

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 16AP-447
 : (C.P.C. No. 15CR-2449)
 James H. Green, : (ACCELERATED CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on December 22, 2016

On brief: *Ron O'Brien*, Prosecuting Attorney, and
Barbara A. Farnbacher, for appellee.

On brief: *W. Joseph Edwards*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, P.J.

{¶ 1} Defendant-appellant, James H. Green, appeals from the June 14, 2016 judgment of the Franklin County Court of Common Pleas convicting him of one count of improper handling of a firearm, in violation of R.C. 2923.16, a felony of the fourth degree, and two counts of possessing dangerous ordinance, in violation of R.C. 2923.17, felonies of the fifth degree. For the following reasons, we affirm.

I. Facts and Procedural History

{¶ 2} On February 6, 2015, at approximately 4:40 a.m., Columbus Police Officers Dorsey and Kerns observed appellant's car parked on Highland Avenue near Stafford and Union Avenues in the city of Columbus. Officer Dorsey testified that the neighborhood was well known to the officers for the high volume of narcotics-related and shots-fired complaints. Initially, the officers observed appellant speaking with a person who was

standing outside the car. The officers then observed appellant travel in reverse, the wrong way, down Highland Avenue. As officers approached the vehicle in their cruiser, appellant changed direction. Officer Dorsey testified "the defendant didn't use a turn signal when he pulled to the curb, and he was still a fair distance away from the curb, and then very quickly he did not signal and continued northbound to go on Highland Avenue, and then he turned to turn to head westbound in an alley just south of Sullivan. Again, he did use his turn signal this time, but he didn't signal within 100 feet." (Feb. 25, 2016 Tr. at 9.) Officer Dorsey further testified that appellant made a series of erratic movements as he travelled through the alley.

{¶ 3} Officer Dorsey testified the officers "initiated our overhead lights and attempted to stop the defendant's vehicle. He did not stop right away. I believe we used our siren a couple of times. The defendant took what I would consider an unusual amount of time to stop. Most people pull over pretty quickly." (Feb. 25, 2016 Tr. at 10-11.) The officers observed appellant looking back at them while he was driving. When appellant did pull over, the officers observed him moving around the vehicle as if he was trying to "duck down out of view" and place something on the ground or under the passenger seat. (Feb. 25, 2016 Tr. at 11.) Officer Dorsey testified that the unusual length of time appellant took to stop, and his furtive movements struck them as unusual. The officers approached appellant's vehicle but, before they arrived, appellant tried to exit his vehicle. Officer Kerns was able to secure appellant at that time. Officer Dorsey then observed in the passenger compartment of the rear seat, what was later determined to be a Stag Arms 15 assault rifle with 95 live .223 caliber rounds in a 100-round drum magazine. Attached to the rifle was an oil can that was used for muffling sound. The weapon was operable. Officer Dorsey testified the weapon was within arms reach of appellant and, therefore, was readily accessible to appellant.

{¶ 4} The officers charged appellant with one count of improper handling of a firearm, in violation of R.C. 2923.16, a felony of the fourth degree, and two counts of unlawful possession of dangerous ordinance, in violation of R.C. 2923.17, felonies of the fifth degree. Appellant filed a motion to suppress. The court held a hearing on the motion to suppress and ultimately denied the motion. Appellant then entered no contest pleas to all three counts. The court accepted appellant's pleas and sentenced him to 24 months of

community control and informed appellant that, if he violated the terms of community control, he would receive a prison term of 12 months on Count 1 concurrent to 6 months on Count 2 concurrent to 6 months on Count 3.

II. Assignment of Error

{¶ 5} Appellant timely appealed and set forth the following sole assignment of error:

THE TRIAL COURT ERRED WHEN IT OVERRULED APPELLANT'S MOTION TO SUPPRESS EVIDENCE THEREBY VIOLATING HIS RIGHTS UNDER THE OHIO AND FEDERAL CONSTITUTIONS.

