*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2003-148

JULY TERM, 2003

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| State of Vermont<br><br>v.<br><br>Jason J. White | }<br>}<br>}<br>}<br>}<br>}<br>}<br>}<br>}<br>} | APPEALED FROM:<br><br>District Court of Vermont, Unit No. 1,<br>Windham Circuit<br><br>DOCKET NO. 243-2-02 WrCr<br><br>Trial Judge: Theresa S. DiMauro |

In the above-entitled cause, the Clerk will enter:

Defendant Jason J. White appeals pursuant to a conditional plea to driving under the influence, second offense. He argues that the trial court erred in denying his motion to suppress, and his two motions to reconsider his motion to suppress, because: (1) the officer did not have a reasonable basis to stop him; and (2) the officer violated his constitutional rights by ordering him to exit his vehicle. We affirm.

In February 2002, at approximately 1:20 a.m, Vermont State Trooper Andrew McLaughlin received word that a fight had occurred in Royalton, Vermont, and that three vehicles, a Bronco, a pickup truck, and a car, had left the scene. Shortly thereafter, the officer saw a Jeep and a pickup truck pass him on Route 14. Based on the location, direction of travel, and description of the vehicles, the officer suspected that the cars he observed had come from the scene of the fight. The officer followed the vehicles north on Route 14, and west on Route 107. The speed limit on Route 107 is fifty miles per hour. It appeared to the officer that the Jeep was accelerating, and the truck was maintaining a steady speed. He passed the truck and increased his own speed to sixty-five miles per hour. The officer stated that, despite driving sixty-five miles per hour behind the Jeep, he did not appear to gain any ground on the vehicle.

When the Jeep turned on to I-89, the officer signaled for it to pull over after ascertaining that his requested backup was in place. Defendant was driving, and there were three other passengers in the car. The officer approached the vehicle on the passenger side, and asked defendant to exit his vehicle. The officer testified that, given the number of passengers in defendant's vehicle, he asked defendant to exit his vehicle mainly out of concerns for his own safety. Based on statements made by defendant, and observations by the officer, defendant was arrested and processed for driving under the influence, second offense.

Before trial, defendant moved to suppress the evidence against him, arguing that the officer lacked a reasonable basis for the initial stop. The trial court denied defendant's motion, concluding that the initial stop was justified because the officer had a reasonable suspicion that defendant was speeding. The court found that the trooper's justification for the stop was enhanced by his reasonable suspicion that defendant was speeding away in an attempt to avoid being pulled over.

Defendant moved for reconsideration of the court's denial of his motion to dismiss, arguing that there was no evidence that the officer had observed him exceeding the speed limit, and that "speeding away" from a police officer did not amount to a reasonable suspicion of criminal activity. The court denied his motion. Defendant then filed a second motion for reconsideration following this Court's decision in State v. Sprague, 2003 VT 20, arguing that the officer had unlawfully ordered him to exit his vehicle. The trial court denied defendant's motion on the record at a change of plea hearing.[1] Defendant entered a conditional plea of nolo contendre to driving under the influence, second offense, and this

appeal followed.

We review motions to suppress de novo. State v. Pierce, 173 Vt. 151, 152 (2001). It is well established that a police officer is authorized to make an investigatory stop based on a reasonable and articulable suspicion of criminal activity. See Delaware v. Prouse, 440 U.S. 648, 663 (1979); State v. Welch, 162 Vt. 635, 636 (1994) (mem.). The officer must have more than an unparticularized suspicion or hunch of criminal activity, but needs considerably less than proof of wrongdoing by a preponderance of the evidence. State v. Kindle, 170 Vt. 296, 298 (2000); Welch, 162 Vt. at 636. The issue of whether a reasonable suspicion supports a particular stop is factually driven, and depends on the totality of the circumstances. State v. Kettlewell, 149 Vt. 331, 335 (1987). "In determining the legality of a stop, courts do not attempt to divine the arresting officer's actual subjective motivation for making the stop; rather, they consider from an objective standpoint whether, given all of the circumstances, the officer had a reasonable and articulable suspicion of wrongdoing." State v. Lussier, 171 Vt. 19, 23-24 (2000).

In this case, the trial court properly denied defendant's motion to suppress after concluding that the officer had a reasonable suspicion that defendant was speeding, and that defendant may have been attempting to elude him. The officer testified that he was driving sixty-five miles per hour on Route 107, and he passed the pickup truck that had been following behind the Jeep. Despite driving sixty-five miles per hour, the officer was unable to gain ground on defendant's vehicle. The posted speed limit on Route 107 was fifty miles per hour. These facts support the trial court's conclusion that, viewed objectively, the officer had a reasonable belief that defendant was speeding, which justified the initial stop. See Lussier, 171 Vt. at 23-24. Additionally, the trooper testified that he observed defendant's Jeep accelerating rapidly once the officer began following him on Route 14. Given the officer's suspicion that defendant's vehicle was leaving the scene of a fight, it was reasonable for the trooper to suspect that defendant wished to avoid being stopped. Therefore, in view of the totality of the circumstances, the officer had a reasonable articulate suspicion that defendant was engaged in wrongdoing. The trial court properly denied defendant's motion to suppress on this basis.

Defendant next argues that the trial court erred in denying his second renewed motion to suppress because the officer violated his rights under Chapter I, Article 11 of the Vermont Constitution when he ordered him to exit his vehicle. See Sprague, 2003 VT 20, ¶ 22. In Sprague, however, we stated that "[t]he facts sufficient to justify an exit order need be no more than an objective circumstance that would cause a reasonable officer to believe it was necessary to protect the officer's, or another's, safety or to investigate a suspected crime." Id. at ¶ 20. In this case, the traffic stop occurred at approximately 1:20 a.m. The officer suspected that defendant had left the scene of a fight, and was possibly trying to elude arrest. The officer waited approximately one minute for backup to arrive before pulling defendant over on I-89, indicative of his safety concerns. The officer testified that he asked defendant to exit his vehicle because there were three passengers in defendant's vehicle, and he was concerned for his safety. Thus, this case is unlike Sprague, where the traffic stop occurred in daylight, the driver was alone, there was no indication that the driver was armed or dangerous, and the officer gave no indication that he feared for his own safety. See id. at ¶¶ 20-22. Under the circumstances of this case, it was objectively reasonable for the officer to believe that his safety was at stake, which provides a sufficient basis to ask defendant to exit his vehicle under Sprague. See id. at ¶ 22. We therefore conclude that the trial court properly denied defendant's second renewed motion to suppress.

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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Marilyn S. Skoglund, Associate Justice

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Frederic W. Allen, Chief Justice (Ret.)

Specially Assigned

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## Footnote

[1] Defendant did not provide a transcript of this hearing, and thus the basis of the court's denial of defendant's second motion to reconsider is unclear.