 101, at ¶¶ 19-20; 792 N.W.2d at 556-57; *Satter*, 2009 S.D. 35, at ¶¶ 8-9, 766 N.W.2d at 155; *State v. Scholl*, 2004 S.D. 85, ¶ 7, 684 N.W.2d 83, 85-86 (collects cases and points to at least four cases where the Court has found reasonable suspicion based solely on an informant's tip). In all these cases, the standard for reasonable suspicion to stop a vehicle is whether there is reasonable suspicion that criminal activity may be afoot. *Burkett*, 2014 S.D. 38, at ¶ 45, 849 N.W.2d at 635-36 (quoting *Wright*, 2010 S.D. 91, at ¶ 10, 791 N.W.2d at 794). This reasonable suspicion, in turn, must be based upon specific and articulable facts which taken together with rational inferences from those facts, reasonably warrant the intrusion.

Burkett, 2014 S.D. 38, ¶ 45, 849 N.W.2d at 635-36 (citing *Herren*, 2010 S.D. 101, at ¶ 8, 792 N.W.2d at 554). The stop must not be the product of mere whim, caprice, or idle curiosity. *Herren*, 2010 S.D. 101, at ¶ 8, 792 N.W.2d at 554. All these elements must be evaluated according to the totality of the circumstances. *Burkett*, 2014 S.D. 38, at ¶ 45, 849 N.W.2d at 635-36 (citing *Rademaker*, 2012 S.D. 28, at ¶ 12, 813 N.W.2d at 177).

All of these standards apply when the Court is evaluating an informant or citizen's tip that criminal activity may be afoot. *Navarette*, 134 S.Ct. at 1688, stated "under appropriate circumstances, an anonymous tip can demonstrate 'sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop.'" (Quoting *Alabama v. White*, 496 U.S. 325, 327, 110 S.Ct. 2412, 2414, 110 L.Ed.2d 301 (1990)). A completely anonymous tip must either be corroborated by surrounding circumstances or there must be other reasons supporting suspicion that a crime has been committed or is about to be committed. *Scholl*, 2004 S.D. 85, ¶ 7, 684 N.W.2d at 85-86; *Florida v. J.L.*, 529 U.S. 266, 271, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000). Under *White*, 496 U.S. at 330, 110 S.Ct. at 2416, information provided by an anonymous tip may be sufficiently reliable to justify an investigative stop, but under *J.L.*, there must be more than a bare report of an unknown, unaccountable informant who neither explained how he knew of the information he was giving, nor

supplied any basis for believing that he had inside information about J.L.

Courts have differed on the amount of corroboration that may be necessary for a tip to be sufficient for reasonable suspicion. This Court collected cases and gave some explanation of the amount of corroboration, or the indicia of reliability necessary for an anonymous tip to furnish reasonable suspicion in *Scholl*, 2004 S.D. 85, at ¶ 7, 684 N.W.2d at 85-86. It is apparent from *Scholl* that even a stop based solely on an informant's tip is permissible under the right circumstances. *State v. Kissner*, 390 N.W.2d 58 (S.D. 1986); *State v. Czmowski*, 393 N.W.2d 72 (S.D. 1986); *State v. Lownes*, 499 N.W.2d 896 (S.D. 1993); *Graf v. State*, 508 N.W.2d 1 (S.D. 1993). Further, it is apparent from *Lownes* that corroboration may consist of entirely innocent conduct corresponding to the tip, and does not require that the tip be corroborated by other evidence of criminality. This holding contrasts with that of the North Dakota Supreme Court in *State v. Miller*, 510 N.W.2d 638, 644-45 (N.D. 1994), which stated that observation of innocent facts did not provide sufficient corroboration. Apparently, the North Dakota court requires more for corroborating a tip than does this Court or the United States Supreme Court. In any

event, the issue is whether the tip is sufficiently reliable or whether it is corroborated by other facts and circumstances.[1]

One important factor in determining the reliability of a tip is whether or not it is anonymous. Defendant contends (DB 21) that this tip was anonymous because the law enforcement officer was not aware of the tipster's identifying information at the time that the tip was given. This is not, however, the criterion that this and other courts have used to determine anonymity of a tip. In *Mohr*, 2013 S.D. 94, at ¶ 20, 841 N.W.2d at 446, this Court stated that the reliability of an informant's tip is greater when the informant is *known or identifiable*, rather than anonymous, in part because the informant can be held accountable if the allegations turn out to be fabricated. An informant is not anonymous where he or she is known or identifiable, as the informant can then be held responsible for false reporting. This is precisely what the trial court found in its Memorandum Decision (SR 170, final paragraph). The fact that an informant identified herself (*Mohr*), or reported face-to-face (*Satter*, 2009 S.D. 35, at ¶¶ 8-9, 766 N.W.2d at 155-56), makes the tip more reliable. Justice Kennedy, in his concurrence in *J.L.*, 529 U.S. at 276, 120 S.Ct. at 1381, said that it adds reliability if an informant "place[es] his anonymity at risk." Further, the Eighth Circuit held in *United States v. Sanchez*, 519 F.3d

[1] The State notes that the *Miller* opinion is supported by only two Justices. There were two concurrences in result and one dissent. *Miller*, 510 N.W.2d at 645.

