



FILED
LORAIN COUNTY

2018 JUN 25 A 9:56

COURT OF COMMON PLEAS
TOM ORLANDO

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JOURNAL ENTRY
Hon. D. Chris Cook, Judge

Date June 25, 2018

Case No. 16CR095302

STATE OF OHIO
Plaintiff

Paul Griffin
Plaintiff's Attorney

VS

ANTWON L. SMITH
Defendant

G. Bremke & M. Kinlin
Defendant's Attorney

This matter is before the Court on Defendant's Motion to Suppress, filed August 9, 2017 and the State's Objection, filed August 30, 2017.

Oral hearing had on May 31, 2018.

The Motion is not well-taken and hereby DENIED.

See Judgment Entry.



JUDGE D. Chris Cook

cc: Griffin, Asst. County Pros.
Bremke, Esq.
Kinlin, Esq.



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Plaintiff's Attorney

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Defendant

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PROCEDURAL HISTORY

This matter is before the Court on Defendant's Motion to Suppress, filed August 9, 2017 and the State's Objection, filed August 30, 2017.

Oral hearing had on May 31, 2018.

STATEMENT OF PERTINENT FACTS

On November 15, 2016, at approximately 4:56 pm, Trooper Chad Schell ("Trooper Schell") of the Ohio State Highway Patrol was on duty in Lorain County, Ohio.¹ Trooper Schell was sitting stationary in his marked patrol vehicle on the Ohio Turnpike near mile marker 113 enforcing traffic laws and working drug interdiction. Trooper Schell has previously worked that area of the Turnpike. (Exhibit "A.")

Trooper Schell has over 10 years experience as a law enforcement officer, was an Ohio police officer in good standing on the date/time of the encounter with the Defendant, and had made "hundreds" of drug-related arrests and investigations in his career. Trooper Schell has training and experience in enforcing Ohio's traffic laws and drug interdiction. *Id.*

As noted, on the date/time in question, Trooper Schell was parked and stationary at the cross-over at mile post 113 observing eastbound traffic. He had "... a clear view of the traffic to the east and to the west ..." He was monitoring the speed of traffic and

¹ See Court's Exhibit "A," Transcript of Proceedings, filed separately but incorporated herein by reference.



was observing the traffic patterns. Traffic flow was normal and that section of the Turnpike has three lanes of travel. *Id.*

As the vehicle at issue, a 2016 Hyundai Sonata ("The Vehicle"), approached Trooper Schell, he noticed that it was "... traveling unusually slow ... there were cars on the right and then a car on the left that were passing The Vehicle as it was traveling in the center lane." According to Trooper Schell, The Vehicle was traveling 59 miles-per-hour in a 70 mile-per-hour zone. *Id.*

As The Vehicle approached Trooper Schell, he observed it travel to the left of the white dividing line and nearly strike another vehicle to the left of The Vehicle. The Vehicle, according to Trooper Schell, passed completely over the dividing line, "... the left side of the vehicle, so the left two tires, the doors, the mirror, the front and rear fender, **traveled to the left of the clearly marked divided white line**, and nearly struck a vehicle that was passing it on the left." (Emphasis added.) As The Vehicle drove by Trooper Schell, he noticed the passenger "... turned around and looked at me to see what I was doing."² The marked lane violation lasted "[S]everal seconds ..." Trooper Schell also described this violation as "... **blatant.**" (Emphasis added.) *Id.*

Based upon these observations, Trooper Schell decided to initiate a traffic stop of The Vehicle. He had to wait a few seconds for traffic to clear to enter the roadway from the cross-over. Trooper Schell eventually caught-up to The Vehicle and initiated a traffic stop as it was traveling eastbound. Surprisingly to Trooper Schell, The Vehicle, which was still traveling in the center lane, pulled over to the left, or median side of the Turnpike. This caught Trooper Schell's attention as most vehicles pull over to the right side of the roadway as the left side, or median side, is more dangerous. *Id.*

After stopping The Vehicle, Trooper Schell approached it and identified himself and the reasons for the stop. The driver was a female who produced her identification. As noted, the Defendant was sitting in the passenger seat (without a seatbelt on).³ *Id.*

While not directly relevant to the Motion To Suppress, during a subsequent search of The Vehicle, Trooper Schell allegedly found approximately 420 grams of heroin.

STANDARD OF REVIEW

A motion to suppress presents a mixed question of law and fact: When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses.

² The "passenger" was the Defendant, though Trooper Schell was unable to identify him as The Vehicle passed by.

³ At the suppression hearing, the defense stipulated to the identification of the Defendant.



Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. *State v. Oberholtz*, 9th Dist. Summit No. 27972, 2016-Ohio-8506, ¶ 5, quoting *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372; *State v. Carey*, 2018-Ohio-831, 9th Dist. No. 28689, Summit (3/7/2018) at ¶ 8.

The Fourth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *." Article I, Section 14, of the Ohio Constitution contains nearly identical language. "For a search or seizure to be reasonable under the Fourth Amendment, it must be based upon probable cause and executed pursuant to a warrant, unless an exception to the warrant requirement applies." *State v. Hetrick*, 9th Dist. Lorain No. 07CA009231, 2008-Ohio1455, ¶ 19, citing *Katz v. United States*, 389 U.S. 347, 357 (1967). "One well-delineated exception to the warrant requirement occurs where police officers perform an investigatory stop based on their reasonable suspicion that criminal activity is afoot." *State v. Hale*, 9th Dist. Summit No. 28334, 2017-Ohio-7048, ¶ 9, quoting *State v. Jackson*, 9th Dist. Lorain No. 14CA010555, 2015-Ohio-2473, ¶ 13, citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968). *Id.* at ¶ 9.

The traffic stop of a vehicle constitutes a seizure for purposes of the Fourth Amendment. *State v. Phillips*, 9th Dist. Medina No. 16CA0018-M, 2017-Ohio-1312, ¶ 6. "[W]here an officer has an articulable reasonable suspicion or probable cause to stop a motorist for any criminal violation, including a minor traffic violation, the stop is constitutionally valid regardless of the officer's underlying subjective intent or motivation for stopping the vehicle in question." *State v. Jackson*, 9th Dist. Summit No. 28625, 2018-Ohio-19, ¶ 16, quoting *Dayton v. Erickson*, 76 Ohio St.3d 3, 11-12 (1996).

Reasonable suspicion is something less than probable cause and is determined by considering and evaluating the totality of the circumstances. See *Phillips* at ¶ 6-7. An analysis of whether reasonable suspicion existed requires this Court to look at "the facts available to the officer at the moment of the seizure or the search." In evaluating the facts and inferences supporting the stop, a court must consider the totality of the circumstances as "viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training and consider whether those facts would 'warrant a man of reasonable caution in the belief that the action taken was appropriate.'" *State v. Smiley*, 9th Dist. Summit No. 23815, 2008-Ohio-1915, ¶ 19, quoting *State v. Bobo*, 37 Ohio St.3d 177, 178-179 (1988), quoting *Terry* at 21-22. *Id.* at ¶ 10.



"[A]n appellate court's review of the trial court's findings of fact looks only for clear error, giving due deference as to the inferences drawn from the facts by the trial court." *State v. Hunter*, 151 Ohio App.3d 276, 2002-Ohio-7326, ¶ 24 (9th Dist.), citing *State v. Russell*, 127 Ohio App.3d 414, 416 (9th Dist.1998), reference *State v. Soto*, 9th Dist., Lorain No. 17CA011024, 2017-Ohio-4348, at ¶ 6.

ANALYSIS

A) THE PARTIES STIPULATED TO LIMIT THE SCOPE OF THIS MOTION TO THE PROPRIETY OF THE STOP OF THE VEHICLE

At the outset, it should be noted that the parties do not challenge the events attendant to this case subsequent to the stop of The Vehicle, including the continued detention, search, or arrest of the Defendant. *Id.*

Accordingly, the sole issue for determination is the legality of the warrantless stop of The Vehicle in which the Defendant was a passenger.

B) THE DEFENDANT HAS STANDING TO CHALLENGE THE STOP OF THE VEHICLE

This Court agrees with Defendants unchallenged position that a passenger in a motor vehicle has standing to challenge the stop and subsequent search of the vehicle.

As early as 1994, the Ohio Supreme Court, based upon a series of United States Supreme Court decisions⁴, determined that both passengers and operators of unowned motor vehicles have Fourth Amendment protections implicit thereto. In *State v. Carter* (1994), 69 Ohio St.3d 57, 63, the Ohio Supreme Court stated, "[B]oth passengers and the driver have standing regarding the legality of a stopping because when the vehicle is stopped, they are equally seized, and their freedom of movement is equally affected." * * * "Additionally, the driver of an automobile who demonstrates that he has the owner's permission to use the vehicle has a reasonable expectation of privacy in the vehicle and standing to challenge its stop and search." *Id.*

C) A VIOLATION OF RC 4511.33 "MARKED LANES" IS A VIOLATION OF OHIO'S TRAFFIC LAWS

RC 4511.33, Driving in Marked Lanes, reads, in pertinent part, "A vehicle or trackless trolley shall be driven, as nearly as practicable, entirely within a single lane or line of

⁴ See: *Rakas v. Illinois* (1978), 439 U.S. 128 and its progeny.



traffic and shall not be moved from such lane or line until the driver has first ascertained that such movement can be made with safety.”