III. Discussion of Law of Seizure

{¶ 6} "The Fourth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, and Section 14, Article I of the Ohio Constitution, protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' " *State v. Ford*, 10th Dist. No. 07AP-803, 2008-Ohio-4373, ¶ 19, quoting Article I, Section 14 of the Ohio Constitution. "Searches and seizures conducted without a warrant are per se unreasonable unless they come within one of the 'few specifically established and well delineated exceptions.'" " *Id.*, quoting *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993), quoting *Thompson v. Louisiana*, 469 U.S. 17, 20 (1984). Those seeking exemption from the warrant requirement bear the burden of establishing the applicability of one of the recognized exceptions. *State v. Lowry*, 4th Dist. No. 96CA2259 (June 17, 1997), citing *United States v. Jeffers*, 342 U.S. 48, 51 (1951). The burden of proof on this issue is that of a "preponderance of the evidence." *State v. Simon*, 119 Ohio App.3d 484, 487 (9th Dist.1997), citing *State v. Baker*, 87 Ohio App.3d 186, 192 (1st Dist.1993).

{¶ 7} An investigative stop by a police officer is one of the common exceptions to the Fourth Amendment warrant requirement. *Terry v. Ohio*, 392 U.S. 1, 20-22 (1968). To justify a brief investigative stop or detention of an individual pursuant to *Terry*, a police officer must be able to cite specific and articulable facts which, taken together with rational inferences derived from those facts, give rise to a reasonable suspicion that the individual is engaged or about to be engaged in criminal activity. *State v. Williams*, 51 Ohio St.3d 58, 60-61 (1990). " 'Reasonable suspicion' has been described as 'requiring

more than an inchoate suspicion or a "hunch," but less than the heightened level of certainty required for probable cause.' " *State v. Parrish*, 10th Dist. No. 01AP-832, 2002-Ohio-3275, ¶ 16, quoting *State v. Seals*, 11th Dist. No. 98-L-206 (Dec. 30, 1999), citing *State v. Shepherd*, 122 Ohio App.3d 358, 364 (2d Dist.1997). "The propriety of an investigative stop by a police officer must be viewed in light of the totality of the surrounding circumstances." *State v. Freeman*, 64 Ohio St.2d 291 (1980), paragraph one of the syllabus. "[T]he circumstances surrounding the stop must 'be viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training.' " *State v. Bobo*, 37 Ohio St.3d 177, 179 (1988), quoting *United States v. Hall*, 525 F.2d 857, 859 (C.A.D.C.1976).

{¶ 8} "The United States Supreme Court has stated that a traffic stop is constitutionally valid if an officer has a reasonable and articulable suspicion that a motorist has committed, is committing, or is about to commit a crime." *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, ¶ 7, citing *Delaware v. Prouse*, 440 U.S. 648, 663 (1979). "[I]f an officer's decision to stop a motorist for a criminal violation, including a traffic violation, is prompted by a reasonable and articulable suspicion considering all the circumstances, then the stop is constitutionally valid." *Id.* at ¶ 8. "Reasonable suspicion exists in traffic stops where a police officer has observed a traffic violation." *State v. Garnett*, 10th Dist. No. 09AP-1149, 2010-Ohio-5865, ¶ 15, citing *Columbus v. Dials*, 10th Dist. No. 04AP-1099, 2005-Ohio-6305, ¶ 21. "[T]raffic stops based on observation by a police officer of a traffic violation are constitutionally permissible." *Garnett* at ¶ 15, citing *Dayton v. Erickson*, 76 Ohio St.3d 3, 11-12 (1996).

IV. Application of Law to the Facts of this Case

{¶ 9} "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. "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." *Id.*, citing *State v. Mills*, 62 Ohio St.3d 357, 366 (1992). Accordingly, an appellate court must defer to the trial court's findings of fact so long as they are supported by competent, credible evidence. *Id.* However, an appellate court reviews de novo

whether the trial court's conclusions of law, based on those findings of fact, are correct. *Id.*, citing *State v. McNamara*, 124 Ohio App.3d 706 (4th Dist.1997).

{¶ 10} Appellant argues he did not, in fact, commit any of the traffic violations testified to by Officer Dorsey. Appellant testified that he was speaking with a friend outside his friend's home when his vehicle got stuck in snow ruts. Appellant testified it was "significantly hard to get out [of the snow rut] because there was a lump behind me and in front of me, so the tires were spinning. So I had to kind of reverse and go forward and rock it a couple of times to get over the rut." (Feb. 25, 2016 Tr. at 41-42.) Appellant argues that Columbus City Code Section 2131.13(a) does not require drivers to use their hazard lights as they back up, only to exercise reasonable safety and give ample warning while backing. Appellant further argues that the cruiser dash-cam video shows that appellant did in fact use his signal within 100 feet of turning left into the alley, in accordance with Columbus City Code Section 2131.14(a). Finally, appellant argues that because he did not commit the traffic violations, the court erred and violated his constitutional rights when it denied his motion to suppress evidence.

