

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
HARRISON COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

DAVID L. WILLIAMS, JR.,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 HA 0005

Motion to Certify a Conflict

BEFORE:

Gene Donofrio, Carol Ann Robb, David A. D'Apolito, Judges.

JUDGMENT:

Motion Denied

Atty. T. Beetham, Prosecutor and *Atty. Jack Felgenhauer*, Assistant Prosecutor, 111 West Warren Street, P.O. Box 248, Cadiz, Ohio 43907, for Plaintiff-Appellee, and

Atty. James Ong, Connolly, Hillyer & Ong, 201 N. Main Street, P.O. Box 272, Uhrichsville, Ohio 44683, for Defendant-Appellant.

Dated:
January 29, 2020

PER CURIAM.

{¶1} Plaintiff-appellee, the State of Ohio, has filed a motion asking this court to certify a conflict to the Ohio Supreme Court between this Court’s judgment in *State v. Williams*, 7th Dist. Harrison No. 19 HA 0005, 2019-Ohio-5064, and the First District’s judgment in *State v. Newell*, 1st Dist. Hamilton No. C-160453, 2017-Ohio-4143.

{¶2} A court of appeals shall certify a conflict when its judgment is in conflict with the judgment pronounced upon the same question by any other court of appeals in the State of Ohio. Section 3(B)(4), Article V, Ohio Constitution.

{¶3} In order to certify a conflict to the Ohio Supreme Court, we must find that three conditions are met:

First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be “upon the same question.” Second, the alleged conflict must be on a rule of law-not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals.

Whitelock v. Gilbane Bldg. Co., 66 Ohio St.3d 594, 596, 613 N.E.2d 1032 (1993). (Emphasis sic.)

{¶4} Moreover, a motion to certify a conflict “shall specify the issue proposed for certification and shall cite the judgment or judgments alleged to be in conflict with the judgment of the court in which the motion is filed.” App.R. 25.

{¶5} The state asserts that the issue in both this case and *Newell* was whether a defendant seeking to suppress evidence based on an alleged warrantless search or seizure has the burden of presenting some evidence beyond the motion to suppress before the burden shifts to the state to show the seizure was valid.

{¶6} In this case, we determined that appellant’s motion to suppress was sufficiently particular to put the state on notice of the nature of his challenge and,

therefore, to shift the burden from appellant to the state to put forth evidence of probable cause to arrest for operating a vehicle while impaired.

{¶7} In *Newell*, Newell filed a motion to suppress evidence collected after what she alleged was an unconstitutional warrantless search and seizure and any oral statements in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct.1602, 16 L.Ed.2d 694 (1966). *Newell* at ¶ 12. The trial court granted the motion finding that the motion shifted the burden to the state to show that it followed the proper procedures. *Id.* at ¶ 6. The state appealed arguing Newell failed to meet her burden of production. *Id.* at ¶ 7. On appeal, the First District relied on the Ohio Supreme Court's decision in *Xenia v. Wallace*, 37 Ohio St.3d 216, 218, 524 N.E.2d 889 (1998). It held that to suppress evidence obtained during a warrantless search or seizure, the defendant must:

(1) demonstrate the lack of a warrant, and (2) raise the grounds upon which the validity of the search or seizure is challenged in such a manner as to give the prosecutor notice of the basis for the challenge. Once a defendant has demonstrated a warrantless search or seizure and adequately clarified that the ground upon which he challenges its legality is lack of probable cause, the prosecutor bears the burden of proof, including the burden of going forward with evidence, on the issue of whether probable cause existed for the search or seizure.

Id. at ¶ 13, citing *Xenia* at 219.

{¶8} The First District found that Newell failed to present any evidence demonstrating that the police had made a warrantless seizure and failed to present any evidence that she was in custody when she allegedly made the statements at issue. *Id.* at ¶ 18. Therefore, the court found Newell failed to meet her initial burden of production to show that her seizure was warrantless or that her statements were the result of a custodial interrogation. *Id.* Thus, it concluded the burden never shifted to the state and trial court erred in granting the suppression motion. *Id.*

{¶9} In the case at bar, however, appellant alleged in his motion to suppress that: (1) there was no lawful cause to detain him and there was no probable cause to arrest him; (2) the deputy lacked probable cause to approach appellant's stopped vehicle

because the vehicle had two working headlights; (3) the deputy failed to conduct any field sobriety tests; (4) the deputy obtained a statement from him in violation of his right against self-incrimination and his right to counsel; (5) the deputy lacked sufficient basis to determine that appellant operated his vehicle while impaired; and (6) the deputy lacked a sufficient basis to establish a chronology of events that appellant was under the influence while operating his vehicle. Opinion at ¶ 16. Appellant went on to argue that the deputy did not have cause to stop and detain him, that his vehicle was legally parked alongside the road when the deputy approached him. Opinion at ¶ 17.

{¶10} Significantly, in *Newell*, there was no mention whatsoever of *any* facts in the motion to suppress, let alone sufficiently particular facts, that would have put the prosecutor on notice of the basis of Newell’s challenge. On this basis, the two cases are distinguishable.

{¶11} Because our Opinion is not in conflict with *Newell* upon the same question of law and is distinguishable on its facts, the state’s motion to certify a conflict is overruled.

JUDGE GENE DONOFRIO

JUDGE CAROL ANN ROBB

JUDGE DAVID A. D’APOLITO

NOTICE TO COUNSEL

This document constitutes a final judgment entry.