

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
PREBLE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellant,	:	CASE NOS. CA2006-02-002 CA2006-02-003
- vs -	:	<u>OPINION</u> 10/30/2006
FLOYD J. HOWARD, et al.,	:	
Defendants-Appellees.	:	

CRIMINAL APPEAL FROM PREBLE COUNTY COURT OF COMMON PLEAS
Case No. 05-CR-9444

Martin P. Votel, Preble County Prosecuting Attorney, James B. Vanzant, 101 East Main Street, Courthouse, 1st Floor, Eaton, Ohio 45320, for plaintiff-appellant

Stephen R. Bruns, 123 West Main Street, Eaton, Ohio 45320, for defendant-appellee, Floyd J. Howard

James W. Thomas, 112 North Barron Street, Eaton, Ohio 45320, for defendant-appellee, Lonka Legere

BRESSLER, J.

{¶1} Plaintiff-appellant, the state of Ohio, appeals the decision of the Preble County Court of Common Pleas granting a motion to suppress evidence.¹ We reverse the trial court's decision.

1. Pursuant to Loc.R. 6(A), we sua sponte remove this case from the accelerated calendar and place it on the regular calendar for purposes of issuing this opinion.

{¶2} On October 18, 2005, while on patrol duty, Ohio State Patrol Trooper Shawn Simms began following a 2006 Ford Taurus being driven eastbound on Interstate 70 in Preble County after he observed the vehicle cross the right edge line of the road. After seeing the car drift over the line two more times, Trooper Simms initiated a traffic stop at 10:41 a.m. When Trooper Simms approached the vehicle he observed defendant-appellee, Lonka Legere, in the driver seat, defendant-appellee, Floyd Howard, in the passenger seat, and Legere's child in the back seat.

{¶3} Four minutes after the stop, Trooper Simms signaled for Legere to exit the vehicle, and she complied. Legere gave her driver's license and a rental contract for the vehicle to Trooper Simms, explaining that she and her passengers had been visiting a friend in Oklahoma and were now on their way to New Jersey. Trooper Simms then spoke with Howard, who provided a birth certificate as his only form of identification. Howard gave a similar account of their recent travels.

{¶4} Eight minutes after the stop, Trooper Simms returned to his vehicle to run a license, registration, wants and warrants check on his mobile computer. While waiting for the information to be returned to the computer, Trooper Simms continued questioning Legere. Trooper Simms then asked Legere to stand on the passenger side of his patrol car, where she could clearly see Zeus, a canine used for drug detection. At that time, 10 minutes after the stop, Legere began to complain of menstrual cramps. A few seconds later, Trooper Simms called the dispatcher and requested backup for safety so he could use Zeus to sniff the Taurus for drugs.

{¶5} By 10:55, which was 14 minutes after the stop, Trooper Simms still had not received the information from his license, registration, wants and warrants check on his computer that he had requested six minutes earlier. At that time, he called the dispatcher

and requested the information. Trooper Chris Ward arrived at 11:00. At 11:03, the dispatcher radioed back with the information, and Trooper Simms responded that he would need to call back on his cell phone to get the information. One minute later, Trooper Simms called the dispatcher and received this information. At 11:05, which was 24 minutes after the stop, Trooper Simms began to walk Zeus around the vehicle, and the canine alerted seconds later.

{¶6} After securing Howard, Legere, and Legere's child, Troopers Simms and Ward searched the vehicle and found several bundles of what they suspected to be marijuana. The troopers conducted a field test, which confirmed that the bundled material was marijuana. The troopers then arrested Howard and Legere.

{¶7} Howard and Legere were each indicted on one count of possession of marijuana in violation of R.C. 2925.11(A)(C)(3)(e), a felony of the third degree, because the amount of drug involved equals or exceeds 5,000 grams but is less than 20,000 grams. In addition, Legere was indicted on one count of possession of criminal tools in violation of R.C. 2923.24(A), a felony of the fifth degree.

{¶8} Howard and Legere each entered a plea of not guilty, and filed separate motions to suppress all evidence seized at the time of their arrest. After a joint hearing on both motions, the trial court granted both suppression motions. The state appeals the trial court's decision, raising a single assignment of error.

{¶9} Appellant's assignment of error:

{¶10} "THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT HELD THAT THE DETENTION OF APPELLEES IN THIS CASE WENT BEYOND THAT WHICH WAS REQUIRED TO CONDUCT THE TRAFFIC STOP IN THIS CASE."

{¶11} In its assignment of error, the state argues the trial court erred in granting

appellees' motion to suppress the evidence seized upon their arrest, based on a 23-minute detention. We agree.

{¶12} An appellate court's review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Long* (1998), 127 Ohio App.3d 328, 332. When considering a motion to suppress, the trial court assumes the role of the trier of fact and is therefore in the best position to resolve factual questions and evaluate witness credibility. *State v. Curry* (1994), 95 Ohio App.3d 93, 96. As such, we accept the trial court's findings of fact so long as they are supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594. However, an appellate court independently reviews the trial court's legal conclusions based on those facts and determines, without deference to the trial court's decision, "whether as a matter of law, the facts meet the appropriate legal standard." *Curry* at 96.

