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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-188

MARCH TERM, 2002

State of Vermont	}	APPEALED FROM:
v.	}	District Court of Vermont,
Steven A. Walden	}	Unit No. 1, Orange Circuit
	}	DOCKET NO. 232-6-00 Oecr
	}	Trial Judge: M. Kathleen Manley

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

Defendant appeals from a judgment of conviction, based on a jury verdict, of driving under the influence of intoxicating liquor and resisting arrest. He contends the court erred in denying a motion to suppress, claiming that the arresting officer lacked reasonable grounds to effectuate a stop of defendant's motor vehicle. We agree, and therefore reverse.

We note at the outset that the State, without notice to the Court, failed to appear at the time of the argument, and the oral argument proceeded with only defendant's counsel addressing the Court.

As disclosed at the hearing on defendant's motion to suppress, and found by the trial court, the facts were as follows. On June 2, 2000, at approximately 6:00 p.m., a Vermont State Police trooper was assisting at an investigation of a disturbance on Davis Road in the Town of Randolph. While standing at the side of the dirt road, the trooper observed a vehicle drive by and recognized the driver as defendant. The trooper had known defendant for many years through interaction with him in the community and had observed him both drunk and sober. On this occasion, the trooper developed "a sense" that defendant had been drinking based on her personal knowledge and experience that defendant, when intoxicated, does not clearly look at her, and has a disheveled appearance and red cheeks, characteristics which she observed that day. When sober, according to the trooper, defendant is clean and neat, smiles, and says hello to her.

After driving past the trooper, defendant continued a short distance down the road, turned around, and drove back at a slower rate of speed, apparently to observe the scene of the investigation, which was the home of a relative. At that point, the officer signaled defendant to stop and made the additional observations that led to defendant's arrest for DUI.

In denying defendant's suppression motion, the trial court ruled that the officer's observations, coupled with her personal experience with defendant, provided a sufficient basis to warrant the investigative stop.

Police officers may make an investigatory stop based on a reasonable suspicion that the suspect is engaged in criminal activity. See Terry v. Ohio, 392 U.S. 1, 21-22 (1968); State v. Lamb, 168 Vt. 194, 196 (1998). "[R]easonable suspicion . . . requires some minimal level of objective justification for making the stop." Lamb, 168 Vt. at 196. As we explained in State v. Kettlewell, 149 Vt. 331 (1987), "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." Id. at 334 (quoting Terry, 392 U.S. at 21). The basis for the suspicion must be more than a "hunch." State v. Sutphin, 159 Vt. 9, 11 (1992) (quoting Terry, 392 U.S. at 27). We assess the reasonableness of the stop in light of the totality of the circumstances.

Lamb, 168 Vt. at 196.

An officer's personal knowledge about a suspect may, in some circumstances, support a finding of reasonable suspicion. In United States v. Harris, 403 U.S. 573, 583 (1971) (cited with approval in Lamb, 168 Vt. at 199), for example, the United States Supreme Court held that an officer's knowledge of a suspect's reputation may be considered in assessing the reliability of an informant's tip concerning the suspect's participation in criminal activity. In Johnson v. State, 540 S.E.2d 212, 214 (Ga. Ct. App. 2000), the court found that an articulable and reasonable suspicion supported a motor vehicle stop based on the officer's personal knowledge that the suspect's license had been suspended. A suspect's personal appearance or otherwise innocuous behavior has also been recognized as factors that may, in some circumstances, be taken into account in assessing the reasonableness of an investigatory stop. See United States v. Brignoni-Ponce, 422 U.S. 873, 885 (1975) (border patrol agents may consider characteristic appearance and dress of persons who live in Mexico); Nicacio v. United States Immigration & Naturalization Serv., 797 F.2d 700, 704 (9th Cir. 1986) (in "special circumstances" failure to make eye contact may be considered a factor contributing to reasonable suspicion justifying stop); State v. Dumas, 750 So. 2d 439, 443 (La. Ct. App. 2000) (flight, furtive gesture, or nervousness at sight of police officer may be factors in assessment of reasonable suspicion), rev'd on other grounds by 786 So. 2d 80 (La. 2000).

These and other courts uniformly hold, however, that factors such as an officer's personal experience with the suspect, or subjective assessment of the suspect's appearance, will not by themselves justify an investigatory stop. See Harris, 403 U.S. at 582 (suspect's reputation, standing alone, is insufficient to support police intrusion); Brignoni-Ponce, 422 U.S. at 885-86 (apparent Mexican ancestry insufficient, standing alone, to warrant stop by border patrol); United States v. Smith, 263 F.3d 571, 593 (6th Cir. 2001) (body odor and slovenly vehicle are factors that may indicate perfectly innocent behavior and cannot, standing alone, serve as grounds for reasonable suspicion); United States v. Montero-Camargo, 208 F.3d 1122, 1135-38 (9th Cir. 2000) (lack of eye contact with police is highly subjective factor, susceptible of many interpretations, and therefore of questionable value without additional factors); Dumas, 750 So. 2d at 443 (flight, furtive gesture, or nervousness are not, by themselves, sufficient to justify investigatory stop).

We have not discovered any case which has upheld an investigatory stop based solely on an officer's subjective knowledge and interpretation of a suspect's otherwise innocuous behavior. Indeed, the trooper was candid in describing her suspicion as based on a "sense," a term that can be considered a synonym for a "hunch." The trooper in this case acknowledged that a disheveled appearance at 6:00 p.m. could be the product of a long work day or other reasonable explanations, and conceded that she had seen defendant in a dirty condition as a result of his work at Vermont Castings. Lacking any other objective indicia of DUI, therefore, we decline to hold that a disheveled appearance, failure to make eye contact, and red cheeks - standing alone - provide a reasonable or sufficient basis for an investigative detention.

We conclude, therefore, that the motion to suppress the evidence resulting from the illegal stop was improperly denied, and that the judgment must be reversed.

Reversed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice