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Criminal Law—Scarlet Letters: Traffic Stops Based on “Special” License Plates Must Follow the Letter of the Constitution—State v. Henning

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**CRIMINAL LAW—SCARLET LETTERS: TRAFFIC STOPS
BASED ON “SPECIAL” LICENSE PLATES MUST
FOLLOW THE LETTER OF THE CONSTITUTION —
*STATE V. HENNING***

Piper Kenney Webb[†] and Bruce H. Hanley^{††}

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I. INTRODUCTION

The Minnesota Supreme Court recently addressed whether a Minnesota statute authorizing law enforcement to stop motorists based solely on the presence of special license plates issued primarily to repeat drunken drivers is proper under the United States and Minnesota

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Constitutions. In *State v. Henning*,¹ the court held the statute unconstitutional by a 4-3 decision. Finding no persuasive reason to do otherwise, the court struck down the legislature's attempt to eliminate the requirement that law enforcement have "reasonable articulable suspicion" to conduct an investigatory stop of a motor vehicle.

This article provides a brief survey of similar laws in other states that require offenders to visually inform the police and public that they have been convicted of drunken driving or other crimes—a requirement reminiscent of centuries-old "scarlet letter" sentencing.² The article then explains two constitutional issues key to the *Henning* decision: the United States Supreme Court's "reasonable articulable suspicion" standard and its erosion, and the Minnesota Constitution's strong protections against "seizure."³ Next, the article traces the history and holding of the *Henning* case and focuses on the statutes involved.⁴ Finally, the article critiques the Minnesota Supreme Court's majority opinion and dissent, noting that while the court has outlawed traffic stops based solely on special "WX," "WY," or "WZ" license plates, police are likely to receive the benefit of the doubt as long as they can provide any reasonable reason for the stop.⁵

II. HISTORICAL BACKGROUND

A. "Scarlet Letter" Sentencing and Efforts to Control Drunken Driving

The death toll from drunken driving is an undeniable tragedy, evidenced by data showing that more than one-third of traffic fatalities can be blamed on alcohol-related crashes.⁶ Repeat drunken drivers are a chief concern. Nearly half of Minnesota's 30,000 driving-while-intoxicated ("DWI") arrests each year involve drivers with prior DWI convictions.⁷

1. 666 N.W.2d 379 (Minn. 2003).

2. *See infra* Part II.A.

3. *See infra* Part II.B.

4. *See infra* Part III.

5. *See infra* Part V.

6. In 2002, 41% of the 42,815 U.S. traffic fatalities were attributed to crashes involving alcohol. In Minnesota, the figure was 39%. *See* MADD Stats & Resources, at <http://www.madd.org/stats/0,1056,1112,00.html> (citing National Highway Traffic Safety Administration data) (last visited Dec. 7, 2003).

7. Jim Cleary, *Controlling Repeat DWI Offenders with Staggered Sentencing*, Information Brief, Minnesota House of Representatives (January 2003), at 3, available at

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The Minnesota Legislature has tried many initiatives to reduce DWI recidivism. So-called “staggered sentencing” was one response.⁸ The state’s new “felony DWI” law, which took effect August 1, 2002, was another.⁹ These efforts have had their moments in the public spotlight—the felony DWI standard in particular. Against this high-profile backdrop, for several decades a Minnesota statute has directed that the license plates attached to cars registered to repeat drunken drivers be impounded and “special series plates” be issued in their place so that law enforcement can readily identify repeat offenders on the road.¹⁰ Typically the plates begin with the letters “WX,” “WY,” or “WZ,” and while only police are trained to look for the plates, anyone knowledgeable about the law can learn to spot cars registered to people likely convicted of drunken driving.

Minnesota is among a handful of states with such laws. Iowa, Ohio, Oregon, and Washington have experimented with measures that alter the license plates of repeat drunken drivers.¹¹ Massachusetts has toyed with requiring repeat offenders to display license plates reading “Twice Convicted of Operating Under the Influence.”¹² For several years Ohio has required repeat drunken drivers to operate vehicles displaying license plates of a different color and with special serial numbers.¹³ That state is beefing up its law as of January 1, 2004, by requiring drivers who operate vehicles with license plates from other states to display a special decal on the bottom left corner of the vehicle’s back window.¹⁴

While the license-plate laws are chiefly designed to catch police officers’ attention, they also are reminiscent of “scarlet letter sentencing,” a centuries-old idea of requiring repeat offenders to visually

<http://www.house.leg.state.mn.us/hrd/pubs/stagsent.pdf> (last visited Dec. 7, 2003).

8. *Id.* at 5 (explaining that staggered sentencing involves splitting up a defendant’s sentence among several shorter terms).

9. MINN. STAT. § 169A.24 (2002).

10. MINN. STAT. § 168.041 (2002).

11. See National Highway Traffic Safety Administration, *Vehicle and License Plate Sanctions*, <http://www.nhtsa.dot.gov/people/outreach/safesobr/19qp/factsheets/vehicle.html> (last visited Dec. 7, 2003).

12. Ellen J. Silberman, *Scarlet Letter Plates Sought for Drunken Drivers*, BOSTON HERALD, May 24, 2001, at 19.

13. OHIO REV. CODE ANN. § 4503.231 (West 1999).

14. OHIO REV. CODE ANN. § 4503.231(B)(2) (West 1999 & Supp. 2003). The change in Ohio, effective Jan. 1, 2004, also permits motorists with limited driving privileges to operate an employer’s vehicle that lacks the special plates as long as the employer knows about the employee’s past. OHIO REV. CODE ANN. § 4503.231(B)(1) (West 2003).

inform others of their questionable past.¹⁵ Scarlet letter sentencing springs from legislative and judicial frustration with the failure of traditional methods of sentencing.¹⁶ However, it also adds “shaming” to the criminal law tenets of incapacitation, retribution, rehabilitation, and deterrence, or at least alters the retribution tenet in a sometimes controversial and perhaps unconstitutional way.

The revival of shaming springs from profound and widespread dissatisfaction with existing methods of punishment. In particular, many people, including judges, doubt the effectiveness and humanity of prison. Yet, the main alternative to prison—parole—is equally unattractive, both because the community fears the often unmonitored return of the offender to its neighborhoods, and because most people believe criminals should not go unpunished.¹⁷

Scarlet letter sentencing results from legislative as well as judicial innovations.¹⁸ Sometimes an individual judge’s creativity sets off well-publicized tussles between branches of government or levels of the judiciary. For example, in 1991 a New York judge required a driver with six drunken-driving convictions to affix a fluorescent sign reading “convicted DWI” on the license plate of any car he might drive.¹⁹ New York’s highest court struck down the sentence because it was not reasonably related to the driver’s rehabilitation and was deemed outside a court’s authority.²⁰ A commentator, meanwhile, urged that the appellate court’s holding be construed narrowly so judicial creativity could be maintained.²¹

15. See generally NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (1850). Hawthorne’s masterpiece, set in Puritan New England, tells the story of Hester Prynne, who bore an illegitimate child and was forced to wear an “A” for “adultery” on her clothing. The book, long in the public domain, is available online at http://www.pagebypagebooks.com/Nathaniel_Hawthorne/The_Scarlet_Letter (last visited Dec. 7, 2003).

16. See Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1882-84 (1991).

17. *Id.* at 1884-85.

18. *Id.* at 1882. For example, Nevada has allowed drunken drivers to bypass incarceration if they perform community service while dressed in clothing that identifies them as drunken drivers. In 1989, a Rhode Island judge required a defendant to place a newspaper advertisement with his picture and words identifying himself as a child molester.

19. *People v. Letterlough*, 655 N.E.2d 146, 147 (N.Y. 1995).

20. *Id.*

21. Dana Wordes, *Recent Development, Penal Law Section 65.10: New York Court of Appeals Holds That Probation Condition Requiring “CONVICTED DWI” Sign on License Plate Was Penalty Not Reasonably Related to Probation*, 70 ST. JOHN’S L. REV.

