

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-08-065

Appellee

Trial Court No. TRC0802506

v.

Michelle M. Maddux

DECISION AND JUDGMENT

Appellant

Decided: March 12, 2010

* * * * *

P. Martin Aubry, Chief Prosecutor, for appellee.

Matthew N. Fech, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This case is before the court on appeal from the judgment of the Perrysburg Municipal Court wherein, on September 4, 2008, the trial court denied the motion to suppress filed by appellant, Michelle Maddux, regarding an April 11, 2008 traffic stop that resulted in a charge of operating a vehicle under the influence, in violation of R.C.

4511.19(A)(1)(a), a misdemeanor of the first degree. On September 19, 2008, appellant entered a plea of no contest, was found guilty, and was sentenced to 33 days in jail, 30 of which were suspended, placed on probation, given limited occupational driving privileges, and was fined. Appellant timely appealed the decision of the trial court denying her motion to suppress and raises the following sole assignment of error on appeal:

{¶ 2} "The trial court erred in denying appellant's motion to suppress because there was no reasonable articulable suspicion for Trooper Schmutz to detain appellant to perform field sobriety testing."

{¶ 3} Review of a motion to suppress on appeal presents mixed questions of law and fact. *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, ¶ 100. Because the trial court is in the best position to resolve factual questions and evaluate the credibility of witnesses, an appellate court must accept the trial court's findings of fact where they are supported by competent, credible evidence. *Id.* "[T]he 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. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8.

{¶ 4} As recognized by this court in *State v. Beeley*, 6th Dist. No. L-05-1386, 2006-Ohio-4799, ¶ 13, "[t]here are two types of traffic stops, each with its own constitutional standard." First, a non-investigatory stop occurs when an officer witnesses a traffic code violation and stops the motorist to issue a citation, warning, or to effect an

arrest. *State v. Downs*, 6th Dist. No. WD-03-030, 2004-Ohio-3003, ¶ 11. In this type of stop, there must be probable cause or "a reasonable ground for belief of guilt." *State v. Moore* (2000), 90 Ohio St.3d 47, 49, and *Carroll v. United States* (1925), 267 U.S. 132, 161. "Probable cause is provided when an officer observes a traffic code violation." *State v. Mapes*, 6th Dist. No. F-04-031, 2005-Ohio-3359, ¶ 38, citing *Whren v. United States* (1996), 517 U.S. 806, 810. See, also, *Dayton v. Erickson*, 76 Ohio St.3d 3, 11, 1996-Ohio-431.

{¶ 5} The second type of stop is the investigatory stop, or the "Terry" stop. See *Terry v. Ohio* (1968), 392 U.S. 1. To justify a *Terry* stop, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, at 21. Once a stop has been made, the officer may briefly detain the party until his suspicions are either confirmed or dispelled. See *Terry*, supra. "An investigatory stop is proper until it becomes overly intrusive." *Beeley*, 2006-Ohio-4799, ¶ 15. If "an officer's objective reasons for prolonging detention in a traffic stop are unrelated to the purpose of the initial stop, the continued detention must be predicated on 'articulable facts giving rise to a suspicion of some illegal activity justifying an extension of the detention.'" *Mapes*, 2005-Ohio-3359, ¶ 40, citing *State v. McMillin*, 6th Dist. No. H-04-018, 2005-Ohio-2096, ¶ 23. See, also, *State v. Robinette* (1997), 80 Ohio St.3d 234, paragraph one of the syllabus. When determining whether or not an investigative traffic stop is supported by a reasonable, articulable suspicion of criminal activity, the stop must be viewed in light of the totality

of circumstances surrounding the stop. *State v. Bobo* (1988), 37 Ohio St.3d 177, paragraph one of the syllabus.

{¶ 6} Additionally, the Ohio Supreme Court has stated that, "where 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." *Erickson*, 76 Ohio St.3d at 11-12. Once a lawful stop has been made, asking the driver and passengers to exit the vehicle pending completion of the traffic stop is merely a continuation of the original stop and the officer is not required to articulate any reasonable suspicion prompting his request that the occupants exit the vehicle. *State v. Evans* (1993), 67 Ohio St.3d 405, 408, citing *Pennsylvania v. Mimms* (1977), 434 U.S. 106, 111. In Ohio, a number of courts have held also that a police officer can order a traffic misdemeanor to remain in the police cruiser for the length of his detention, reasoning that, akin to *Mimms*, such an order "is a modest incremental intrusion justified by the nature of the traffic stop itself." *State v. Mullins*, 5th Dist. No. 2006-CA-00019, 2006-Ohio-4674, ¶ 27, citing *State v. Carlson* (1995), 102 Ohio App.3d 585, 595-596, *State v. Warrell* (1987), 41 Ohio App.3d 286, 287, *State v. Wineburg* (Mar. 27, 1998), 2d Dist. No. 97 CA 58, *State v. Block* (Dec. 15, 1994), 8th Dist. No. 67530, discretionary appeal denied (1995), 72 Ohio St.3d 1521, and *Middletown v. Downs* (Mar. 19, 1990), 12th Dist. No. CA89-06-094.