1208, 1214 (10th Cir. 2008) that a person or known tipster is not in the same class as one who is truly anonymous. Since both the person who observed Defendant's drunkenness (Hardee's employee Adam Hill) and the shift supervisor who called the Brookings Police Department (James Debough) were identified, and actually testified, the tip ought not to be considered anonymous.

D. The Law Enforcement Officer Had Reasonable Suspicion That Defendant Was Driving Under the Influence.

At the outset, it is plain, and the State concedes, that the traffic stop was based on the information contained in the tip from James Debough and Adam Hill, and not on any independent observations of the law enforcement officer. MH 28-29, SR 48-49. The analysis, therefore, must be of the tip itself, not of observations by the law enforcement officer.

This tip may not be viewed as anonymous. As this Court made plain in *Satter*, 2009 S.D. 35, at ¶ 9, 766 N.W.2d at 155-56, where a tipster is either known or knowable, it weighs in favor of the reliability of the tip. In *Mohr*, the Court stated that the reliability of an informant is greater when the informant is either known or identifiable, rather than anonymous. 2013 S.D. 94, at ¶ 20, 841 N.W.2d at 446. Plainly, both Hill and Debough were identifiable, as they testified at the motion hearing. One of the primary reasons an anonymous tip is not as reliable is that it is unknowable whether the tipster has an ulterior motive, and the tipster cannot be held accountable for making a false

report. Neither of these rationales applies in this case. Since both of the informants are known, and were in fact available for and were cross-examined by defense counsel, the tip is more reliable for this reason alone.[2]

The trial court found other reasons to credit the tip and to support reasonable suspicion for the stop, all in accordance with this Court's cases and the cases from other courts. The trial court appropriately reviewed the totality of the circumstances and applied the law. As this Court found in *Lownes*, 499 N.W.2d at 900, certain innocent details are sufficient to corroborate a tip (*contra Miller*, 510 N.W.2d at 644-45). This view of the law is also supported in *United States v. Wheat*, 278 F.3d 722, 735 (8th Cir. 2001), a case this Court cited approvingly in *Scholl*, 2004 S.D. 85, at ¶ 9, 684 N.W.2d at 86 as well as in *Satter*, 2009 S.D. 35, at ¶ 7, 766 N.W.2d at 155. Thus, under South Dakota law, unlike in the *Miller* decision, corroboration of innocent details can be sufficient to allow a tip to support reasonable suspicion. And this Court has found that a citizen tip, or even an anonymous tip may be sufficient in and of itself to support reasonable suspicion. *Satter* 2009 S.D. 35, at ¶ 6-7, 766 N.W.2d at 155;

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[2] Defendant argues at DB 21 that the magistrate court found that the tip was anonymous, and this finding should be credited. The facts are not, however, in dispute. The application of the law, as contrasted to determining the historical facts, is reviewed de novo without presumption in favor of a trial court finding. *Olson*, 2016 S.D. 25, ¶ 4 ("once the facts have been determined, however, the application of a legal standard to those facts is a question of law reviewed de novo.")

Scholl, 2004 S.D. 85, at ¶ 7, 684 N.W.2d at 85-86, further citing *Kissner,* 390 N.W.2d 58; *Czmowski*, 393 N.W.2d 72 and *Lownes*, 499 N.W.2d 896. The tip in this matter was reliable because an identified citizen informant indicated there was a possible drunk driver, who was located at the drive-thru window at Hardee's in Brookings, South Dakota, at approximately 1:50 a.m. The Hardee's employee, Adam Hill, had the opportunity to observe Defendant in close proximity through the drive-up window; the shift supervisor, James Debough, described the car involved, and said it was at the drive-up window, and the shift supervisor was able to give the license plate number as 7CG082.

The tip was thereafter corroborated by the law enforcement officer, in that he was able to view the vehicle as it was leaving; he was less than a block from the restaurant as the vehicle drove away; and he was able to verify the license plate number, so there was no danger of misidentifying the vehicle. *Satter*, 2000 S.D. 35, ¶ 13, 766 N.W.2d at 156-57. The law enforcement officer could readily determine that this was the vehicle to which the tip applied.[3]

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[3] Defendant argues that the law enforcement officer did not have information showing that Defendant was intoxicated before he made the stop. (Dispatch Tape, Exhibit A, demonstrates that the dispatcher did not pass along information about Defendant's condition other than that he appeared to be intoxicated.) While this may show that the law enforcement officer had less detail before he made the stop, the information is still relevant to show the credibility of the tipster and that he was not making a false report. It also shows that the tipster's observations of intoxication are well supported.

In fact there was a tip. It indicated a drunk driver. It sufficiently identified the vehicle being driven so that there was no chance of misidentification. *Id.* The employee, Hill, was later able to corroborate the tip by giving detailed information. The tip was not only reliable, but sufficiently corroborated by both innocent and guilty details. It showed likely criminality, that is, driving under the influence.

This Court has applied a balancing test in *Scholl*, 2004 S.D. 85, at ¶ 10, 684 N.W.2d at 87. The Court has balanced the tipster's reliability (given the basis of knowledge) and found that an *anonymous* tip conveying a contemporaneous observation of criminal activity whose innocent details are corroborated can be credible. Citing *Wheat*, 278 F.3d at 734-35. The risk that an anonymous tip may be fiction intended to cause trouble for another motorist is slight (and in this case is almost non-existent because the tipster is identified). As compared to this risk, the risk of not allowing the police to immediately conduct investigatory stops of potentially impaired drivers is great. Possibly drunk drivers pose an imminent threat to public safety and failure to stop them immediately risks sudden and potentially devastating accidents. *Scholl*, 2004 S.D. 85, at ¶ 10, 684 N.W.2d at 87. In *Scholl* there was no observation of bad driving, (*Scholl*, 2004 S.D. 85, at ¶ 13, 684 N.W.2d at 87) only an observation that a suspect was stumbling "pretty badly" in leaving a bar. The

Court stated that other courts have found a reasonable suspicion based on observations of non-driving behavior by a suspect. *Id.* The Court cited a number of examples where observation of otherwise innocent conduct, as opposed to bad driving, was sufficient. Here, there was observation of bloodshot eyes, slurred speech, and inability to grasp and hold drinks at a drive-up window, which is similar to the cases cited in *Scholl*.

In this instance, the tip was not anonymous, and the tipster gave sufficient information to corroborate observations. While the law enforcement officer did not possess all the details of the tipster's observations, the vehicle was appropriately identified, and a traffic stop occurred immediately after the tipster's observations. The tipster later corroborated the reasons for his conclusion at the time of the evidentiary hearing. This stop was made with sufficient reasonable suspicion.

CONCLUSION

The State requests that Defendant's conviction be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's Brief contains 3,124 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this 3rd day of May 2016.

/s/ *Craig M. Eichstadt*
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 3rd day of May 2016, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Steven Alexander Stanage* was served via electronic mail upon Don McCarty, donmccarty@lawinsd.com and Benjamin Kleinjan, benkleinjan@lawinsd.com.

/s/ *Craig M. Eichstadt*
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IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL NO. 27769

STATE OF SOUTH DAKOTA,

PLAINTIFF/APPELLEE,

vs.

STEVEN STANAGE,

DEFENDANT/APPELLANT.

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
BROOKINGS COUNTY, SOUTH DAKOTA

THE HONORABLE GREGORY STOLTENBURG
Circuit Court Judges

APPELLANT'S REPLY BRIEF

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	)	
STEVEN STANAGE,	)	
	)	
Defendant/Appellant.	)	

PRELIMINARY STATEMENT

References to the Settled Record, consisting of Brookings County Criminal File 14-586, will be designated by (SR) followed by the appropriate page number. Exhibits from any of the hearings will be designated by Exhibit number. References to the Motions Hearing Transcript shall be designated by (HT) followed by the appropriate page number or exhibit. References to the Appellee's brief are designated AB followed by the appropriate page number

JURISDICTIONAL STATEMENT

Jurisdiction has been shown and is not in controversy. This Court derives its jurisdiction pursuant to Chapter 23A-32 of the South Dakota Codified Law.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully renews his requests the privilege of oral argument.

LEGAL ISSUES

1. THE COURT ERRED IN CONCLUDING THAT THE STOP AND SEIZURE OF THE DEFENDANT PURSUANT TO AN ANONYMOUS TELEPHONE TIP DID NOT VIOLATE HIS CONSTITUTIONAL RIGHT AGAINST UNREASONABLE SEARCHES AND SEIZURES UNDER THE STATE AND FEDERAL CONSTITUTION.

The Magistrate denied the Defendant's motion to suppress and the Circuit affirmed, improperly concluding that the stop was justified based on reasonable suspicion under the totality of the circumstances.

Most Relevant Authority:

Navarette v. California, 134 S. Ct. 1683, 188 L. Ed. 2d 680 (2014)

State v. Walter, 2015 S.D. 37, 864 N.W.2d 779

State v. Miller, 510 N.W.2d 638 (N.D. 1994)

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The facts are briefly summarized as follows: On October 26, 2014, Mr. Hill, a Hardees employee saw a patron at the drive-through and "assum[ed]" that he was under the influence. HT 6, 7. Mr. Hill did not call the police himself. Instead, he told Mr. Debough, who tipped off the police. HT 7. Mr. Debough did not identify himself or Mr. Hill on the call. Mr. Hill did not participate in the phone tip.

Dispatch advised of a possible intoxicated driver with license plate 7CG-082. HT 23. Dispatch advised that Hardees was holding the vehicle. HT 30-31. "I[, Deputy Kriese,] had a call being told that there as a possible drunk driver at the Hardee's window." HT 34. Deputy Kriese stopped the vehicle. The State concedes that the stop was based solely on the information in the tip, and not on any independent observations of Deputy Kriese. AB 10.

The Brookings County State's Attorney's office discovered Mr. Hill's and Mr. Debough's identity a few days before the suppression hearing, and after the motion to suppress was served. The motion was denied and appealed to this Court after a stipulated trial.

STANDARD OF REVIEW

As referenced in the briefs, it is a well-settled principle that the denial of a Motion to Suppress for a violation of a constitutionally protected right raises a question of law which requires a *de novo* review. Findings of fact are reviewed under the clearly erroneous standard; although the application of a legal standard to those same facts will likewise be reviewed de novo. The Court's standard of review here is not disputed, and is adequately recited in both party's prior briefs. *See* AB 4–5.

ARGUMENT

This case involves an uncorroborated, anonymous, telephone tip with a conclusory allegation of assumed drunk driving. The state concedes that the traffic stop in this case was based only on the information contained in a telephone tip. AB 10. The state further concedes that there were not any independent observations of the law enforcement officer to support the stop. AB 10.

The sole issue is whether this tip, standing alone, bore sufficient indicia of reliability to support reasonable suspicion. *See e.g.*, *Graf v. State*, 508 N.W. 1 (1993) ("[T]he only facts supplied were a license number, general location of the vehicle, and a statement that the driver might 'possibly' be drunk. . . . The requirement of specific and articulable facts was simply not met.").

It is important to remember that the tipster and the witness in this case are not the same person. The State's argument is that the tip was sufficiently reliable because (1) the information was not a "truly" anonymous source since both men showed up at the hearing, AB 10–11, (2) the tipster accurately supplied the license number and location of the driver to dispatch, and (3) after the stop, the witness gave additional information that would support the stop. AB 13. It is undisputed that the identity of neither Hardees employees, nor the content of the tip were relayed to the officer prior to the inception of the stop. An officer's action must be "justified at its inception." *Terry v. Ohio*, 392 U.S. 1, 20 (1968). The only information relayed was that there was a possible drunk driver at Hardees.

The caselaw is well developed. Certain unique anonymous tips, standing all alone, are good enough to support reasonable suspicion. They bear sufficient indicia of reliability. But most do not. "[A]n anonymous tip *alone* seldom demonstrates the informant's basis of knowledge or veracity." *Alabama v. White*, 496 U.S. 325, 329 (1990) (emphasis added). The recent US Supreme Court case of *Navarette v. California*, 134 S. Ct. 1683, 1688, 188 L. Ed. 2d 680 (2014), identified one such self-sufficient tip. "[U]nder appropriate circumstances, an anonymous tip can demonstrate "sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop." *Id.*, at 327, 110 S.Ct. 2412. The Court in *Navarette* held that (emphasis added):

> By reporting that **she** had been **run off the road** by a specific vehicle—a silver Ford F–150 pickup, license plate 8D94925—the caller necessarily claimed eyewitness knowledge of the alleged dangerous driving. That basis of knowledge lends significant support to the tip's reliability. (citation omitted).

Here, the tip alone is not self-sufficient. The caller did not actually have any eyewitness knowledge to relay to law enforcement; he heard everything secondhand. Hill was the eyewitness, but Debough was the one who called the police. Hill did not make the call; he hid his identity behind his manager. No eyewitness called law enforcement or relayed their version of the facts prior to the stop. *Id.* at 1689. Here, the facts are more similar to *Florida v. J.L.*, 529 U.S. 266 (2000), "where the tip provided no basis for concluding that the tipster had actually seen the gun." *Navarette*, 134 S.Ct. at 1689. (citing *J.L.*, 529 U.S. at 271). Debough did not witness anything at all, other than Hill's speaking. The substance of the *Navarette* tip necessarily implied that the informant watched the other car being driven dangerously because she, the caller, had been run of the road, which increased the reliability. Not so here; the tip did not indicate that Debough had any personal interaction with the driver, or certainly that the driver had done anything dangerous to Debough.

In addition, the *Navarette* court contrasted its case and cautioned its readers not to apply its reasoning willy-nilly to find all manner of tips to be self-sufficient: "The 911 caller in this case reported . . . more than a conclusory allegation of drunk or reckless driving. Instead, she alleged a specific and dangerous result of the driver's conduct . . . ." *Id.* at 1691. This Court has also previously gone out of its way to emphasize the caution law enforcement should be exercised before acting on information provided by an anonymous telephone tip. "'**Thus, if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable.**'" *Graf*, 508 N.W. at 2 (quoting *White*, 496 U.S. at 330) (emphasis added by South Dakota Supreme Court).