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Scarlet letter sentencing has its place, advocates say, because it encourages repeat offenders to obey the law and also warns the public that a repeat offender is nearby.²² It has its detractors, as well. For instance, an official from the Massachusetts American Civil Liberties Union chapter described that state’s proposed DWI license-plate measure as “sort of like the public pillory on Boston Common.”²³

B. History of the “Reasonable Articulate Suspicion” Standard

1. The United States Supreme Court sets the “Reasonable Articulate Suspicion” Standard

Apart from the collateral issues of shame and scarlet letter sentencing is what legislators say is the chief goal of issuing special license plates for cars registered to repeat drunken drivers: allowing police officers to easily identify motorists with questionable pasts. When police spot a motorist driving a vehicle with the special plates, they are encouraged to keep careful watch—or, in Minnesota’s case, permit officers to pull over the driver, regardless of whether the officer suspected any wrongdoing was afoot and even though the driver may never have been convicted of a crime.

When a motorist is stopped, that constitutes a “seizure,” which, according to the Fourth Amendment to the United States Constitution, must be reasonable. Specifically, the Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.²⁴

421, 433 (1996).

22. See, e.g., Barbara Clare Morton, Note, *Bringing Skeletons out of the Closet and into the Light—“Scarlet Letter” Sentencing Can Meet the Goals of Probation in Modern America Because It Deprives Offenders of Privacy*, 35 SUFFOLK U. L. REV. 97, 100-01 (arguing that violating a repeat offender’s privacy “can successfully rehabilitate and deter some offenders and would-be criminals”). See also *Road Warrior*, VIRGINIAN-PILOT & LEDGER-STAR (Norfolk, Va.), Sept. 18, 2002, at B5 (including a letter from a newspaper reader suggesting that Virginia replicate Minnesota’s law requiring repeat DWI offenders to display special license plates. The reader wrote: “If nothing else, it would warn us to be extra vigilant when we encounter a car with such a plate.”).

23. Silberman, *supra* note 12.

24. U.S. CONST. amend. IV.

Until 1968, when the United States Supreme Court decided *Terry v. Ohio*,²⁵ the Supreme Court interpreted the Fourth Amendment's probable cause provision literally, holding that for a seizure to be lawful, probable cause had to be present.²⁶ In *Terry*, however, the Court distinguished between an arrest and an investigatory stop, holding that the latter required only a reasonable articulable suspicion rather than probable cause.

In *Terry*, an experienced officer was on routine patrol when he spotted two individuals standing on a street corner.²⁷ The officer observed these men taking turns pacing in front of and peering through a store window five or six times each.²⁸ Based on his prior experience in this particular neighborhood, the officer determined that this activity was typical of "casing a job" for robbery.²⁹ The officer then approached the men, identified himself as a police officer and performed a "pat down" of the men's outer clothing. During this limited pat down, the officer discovered guns in the men's pockets.³⁰ The men were arrested.³¹ During their case, the men sought to have the guns suppressed, arguing that this search and seizure was unreasonable because it was not based on probable cause.³²

In determining whether the seizure and search was reasonable, the *Terry* Court engaged in a two-prong inquiry: (1) whether the officer's actions were justified, and (2) whether these actions were reasonably related in scope to the circumstances that justified the interference.³³ The Court focused on balancing the government's need to search or seize against the invasion of the individual.³⁴ In order to justify such an intrusion, the Court held that the officer would need to point to "specific and articulable facts which . . . reasonably warrant [the] intrusion."³⁵ Requiring the officer to point to these specific facts allows a judge to objectively look at the facts to determine reasonability and lawfulness.

The Court further examined the government's interest in keeping officers and the public safe. The Court reasoned that an arrest is "wholly

25. 392 U.S. 1 (1968).

26. See *Katz v. United States*, 389 U.S. 347, 351-57 (1967).

27. *Terry*, 392 U.S. at 5.

28. *Id.* at 6.

29. *Id.*

30. *Id.* at 7.

31. *Id.*

32. *Id.* at 7-8.

33. *Id.* at 19-20.

34. *Id.* at 20-21.

35. *Id.* at 21.

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different” from a limited search where an “officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous . . . [he may] conduct a carefully limited search”³⁶ The standard announced in *Terry* later became known as the “reasonable articulable suspicion” standard.

Gradually, the Supreme Court began to use the “reasonable articulable suspicion” standard in analyzing situations other than limited pat down searches of a person. For example, the Court used this standard in analyzing motor vehicles stops.³⁷ Eventually, the Court went even further, holding that under some circumstances, the government need not even have a reasonable articulable suspicion to stop a motor vehicle.³⁸

These decisions balanced the government’s interest in stopping criminal activity against the privacy rights of a citizen.³⁹ For example, in *Michigan Department of State Police v. Sitz*,⁴⁰ the Court addressed whether law enforcement may use roadblocks to stop and investigate all drivers in order to arrest those who are impaired by alcohol. By stopping every motorist who reached a roadblock, law enforcement could not state a reasonable articulable suspicion for the stop. The Court’s opinion explained that a “seizure” occurs under the Fourth Amendment when a vehicle is stopped at a checkpoint.⁴¹ In determining that the seizure was reasonable under the facts of the case, the Court held that “the balance of the State’s interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program.”⁴²

2. *The Minnesota Constitution affords more protection than the United States Constitution: State v. Ascher*

The Minnesota Supreme Court has taken an approach different from

36. *Id.* at 30.

37. *See Adams v. Williams*, 407 U.S. 143 (1972).

38. *See United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (border patrol’s routine of stopping vehicles at checkpoints located on major highway to check for illegal aliens absent reasonable articulable suspicion did not violate Fourth Amendment).

39. *See id.* at 560.

40. 496 U.S. 444 (1990).

41. *Id.* at 450.

42. *Id.* at 455.

the United States Supreme Court in analyzing its citizens' Fourth Amendment rights while in motor vehicles. In *Ascher v. Commissioner of Public Safety*,⁴³ the Minnesota Supreme Court interpreted the Minnesota Constitution more broadly than the federal Constitution.

Ascher involved a state and local sobriety roadblock. The Burnsville Police Department, along with the Minnesota State Patrol, set up a roadblock stopping all vehicles in an attempt to catch alcohol-impaired drivers.⁴⁴ The officers briefly detained each driver and directed those believed to be under the influence to a "final screen" area.⁴⁵ The State Patrol notified the media of the roadblock, and news crews set up cameras in the final screen area.⁴⁶ After being directed to this area, Ricky Ascher, a driver, was required to undergo field sobriety tests and take a preliminary breath test.⁴⁷ Ascher was subsequently arrested and charged with refusal to submit to chemical testing.⁴⁸ In total, only 2.3% of those stopped at the roadblock were arrested for some type of offense.⁴⁹

The Minnesota Supreme Court held that when law enforcement uses roadblocks to stop drivers to investigate and arrest those who are impaired by alcohol, the police violate Article I, Section 10 of the Minnesota State Constitution.⁵⁰ The court explained that the Minnesota Constitution requires police to have an objective individualized articulable suspicion of criminal activity to stop a driver.⁵¹ The court further held that the state had not proven there was any reason to dispense with this rule. In the interest of protecting the public from intrusive procedures, the court held the statute unconstitutional.⁵²

Suspicionless stops surfaced again a year later in the Minnesota Court of Appeals. In *State v. Greyeagle*,⁵³ the appeals court addressed whether a police officer could stop a vehicle based solely on the fact that the vehicle bore special series license plates issued to those with repeated driving violations, including drunken driving. In that case, a state trooper stopped a motorist based on the trooper's routine practice of

43. 519 N.W.2d 183 (Minn. 1994).

44. *Id.* at 184.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 187.

51. *Id.*

52. *Id.*

53. 541 N.W.2d 326 (Minn. Ct. App. 1995).

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stopping all vehicles with such special registration license plates.⁵⁴ These plates were made available to “drivers or owners of cars whose regular plates have been impounded because of driving violations.”⁵⁵ A person could obtain the special plates if he or she showed that there was another licensed driver who was still legally entitled to drive the vehicle.⁵⁶

The court of appeals held that the police may not make suspicionless stops of drivers based solely on special series registration plates, where the statute creating such plates does not provide that the plates are issued under a condition of having to be routinely stopped.⁵⁷ The court also determined that where the state produced no evidence that suspicionless stops are any more effective than the traditional stops based on particular suspicion, the routine stop of special series registration vehicles is unconstitutional.⁵⁸

In apparent response to *Greyeagle*,⁵⁹ the Legislature passed Minnesota Statutes section 168.0422, which permitted police to pull over drivers displaying special series plates “for the purpose of determining whether the driver is operating the vehicle lawfully under a valid driver’s license.”⁶⁰

In *State v. Baumann*, a 2000 case involving section 168.0422, the Minnesota Court of Appeals upheld a traffic stop of a motorist bearing the plates, but did so without reaching the constitutional issues.⁶¹ However, a sharply worded concurrence from Judge Randall, reminiscent of criticisms involving scarlet letter sentencing, urged that the underlying statute’s constitutionality must be considered:

Minn. Stat. § 168.0422 is a statute authorizing a “mark” or “brand” to be placed on a citizen’s vehicle license plate. That mark labels that vehicle’s driver as one who can be stopped, not for articulable suspicion of criminal activities, but rather because of the “mark.” That is impermissible You might as well make the mark a pink triangle or some other identifying object. The results are exactly the same.⁶²

54. *Id.* at 327.

55. *Id.* (citing MINN. STAT. §§ 168.041, subd. 6; 168.042, subd. 12 (1994)).

56. *Greyeagle*, 541 N.W.2d at 327.

57. *Id.* at 328, 330.

58. *Id.* at 329.

59. *State v. Henning*, 666 N.W.2d 379, 383 (Minn. 2003).

60. MINN. STAT. § 168.0422 (2002).

61. *State v. Baumann*, 616 N.W.2d 771 (Minn. Ct. App. 2000) (*review denied* Minn. Nov. 15, 2000).

62. *Id.* at 778.

Finally, in 2003, the constitutionality of traffic stops based solely on Minnesota Statutes section 168.0422 was decided in *State v. Henning*.

III. *STATE V. HENNING*

A. *The Facts, Statutes, and Initial Appeal*

Joel Henning, the driver in *State v. Henning*, received special series “WZ” license plates after his vehicles were impounded because of two previous “driving while impaired” convictions.⁶³ Pursuant to Minnesota law, Henning’s father requested special series plates after demonstrating to the court that he was the owner of the vehicle and had a valid driver’s license.⁶⁴ Specifically, Minnesota Statutes section 168.041, subdivision 6, allows special series license plates to be issued:

If a member of the violator’s household has a valid driver’s license, the violator or owner has a limited license issued under section 171.30, or the owner is not the violator and the owner has a valid or limited license or a member of the owner’s household has a valid driver’s license.⁶⁵

On July 12, 2000, an Olmsted County deputy noticed Henning’s vehicle bearing the “WZ” plates.⁶⁶ The deputy followed the vehicle but did not notice any inappropriate driving conduct or any driving violations.⁶⁷ The deputy stopped the vehicle,⁶⁸ later testifying that the only reason he stopped Henning’s vehicle was because the vehicle displayed special series plates.⁶⁹

Joel Henning told the deputy he knew he could be stopped based on the special series license plates, but he also expressed belief that the deputy needed an additional reason to stop him.⁷⁰ Henning had no valid driver’s license at the time of the stop because his license had been revoked.⁷¹ The deputy cited Henning for driving after revocation, having no driver’s license in his possession, and having no proof of insurance.⁷²

63. *Henning*, 666 N.W.2d at 381-82.

64. *Id.* at 387 (Meyer, J., dissenting).

65. *Id.* at 383.

66. *Id.* at 381.

67. *Id.*

68. *Id.*

69. *Id.* at 382.

