[Cite as *State v. Hill*, 2006-Ohio-6118.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellant	:	C.A. Case No. 21604
v.	:	T.C. Case No. 05-CR-4636
TARUS T. HILL	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellee	:	

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O P I N I O N

Rendered on the 17th day of November, 2006.

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PER CURIAM:

{¶ 1} The Montgomery County Common Pleas Court granted Defendant-Appellee's Motion to Suppress evidence procured in a vehicle stop and pat down. The State appeals assigning a single error:

THE TRIAL COURT ERRED WHEN IT SUSTAINED HILL'S MOTION TO SUPPRESS EVIDENCE

{¶ 2} Defendant-appellee was arrested on one count of trafficking in marijuana, a felony of the fifth degree. Following his plea of not guilty, and release on personal recognizance, he filed a Motion to Suppress the evidence obtained at the scene of the antecedent traffic stop.

{¶ 3} Following an evidentiary hearing the trial court granted the motion to suppress. The court favored us with extensive fact findings. The trial court found, inter alia:

{¶ 4} Officer Susan Benge, a sixteen year veteran on the Dayton Police Department, accompanied by her partner was patrolling the area of Dunbar Manor on October 29, 2005 at 7:45 P.M. Dunbar Manor is a housing project with a high level of violence in Dayton.

{¶ 5} Benge observed a vehicle parked in front of a mini-mart on Wisconsin Street. The vehicle had its parking lights on. The windows of the vehicle were tinted 'very dark.' Benge observed a person sitting in the driver's seat.

{¶ 6} In her experience "a vehicle in the area of Dunbar Manor, with its parking lights on, is a vehicle that is dealing drugs." As Benge turned on Wisconsin Street, the vehicle, located on the other side of the boulevard, "pulled off." Benge flipped around and got behind the vehicle. She observed that the tail lights or light "were not illuminated red." She initiated a traffic stop on account of the tail lights not illuminating and the window tint violation. "Officer Benge could not recall if one or both of the tail lights were not illuminating and did not articulate whether the tail lights illuminated white instead of red or whether only one was simply not working. At no time did Officer

Benge issue a ticket for either the tail light or window tint violation. Neither Officer Benge or her partner had a tint meter nor did they otherwise conduct an investigation of the window tint."

{¶ 7} When the officer approached the vehicle the driver had driver's license and insurance card in hand and the window down. Officer Benge smelled a strong odor of marijuana coming from the inside of the vehicle and saw what appeared to be crack cocaine crumbs on the Defendant's lap. Officer Benge testified that she was able to recognize the smell of marijuana from her experience as a police officer in the west side of Dayton for sixteen years and by the fact that she has an allergic reaction when she gets near it.

{¶ 8} Knowing from her experience that "drugs and guns go hand in hand" Officer Benge, concerned for her safety, asked the Defendant to step out of the car so she could perform a pat-down search for weapons. When patting down the Defendant's chest, she felt and heard the crunching of a large baggie in the Defendant's inside coat pocket, at which point the Defendant stated, "this is not my coat." She felt another baggie in the Defendant's jeans pocket, at which point the Defendant stated, "I'll take a ticket for that" indicating that he had less than 100 grams of marijuana. From experience the officer knew the baggies contained marijuana. She retrieved several small baggies of marijuana individually packaged for sale. Benge then arrested the Defendant and searched the vehicle discovering a loaded handgun, marijuana, and a bag of pills.

{¶ 9} The Defendant-Appellee testified at the hearing. As to his testimony:

{¶ 10} He claims he was getting lottery tickets inside the mini-mart, saw the police vehicle when he was coming out of the store, then got into his car and drove away. He did not know what coat he was wearing, but it was not his. There was nothing wrong with his tail lights. Nothing was illegal about the window tint. He was not ticketed for either the lights or the tint. (Transcript of Suppression Hearing, pp. 31-32, 34, 40, 42).

