

[Cite as *State v. Dorsey*, 2011-Ohio-962.]

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 24286
Plaintiff-Appellant	:	
	:	Trial Court Case No. 10-CR-1676
v.	:	
	:	
MARQUETTE DORSEY, JR.	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellee	:	

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OPINION

Rendered on the 4<sup>th</sup> day of March, 2011.

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FAIN, J.

{¶ 1} Plaintiff-appellant the State of Ohio appeals from an order suppressing evidence found in the car of defendant-appellee Marquette Dorsey. The State contends that the trial court erred in granting the motion to suppress, because a traffic violation that the police observed Dorsey commit was a sufficient basis for a brief traffic stop, regardless of the

actual motives of the police in making the stop. Whether Dorsey violated the traffic ordinance in question turns upon a crucial finding of fact that the trial court did not make. Consequently, the order from which this appeal is taken is Reversed, and this cause is Remanded for further proceedings, which should include making the necessary finding of fact.

I

{¶ 2} In May, 2010, during the 5 p.m. rush hour, Detective Chad Knight was on assignment with the CIRGV (Community Initiative to Reduce Gun Violence) task force. For this assignment Detective Knight was in plain clothes and driving an unmarked car, with a fellow officer. Joining Detective Knight on assignment that day were two, two-man marked police vehicles, Officer Timothy Liddy in one, and Officer Matthew Beavers in the other.

{¶ 3} The CIRGV task force is mostly Detective Knight, who drives around in high crime areas and looks for gang activity, guns, and drugs. If any illegal activity is observed by Detective Knight, it is radioed to the accompanying police officers, who make the appropriate stops. Detective Knight has been with the Dayton Police Department for 15 years. Besides working with the CIRGV task force, Detective Knight also has experience working street patrol, vice, a combined area narcotics task force, street level narcotics, and he worked with the FBI Safe Streets Task Force.

{¶ 4} On this May evening Detective Knight was driving down Hudson Avenue, which is known to be a big crime area, when he noticed a red Oldsmobile parked on the side of the road. Detective Knight observed two individuals in the car – one in the passenger seat and one in the back seat. As he passed by, the individual in the passenger seat made eye contact with Detective Knight and made a “flagging” motion. Detective Knight testified that

the flagging motion is more than just a wave – it is a specific motion indicating that the individual is attempting to engage in a drug deal. Concluding that he was being summoned to buy drugs, Detective Knight made a U-turn, parked on the side of Hudson Avenue facing the Oldsmobile, and called the marked police vehicles, reporting the suspicious behavior. Detective Knight did not attempt any further contact with the individuals in the car, due to safety concerns. While waiting for backup to arrive, Detective Knight observed several cars pass by the Oldsmobile, but failed to notice if any further “flagging” occurred.

{¶ 5} Prior to the arrival of the marked vehicles on the scene, Detective Knight saw Dorsey came out of a house across the street from the Oldsmobile, cross to the Oldsmobile, and get into the driver’s seat. At this point, Dorsey started up the car and pulled out from the curb, without signaling. This was observed by Police Officer Beavers, who had just arrived, and by Detective Knight. The marked police vehicle that Officer Beavers was in did a U-turn and pulled Dorsey over, the Oldsmobile coming to a stop in the middle of the street. Officer Beavers testified that the reason that Dorsey was pulled over was for the traffic violation, but that Dorsey would have been pulled over on reasonable suspicion of criminal drug activity, had the traffic violation not occurred. Meanwhile, the police cruiser that Officer Liddy was in boxed the Oldsmobile in between that cruiser and Officer Beaver’s cruiser, so that Dorsey was not free to leave. Liddy testified that Detective Knight had radioed him about the traffic violation prior to Liddy’s arrival.

{¶ 6} Officer Liddy approached the Oldsmobile’s driver’s side and saw the individuals in the car making motions to hide items at their feet. When Officer Liddy made it to the driver’s window, he saw several plastic bags containing a white substance in plain view

at Dorsey's feet. Believing the white substance to be crack cocaine, Officer Liddy ordered Dorsey out of the car. Officer Beavers took Dorsey to the back of his police cruiser, where he informed Dorsey of his Miranda rights. While Officer Beavers took Dorsey into custody, Officer Liddy seized the bags containing the white substance and did a field analysis, confirming that the substance was crack cocaine.

{¶ 7} Officer Beavers did not do any questioning of Dorsey, but surrendered Dorsey to Detective Knight for questioning. Officer Beavers did not issue a traffic citation for the failure to signal; he testified that he believed that Dorsey was not cited because of his cooperation while being questioned by Detective Knight.

{¶ 8} Dorsey moved to suppress the evidence found as a result of the stop, contending that the stop was illegal, due to lack of reasonable, articulable suspicion. At the hearing on the motion, the State presented testimony from the three police officers, which included testimony that the traffic violation was a basis for the stop, as well as testimony that Dorsey would have been stopped anyway, even without the traffic violation. The particular section of the Dayton Code of General Ordinances that Dorsey was alleged to have violated was not cited. Officer Beavers was able to recite the code, when asked, but he was unable to recall the particular section without his clipboard.

{¶ 9} The trial court issued a written decision granting Dorsey's motion to suppress, finding that a single "flagging" motion, without more, is insufficient to give rise to a reasonable, articulable suspicion of criminal drug activity. The trial court's decision did not address the alleged traffic violation, other than by noting, in its recitation of facts, that Dorsey had pulled away from the curb without signaling.