This case presents a tip containing nothing more than a conclusory allegation of drunk driving. The caller did not report any factual result of drunk driving, like being all over the road or crashing. No such result was observed by the witness either. In *Navarette*, the result of dangerous driving was experienced firsthand by the tipster/witness, who was run off the road. The Circuit Court below disregarded the Supreme Court's words of caution in *Navarette*. Even the State points out that, under *J.L.*, 529 U.S. at 271, a tip must have more than a bare report of an unknown, unaccountable informant who neither explains how he knows the information, nor supplies any basis for that information. AB 7–8.

The State argues that the stop based on the conclusory tip is permissible because it was actually from an "identified, nonanonymous citizen." AB 4. As basis for that assertion, the state points out that the man on the phone eventually was identified by the prosecutor and came forward and testified at the hearing. AB 10. A stop must be supported at its inception, and the fact that the name and identity of the caller was learned much later does not dispel the fact that the tipster was anonymous to the stopping officer at the time of Fourth Amendment implication. It further does nothing to dispel the fact that the caller effectively concealed the identity of the real witness Hill. The State's reasoning would also lead to unreasonable contingencies. Assume a tip is clearly unreliable. It does not magically become reliable if the tipster comes forward later, after the Amendment is implicated and the right interfered with. The witness here was anonymous at the critical inception of the stop.

First, the tip was found by the Magistrate to be anonymous because the deputy knew nothing about the conclusory tipster. That fact was undisputed, not clearly

erroneous, and found by the Magistrate who was in a position to evaluate the credibility of the witnesses. Whatever was relayed to Deputy Kriese, it was not the eyewitness's identity. The witness and the tipster remained anonymous until challenged. That witness was anonymous to a reasonable officer in the Deputy's position.

The State first inquires into the "true" anonymous-ness of the tip. AB 9–10. An anonymous caller who cannot be identified is less reliable than one who can, and this is borne out in the bare majority of *Navarette*. But Justice Scalia clarifies the anonymous test that is relevant to this inquiry:

> "[E]liminating accountability . . . is ordinarily the very purpose of anonymity." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 385, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995) (Scalia, J., dissenting). The unnamed tipster "can lie with impunity," *J. L., supra*, at 275, 120 S.Ct. 1375 (Kennedy, J., concurring). . . . When does a victim complain to the police about an arguably criminal act . . . without giving his identity, so that he can accuse and testify when the culprit is caught?
>
> [. . .]
>
> But assuming the Court is right about the ease of identifying [a caller], it proves absolutely nothing in the present case unless the anonymous caller was *aware* of that fact. "It is the tipster's *belief* in anonymity, not its *reality*, that will control his behavior." *Id.*, at 10 (emphasis added). There is no reason to believe that your average anonymous 911 tipster is aware that 911 callers are readily identifiable. *Navarette*, 1692–93, 1694 (Scalia, J., dissenting) (emphasis in original).

There is no indication that Mr. Hill was *aware* that he forfeited his anonymity when he told his supervisor about the patron at the drive-through, which would increase his reliability. Quite the opposite. He did not call law enforcement himself, he simply told his supervisor. He did not tell his supervisor to call the police. Mr. Hill deferred and disowned all accountability for the truth of his statements. Mr. Hill did not take on the accountability of complaining about an arguably criminal act, accusing, and testifying;

there is impunity for him to lie to his supervisor about the condition of a drive through patron. Debough pointed out that he and his employees maintained a relationship of trust. HT 15. When Mr. Hill told his manager, rather than calling the police himself, the reliability of the tip is not increased, it is actually decreased. The relevant point is that a tipster may not be relied upon if he took steps to protect his identity, or would reasonably believe himself to be anonymous, at the inception of the stop.

The issue of the "true" anonymous-ness of the caller is also red herring because regardless of whether the tipster was temporarily anonymous or permanently confidential, some meaningful or minimal corroboration or indicia of reliability are still necessary, *see State v. Satter*, 2009 S.D. 35, ¶ 12, 766 N.W.2d 153, 156, just as corroboration is necessary for a tipster whose identity is known to be that of an unreliable person. It is undisputed that the officer did not know the identity of the tipster prior to his decision to initiate the stop. It is similarly undisputed that the officer made no effort to corroborate anything other than the license plate number. Neither the facts, nor the basis for the facts, were relayed to the stopping officer. The officer made no efforts to learn the name or identity of the tipster prior to relying on it. It is also undisputed that the officer made absolutely no attempt to corroborate the tip with other facts or circumstances, such as observing the vehicle drive down an empty street. It is also undisputed that the magistrate found the tipster's identity to be unknown to the officer at the time of the stop from a factual perspective. AB 11 n. 2. Yet the officer treated the conclusory tip as *per se* reliable, and the state asks this Court to do the same.

The state concedes that law enforcement may rely on anonymous tips alone to perform a stop only when the circumstances are just right. AB 8 (citing *Scholl*, 2004 S.D.

85, ¶7, 684 N.W.2d 83, 85–86). *See also State v. Kissner*, 390 N.W.2d 58 (S.D. 1986) (involving a tipster who described how the vehicle was being driven); *Navarette* ("she alleged a specific and dangerous result of the driver's conduct"). The State cites *State v. Lownes*, 499 N.W.2d 896 (S.D. 1993), which contains a much more extensive tip, including personal knowledge of the driver's name. *But see, Graf*, 508 N.W.2d at 3 ("the facts of this case are in sharp contrast to . . . *Lownes* cases where anonymous telephone callers described specific facts concerning driving conduct and gave detailed information"). Finally, the state concedes *Graf*, where "an anonymous citizen reported a possible drunk driver in a large brown car with license '1E3312' travelling west on 10th Street."

The point of these collected citations is that the tip needs to relay a not insignificant amount of facts before it can be relied on without additional police corroboration. The State posits that these cases mean that it is enough for Deputy Kriese to sufficiently corroborate the tip because he saw the "innocent" detail of a vehicle with a given license plate at Hardees. But the State misses the point of these cases. Innocent details may only be sufficient corroboration if there are enough of them. The details in *Lownes* were numerous, which is what distinguishes it factually from *Graf* and this case.

This Court has already ruled that an officer's observation of limited corroborating facts, i.e. that there is a car driving with the tipped license plate number in a certain place, is insufficient corroboration. *Graf*. *Kissner's* tipster actually observed dangerous driving—rather than just a conclusory possibility. The tipster in *Lownes* produced a wealth of particulars, not just a conclusory allegation. *See also, Satter*, 2009 S.D. 35, 766 N.W.2d 153 (describing detailed face-to-face interaction between tipster and officer);

Scholl, 2004 S.D. 85, 684 N.W.2d 83 (describing how tipster followed vehicle and continued to update dispatch on the location of the vehicle).

State v. Burkett, 2014 S.D. 38, 849 N.W.2d 624, also cited by the State, AB 6, is inapposite because there the officer observed independent details regarding the driving prior to initiating the stop, while here it is undisputed that there were no additional observations, only a tip. AB 10. *See also State v. Mohr*, 2013 S.D. 94 ¶ 22, 841 N.W.2d 440, 447 ("viewed in isolation, [the call] might lack the factual basis for police to have a reasonable suspicion of criminal activity."); *State v. Herren*, 2010 S.D. 101, ¶ 19, 792 N.W.2d 551, 556 ("Alone, the tip did not provide the officer with reasonable suspicion to stop the vehicle."). Unlike here, the officer in *Mohr*, *Burkett*, and *Herren* made independent observations that supported the stop. Here, it is undisputed that the stop was not based on any officer observations. AB 10.

This case is unlike *Scholl*. There:

> The tipster provided the basis of his information and suspicion, *i.e.*, personal observation of the driver stumbling badly from a bar and having trouble getting into his vehicle. The tipster provided a complete description of the vehicle make and model, gave the color of the vehicle and its unique Nebraska license number. The tipster identified the location of the vehicle and the direction in which it was moving. The tipster kept in constant contact with dispatch and continually updated it on the location of the vehicle. Finally, within minutes of the first dispatch, the officer here proceeded to the location identified by the tipster and verified the informant information before bringing the subject vehicle to a stop. While the tipster did not describe specific driving conduct as a basis for the stop, as we have previously discussed, he did describe non-driving conduct that yielded a reasonable suspicion that the driver was driving while under the influence of alcohol. *Scholl*, at ¶ 17.

But in *Graf*:

> The tip provided the make, model, and license plate number of the defendant's vehicle, as well as a statement "that the driver was 'possibly' intoxicated." *Id.* at 3–4. However, "[t]he caller described no erratic

> driving[,]" nor did the officer "observe any erratic driving on [the defendant's] part." *Id.* at 3. We recognized the case was unlike other "cases where ... callers described specific facts concerning driving conduct and gave detailed information which substantiated the tip and gave it greater reliability." *Id.* (citing *Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990)). Thus, because the tip only asserted a conclusory allegation of drunk driving, and because the officer did not observe any suspicious behavior, we held "[t]he requirement of specific and articulable facts was simply not met." *Id.* at 4.
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> *State v. Walter*, 2015 S.D. 37, ¶ 10, 864 N.W.2d 779, 784.

The substance of the tip relayed to the officer here was that there was a possibly impaired driver with a certain license plate number. There were no circumstances relayed to the officer, and no circumstances observed by the officer.

In *Walter*, "Officer Ackland did not corroborate the report's conclusory assertion by personal observation of Walter." *Id.* at ¶ 13. It is undisputed that the deputy Kriese made no observations to corroborate the conclusory telephone tip. AB 10. The state concedes that the sole basis for the stop was the informant's tip. AB 6. "[T]he State concedes, that the traffic stop was based on the information contained in the tip . . ., and not on any independent observations of the law enforcement officer." AB 10. Hence, like in *Walter*, "the totality of the circumstances upon which to find reasonable suspicion is therefore limited to the simple and conclusory report given to [the officer] by the dispatcher." *Id.* at ¶ 13.