70. *Id.*

71. *Id.*

72. *Id.*

Henning challenged the stop at an omnibus hearing in Olmsted County District Court.⁷³ Henning argued that section 168.0422 of the Minnesota Statutes was unconstitutional.⁷⁴ At the hearing, the deputy admitted that the special series license plates were the only reason he stopped the vehicle.⁷⁵ The district court held the statute unconstitutional but found that special series license plates gave the deputy “reasonable and articulable suspicion of criminal activity to justify the stop.”⁷⁶ Henning was convicted of driving after revocation and driving without a valid driver’s license in his possession.⁷⁷

Henning appealed to the Minnesota Court of Appeals, which affirmed the convictions and held the statute constitutional.⁷⁸ The appeals court held that Henning implicitly submitted to routine police stops by applying for and displaying special series license plates.⁷⁹ The court explained that “[b]y applying for and displaying those plates, appellant submitted to routine police stops of his vehicle; he told the deputy that he knew he could be stopped because of the plates.”⁸⁰ The court noted that even if Henning had not known, he would be deemed to have submitted since citizens are presumed to know the law.⁸¹

The Minnesota Court of Appeals analogized Henning’s situation to that in which a driver consents to tests for purposes of determining the presence of alcohol, controlled substance, or hazardous substances pursuant to Minnesota Statutes section 169.123, subdivision 2(a).⁸² The court of appeals explained that:

If operating motor vehicles within the state legally implies a driver’s consent to blood, breath, or urine testing for a particular purpose, it is reasonable to infer that utilization of special series license plates likewise may legally imply the driver’s consent to stops of the vehicle for a particular purpose.⁸³

However, the testing conducted to determine whether a driver is

73. State v. Henning, 644 N.W.2d 500, 501 (Minn. Ct. App. 2002).

74. *Id.*

75. State v. Henning, 666 N.W.2d 379, 382 (Minn. 2003).

76. State v. Henning, 644 N.W.2d 500, 501 (Minn. Ct. App. 2002).

77. *Id.*

78. *Id.* at 504

79. *Id.* at 502.

80. *Id.* at 502.

81. *Id.* at 502 n.1.

82. *Id.* at 502.

83. *Id.*

impaired takes place only after an officer already has a reasonable articulable suspicion to stop the vehicle and probable cause to arrest the suspect. In such a case, an officer would have specific justification for believing that the driver was impaired. An officer cannot simply pull over a driver and require the person to submit to a test.

Henning petitioned to the Minnesota Supreme Court, which granted certiorari.

B. In the Minnesota Supreme Court

The Minnesota Supreme Court held section 168.0422 unconstitutional under both the Fourth Amendment of the United States Constitution and Article I, Section 10 of the Minnesota Constitution.⁸⁴

Pursuant to *Delaware v. Prouse*,⁸⁵ stopping a motor vehicle to check whether the driver is properly licensed is a seizure and is not permitted under the Fourth Amendment without reasonable articulable suspicion.⁸⁶ However, the state argued that there was no reasonable expectation of privacy because Henning applied for and received the special series license plates, and that by doing so he was aware that his use of the vehicle gave police authority to stop vehicles with such license plates without reasonable articulable suspicion.⁸⁷ The Minnesota Court of Appeals relied on that argument in upholding the statute's constitutionality; however, the Minnesota Supreme Court rejected this analysis.⁸⁸

As the court explained, the facts did not establish that Henning had a subjective belief that he could be pulled over solely because of the special license plates.⁸⁹ More importantly, because the state contemplated that Henning's father might apply for and receive the special license plates, the state knew that someone other than Henning—someone with a valid driver's license—might be driving the vehicle. To obtain the special plates, one must show that the person who will be driving the vehicle will be doing so legally. That driver might be a violator with a temporary license, or it might be someone never convicted of a crime. As the supreme court correctly pointed out, “[t]hus, Minn. Stat. § 168.0422 subjects a number of licensed motorists,

84. State v. Henning, 666 N.W.2d 379, 386 (Minn. 2003).

85. 440 U.S. 648 (1979).

86. *Henning*, 666 N.W.2d at 383.

87. *Id.* at 383-84.

