[Cite as *State v. Green*, 2009-Ohio-2540.]

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2008 CA 104
v.	:	T.C. NO. 08 TRC 06783
JANELL L. GREEN	:	(Criminal Appeal from Fairborn Municipal Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 29th day of May, 2009.

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FROELICH, J.

{¶ 1} Defendant-appellant Janell Green appeals from her conviction for operating a motor vehicle while under the influence of alcohol. Specifically, Green claims that the trial court should have granted her motion to suppress because she was subjected to an unlawful investigatory stop, as she was stopped without reasonable articulable suspicion of criminal activity. Because the stipulated evidence

supported the court's finding of a consensual encounter, we will affirm the judgment of the trial court.

I

{¶ 2} Fairborn Police Officer May was on patrol at 2:43 a.m. on May 29, 2008, when he saw Green driving northbound on North Broad Street. He saw that she "swayed" back and forth between the center line and the curb. Officer May followed Green for several blocks as she continued to "drift" back and forth within her lane. Green pulled into the parking lot of a grocery store, which was closed. She parked her car in front of the store, turned off the lights, and remained in the vehicle. Officer May had continued down North Broad Street, but suspicious of Green's driving combined with the fact that he "considered it unusual" in the early morning hour that she parked in the lot of a closed store and turned off her lights but remained in the car, he made a u-turn and returned to the grocery store. Officer May "pulled in behind" Green and turned on his spotlight and "flashed" it on Green's car.

{¶ 3} As Officer May approached the vehicle, Green opened her door to get out, and Officer May smelled a heavy odor of an alcohol beverage emanating from the car. When the officer advised her of his observations and suspicions, Green told Officer May that she and her friend had just stopped for groceries, and they planned to return to Green's home. Her face was flushed; her eyes were watery and bloodshot with dilated pupils; and her speech was slurred. Green appeared to be intoxicated. What happened next was beyond the scope of the motion to suppress and cannot be determined from the record other than noting that Green was charged with operating a motor vehicle while under the influence of alcohol pursuant to R.C. 4511.19(A)(1)(a)

and refusal to take a chemical test pursuant to R.C. 4511.19(A).

{¶ 4} Green filed a motion to suppress. Rather than present testimony at the hearing on the motion, the parties stipulated to the facts as presented in the first two paragraphs of the police narrative, with the additional stipulations that Officer Mays "flashed" his spotlight on Green's vehicle and that Green "felt she was unable – not allowed to leave." Finding that the contact between Green and Officer May was a consensual encounter, the trial court overruled the motion to suppress. Green pled no contest to driving under the influence; the other charge was dismissed, and the trial court sentenced her accordingly. Green appeals.

II

{¶ 5} Green's First Assignment of Error:

{¶ 6} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT, BECAUSE OFFICER MAY CONDUCTED AN INVESTIGATORY STOP–NOT A CONSENSUAL ENCOUNTER."

{¶ 7} Green's Second Assignment of Error:

{¶ 8} "THE TRIAL COURT ERRED WHEN IT DID NOT SUPPRESS THE UNLAWFUL SEIZURE, BECAUSE OFFICER MAY DID NOT HAVE SUFFICIENT REASONABLE SUSPICION TO STOP GREEN."

{¶ 9} In her two assignments of error, Green presents interrelated arguments challenging the propriety of the contact by the officer. She first maintains that the trial court should have granted her motion to suppress because her encounter with Officer May was an investigatory stop rather than a consensual encounter. Because of this, she also argues that the officer did not have reasonable suspicion to warrant the stop.

We will begin our analysis by considering whether the contact between Officer May and Green was a consensual encounter, because if the encounter were consensual, then the Fourth Amendment is not implicated, and we need not address whether the officer had reasonable articulable suspicion to justify an investigatory stop.

{¶ 10} Officer May testified that he decided to make contact with Green after witnessing her ongoing "drift" combined with seeing her park at 2:45 in the morning in the lot of a closed store and turn off her lights, but remain in the car. Generally, momentary lapses in control usually do not furnish reasonable articulable suspicion of illegal driving. *State v. Weierman*, Montgomery App. No. 18853, 2001-Ohio-7007, citing, e.g., *State v. Elder* (July 25, 1996), Ross App. No. 95CA2165. Modest weaving within one's lane, without more, is insufficient. *State v. Luckert,* Hamilton App. Nos. C-020359, C-070360, C-070361, 2008-Ohio-1441, ¶15 (internal citations omitted).

{¶ 11} However, in a case factually similar to this one, the defendant was stopped for "weaving within his own lane over the course of several blocks" combined with the early morning hour and recent history of DUI arrests in the neighborhood. *State v. Hilleary* (May 24, 1989), Miami App. No. 88-CA-5. Therein we held that the defendant's "erratic driving alone was a sufficient basis for an articulable and reasonable suspicion, justifying an investigative stop to determine the reason for the erratic driving, under the holdings of *Terry* and [*Freeman*]. The officer may have had a duty, morally at least, to investigate the cause of the weaving, in order to protect the public, and even Hilleary, for that matter, against such possible causes as the driver being unduly mentally fatigued or sleepy, or even some mechanical defect of the automobile." Id. See, also, *State v. Leal* (Jan. 15, 1999), Montgomery App. No.

17020.

{¶ 12} Other courts have agreed. In *State v. McCulloch* (May 20, 1988), Wood App. No. WD-87-56, the defendant was stopped for weaving. The court held in *McCulloch* that "[e]rratic driving, in and of itself, is an articulable reason for a police officer to stop a vehicle." Id., citing *State v. Aleshire* (Aug. 5, 1986), Franklin App. No. 85 AP-869. "Weaving, whether within or outside one's lane, is indicative of erratic driving which authorizes the police to stop the vehicle." *Village of Montpelier v. Lyon* (May 1, 1987), Williams App. No. WMS-86-16.