{¶ 11} In its analysis the court accurately summarized the legal standards, the burden of proof, and the appropriate presumptions. The court then pronounced its conclusions of law:

{¶ 12} "In this case, Officer Benge initiated a traffic stop on account of tail light and window tint violations. R.C.4513.05 and Ohio Adm. Code 4501:2-1-09(D) require only that a vehicle be equipped with one tail light emitting a red light. Since Officer Benge could not remember if the Defendant's vehicle had one or none of its tail lights emitting a red light, the state has failed to demonstrate a sufficient basis to stop the Defendant's vehicle due to a tail light violation."

{¶ 13} The court then identifies the law regarding tinting and concluded, "Officer Benge did not test the light transmittance of the Defendant's vehicle's windows nor did she have the ability to do so…Officer Benge lacked probable cause and was unable to point to specific and articulable facts, which provide a particularized and objective basis for suspecting a window tint violation."

{¶ 14} Finally the court states, "Last, Officer Benge testified that, in her

experience, a vehicle in the area of Dunbar Manor, a violent housing project, with its parking lights on, is a vehicle that is dealing drugs. This information taken together with the facts that the vehicle had tinted windows (although not dark enough to raise a reasonable suspicion of a tint violation, as explained above) and that Defendant was sitting in the driver's seat are not sufficient when viewed in the totality of the circumstances, to support the suspicion that Defendant was engaged in criminal activity. The Court believes Officer Benge's level of suspicion was more akin to a hunch than it was to the suspicion needed to justify the stop."

{¶ 15} We find no abuse of discretion in the considered judgment of the trial court and overrule the assignment of error.

{¶ 16} THE JUDGMENT OF THE MONTGOMERY COUNTY COURT OF COMMON PLEAS IS AFFIRMED.

WOLFF and DONOVAN, JJ., concur.
MILLIGAN, V.J., dissents.

Milligan, V.J., dissents:

{¶ 17} I respectfully dissent. The trial court decision is not the result of an abuse of discretion, it is contrary to law. My reasons follow.

{¶ 18} In this case the trial court fully and adequately explained the applicable constitutional law questions as to a law enforcement stop of a motor vehicle. In appellate review of the trial court findings and judgment, we defer to its fact findings to the extent they are supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 621 N.E.2d 726. If we find the facts so supported we

review de novo the court's conclusion of law, based on such facts. I conclude that upon the found, supported facts the conclusion of law is contrary to law.

{¶ 19} Law officers are charged by law with a plethora of duties which include the prevention of crime, enforcement of laws, and the preservation of peace and the preservation of public safety and protection. See *State v. Hyde* (1971), 26 Ohio App.2d 32, 55 O.O.2d 52, 268 N.E.2d 810, and R.C. 737.11. The Fourth Amendment, in both the federal and state contexts, calls for a delicate balancing between the liberty and freedom of persons and the protection of society in the enforcement of criminal laws. Courts give priority to liberty and freedom in that balance. And rightly so. But when the balance is skewed by systematic pretext in the enforcement of the criminal laws we need to take another look.

{¶ 20} It was the U.S. Supreme Court in the 1960's that determined the Fourth Amendment extended to state criminal proceedings, and it has been recognized since that federal decisions on these matters establish a floor below which states, and their courts, may not go in monitoring criminal cases for compliance. See *Mapp v. Ohio* (1961), 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, (the Warren Court); *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35, 616 N.E.2d 163.

{¶ 21} The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated. U.S. Constitution, Fourth Amendment, Art. I, Section 14. The Ohio Constitution, Art. I, Sec. 14 contains precisely the same language as the Fourth U.S. Amendment.

{¶ 22} The exclusionary rule addressed in a motion to suppress is not a rule of

constitutional proportions; it is a rule of evidence designed to hopefully impact police officer violations of a person's constitutional, U.S. Constitutional, Fourth Amendment rights. As readily recognized by the U.S. Supreme Court at the time of its adoption, the constitutional prohibition is against unreasonable search and seizure. Contraband and/or persons seized as a consequence of a search and seizure may be highly relevant to the merits of a criminal case.[1] The remedy for unreasonable search and seizure could have been discipline of the police officer, or civil liability for the violation of rights.

