

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STATE V. SWIERCZYNSKI

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

STATE OF NEBRASKA, APPELLEE,
V.
THOMAS S. SWIERCZYNSKI, APPELLANT.

Filed April 3, 2012. No. A-11-706.

Appeal from the District Court for Cuming County, ROBERT B. ENSZ, Judge, on appeal thereto from the County Court for Cuming County, RICHARD W. KREPELA, Judge. Judgment of District Court affirmed.

Matthew M. Munderloh, of Johnson & Mock, for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Thomas S. Swierczynski appeals his conviction for driving under the influence of alcohol. He argues that the county court erred in overruling his motion to suppress evidence and that the district court erred in affirming that decision. Because the officer had probable cause to stop the vehicle due to its loud exhaust system, we affirm.

BACKGROUND

At approximately 1:25 a.m. on December 6, 2009, Nebraska State Patrol Trooper Michael Thorson was traveling southbound on Highway 275 just south of West Point, Nebraska, when he passed a northbound pickup truck. Even with his windows closed, Thorson noticed that the truck had an “extremely loud exhaust system.” Thorson turned his vehicle around and stopped the truck, which was driven by Swierczynski. Thorson stated that he was unable to see a muffler on the truck. In speaking with Swierczynski, Thorson detected the odor of alcohol on his

breath, although Swierczynski denied that he had been drinking that evening. Thorson stated that Swierczynski showed impairment when administered a number of field sobriety tests and that a preliminary breath test showed a result of .096. Swierczynski was arrested for driving under the influence of alcohol. His blood alcohol content was later determined to be .101.

Prior to trial, Swierczynski moved to suppress evidence obtained as a result of the traffic stop. After a hearing that included testimony by Thorson, the county court denied the motion to suppress, noting that Neb. Rev. Stat. § 60-6,286 (Reissue 2010) requires every vehicle to be equipped and operated so as to prevent excessive or unusual noise and that Thorson had testified to excessive noise coming from Swierczynski's vehicle.

In a stipulated bench trial, the court received as evidence the transcript from the suppression hearing, including all exhibits, and a written stipulation of the parties that Swierczynski operated a motor vehicle in Cuming County, Nebraska, on December 6, 2009; that Swierczynski performed field sobriety tests; that upon the completion of those tests, there were reasonable grounds to believe that Swierczynski was driving under the influence of alcohol; that there was probable cause to arrest Swierczynski; and that the result of blood alcohol tests was a blood alcohol content of .101. The stipulation preserved all objections raised at the time of the hearing on the suppression motion. The State dismissed additional counts of false reporting and faulty muffler.

The county court found Swierczynski guilty of driving under the influence of alcohol. Swierczynski was fined \$400, and his driver's license was revoked for 60 days. He timely appealed to the district court, which affirmed the county court's judgment.

Swierczynski's timely appeal to this court followed. Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

ASSIGNMENT OF ERROR

Swierczynski contends that the district court erred in affirming the county court judgment, particularly in its decision to overrule his motion to suppress.

STANDARD OF REVIEW

In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeals, and its review is limited to an examination of the record for error or abuse of discretion. *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011). Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record. *Id.* When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

In reviewing a trial court's ruling on a motion to suppress based on the Fourth Amendment, we will uphold its findings of fact unless they are clearly erroneous. *Id.* But we review de novo the trial court's ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search. *Id.*

ANALYSIS

Swierczynski argues that the county court should have suppressed evidence obtained as the fruit of an illegal stop. He claims that Thorson had no reasonable suspicion that Swierczynski had been, or was about to be engaged in, criminal activity. Swierczynski specifically directs us to Thorson's testimony that upon stopping Swierczynski, Thorson asked him whether his pickup was a diesel truck. Thorson testified that diesel trucks were very loud and that he wished to verify that the truck was loud because of an issue with the exhaust system rather than merely because the truck was a diesel truck. Thorson apparently believed that operation of a diesel truck would not violate the provisions of § 60-6,286. Swierczynski contends that this testimony indicates there was no particularized basis for Thorson to believe that Swierczynski was in violation of § 60-6,286.

The test to determine if an investigative stop was justified is whether the police officer had a reasonable suspicion, based on articulable facts, which indicated that a crime had occurred, was occurring, or was about to occur and that the suspect might be involved. See *State v. Bowers*, 250 Neb. 151, 548 N.W.2d 725 (1996). A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 250 (2012).

Section 60-6,286 provides, in relevant part, that “[e]very vehicle shall be equipped, maintained, and operated so as to prevent excessive or unusual noise. No person shall drive a motor vehicle on a highway unless such motor vehicle is equipped with a muffler or other effective noise-suppressing system in good working order and in constant operation.” Thorson testified that as he passed Swierczynski's truck, he heard an extremely loud exhaust system, much louder than a “normal” vehicle and comparable in loudness with the 25 to 30 traffic stops he had made in the previous year for a loud muffler.

In *State v. Bartholomew*, 258 Neb. 174, 602 N.W.2d 510 (1999), a stop pursuant to § 60-6,286 was determined to be lawful on the basis that it was a traffic infraction to drive a vehicle with a muffler that was in disrepair. In *Bartholomew*, the court said, “It does not matter whether the muffler ultimately was the cause of the sparks so long as the officer had a reasonable suspicion, based on articulable facts, that a traffic violation was occurring.” 258 Neb. at 178-79, 602 N.W.2d at 514. As noted above, it is well established that a traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. See *State v. Nolan, supra*. Thus, Swierczynski could clearly be stopped for a traffic infraction, notwithstanding Thorson's personal opinion that a diesel truck may not fall within the parameters of the statute.

Our de novo review of the record leads us to conclude that probable cause existed for Thorson to stop Swierczynski's pickup. The facts of this case, largely undisputed, demonstrate that Thorson's stop of Swierczynski violated neither the Fourth Amendment to the U.S. Constitution nor article I, § 7, of the Nebraska Constitution. Swierczynski's assignment of error is without merit.

CONCLUSION

As the district court found, the county court did not err in overruling Swierczynski's motion to suppress. The judgment of the district court is affirmed.

AFFIRMED.