{¶ 11} The trial court found, however, the following:

[T]he officers had a reasonable suspicion that Defendant had violated Section 2131.13(a) as he attempted to maneuver his car from the lane where it was parked into the lane of travel. The evidence shows that Defendant initiated two distinct movements of his parked car in order to get around a van parked directly in front of him and travel north on Highland. First, Defendant had to back his car in order to obtain sufficient space to turn his vehicle to the left into the northbound lane of travel and avoid the parked van. Defendant initiated this backing maneuver in compliance with Section 2131.13(a). There were no parked cars or moving vehicles behind him when Defendant began to back his car. Further the dash-cam videotape shows that Defendant's backup lights came on shortly after the cruiser turned on to Highland a substantial distance to the rear of Defendant's vehicle. However, * * * [b]y the time Defendant had backed his car and come to a stop before moving forward, the cruiser was now in the lane of travel a short distance behind Defendant's car. It was at this point that Defendant's actions gave the officer's [sic] reasonable suspicion of the violation of Section 2131.13(a), as well as Section 2131.14(a).

Instead of stopping and waiting for the cruiser to safely pass by his vehicle, Defendant immediately began moving forward, initially toward the curb, before turning left into the lane of travel without signaling his intent to move to the left. Based upon these facts, the Court finds that the officers had reasonable suspicion that Defendant was violating Section 2131.14(a) by starting to move forward and to the left without ascertaining that such movement could be made with safety or yielding the right-of-way to the moving cruiser. * * * Moreover, Defendant failed to give ample warning of his intended movement to the left from the lane where he had been parked into the lane of travel to his left. No left turn signal was activated before Defendant turned his vehicle to the left into the lane of travel.

[T]he Court [further] agrees, the officers had reasonable suspicion that Defendant failed to give a continuous signal "during not less than the last one hundred (100) feet traveled by [Defendant's] vehicle before turning" left into an alley as required by Section 2131.14(a).

* * *

[I]t is clear * * * from the dash-cam tape that Defendant activated his left turn signal only a few feet before turning left into the alley. Therefore, it is apparent from the officers' point of view that at the time they initiated the traffic stop, they had a reasonable suspicion Defendant was violating Section 2131.14(a) as he turned left into the alley.

(May 24, 2016 Entry at 5-7.) The court concluded the officers legally stopped appellant for suspected traffic violations and that during the traffic stop, the officers found the evidence that defendant seeks to suppress in plain view. The court denied the motion to suppress.

{¶ 12} Section 2131.13(a) of the Columbus City Code states:

No person shall start a vehicle that is stopped, standing, or parked until such movement can be made with reasonable safety and so as to yield the right-of-way to moving vehicles.

Before backing, operators of vehicles shall not move unless such movement can be made with reasonable safety and without interfering with other traffic and shall give ample warning, and while backing they shall exercise vigilance not to injure persons or property on the street or highway.

{¶ 13} Section 2131.14(a) of the Columbus City Code states:

No person shall turn a vehicle or move right or left upon a street or highway unless and until such person has exercised due care to ascertain that the movement can be made with reasonable safety nor without giving an appropriate signal in the manner hereinafter provided.

When required, a signal of intention to turn or move right or left shall be given continuously during not less than the last one hundred (100) feet traveled by the vehicle before turning
* * *.

{¶ 14} We have viewed State's exhibit A, the cruiser dash-cam video, and considered the testimonies of Officer Dorsey and appellant. We find the trial court's findings of fact excerpted above are supported by competent, credible evidence. Therefore, we defer to the trial court's findings. We further find, de novo, having considered Columbus City Code Sections 2131.13(a) and 2131.14(a), and the law of seizure, the trial court appropriately concluded that the officers had reasonable suspicion and were justified in stopping appellant. Accordingly, the trial court properly concluded that the seizure of appellant did not violate appellant's constitutional rights. The trial court did not err in overruling appellant's motion to suppress evidence.

V. Conclusion

{¶ 15} For the foregoing reasons, appellant's sole assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

TYACK and BROWN, JJ., concur.