{¶ 23} Justice William Douglas addressed these options in *Mapp v. Ohio* (1961), 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081:

{¶ 24} "When we allowed States to give constitutional sanction to the 'shabby business' of unlawful entry into a home (to use an expression of Mr. Justice Murphy, *Wolf v. Colorado*, 388 U.S. at 46), we did indeed rob the Fourth Amendment of much meaningful force. There are, of course, other theoretical remedies. One is disciplinary

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[1] "I am still not persuaded that the Fourth Amendment, standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized from him in violation of its commands. For the Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence, and I am extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures. Reflection on the problem, however, in the light of cases coming before the Court since Wolf, has led me to conclude that when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule." *Mapp,* Justice Hugo Black, concurring, at 661-662.

action within the hierarchy of the police system, including prosecution of the police officer for a crime. Yet, as Mr. Justice Murphy said in *Wolf v. Colorado*, 388 U.S. at 42, 'Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered.' The only remaining remedy, if exclusion of the evidence is not required, is an action of trespass by the homeowner against the offending officer. Mr. Justice Murphy showed how onerous and difficult it would be for the citizen to maintain that action and how meager the relief even if the citizen prevails. 338 U.S. 42 -44. The truth is that trespass actions against officers who make unlawful searches and seizures are mainly illusory remedies." *Mapp,* supra, at 670.

{¶ 25} Fifty years of experience has demonstrated that the exclusionary rule has not significantly reduced the number of cases where suppression motions are filed.[2] What it has done, as "political correctness" demonstrates, is thrust law enforcement into the paradoxical position of testifying as to a pretextual rationale for stop and search, instead of the real truth. "Profiling" has become an abhorrent concept the public has been taught to avoid at all cost, even the truth. Yet, upon reflection, it is also clear that much conduct in the public arena is preceded by an understanding, based often on common experience, that under certain circumstances predicable

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[2] *Mapp,* supra; *Terry v. Ohio*(1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, and their progeny.

consequences naturally and often follow.[3] As in the case at bar the testimony about the tinted windows and/or the faulty taillight is a smoke screen designed to leapfrog the stop, arrest, and seizure out of and beyond the reach of the exclusionary rule.

{¶ 26} In the determination of an officer's conduct, vis-à-vis constitutional proscriptions, the judicial examination requires that the conduct be examined from an objective perspective – not what this officer thought and believed, but what a reasonable officer, with the same background and experience would think and believe. *State v. Edwards* (1992), 80 Ohio App.3d 319, 609N.E.2d 200; *State v. Andrews* (1991), 57 Ohio St.3d 86, 565 N.E.2d 1271.

{¶ 27} Putting on the mind of a reasonable police officer requires a sequential understanding of observations and events and their composite meaning. Perception of reality is seldom a sudden, immediate reaction. Rather it is sequential both in observation and events, and in mental persuasion. This case is another good example of how sequential analysis from simply doing the job to having objective probable cause to arrest and detain should work.

{¶ 28} In most cases a trained officer, as a consequence of what he or she sees or hears, will begin with a hunch or a question, "is something untoward going on here?" Such thought may mature into a suspicion, under all the circumstances, that what is seen or heard is not right; leading to a thought that it may be dangerous or

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[3] Does not profiling lead to the current police practice of random stops of vehicles in the late night in areas where there are numerous liquor establishments and where persons are often seen leaving in a state of intoxication? And the "exigent circumstances" exception to the exclusionary rule is grounded in profiling.

illegal; leading to "it is suspicious;" leading to "it is sufficiently suspicious that, under all of what I know now, I can articulate a suspicion;" leading to a determination to initiate a minimally invasive step of stopping the vehicle or person; leading to an objective determination based on experience, training, and observation that there is probable cause to believe some crime is being, or has been, committed. To the reasonable officer the path to probable cause can end at any step in the outlined mental process. And if the officer continues to make the arrest it will violate the Fourth Amendment to the U.S. Constitution.

