

NOTICE

Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law, although it may be cited for whatever persuasive value it may have. See McCoy v. State, 80 P.3d 757, 764 (Alaska App. 2002).

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ADAM CLYDE KEIZUR,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13096
Trial Court No. 3PA-17-01104 CR

MEMORANDUM OPINION

No. 6929 — March 17, 2021

Appeal from the District Court, Third Judicial District, Palmer,
William L. Estelle, Judge.

Appearances: Jane B. Martinez, Law Office of Jane B. Martinez, LLC, Anchorage, under contract with the Office of Public Advocacy, for the Appellant. Glenn J. Shidner, Assistant District Attorney, Palmer, and Kevin G. Clarkson, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Wollenberg and Harbison,
Judges.

Judge WOLLENBERG.

Following a jury trial, Adam Clyde Keizur was convicted of driving under the influence.¹ Keizur appeals his conviction, arguing that the district court erred in

¹ AS 28.35.030(a).

denying his motion to suppress the evidence from the traffic stop and investigation that led to his arrest. According to Keizur, the stop was not supported by reasonable suspicion.

For the reasons discussed in this opinion, we agree with Keizur that the trial court erred in denying his motion to suppress. We therefore reverse Keizur's conviction.

Underlying facts

Alaska State Trooper Lee Phillips was the sole witness at the evidentiary hearing on Keizur's motion to suppress. Phillips testified that at approximately 8:00 p.m. on the Fourth of July, he observed a man later identified as Keizur driving an ATV south from the Cubby's grocery, dry goods, and liquor store near mile 98 on the Parks Highway. Keizur had a passenger on the ATV and a cooler strapped to the back. Additionally, Trooper Phillips observed what he thought was a beer bottle in Keizur's left hand, but he admitted that he was too far away to read the label.

Shortly thereafter, the ATV, driving on an established trail, disappeared into the woods. Phillips drove to a pullout roughly three-quarters of a mile away where he anticipated that the ATV would come back out of the woods, parked his vehicle, and waited.

As Phillips expected, Keizur's ATV eventually approached the pullout. When the ATV came over a hill in view of the pullout, it stopped moving. Trooper Phillips described the interaction as "... you know, our eyes met, essentially he came to a stop." At this point, Trooper Phillips could not view Keizur's hands to determine if the bottle was still there.

Trooper Phillips estimated that he was roughly three hundred feet from Keizur at this point and that, in his opinion, the marked trooper vehicle was in clear view of a driver coming over the hill on which Keizur was stopped. After five seconds,

Keizur began to drift backward out of sight of Trooper Phillips. At this point, Trooper Phillips was unsure if Keizur was “coasting backwards or if they were going to reverse and go the other way.” But Trooper Phillips testified that he did not believe that Keizur was “eluding” or “trying to avoid contact.”²

Based on these observations, Trooper Phillips activated his lights and initiated a traffic stop of Keizur. Upon contacting Keizur, Trooper Phillips smelled a strong odor of alcohol and observed that Keizur had bloodshot and watery eyes. A second trooper completed an investigation for driving under the influence, and Keizur was subsequently arrested for this offense.

Keizur moved to suppress the evidence gathered as a result of the traffic stop. The district court denied Keizur’s motion to suppress, finding that the trooper’s testimony gave rise to reasonable suspicion that Keizur was driving under the influence. Keizur now appeals that ruling.

Why we conclude that the trooper lacked a sufficient basis for the stop

Under Alaska law, a police officer may conduct an investigative stop only when the officer has reasonable suspicion that imminent public danger exists or serious

² Indeed, at trial, Trooper Phillips testified to different observations — observations that further support Keizur’s argument on appeal that Trooper Phillips lacked reasonable suspicion. Specifically, Phillips testified at trial that he saw Keizur’s ATV pause at the top of the hill *and then continue forward*, and the trooper mentioned nothing about the ATV coasting backward.

However, Keizur’s attorney did not renew the motion to suppress at that time, and it was the defense attorney’s obligation to do so if he believed that the court’s original determination was incorrect after hearing Phillips’s trial testimony. *See Waters v. State*, 64 P.3d 169, 171 (Alaska App. 2003) (holding that an appellant may not attack a pretrial ruling with evidence developed at trial, unless the appellant moved for reconsideration in the trial court based on the newly-developed evidence). We have therefore decided this case based only on Trooper Phillips’s testimony at the evidentiary hearing.

harm to persons or property has recently occurred.³ Driving under the influence clearly constitutes an imminent public danger.⁴ The key question, therefore, is whether the trooper had reasonable suspicion that Keizur was driving under the influence.

To possess “reasonable suspicion,” an officer must have some “minimal level of objective justification” — that is, “something more than an inchoate and unparticularized suspicion or hunch.”⁵ In particular, “[t]he officer must be able to point to ‘specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion.’”⁶

In *Burnett v. State*, we discussed this standard as it applies to a traffic stop based on a suspicion that the driver is under the influence.⁷ We explained that “[a] police officer may have reasonable suspicion to believe that a driver is under the influence even though the officer does not observe the driver actually do something dangerous.”⁸ Rather, “[i]t is sufficient if the officer observes facts which [support a reasonable belief] that the person to be stopped *is* dangerous.”⁹

Thus, in *Ebona v. State*, the Alaska Supreme Court held that there was reasonable suspicion to stop the defendant’s vehicle when the police had earlier observed

³ *Coleman v. State*, 553 P.2d 40, 46 (Alaska 1976).

⁴ *Ebona v. State*, 577 P.2d 698, 701 (Alaska 1978).

⁵ *State v. Miller*, 207 P.3d 541, 544 (Alaska 2009).

⁶ *McQuade v. State*, 130 P.3d 973, 977 (Alaska App. 2006) (quoting *Waring v. State*, 670 P.2d 357, 365 (Alaska 1983) (quotations omitted)) (alteration in *McQuade*).

⁷ *Burnett v. State*, 264 P.3d 607 (Alaska App. 2011).

⁸ *Id.* at 612.

⁹ *Id.* (quoting *State v. Moran*, 667 P.2d 734, 736 (Alaska App. 1983)) (alteration in *Burnett*) (emphasis in *Moran*).

the defendant walking, apparently intoxicated, and then, about one hour later, saw him driving a car that was weaving within its lane of traffic.¹⁰ In *Hamman v. State*, this Court upheld a traffic stop when the officer saw the defendant’s vehicle weave noticeably, cross the fog line, and then jerk back into its lane.¹¹ And in *Burnett* itself, we contrasted the defendant’s act of unnecessarily spinning his tires — which, we held, did not alone provide sufficient indication of intoxication to justify a traffic stop for driving under the influence — with a number of unpublished cases, in which we relied on the defendants’ poor or unusual driving as sufficient justification for a DUI stop.¹²

Here, there was no indication that Keizur was driving dangerously and there were no objective facts establishing that Keizur had recently consumed alcohol.¹³ Trooper Phillips admitted that he could not read the label on the bottle, so his conclusion that Keizur was holding an alcoholic beverage relied on inference rather than direct observation. And even if the bottle was a beer bottle, Trooper Phillips never testified that the bottle was open or that he saw Keizur drinking from it. Standing alone, Trooper Phillips’s observation of what appeared to be a beer bottle did not meet the “minimum level of objective justification” necessary to establish reasonable suspicion that Keizur was driving under the influence.

Furthermore, the remaining facts did not elevate Trooper Phillips’s hunch to reasonable suspicion. The fact that Keizur was leaving a store that sold alcohol suggested only that he may have just purchased alcohol, not that he had recently

¹⁰ *Ebona v. State*, 577 P.2d 698, 701 n.12 (Alaska 1978).

¹¹ *Hamman v. State*, 883 P.2d 994, 995 (Alaska App. 1994).

¹² *Burnett*, 264 P.3d at 612-14 (collecting cases).

¹³ There was also no suggestion that Keizur had committed a traffic infraction that would independently justify a stop.

consumed it. The fact that Keizur crested the hill and then started to roll backward could, in a different context, suggest that Keizur was attempting to evade police, but Trooper Phillips specifically testified at the evidentiary hearing that Keizur “wasn’t eluding or [anything] like that” and “wasn’t trying to avoid contact.” The remaining facts — that it was the Fourth of July and that Keizur had a cooler on the back of his ATV — suggested at most that Keizur was traveling somewhere to consume alcohol (or food). They do not give rise to a reasonable suspicion that Keizur was presently intoxicated.

We acknowledge that we reached a different conclusion in *Greenway v. State*, an unpublished opinion with similar facts.¹⁴ But *Greenway* is readily distinguishable. In *Greenway*, which also involved Trooper Phillips, Phillips observed Greenway driving an off-road vehicle (similar to a dune buggy) on a dirt trail running alongside Pittman Road in Wasilla.¹⁵ Trooper Phillips saw Greenway holding his left hand out of the driver’s side window, emptying liquid from a “shiny silver can.”¹⁶ When Greenway saw Trooper Phillips, he quickly pulled the shiny can back into the vehicle.¹⁷ Based on these observations, Trooper Phillips conducted a traffic stop. The trial court upheld the stop, and we affirmed.

There are two important differences between Keizur’s case and *Greenway*. First, Trooper Phillips observed Greenway pouring liquid out of the can, which established that Greenway had an open container in his vehicle. (Indeed, the trial court upheld the stop in *Greenway* on the grounds that the trooper had sufficient cause to believe that Greenway was driving with an open container of an alcoholic beverage in

¹⁴ *Greenway v. State*, 2015 WL 9591333 (Alaska App. Dec. 30, 2015) (unpublished).

¹⁵ *Id.* at *1.

¹⁶ *Id.*

¹⁷ *Id.*

the passenger compartment — a violation of AS 28.35.029.¹⁸) Here, by contrast, Trooper Phillips never observed Keizur open the bottle, drink from it, or pour anything out of it.

Second, Greenway quickly pulled the can out of Trooper Phillips's view when he saw Phillips's patrol car, which Phillips testified was suspicious behavior that led him to believe that the shiny can was a beer can. In contrast to his testimony in *Greenway*, Trooper Phillips did not testify that Keizur engaged in any suspicious behavior when he first saw Keizur holding the bottle and, although Keizur crested the hill and started to roll backward when he saw Trooper Phillips's patrol car, Trooper Phillips specifically testified that this behavior did not lead him to believe that Keizur was eluding or attempting to avoid contact.

For all these reasons, we conclude that the observations by Trooper Phillips in this case did not establish reasonable suspicion to believe that Keizur was driving under the influence. Accordingly, the trial court should have granted Keizur's motion to suppress.

Conclusion

The judgment of the district court is REVERSED.

¹⁸ *Id.* at *2.