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Court of Appeals of Alaska.

Brent A. BROCKWAY, Appellant,
v.
STATE of Alaska, Appellee.

No. A-10659. | Feb. 16, 2011.

West KeySummary

**1** **Automobiles**
Equipment or Inspection Offenses, in General

Police officer had probable cause to believe that defendant was driving a commercial motor vehicle in violation of the law, and thus officer's traffic stop of defendant was lawful. Officer testified that he was trained and experienced in enforcing Alaska's commercial motor vehicle laws, and that he had stopped vehicles similar in size and proportions to the one defendant was driving that had been rated over the 10,001 pound threshold. Officer's estimate was close, in that defendant's truck's gross vehicle rating was 9,990 pounds. Officer's belief that the truck was a commercial motor vehicle was supported by evidence that the truck was registered to what appeared to be a commercial business. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

Appeal from the Superior Court, Fourth Judicial District, Fairbanks, Douglas L. Blankenship, Judge.

**Attorneys and Law Firms**

Michael C. Kramer, Borgeson & Burns, P.C., Fairbanks, for the Appellant.

Eric A. Ringsmuth, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Daniel S. Sullivan, Attorney General, Juneau, for the Appellee.

Before: COATS, Chief Judge, and MANNHEIMER and BOLGER, Judges.

**Opinion**

***MEMORANDUM OPINION AND JUDGMENT***

BOLGER, Judge.

***1** Brent A. Brockway was convicted of felony driving under the influence. [1] On appeal, he claims that the superior court applied the wrong legal standard in ruling that his traffic stop was lawful. He also argues that the stop was an illegal pretext to investigate him for driving under the influence. For the reasons set out here, we disagree with Brockway and therefore affirm his conviction.

***Background***

On June 28, 2009, at approximately 2:25 a.m., North Pole Police Sergeant Billy Bellant saw Brockway drive a flatbed truck out of the parking lot of the 12 Mile Roadhouse, a bar on the Old Richardson Highway. Bellant stopped Brockway's truck because it appeared that the truck was a commercial vehicle with a gross vehicle weight rating of over 10,001 pounds. As such, the truck was subject to state and federal regulations requiring the truck to display United States Department of Transportation (USDOT) identification numbers and the vehicle's company name. [2] After Bellant stopped the truck, he discovered that it had a gross weight rating of only 9990 pounds, hence it was not a commercial vehicle and not subject to these regulations. However, upon contacting Brockway, Bellant noticed indications that Brockway was intoxicated.

Brockway admitted that he had consumed alcohol prior to driving, and he performed poorly on field sobriety tests. Bellant arrested Brockway for DUI and later tested him with a

DataMaster. The DataMaster showed that Brockway's breath alcohol content was .223 percent. Because Brockway had two prior qualifying DUI convictions, he was charged with felony DUI.

Prior to trial, Brockway moved to suppress evidence discovered during the stop. He argued that Sergeant Bellant did not have probable cause to stop him and that the stop was a pretext to investigate him for DUI.

Superior Court Judge Douglas L. Blankenship held a hearing to resolve Brockway's motion. Sergeant Bellant was the only witness. He testified that he was trained to enforce the state's commercial motor vehicle regulations (which incorporate the federal commercial motor vehicle regulations).[3] He said that based on his training and experience, he estimated that the flatbed truck had a gross vehicle weight rating that exceeded 10,001 pounds. Before stopping the truck, he ran the truck's license plate and discovered that it was registered to what appeared to be a commercial business, Ice Cap Panel Shop, Inc.

Bellant testified that based on the truck's size and apparent commercial ownership, he believed the truck was a commercial motor vehicle. Accordingly, the truck was required to have certain USDOT information displayed on its sides. When Bellant saw no USDOT markings on the truck, he believed the truck was in violation of state commercial motor vehicle regulations.

Bellant stopped Brockway and checked the information posted inside the truck's door frame. When he did so he discovered that the truck's gross vehicle weight rating was 9990 pounds, eleven pounds less than he had estimated. The truck was therefore not subject to commercial motor vehicle regulations. Bellant then investigated Brockway for DUI, because as soon as he contacted Brockway he noticed signs that he was intoxicated.