{¶ 29} I believe that this is precisely what happened in this case, based upon the "facts" as enumerated by the trial court, and the sequential events leading to the arrest. A reasonable Dayton police officer, with 16 years experience and familiar with the area in question, would have a "hunch" that something untoward might be happening when he or she saw a vehicle parked with its parking lights on in that neighborhood.[4] That hunch would reasonably ripen into a suspicion that all is not right with that vehicle. The observation that the car had tinted glass and was occupied by a single person in the driver's seat would reasonably ripen into an articulable suspicion that drug activity was involved.

{¶ 30} Such an articulable suspicion justifies a minimally invasive vehicle stop.

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[4] "Q: In your experience as a police officer, did that (vehicle parked on Wisconsin Street with parking lights on and windows tinted very dark and someone seated in that vehicle) indicate anything to you? A: (Officer Benge) Yes, it does. Wisconsin Street is a street that runs right alongside of Dunbar Manor, which is a very violent housing project. And it's been our experience that the vehicle with the parking lights on is the vehicle that's dealing drugs." (Transcript of Suppression Hearing, p. 5).

When as a consequence of the stop the officer smells marijuana (which such officer identifies from training and experience) it a reasonable to conclude that further invasion of privacy is warranted. The minimal pat-down revealing what appears to the officer to be contraband is sufficient to trigger the objective conclusion of "reasonable cause to believe" a crime is being, or has been committed.

{¶ 31} It was not necessary in this sequence for the officer to observe a violation of law. The issue of a faulty tail light, or even whether the tinted windows were violative of the statutory provision is irrelevant to the question of what an objective, reasonable police officer, not this specific officer, would have believed. A police officer can be right for the wrong reason in such a circumstance.[5]

{¶ 32} Here, the trial court acted contrary to law when it drew its conclusions of law from the subjective testimony (the articulated belief of the officer) rather than applying an objective analysis to the sequential, factual, evidence. *City of Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 665 N.E.2d 1091.

{¶ 33} We are enjoined to weigh the facts and circumstances through the eyes of a reasonable prudent police officer on the scene, who must react to events as they unfold, giving due weight to the officer's training and experience, and to view the evidence as it would be understood by persons in law enforcement. *State v. Andrews* (1991), 57 Ohio St.3d 86, 5465 N.E.2d 1271. The issue is whether a reasonably

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[5] The proclivity of arresting officers to hang probable cause issues on pretextual observations of law violation is a consequence of the tension law enforcement feels between freely doing their job to the best of their ability and the perceived legal need to identify a criminal violation as a precondition of action.

prudent man or woman in the circumstances involved would be warranted in the belief that his or her safety was at risk. *Terry v. Ohio* (1968), 1968, 392 U.S. 1. If so, the officer may perform a search as a reasonable precaution. *State v. Stewart*, Montgomery App. 19961, 2004-Ohio-1319.

{¶ 34} Although *Stewart* is a stop and pat down case the rationale is equally applicable to the case sub judice. Here the stop was a minimal intrusion incident to operation on the highway. The officer had a right to approach the car and further her investigation. The smell of marijuana justified her in ordering the Appellee out of the car, and conducting a minimally intrusive pat down search. The Appellee's liberty was circumscribed only minimally at that time; and was consistent with the objective belief appropriately ascribed to a reasonable officer.

{¶ 35} The discovery of possession of what she knew to be marijuana justified further intrusion into Appellee's privacy and freedom. And the observed presence of the loaded gun in the car elevated the officer's objective belief to probable cause sufficient to satisfy constitutional and legal standards for arrest and detention.

{¶ 36} I conclude that the trial court erred as a matter of law when it examined the found facts and concluded that the officer did not have probable cause to seize the contraband and arrest and detain the Appellee. I would sustain the Assignment of Error and remand the case to the trial court for further proceedings according to law.

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(Hon. John R. Milligan, retired from the Fifth Appellate District, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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