{¶13} "Where a police officer stops a vehicle based on probable cause that a traffic violation has occurred or was occurring, the stop is not unreasonable under the Fourth Amendment to the United States Constitution even if the officer had some ulterior motive for making the stop, such as a suspicion that the violator was engaging in more nefarious criminal activity." *Dayton v. Erickson*, 76 Ohio St.3d 3, 1996-Ohio-431, syllabus.

{¶14} In conducting a stop of a motor vehicle for a traffic violation, an "officer may detain an automobile for a time sufficient to investigate the reasonable, articulable suspicion for which the vehicle was initially stopped." *State v. Cahill*, Shelby App. No. 17-01-19, 2002-Ohio-4459, at ¶21, citing *State v. Smith* (1996), 117 Ohio App.3d 278, 285. However, an investigative stop may last no longer than is necessary to effectuate the purpose of the stop. *State v. Venham* (1994), 96 Ohio App.3d 649, 655; *Florida v. Royer* (1983), 460 U.S. 491, 103 S.Ct. 1319.

{¶15} Thus, when detaining a motorist for a traffic violation, an officer may delay the motorist for a time period sufficient to issue a ticket or a warning. *State v. Keathley* (1988), 55 Ohio App.3d 130, 131. This time period also includes the period of time sufficient to run a computer check on the driver's license, registration, and vehicle plates. *State v. Bolden*, Preble App. No. CA2003-03-007, 2004-Ohio-184, ¶17, citing *Delaware v. Prouse* (1979), 440 U.S. 648, 659, 99 S.Ct. 1391. "In determining if an officer completed these tasks within a reasonable length of time, the court must evaluate the duration of the stop in light of the totality of the circumstances and consider whether the officer diligently conducted the investigation." *State v. Carlson* (1995), 102 Ohio App.3d 585, 598-599, citing *State v. Cook* (1992), 65 Ohio St.3d 516, 521-522 and *U.S. v. Sharpe* (1985), 470 U.S. 675, 105 S.Ct. 1568.

{¶16} However, the detention of a stopped driver may continue beyond this time frame when additional facts are encountered that give rise to a reasonable, articulable suspicion of criminal activity beyond that which prompted the initial stop. *State v. Myers* (1990), 63 Ohio App.3d 765, 771; *Venham*, 96 Ohio App.3d at 655.

{¶17} In addition, a lawfully detained vehicle may be subjected to a canine sniff of the vehicle's exterior even without the presence of a reasonable suspicion of drug-related activity. *State v. Rusnak* (1997), 120 Ohio App.3d 24, 28. Both Ohio courts and the United States Supreme Court have determined that "the exterior sniff by a trained narcotics dog to detect the odor of drugs is not a search within the meaning of the Fourth Amendment to the Constitution." *Id.*; *United States v. Place* (1983), 462 U.S. 696, 103 S.Ct. 2637. Thus, a canine sniff of a vehicle may be conducted during the time period necessary to effectuate the original purpose of the stop. Moreover, if a trained narcotics dog "alerts to the odor of drugs from a lawfully detained vehicle, an officer has probable

cause to search the vehicle for contraband." *Cahill*, 2002-Ohio-4459 at ¶22.

{¶18} The trial court found, and the parties do not dispute, that Trooper Simms had a valid reason to stop the vehicle after observing the vehicle cross the right edge line of the road. However, the trial court found that Trooper Simms detained appellees beyond that which was required to conduct the stop, and that the detention was not supported by facts giving rise to a reasonable and articulable suspicion of criminal activity.

{¶19} The trial court stated in its opinion, "[t]he Court * * * finds no evidence of the observation of facts that would give rise to a reasonable articulable suspicion that either [appellee] was involved in the commission of another crime. The accounts of the trip given by each [appellee] were consistent in all material respects. * * * When the mobile computer was not functioning properly, all Trooper Simms needed to do was to call the dispatcher (which he eventually did). Rather than do this, Trooper Simms attempted to kill time until Trooper Ward arrived. * * * The Court believes that this was detention of the [appellees] beyond that which was required to conduct this stop * * * and that the detention was not supported by facts giving rise to a reasonable and articulable suspicion of criminal activity."

{¶20} Contrary to the trial court's conclusion, we find that Trooper Simms did not detain appellees for an unreasonable amount of time, and that the court erred in granting appellees' motion to suppress the evidence seized upon their arrest. While this court must defer to the trial court's resolution of factual questions and evaluation of witness credibility, the trial court's decision does not indicate it disbelieved Trooper Simms testimony. Rather, the trial court's decision indicates that it merely disagrees with Trooper Simms's conclusions and decision-making conducted in the field during the investigation.