***2** After the hearing, Judge Blankenship denied Brockway's suppression motion, finding that despite Bellant's mistake, at the time Bellant stopped the truck he had probable cause to believe the truck was in violation of commercial motor vehicle regulations. In other words, Judge Blankenship ruled that, based on his experience and training in enforcing the commercial vehicle regulations, his observation of the size of the truck, and the vehicle's commercial registration, Bellant had reasonably trustworthy information sufficient to warrant a person of reasonable caution to believe that an offense was being committed.[4] The judge also found that the test set out in *Coleman v. State*[5] to justify an investigative stop did not apply because Bellant had probable cause (not simply reasonable suspicion) to stop Brockway. He also found that the stop was not pretextual.

Later, Judge Blankenship found Brockway guilty of felony DUI based on stipulated facts. This appeal follows.

***Discussion***

***Judge Blankenship did not need to apply the Coleman test.***

Brockway claims that Judge Blankenship erred when he ruled that the investigative stop standards discussed in *Coleman* did not apply to his traffic stop. Under *Coleman*, an investigatory stop is permissible only if the police have reasonable suspicion to believe imminent public danger exists or serious harm to persons or property has recently occurred.[6] At the suppression hearing, Judge Blankenship held that the *Coleman* standard does not apply when the police have probable cause to believe a motorist has committed a traffic violation. This ruling was correct. The *Coleman* balancing test does not apply when a police officer has probable cause, as opposed to merely reasonable suspicion. As we recently explained,

> the *Coleman* line of cases applies only to situations where the police have no probable cause to make an arrest-cases where there is some lesser degree of suspicion, and the question is whether the police were justified in temporarily detaining a suspect or witness to further investigate the matter.[7]

Judge Blankenship found that Bellant had probable cause to stop Brockway for driving a commercial motor vehicle that lacked the markings required by law. Consequently, he committed no error when he did not apply the *Coleman* balancing test.

***The traffic stop was based on probable cause.***

Brockway does not directly address Judge Blankenship's ruling that Bellant had probable cause for the traffic stop. Instead, Brockway argues that under *Coleman*, the regulatory commercial vehicle offense he was suspected of committing was neither serious nor imminent enough to justify the stop. But as we have just explained, in light of Judge Blankenship's finding that Bellant had probable cause for the

stop, Brockway's discussion of the *Coleman* balancing test is not relevant. Police may lawfully conduct a traffic stop when they have probable cause to believe even a minor traffic violation has occurred. [8]

***3** "For an officer to have probable cause, the officer must have reasonably trustworthy information sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed." [9] At the suppression hearing, Bellant testified that he was trained and experienced in enforcing the state's commercial motor vehicle laws. He said he had stopped vehicles similar in size and proportions to the one Brockway was driving that had been rated over the 10,001 pound threshold. Based on this training and experience, Bellant believed that Brockway's truck was also over the threshold. Bellant's estimate was close-only eleven pounds off. Moreover, Bellant's belief that the truck was a commercial motor vehicle was supported by evidence that the truck was registered to what appeared to be a commercial business.

It is true that after the stop, Bellant discovered that Brockway was not driving a commercial motor vehicle rated over 10,001 pounds. But this does not mean that the stop was unlawful. Both the Alaska Supreme Court and this court have stressed that "[i]n dealing with probable cause, ... as the very name implies, we deal with probabilities." [10] These probabilities "are not technical; they are the factual and practical considerations of every day life on which reasonable and prudent [people], not legal technicians, act ." [11] Accordingly, the substance of probable cause "is a reasonable ground for belief of guilt," and this " 'means less than evidence which would justify condemnation' or conviction." [12]

Based on our review of the record, we agree with Judge Blankenship that Bellant had probable cause to believe that Brockway was driving a commercial motor vehicle in violation of the law. Hence, the traffic stop was lawful. And because the stop was lawful, Bellant's subsequent observations that Brockway appeared to be intoxicated allowed Bellant to investigate whether Brockway was driving under the influence. [13]

***Brockway did not show that the traffic stop was pretextual.***
Brockway also sought suppression on the ground that Bellant stopped him for a commercial vehicle violation as a pretext to investigate whether he was driving under the influence. Judge Blankenship rejected this claim, finding that "the sole reason for [the] stop" was Bellant's belief "that this was a commercial vehicle without the [appropriate] markings."