The State dismisses the reasoning of *State v. Miller*, 510 N.W.2d 638 (N.D. 1994), which this Court has previously relied on to distinguish its decisions. The State makes no effort to distinguish the other persuasive authority. *E.g. State v. Wagner*, 2011 WL 598433 (Ohio App. 2011) (unpublished) (reversing lower court's denial of suppression where employee reported a "drunk" customer to off-duty policeman, who

"radioed to dispatch that there was 'a possible drunk driver in the drive-thru' and requested that a marked car respond"). *Cf. State v. Steinbrunner*, 2012 WL 1926395 (Ohio App. May 29, 2012) (unpublished) (reasonable suspicion exists where drive-through tipster gave his name and contact info, the suspect vehicle's make/color/license number, described their lengthy interaction, and where officer spoke briefly with drive-through attendant before stopping suspect); *Sidney v. Stout*, 671 N.E.2d 341 (Mun. Ct. Ohio 1996) (no reasonable suspicion where officer approached driver in drive-thru).

The facts in *Miller* are uncannily similar, and the reasoning is consistent with South Dakota and Supreme Court precedent. In *Miller*, the ND Supreme Court rejected a stop. The facts are so close:

> Shortly before midnight on June 22, 1992, the Bismarck Police Department dispatcher notified Officer James Chase that a caller had reported a possible drunk driver in the Wendy's drive-up lane. The caller identified himself to the dispatcher as "Jody with Wendy's," but the dispatcher did not tell Chase the caller was identified, either by name or his employment. The dispatcher described the vehicle as a red pickup and gave its license plate number and location as second in line in the drive-up lane. The dispatcher also relayed the informant's statement that the driver "could barely hold his head up." Chase was about a mile away from Wendy's and arrived there in a matter of minutes. Chase saw an orange pickup coming out of the drive-up lane. The pickup pulled out of the Wendy's parking lot and drove east on Capitol. Chase followed the pickup as it drove north on the frontage road in front of Wendy's at about five to seven miles per hour, and then turned into the Wendy's parking lot and parked. Chase verified that the pickup's license number matched the number reported by the dispatcher, but did not notice anything unusual about the pickup's driving. Chase pulled in behind the pickup and turned on his warning flashers. He then conducted field sobriety tests on Miller and arrested him. *State v. Miller*, 510 N.W.2d 638, 639 (N.D. 1994)
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> . . .
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> Because anonymous telephone tips are of lesser quality, *i.e.*, reliability, than face-to-face tips or tips from named callers, a larger quantity of information is required to raise a reasonable suspicion. Where the informant makes no prediction of future behavior indicating "inside

> information—a special familiarity with [the suspect's] affairs" that the police may corroborate, **the investigating officer must corroborate an anonymous, and therefore presumably unreliable, tip in some other way**. Typically, our impaired driver cases involve tips that give a description and the location of the vehicle—"easily obtained facts and conditions existing at the time of the tip" and available to the general public. Corroboration of this type of information does not increase the reliability of the tip. *See State v. Thompson*, 369 N.W.2d 363 (N.D.1985) [holding that corroboration of facts available to general public was insufficient to establish probable cause]. Therefore, our cases have required that the officer corroborate the tip by observing some behavior on the part of the driver, either illegal or indicative of impairment, that alerts the officer to a possible violation. *See also Wibben, supra* at 332 [stating that an officer's inferences and deductions may constitute part of the basis for reasonable suspicion]. *State v. Miller*, 510 N.W.2d 638, 639, 642 (N.D. 1994) (emphasis added)

The State argues for a directly adverse ruling, suggesting that observing easily obtained facts and conditions existing at the time of the stop, such as description and location, which are available to the general public, actually increases the reliability of the tip. This argument would require this Court to reverse *Graf*, where "the only facts supplied were a license number, general location of the vehicle, and a statement that the driver might 'possibly' be drunk." *Graf*, 508 N.W.2d at 3.

The State tries to distinguish *Miller* by referencing *Lownes* for the proposition that any innocent detail observed by law enforcement is sufficient to corroborate a tip. AB 11. But the state concedes that the officer could not even observe any innocent details to corroborate the tip with, and it stop was not based "on any independent observations of the law enforcement officer. MH 28–29, SR 48–49" AB 10 (citations in original). The officer did not observe any facts incriminating or otherwise. *Lownes* is factually inapposite because of the wealth of particular innocent facts, including the name of the driver, which was supplied above and beyond a mere conclusory statement of a possible intoxicated driver.

This Court has twice cited *Miller*. *Satter*, 2009 S.D. at ¶ 16; *Scholl*, 2004 S.D. at ¶ 9 ("We perceive a distinction between observations at a fast food restaurant such as in *Miller*, . . . and observations at a bar where the likelihood of alcohol consumption is obviously enhanced.").