88. State v. Henning, 644 N.W.2d 500, 502-03 (Minn. Ct. App. 2002).

89. State v. Henning, 666 N.W.2d 379, 384 (Minn. 2003).

who were not a party to the original revocation of the registration plates or the subsequent reissuing of the special series plates, to the possibility of being stopped by every law enforcement officer they encounter.”⁹⁰ The court subsequently discredited the state’s assertion that Henning had no reasonable expectation of privacy and that this “fact” justified a suspicionless stop.⁹¹

The court then examined whether Henning’s stop was reasonable. If there was no reasonable articulable suspicion, the state must provide a persuasive reason for dispensing with the general requirement of individualized suspicion.⁹² Citing *Prouse*, the Minnesota Supreme Court explained, “[w]here individualized suspicion is not required to make a stop, other safeguards are relied upon to assure that a driver’s reasonable expectation of privacy may not be invaded at the discretion of a patrolling officer.”⁹³ The court further explained, “[t]he degree of the intrusion must be weighed against the promotion of legitimate government interests.”⁹⁴ The court noted that legal drivers with special series license plates would be subject to repeated stops at the unchecked discretion of law enforcement.⁹⁵ The court concluded that the state had not met its burden of articulating its persuasive reason for dispensing with the general requirement of individualized suspicion.⁹⁶

Justice Meyer wrote the dissenting opinion, which was joined by Chief Justice Blatz and Justice Hanson. The dissent based its opinion on balancing competing interests: (1) the gravity of the public concern served by the seizure, (2) the degree to which the seizure advances the public interest, and (3) the severity of the interference with individual liberty.⁹⁷ The dissent pointed out that with respect to the first factor, the state has a substantial interest in keeping roads safe.⁹⁸ With respect to the second factor, the dissent noted that “[v]iolators whose license plates

90. *Id.*

91. *Id.* The court discredited the district court’s ruling that there existed reasonable articulable suspicion to stop the vehicle. Applying a totality of the circumstances analysis, the court correctly pointed out that the special series license plates are issued only when it is shown that the vehicle may be legally driven. Thus, the mere presence of such plates could not constitute reasonable articulable suspicion. *Id.* at 384-85.

92. *Id.* at 385 (quoting *Ascher v. Comm’r of Pub. Safety*, 519 N.W.2d 183, 186 (Minn. 1994)).

93. *Id.* (citing *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979)).

94. *Id.* at 384 (citing *United States v. Knights*, 534 U.S. 112, 119 (2001)).

95. *Id.* at 385.

96. *Id.* at 386.

97. *Id.* at 387 (Meyer, J., dissenting).

98. *Id.* at 388.

were impounded by the arresting officer showed a 50 percent decrease in recidivism over a 2-year period”⁹⁹ With regard to the third factor, the dissent claimed that the stops involve a narrow class of persons and that these stops would be limited and brief.¹⁰⁰

In responding to these points, the majority agreed that the state has a legitimate interest in keeping drunken drivers off the road.¹⁰¹ As the court pointed out, however, “[t]he state has not met its burden of showing that it is impracticable for police to develop individualized suspicion and that a departure from the individualized suspicion requirement will significantly help police achieve a higher rate of arrest than would using more conventional means of apprehending alcohol impaired drivers.”¹⁰² Although the practice of impounding license plates may further the state’s interest in protecting the public, the court explained, the subsequent issuance of special plates to allow the vehicle to be driven by a legal driver does not necessarily further the state’s interests in protecting the public.¹⁰³

IV. ANALYSIS

The Minnesota Supreme Court’s firm position that suspicionless stops of motorists are improper can be cast in terms heard frequently at the United States Supreme Court during Chief Justice Earl Warren’s reign: the ends do not justify the means.

Clearly the *Ascher* and *Henning* decisions put the burden squarely on Minnesota law enforcement to show that there is a legitimate and specific reason to stop a motor vehicle. While the public interest in curbing drunken drivers in general, and repeat offenders in particular, is a vital public interest and a vexing problem, the Minnesota Supreme Court has unequivocally mandated that motorists must be observed doing *something* wrong before a traffic stop may commence.

The *Henning* decision stands apart from recent decisions in neighboring jurisdictions that involved questionable traffic stops involving license plates. In Iowa this year, a police officer’s mistaken stop was forgiven after he initially thought a driver was operating a vehicle lacking a rear license plate but then saw the temporary paper card

99. *Id.* at 389.

100. *Id.*

101. *Id.* at 386.

102. *Id.* (citing *Ascher v. Comm’r of Pub. Safety*, 519 N.W.2d 183, 186 (Minn. 1994)).