In the case at bar, not only was The Vehicle operated outside a single lane of traffic but it moved in such a manner as to almost cause an accident. These violations of RC 4511.33 formed the basis for a legal, constitutionally valid traffic stop.

D) TROOPER SCHELL HAD A REASONABLE, ARTICULABLE SUSPICION THAT THE VEHICLE HE STOPPED COMMITTED A TRAFFIC VIOLATION

With respect to the Defendant, this is not a close call.

An experienced, trained police officer on traffic patrol on the Ohio Turnpike observed a vehicle operating in the center lane headed eastbound at a noticeably slow speed and clocked it 59 miles-per-hour in a 70 miles-per-hour zone.⁵ While this operation, in and of itself, was not a traffic violation nor standing alone a sufficient basis to conduct a traffic stop as there was no testimony that the slow speed “impeded traffic,” it nevertheless formed the basis for Trooper Schell’s observations and to put it colloquially, got his attention.

While observing The Vehicle thus, Trooper Schell clearly observed it commit a marked lane violation as it significantly went left of center. Trooper Schell’s testimony was clear, credible, and convincing. It was not contradicted in any significant manner on cross examination despite the fact that he conceded that the violation was not caught on his dash cam. Moreover, Trooper Schell testified in significant detail that The Vehicle passed completely over the dividing line, “. . . the left side of the vehicle, so the left two tires, the doors, the mirror, the front and rear fender, **traveled to the left of the clearly marked divided white line**, and nearly struck a vehicle that was passing it on the left.”⁶ (Emphasis added.) The marked lane violation lasted “[S]everal seconds . . .” Trooper Schell also described this violation as “. . . **blatant**.” (Emphasis added.)

This testimony, as long as deemed competent and credible, would independently be sufficient to legally justify a traffic stop.

But Trooper Schell observed more.

⁵ A possible violation of RC 4511.22, “Slow Speed.”

⁶ A possible violation of RC 4511.27, “Overtaking and passing of vehicles proceeding in the same direction.”



As The Vehicle drove by Trooper Schell left of center, “. . . it nearly struck another vehicle . . .” And, Trooper Schell further observed the passenger turn around “. . . and look[ed] at me to see what I was doing.”

All of these facts, when considered in their totality, articulate more than a reasonable suspicion of a violation of Ohio’s traffic laws, they actually raise to the level of probable cause. Nevertheless, the question remains – was the warrantless stop “legal?”

One well-delineated exception to the warrant requirement occurs where police officers perform an investigatory traffic stop based on their reasonable suspicion that criminal activity is afoot. *Jackson, supra*, citing *Terry*. A traffic violation constitutes criminal activity for purposes of a Fourth Amendment challenge to a warrantless traffic stop. (See: *State v. Slates*, 9th Dist. Summit No. 25019, 2011-Ohio-295, ¶ 23, and its progeny.)

Reasonable suspicion is something less than probable cause and is determined by considering and evaluating the totality of the circumstances. *Phillips, supra*. In evaluating the facts and inferences supporting the stop, a court must consider the totality of the circumstances as “viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training and consider whether those facts would ‘warrant a man of reasonable caution in the belief that the action taken was appropriate.’” *Bobo, supra*.

In the case at bar, there is little question that any reasonably cautious police officer guided by his experience and training who observed what Trooper Schell observed would have reached an identical conclusion that The Vehicle committed *at least* one traffic violation, and perhaps more.

Based upon the totality of the facts and circumstances at issue, as well as the compelling, credible testimony of Trooper Schell, the stop of The Vehicle was not violative of the Defendant’s Fourth Amendment Constitutional rights but was fully justified in the premises.

CONCLUSION

Accordingly, for the foregoing reasons, the Motion To Suppress is not well-taken and hereby DENIED.

Final pre-trial remains set for Thursday, July 19, 2018 @ 1:30 pm.
Jury trial remains set for **Monday, August 13, 2018 @ 8:30 am.**



NO CONTINUANCES OF THE JURY TRIAL WILL BE GRANTED ABSENT
EXTRAORDINARY CAUSE.

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to be "D. Cook", written over a horizontal line.

JUDGE D. Chris Cook