{¶ 13} All this being said, a police officer may approach a person in a public place, ask him for information, ask him for permission to search his belongings, and examine the person's identification without implicating the Fourth Amendment, as long as "the police officer has not, by physical force or a display of authority, restrained the person's liberty such that a reasonable person would not feel free to walk away." *State v. Schott* (May 16, 1997), Darke App. No. 1415, citing *United States v. Mendenhall* (1980), 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497; *Terry v. Ohio* (1968), 392 U.S. 1, 21-2, 88 S.Ct. 1868, 20 L.Ed.2d 889. "Whether a reasonable person would feel free to leave is dependent upon the totality of the circumstances...." Id.

{¶ 14} Green contends that an investigatory stop occurred because Officer May blocked her car and because he turned his spotlight on her vehicle. Officer May approached Green after she had parked her car in front of the closed store, turned off her lights and remained in the car. In most situations, when an officer blocks a driver from leaving, there has been a stop. *State v. Lewis,* Williams App. No. WM-08-009, 179 Ohio App.3d 159, 2008-Ohio-5805, ¶15-16. Furthermore, when an officer pulls up

behind a parked car, turns on its emergency lights, and trains his spotlight on the vehicle, no reasonable person would feel free to leave. See, e.g., *State v. Broom,* Montgomery App. No. 22468, 2008-Ohio-5160, ¶7. See, also, *State v. Cosby*, Montgomery App. No. 22293, 2008-Ohio-3862, where this court found that the activation of a cruiser's overhead lights (albeit for traffic safety concerns) and aiming the white spotlight of the cruiser at the pedestrian defendant constituted a non-consensual stop. Id. ¶15.

{¶ 15} On the other hand, in *United States v. Clements* (C.A. 7, 2008), 552 F.3d 790, the court found no seizure despite the cruiser's pulling 15-20 feet behind the defendant's stopped vehicle and activating the spotlight and flashing red and blue lights. "The police encounter in this case was not a seizure for Fourth Amendment purposes. Clements had voluntarily stopped his car; he did not stop because of the flashing police lights. Likewise, Clements was not seized when the officers approached his car. The officers approached the car to investigate why the car had been parked and running on a public street for four hours, a circumstance unusual enough to at least merit some investigation. The officers illuminated their flashing lights to alert the car's occupants that they were going to approach the vehicle. Without identifying themselves appropriately to the car's occupants, the officers would have put themselves at risk in approaching a parked car late at night. Other than illuminating their flashing lights for identification and safety purposes, the officers did nothing that could have made Clements feel that his freedom was restrained; they did not draw their weapons, they did not surround Clements's car with multiple squad cars or officers or otherwise prevent him from driving away, they did not lay a hand on

Clements, and they did not use forceful language or tone of voice until after the officers felt threatened by Clements's gesture with the knife. Up to this point, the circumstances could not have caused a reasonable person to feel restrained." Id. at 795-796.

{¶ 16} In *United States v. Taylor* (C.A. 1, 2007), 511 F.3d 87, two officers driving an unmarked car pulled into a parking lot in a high-crime area where a group of people were gathered, in order to investigate whether they were dealing drugs. The defendant was seated in his vehicle, and the vehicle was stopped in front of a building served by the parking lot. The officers drove past the defendant's vehicle and pulled to a stop behind it, and then proceeded to walk toward the crowd. As the officers walked past the defendant's vehicle, he began making furtive movements. They asked him to step out, and further developments led to their discovery of a gun inside the vehicle. The First Circuit held that the officers' approach of the defendant's vehicle was not a seizure and that parking behind it as they did did not show Defendant was not free to leave because his vehicle "was not in fact hemmed in from all sides and could have been driven forward and turned left to exit the parking lot." Id. at 92, citing *United States v. Smith* (C.A. 1, 2005), 423 F.3d 25, 30. See, also, *United States v. Angell* (C.A. 8, 1993), 11 F.3d 806, which found no seizure where a deputy, after noticing a vehicle pull up to an unoccupied van at 1:50 a.m., shined his flashlight on the vehicle as it stopped at a stop sign, asked the occupants who they were and where they were going, asked the driver if he had been drinking, and told the vehicle's occupants to "[s]tay there, I want to talk to you", noting the deputy "would probably have been derelict in his duties had he not made such an inquiry." Id. at 807, 810 (abrogated on

other grounds), as cited in *United States v. Barry* (C.A. 8, 2005), 394 F.3d 1070.

{¶ 17} Whether a police-citizen contact is consensual or a seizure is a legal conclusion based on the specific facts. Although many such contacts may result in a subjective belief on the part of the citizen that she should succumb to apparent lawful authority and that a misunderstanding on the part of the citizen could have negative consequences, there is no bright-line spotlight rule.

{¶ 18} At 2:45 in the morning Green had voluntarily pulled off the road into the parking lot of a closed business, turned off her lights and stayed in the car. The officer who had noticed the car's drifting in her lane and observed it park did not effect a "seizure" when he pulled behind the vehicle (the court found "there is no evidence that the cruiser blocked the defendant's car") and flashed his spotlight on the car.

{¶ 19} For these reasons, Green's first assignment of error is overruled, and the second assignment of error is moot.

III

{¶ 20} We will affirm the judgment of the trial court.

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GRADY, J. and WOLFF, J., concur.

(Hon. William H. Wolff, Jr., retired from the Second District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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