The anonymous tipster is presumptively unreliable, not the other way around. The only information the caller provided to law enforcement was through the phone call made to dispatch. The caller did not describe the driver. The caller did not identify the third party witness who allegedly observed the driver. All that was provided was a conclusory assumption that was not based upon any personal observation or any facts or reasonable inferences from those facts. Law enforcement did not go to Hardees and identify either the tipster or the witness. At the inception of the vehicular stop, they did not know the identity of the witness. They simply relied on a conclusory tip. It is undisputed that the arresting officer made no observations. AB 10. The sole basis for the stop of the vehicle was whatever the dispatch told the officer over the radio, which was a purely conclusory anonymous tip. At the point the vehicle was stopped, the officer did not have the name or contact information for the person who called in the report.

The report to the officer was that there was a possible drunk driver at Hardees with a certain license number, and gave no other details. This is exactly the type of conclusory, uncorroborated anonymous tip that fails to provide objective reasonable suspicion as in *Graf*. Either independent corroboration or further inquiry with the tipster is required *before* initiating a stop. Mr. Hill did not call dispatch, preferring to stay out of it and keep his identity screened. The call made to dispatch did not include details as to

what was observed, and it did not identify the caller or the person that observed the Defendant. Dispatch relayed only conclusory information to the officer.

Where an anonymous tip gives only a layman's conclusory hypothesis, as in this case, the officer is required to observe some corroborating suspicious behavior in addition to the tip, such as suspicious driving. Alternatively, the officer can further inquire into the unstated basis of the layman's hypothesis prior to initiating a stop. The tip in this case is anonymous and unreliable for the purposes of reasonable-suspicion analysis. Considering the quality of the tip and the minimal and conclusory quantity of the information provided, it does not rise to the level of reasonable suspicion. An informant's single, inferential hypothesis that there is "possibly" a drunk driver at the window does not approach the precision of the information required for an uncorroborated tip, which is why this exact circumstance is specifically warned about in the dicta in *Navarette*. 134 S.Ct. at 1691 (distinguishing itself from cases involving a mere "conclusory allegation of drunk or reckless driving"). The tip gave only some conclusory allegations. The tip required corroboration of suspicious conduct to meet the requirements of reasonable suspicion. It is undisputed that there was none. AB 10.

Also critical is that the State's argument improperly considered information that was indisputably never communicated in the tip. Indeed, the complete information that the court held supported reasonable suspicion was never actually communicated until the Suppression Hearing. The Circuit Court identified several "facts" in support of reasonable suspicion. *See* Memorandum Opinion, pp. 6–7. But these facts came to light at the suppression hearing, and were not communicated to law enforcement at or before the stop's inception. They were not communicated to Deputy Kriese or to dispatch. The

singular information to consider is whatever was relayed to the deputy. A stop must be justified at its inception, and the State urges this Court to improperly look to external facts that were simply not communicated prior to the stop. All Deputy Kriese knew was that there was a driver at Hardees, with a certain license plate, who was "possibly" under the influence. *See Graf*. That is all the information that was communicated in the tip to the officer, and that is the limit of the analysis. Only the information that was objectively relayed to the officer at the inception of the stop can be considered. This was a minimal conclusory tip at the time that it was made. It did not provide reasonable suspicion.

Finally, the State misstates the corroboration requirement. AB 13–14. It is not the *tipster* who must corroborate the officer's observations after the stop; it is the *officer* who has a duty to make independent observations that corroborate the nameless tipster. This officer did no such thing, and that is undisputed: The stop was not based "on any independent observations of the law enforcement officer. MH 28–29, SR 48–49" AB 10 (citations in original).

CONCLUSION

It is undisputed that the only basis for the stop is the tip. AB 10. The tip in this case does not bear sufficient indicia of reliability to give rise to reasonable suspicion. The fact that the Brookings County State's Attorney was able to turn up the tipster a few days before the hearing is irrelevant. This case resembles *Miller* and *Graf*. This Court and the United States Supreme Court have repeatedly held that some corroboration by officer observation is necessary for these conclusory tips, or else the there is no reasonable suspicion. Law enforcement leaped at a conclusory tip without vetting it. Reasonable suspicion was not present, and suppression should have been granted.

Dated this 17th day of May, 2016.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 17th day of May, 2016, the foregoing brief were transmitted to Clerk of the Supreme Court electronically, with the original and two photocopies via U.S. mail, and with electronic service upon the following:

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CERTIFICATE OF COMPLIANCE

The undersigned, Benjamin Kleinjan, attorney for the Appellant in the above-captioned matter, hereby certifies, pursuant to SDCL 15-26A-66(b)(4) that the Appellant's Brief was completed in Times New Roman typeface, 12 point, and according to the automated word count in the word-processing system used to prepare the brief, Microsoft Word 2010, it contains 4856 words, exclusive of the table of contents, table of cases, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel.

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