103. *Id.*

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in the rear window and completed the stop nonetheless.¹⁰⁴ The Iowa Court of Appeals reasoned that even though the officer was mistaken, “there arose no requirement that the officer act like he had never seen [the driver].”¹⁰⁵ The Seventh Circuit, meanwhile, said a western Wisconsin trooper acted properly after pulling over a van not displaying a rear license plate, even though a temporary registration was affixed to the rear window and the officer, peering through the tinted window, could observe “a square cardboard with letters on it.”¹⁰⁶

Although *Henning* sets a stringent standard for law enforcement, it is likely that courts will scrutinize traffic stops of vehicles bearing special series plates closely on a case-by-case basis and may defer to police whenever possible. For example, in *State v. Baumann*, a 2000 case in which the Minnesota Court of Appeals upheld the stop of a vehicle bearing “WX” plates without reaching the constitutional issue, the police officer received the benefit of the doubt.¹⁰⁷ The officer had overheard police-radio chatter early in his shift about a white Chevrolet Corsica whose driver was wanted on warrants and whose driving privileges had been canceled.¹⁰⁸ Although the Chevrolet’s license plate number was included in the radio transmission, the officer did not recall the license plate number or the driver’s gender when he pulled over Robert Baumann’s white Chevrolet Corsica.¹⁰⁹

Nonetheless, the court of appeals upheld the traffic stop and rejected Baumann’s constitutional challenge.¹¹⁰ The court ruled that the stop was supported by reasonable articulable suspicion because the stop was not based solely on Baumann’s “WX” plates.¹¹¹ As Judge Harten reasoned, “[a]lthough the officer may not have been certain that the vehicle he stopped was the same vehicle seen earlier in the evening, this was a reasonable inference. The vehicle descriptions were identical, and the stopped vehicle was first observed only a mile from the reported earlier sighting.”¹¹² The Minnesota Supreme Court subsequently refused to reconsider the *Baumann* case.

104. *State v. Ross*, No. 01-1840, 2003 WL 118334, at *1 (Iowa Ct. App. Jan 15, 2003).

105. *Id.* at *2.

106. *United States v. Dumas*, 94 F.3d 286, 288 (7th Cir. 1996).

107. *State v. Baumann*, 616 N.W.2d 771 (Minn. Ct. App. 2000).

108. *Id.* at 772.

109. *Id.* at 772-73.

110. *Id.* at 772.

111. *Id.* at 774.

112. *Id.*

While *Henning* and *Ascher* taken together require police officers making a traffic stop to provide some rationale besides special series plates, *Henning* and *Baumann* taken together suggest that Minnesota appellate courts are likely to give police substantial latitude as long as they can provide *some* reasonable articulable suspicion for the traffic stop.

This means that Minnesota drivers and their defense attorneys must push police to provide bases for all traffic stops involving special series license plates. When the state fails to meet that burden, charges stemming from traffic stops based solely on “WX,” “WY,” or “WZ” plates must be dismissed. However, once police provide grounds for the stop, courts are likely to defer to officers’ judgment as long as the grounds are at all reasonable. That seems to shift the burden back to the defendant exhibiting the special plates, who is faced with proving the unreasonableness of a stop based on an improper lane change, a failure to yield, or one of a plethora of minor driving infractions that sober as well as drunken drivers do constantly.

V. CONCLUSION

In *State v. Henning*, the Minnesota Supreme Court took a firm stance in favor of the “reasonable articulable suspicion” standard. The court made it clear that constitutional rules apply even during stops of vehicles with special series license plates, which are issued chiefly to repeat drunken drivers. However, when *Henning* is viewed in light of other recent Minnesota appellate cases, it seems clear that courts are poised to give police the benefit of the doubt as long as the officers can provide some reasonable reason for stopping a vehicle besides the presence of the special plates.

In theory, the Minnesota Supreme Court has reached a workable balance between targeting repeated drunken drivers and ensuring citizens’ constitutional rights. Now, the challenge will be in ensuring that theory translates into practice, lest those special license-plate letters “WX,” “WY,” and “WZ” take on an uncomfortable, and perhaps unconstitutional, scarlet tinge.