As we pointed out in *Nease v. State*, Alaska law is still undecided on the question of pretext stops. [14] The United States Supreme Court rejected the "pretext stop" doctrine in *Whren v. United States*. [15] Alaska courts have not yet decided whether to follow *Whren* or, instead, the decisions of other states that have adopted the "pretext stop" doctrine as a limitation on the authority of police to stop vehicles for traffic violations. [16]

We did not need to resolve this issue in *Nease*, and we need not do so in Brockway's case. As we explained in *Nease*, even under the "pretext stop" doctrine, a defendant must show that the officer who conducted the stop had an improper motive for making the stop and that, because of this improper motive, the officer departed from reasonable police practices in conducting the stop. [17]

***4** The defendant in *Nease* "presented no evidence to suggest that police officers never stop motorists to issue citations for equipment violations, or that they would never do so under the circumstances of this case." [18] Nor did Nease show that the officer who stopped him "manipulated the traffic stop ... by abnormally expanding or extending his contact with Nease so that he could investigate Nease's potential drunk driving." [19]

Like Nease, Brockway presented no evidence suggesting that police officers never stop motorists to issue citations for commercial vehicle violations. Nor did he show that, prior to observing signs of Brockway's intoxication, Bellant abnormally expanded or extended his contact with Brockway to investigate Brockway's potential drunk driving. Although Brockway asserts that Bellant departed from reasonable police practice because he did not use the internet or law enforcement databases to establish the gross vehicle weight rating of the truck before initiating the traffic stop, he offered no evidence to support his assertion that reasonable police practice required these additional measures. In short, Brockway, like Nease, failed to allege sufficient facts to bring the traffic stop within the doctrine of pretext stops. Therefore, Brockway would not be entitled to relief even if we were to adopt the pretext doctrine as a matter of state law. We therefore find no error on this issue.

The superior court's judgment is AFFIRMED.

***Conclusion***

Footnotes

1 AS 28.35.030(a), (n).
2 17 Alaska Administrative Code (AAC) 25.210(d); 49 C.F.R. § 390.5(1); 49 C.F.R. § 390.21(b).
3 *See* 17 AAC 25.210(d).
4 *See Schmid v. State*, 615 P.2d 565, 574 (Alaska 1980); *State v. Campbell*, 198 P.3d 1170 (Alaska App.2008).
5 553 P.2d 40, 46 (Alaska 1976).
6 *Id.*
7 *Chase v. State*, --- P.3d ----, Op. No. 2282, at 8, 243 P.3d 1014, 2010 WL 4913341, at *4 (Alaska App. Dec.3, 2010); *see Joseph v. State*, 145 P.3d 595, 600 (Alaska App.2006) ("If [the police officer] had lawful justification for arresting Joseph when he began to chase him, this would allow the State to escape the *Coleman* strictures on investigative stops.").
8 *See Chase*, Op. No. 2282, at 7, 243 P.3d 1014, 2010 WL 4913341, at *4.
9 *Campbell*, 198 P.3d at 1173 (citing *Schmid*, 615 P.2d at 574; *State v. Grier*, 791 P.2d 627, 631 (Alaska App.1990)).
10 *McGee v. State*, 614 P.2d 800, 806 (Alaska 1980) (quoting *Brinegar v. United States*, 338 U.S. 160, 175, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949)); *accord Grier*, 791 P.2d at 631.
11 *Grier*, 791 P.2d at 631 (quoting *Brinegar*, 338 U.S. at 175).
12 *Dunn v. State*, 653 P.2d 1071, 1077 (Alaska App.1982) (quoting *Brinegar*, 338 U.S. at 175).
13 *See Russell v. Anchorage*, 706 P.2d 688, 689 (Alaska App.1985).
14 105 P.3d 1145, 1148 (Alaska App.2005).
15 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).
16 *See Chase*, Op. No. 2283, at 10, 2001 WL 4913341, at *6; *Morgan v. State*, 162 P.3d 636, 638 (Alaska App.2007); *Nease*, 105 P.3d at 1148; *Way v. State*, 100 P.3d 902, 904 (Alaska App.2004); *Hamilton v. State*, 59 P.3d 760, 766 (Alaska App.2002).
17 105 P.3d at 1149.
18 *Id.* at 1149-50.
19 *Id.* at 1150.