{¶21} As the U.S. Supreme Court stated in *Sharpe*, 470 U.S. at 686-687:

{¶22} "In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. * * * A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing. * * * A creative judge engaged in post hoc evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished. But '[t]he fact that the protection of the public might, in the abstract, have been accomplished by "less intrusive" means does not, itself, render the search unreasonable.' * * * The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it." (Internal citations omitted.)

{¶23} In *Bolden*, 2004-Ohio-184 at ¶19-25, this court affirmed a Preble County Court of Common Pleas decision finding that under similar facts and circumstances, a 23 to 30 minute period of detainment from the time of the initial stop until the time the canine alerted was reasonable. It is important to note that in this case, the total length of the stop was less than 24 minutes in duration. Moreover, only 14 minutes elapsed between the time Trooper Simms ran the license, registration, wants and warrants check on his mobile computer and the time when the information was ultimately available to Trooper Simms from the dispatcher. Trooper Simms testified that during this period of time, he encountered additional facts which gave him a reasonable, articulable suspicion that, based on his involvement in several hundred drug interdiction stops, appellees were engaged in additional criminal behavior beyond that for which they had been stopped.

{¶24} Trooper Simms testified that he asked both appellees the same set of questions, and their responses were inconsistent. Legere told Trooper Simms that they had rented the vehicle in New Jersey, and had driven it to visit a high school friend in Oklahoma at an Air Force base, and that they were now returning to New Jersey. Although Legere stated they had spent a couple of days in Oklahoma visiting her friend, she was unable to recall the name of the Air Force base. Howard also told Trooper Simms that they had been visiting Legere's friend, but that she was Legere's sorority sister.

{¶25} In addition, Trooper Simms became suspicious because Legere's timeline of events seemed illogical. Legere gave Trooper Simms a vehicle rental agreement indicating they had rented the vehicle in New Jersey on October 15. Legere told Trooper Simms that it took them 24 hours of driving time to travel to Oklahoma, and that they spent a couple of days there and were on their way to New Jersey. Trooper Simms testified that her story seemed illogical because it was not possible for them to leave New Jersey on the 15th, spend 24 hours driving to Oklahoma, spend at least two days there, and then be back in southern Ohio on the 18th, when he stopped them.

{¶26} Further, Trooper Simms testified that he became even more suspicious when Legere began complaining of menstrual cramps. Trooper Simms explained that when he first observed Legere, she was calm and laughing. However, when Legere stood on the passenger side of his patrol car, where Zeus, the canine, was in clear view, she started to act very nervous, and then began moaning, grabbing at her stomach, and doubling over at the waist. After checking to see if Legere needed assistance, Trooper Simms called for backup. Trooper Simms continued the investigation by conducting a canine sniff less than 15 minutes later.

{¶27} After reviewing the evidence, we conclude that Trooper Simms acted with diligence in conducting the investigation, and did not unreasonably detain appellees beyond that which was necessary to conduct the investigation. According to the record, the 14-minute period of time it took for Trooper Simms to receive the information needed to complete the traffic stop can be attributed to the failure of his mobile computer to function properly. Trooper Simms attempted to obtain the information from his computer at 10:49, and, after determining that the computer was not functioning properly, requested the information from the dispatcher only six minutes later. While waiting for the dispatcher to provide the information necessary to complete the traffic stop, Trooper Simms encountered facts which, based on his experience in drug interdiction, gave him reasonable suspicion that there were drugs in the vehicle.

{¶28} In finding that Trooper Simms detained appellees for an unreasonable amount of time, the trial court emphasized that Trooper Simms wrote in his police report, which he confirmed in his testimony, that, while waiting for Trooper Ward to arrive, he "tried to kill as much time as [he] could * * *." We find such emphasis to be misplaced. Trooper Simms explained in his testimony that he tried to kill time by making conversation with Legere in an attempt to keep her calm while he was waiting both for backup and for the dispatcher to provide him with the information he needed to complete the traffic stop. At the time when this occurred, Trooper Simms had already encountered the facts which gave him reasonable suspicion that that there were drugs in the vehicle. Trooper Simms was then permitted to detain appellees for a reasonable length of time necessary to extend the investigation, which he was unable to continue until Trooper Ward arrived. Trooper Ward arrived less than 10 minutes after being called, and Zeus alerted five minutes later. We find Trooper Simms's use of the phrase "killing time" to be

inconsequential in determining the reasonableness of the detention, and we find nothing in the record to indicate that Trooper Simms failed to act diligently in conducting the investigation.

{¶29} For the foregoing reasons, we sustain the state's assignment of error. Accordingly, the trial court's judgment granting appellees' motion to suppress is reversed, and this matter is remanded to the trial court for further proceedings according to law and consistent with this opinion.

{¶30} Judgment reversed and remanded.

POWELL, P.J., and YOUNG, J., concur.

[Cite as *State v. Howard*, 2006-Ohio-5656.]