{¶ 7} "[I]n order to conduct field sobriety tests, all that is required is reasonable articulable suspicion of criminal activity. *State v. Sanders* (1998), 130 Ohio App.3d 789, 794. Reasonable suspicion is "* * * something more than an inchoate or unparticularized suspicion or hunch, but less than the level of suspicion required for probable cause." *State v. Shepard* (1997), 122 Ohio App.3d 358, 364." *Beeley*, 2006-Ohio-4799, ¶ 15, quoting *State v. Barner* (Apr. 26, 2002), 6th Dist. No. WD-01-034. "Where a non-investigatory stop is initiated and the odor of alcohol is combined with glassy or bloodshot eyes and further indicia of intoxication, such as an admission of having consumed alcohol, reasonable suspicion exists." *Id.* at ¶ 16.

{¶ 8} At the suppression hearing in this case, Ohio State Patrol Trooper Bo Schmutz testified that he observed appellant's vehicle on Interstate 75, at 2:57 a.m. Schmutz testified that he pulled appellant over due to her license plate light not being illuminated. After pulling the vehicle over to the side of the highway, Schmutz approached the vehicle and asked appellant for her license and registration. According to Schmutz, appellant looked through her entire purse for her driver's license, but found it in her coat pocket. During this time, Schmutz noticed an odor of alcohol and that appellant's eyes were glassy. Schmutz asked appellant to exit her vehicle and to sit in the front passenger seat of his cruiser while he checked the status of her license and registration. Schmutz testified that he moved appellant to the patrol car for her own safety, given the time of the stop and the location on the interstate.

{¶ 9} While appellant was in the front passenger seat of the patrol car, Schmutz inquired regarding appellant's activities that evening. Appellant indicated that she had visited two bars in Bowling Green, Ohio. Schmutz noticed a paper wrist band on appellant and asked her how many alcoholic beverages she had consumed while at the bars. According to Schmutz, appellant stated that she had two drinks.

{¶ 10} Schmutz then asked if he could perform some field sobriety tests to determine if appellant was impaired. Appellant agreed and Schmutz administered the horizontal gaze nystagmus test while appellant was seated in the patrol car. Appellant failed this test. Outside of the patrol car, Schmutz administered the one leg stand and the walk and turn test. Schmutz testified that appellant failed all the field sobriety tests. According to Schmutz, the tests were performed in compliance with the standards set forth in the National Highway Transportation Safety Administration manual on DWI Detection and Standardized Field Sobriety Testing. Appellant also agreed to take a portable breath test which Schmutz testified registered .09 grams of alcohol per 210 liters of breath.¹ The defendant was then arrested and charged with operating a vehicle while under the influence of alcohol, in violation of R.C. 4511.19(A)(1)(a).

{¶ 11} The trial court determined that based upon the totality of the circumstances, including the odor of alcoholic beverage coming from appellant, her glassy eyes, the fumbling for her operator's license, her failure of the field sobriety tests and the reading

¹The citation issued to appellant indicated that she had a prohibited blood alcohol concentration of .110. In either event, appellant's blood alcohol level was in excess of Ohio's legal limit. See R.C. 4511.19(A)(1)(d).

on the portable breathalyzer, Schmutz had probable cause to arrest appellant for operating a vehicle while under the influence of alcohol. Appellant, however, argues that the investigatory stop became overly intrusive when Schmutz asked appellant to sit in the front seat of his patrol car. Appellant argues that a mild odor of alcohol and glassy eyes, given the time of night, does not rise to the level of reasonable suspicion to continue the detention, or remove appellant to the patrol car.

{¶ 12} Based upon our independent review of the record, we find that because the license plate was not illuminated, there was competent, credible evidence upon which the trial court could rely in finding that Schmutz had probable cause to stop appellant's vehicle. Once lawfully stopped, Schmutz was permitted to order appellant to exit her vehicle. In continuation of the stop, Schmutz testified that because of the time and location of the stop, he moved appellant to his patrol car for her safety while he ran a records check on her. Although such an order may be justified by the nature of the stop, we nevertheless find that, based upon the totality of the circumstances, Schmutz could have had a reasonable and articulable suspicion of some illegal activity that justified his further detention of appellant for questioning.

{¶ 13} Specifically, we find that the early morning hour, the odor of alcohol about appellant's person, appellant fumbling through her purse for her operator's license, when it was actually in her pocket, and appellant's glassy eyes, were sufficient to raise a reasonable suspicion of criminal activity. Once in the patrol car, Schmutz also observed a wrist band on appellant, appellant admitted to consuming alcoholic beverages, and

agreed to undergo field sobriety tests, which she failed. Accordingly, we find that Schmutz had probable cause to arrest appellant for operating a vehicle while under the influence of alcohol.

{¶ 14} Based on the foregoing, we find that the trial court did not err in denying appellant's motion to suppress. Schmutz was justified in stopping and briefly detaining appellant under the totality of the circumstances presented in this case. Appellant's sole assignment of error, therefore, is found not well-taken.

{¶ 15} On consideration whereof, this court finds that substantial justice has been done the party complaining and the judgment of the Perrysburg Municipal Court is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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