{¶ 10} The State appeals from the suppression order.

## II

{¶ 11} The State's sole assignment of error is as follows:

{¶ 12} "THE TRIAL COURT ERRED IN APPLYING THE FACTS OF THE CASE TO THE APPLICABLE LAW, IN THAT THE COURT FAILED TO CONSIDER THAT DORSEY COMMITTED A TRAFFIC VIOLATION WHICH JUSTIFIED THE STOP."

{¶ 13} The State argues that the trial court failed to consider the traffic violation, which was a sufficient basis for the stop, and that the motion to suppress evidence resulting from the stop should have been denied.

{¶ 14} We have held that in reviewing, "a motion to suppress, the trial court assumes the role of the trier of fact, and, as such, is in the best position to resolve questions of fact and evaluate the credibility of the witnesses. *State v. Clay* (1972), 34 Ohio St.2d 250, 63 O.O.2d 391, 298 N.E.2d 137. Accordingly, in our review, we are bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting those facts as true, we must independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the applicable legal standard." *State v. Retherford* (1994), 93 Ohio App.3d 586, 592.

{¶ 15} The trial court did not consider the traffic violation in its analysis of the validity of the stop. The trial court's decision to grant Dorsey's motion to suppress was based on the reasonable suspicion standard put forth in *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868.

{¶ 16} The Supreme Court of Ohio has held that when a police officer stops a vehicle with probable cause that a traffic violation has occurred, or is occurring, there is no violation

of the Fourth Amendment to the United States Constitution. *State v. Mays*, 119 Ohio St.3d 406, 411, 2008-Ohio-4539. A traffic violation is sufficient justification to stop a vehicle, even if the officer has some ulterior motive for making the stop, including, for example, a legally insufficient suspicion that more nefarious criminal activity is taking place, or has taken place. *Id.* The fact that a traffic violation is merely a pretextual basis for a stop is immaterial, so long as a police officer having the information available to the stopping officer would, in fact, be justified in making a traffic stop. *Whren v. United States* (1996), 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89; *Dayton v. Erickson* (1996), 76 Ohio St.3d 3.

{¶ 17} Dorsey's failure to signal before pulling away from the curb was testified to by all of the police officers who testified. Officer Liddy testified that Detective Knight radioed that the violation took place; Officer Beavers testified to witnessing the violation and pulling Dorsey over for the violation; Officer Knight testified to witnessing Dorsey pull away from the curb without signaling, and that several cars passed by while the Oldsmobile was parked at the curb. Although the particular number of the ordinance specifying the violation was never cited, Officer Beavers testified that there was a Dayton City ordinance requiring a motorist to signal before pulling into the line of traffic. The ordinance described by the testimony of the Officers is R.C.G.O. 72.05, which states that, "any vehicle attempting to re-enter traffic while halted parallel or diagonal with the curb shall yield the right-of-way to oncoming traffic in the street approaching from the rear. The parked vehicle shall proceed into the line of traffic only after the driver has given the appropriate signal which indicates his intention of turning from the curb and into the line of traffic. The vehicle shall in no event enter the line of traffic until the driver has ascertained that no hazard exists." To make out a violation of this ordinance, it

must be established that there was actual traffic approaching from the rear of the vehicle that pulled away from the curb without signaling. *State v. Davidson*, Montgomery App. No. 22442, 2009-Ohio-2319, ¶¶ 17-18.

{¶ 18} One of the police officers involved in the stop, Chad Knight, testified that “there was traffic in the area when he [Dorsey] failed to signal.” The trial court found that: “He [Dorsey] began to pull away from the curb while failing to use his turn signal.” But the trial court made no finding whether, when Dorsey pulled away from the curb without signaling, there was a line of traffic into which he was entering. Because we regard that fact as crucial to the State’s argument that a traffic stop was justified, this cause must be remanded for a finding of fact on that issue.

{¶ 19} No ticket was issued to Dorsey for the traffic violation to indicate the specific traffic violation. The lack of citation distinguishes this case from *State v. Brewer* (November 5, 1999), Montgomery App. No. 17734, a case cited by Dorsey. In *Brewer*, there was a citation issued under R.C.G.O. 71.31, which does not apply to a motorist who fails to signal when pulling away from the curb on a residential street. We concluded that the State could not raise R.C.G.O. 72.05 for the first time on appeal.

{¶ 20} In the case before us, the State raised the issue of a traffic violation several times during the course of the hearing. Officer Beavers testified that the reason that Dorsey was pulled over was the traffic violation, but conceded that Dorsey would have been pulled over anyway on suspicion of criminal activity. It is true, as Dorsey notes, that the State did not argue in the trial court that the stop was justified by the traffic violation. But neither party orally argued the motion at the conclusion of the hearing, oral argument was not requested or

invited, neither party submitted a post-hearing brief, and neither party was requested or invited to submit a post-hearing brief. Under these circumstances, we cannot find that the State waived an argument in opposition to the motion that was presented by the evidence submitted at the hearing. Otherwise, we would have to find that both parties waived all arguments that could be made for or against the motion.

{¶ 21} The State’s sole assignment of error is sustained, in part.

III

{¶ 22} The State’s sole assignment of error having been sustained, in part, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings consistent with this opinion, which shall include a finding of fact whether there was a line of traffic into which Dorsey was entering when he pulled away from the curb without signaling.

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GRADY, P.J., and DONOVAN, J., concur.

Copies mailed to:

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