

FROELICH, J.

{¶ 1} Pursuant to R.C. 2945.67(A) and Crim.R. 12(K), the State of Ohio appeals the decision of the Montgomery County Court of Common Plea granting Calvin Wilson's motion to suppress. For the following reasons, the trial court's judgment will be affirmed.

I. Facts and Procedural History

{¶ 2} After a suppression hearing, the trial court found the following facts.

{¶ 3} At approximately 10:55 p.m. on October 1, 2016, Dayton Police Officers William Davis and Bryan Camden were driving eastbound in their marked cruiser on Hoover Avenue. The conditions were dark and rainy, and the streets were wet, causing significant glare from the headlights of approaching traffic; the cruiser's windshield wipers were activated. The posted speed limit on Hoover Avenue was 35 miles per hour.

{¶ 4} As the cruiser approached the intersection of Hoover and Elmhurst, Wilson's vehicle (a 2015 Chevy Traverse SUV) turned right from Elmhurst onto Hoover in front of the cruiser. Officer Davis testified that only two or three car lengths separated the vehicles when Wilson pulled out and that he (Davis) "had to hit the [brakes] to avoid running into the rear of [Wilson's] vehicle;" the trial court found this testimony to be not credible. Instead, after a review of the cruiser video, the trial court found that Wilson pulled onto Hoover "no less than 306 feet – or more than eighteen (18) car lengths – in front of the cruiser." The trial court further stated that "[a] slamming on of the cruiser's brakes would necessarily have precipitated a sudden dip of the cruiser's nose – a dip completely absent on the video." Rather, the trial court found that the cruiser "gently decelerated" from a speed of 43 miles per hour to the posted speed limit.

{¶ 5} The cruiser followed Wilson's vehicle to the next intersection, Hoover Avenue

and North Gettysburg Road. Both vehicles stopped in the left turn lane at the traffic light. The officers remarked to each other about the out-of-state license plates on Wilson's vehicle (a rental) and discussed towing Wilson's vehicle. When the traffic light turned green, both vehicles moved forward to turn left onto North Gettysburg. At this juncture (over one and a half minutes after Wilson pulled onto Hoover), the officers engaged in the following exchange, which the trial court concluded was "staged":

Davis: "He pulled out there, pulled right in front of me!"

Camden: "He pulled out in front of us."¹

Davis: "Had to hit the brakes to avoid * * *."

Camden: "Yeah, they had a – a failure to yield."

(Footnote added.) After both vehicles turned onto Gettysburg, the officers initiated a traffic stop due to Wilson's alleged failure to yield.

{¶ 6} The trial court's decision did not detail what occurred during the stop; the decision stated that additional facts were generally unnecessary in light of the court's conclusion that the stop was legally infirm. Officer Davis testified that he approached the driver's side of Wilson's vehicle, while Officer Camden approached on the passenger side. Wilson was the sole occupant. Davis stated that music was playing loudly, and when Wilson rolled down the driver's side window, Officer Davis could "smell marijuana very strongly, and * * * could see smoke coming from the car."

{¶ 7} According to Officer Davis, he introduced himself to Wilson, told Wilson the reason for the stop, and asked Wilson if he had a rental agreement. Davis testified that

¹ We find Officer Camden's response difficult to discern, and we accept the trial court's factual finding regarding this statement.

as Wilson reached over to the glove compartment, he (Davis) noticed in the center console, in plain view, a “wad of cash” in a cup holder and a clear plastic jar of what appeared to be marijuana; the trial court expressly found that the marijuana was not in plain view. Davis further testified that he asked Wilson what was in the center console, and Wilson admitted that it was marijuana. The officers decided to search the vehicle.

{¶ 8} Officer Davis testified that he asked Wilson to step out of the vehicle, and he placed Wilson, without handcuffs, in the cruiser. While Officer Camden conducted a search of Wilson’s vehicle, Officer Davis ran Wilson’s information through the Law Enforcement Automated Database System (LEADS) and conversed with Wilson. After Officer Camden located a firearm between the driver’s seat and the center console, Wilson was arrested for improper handling of a firearm in a motor vehicle. Davis testified that he issued citations for failure to yield and possession of marijuana (a minor misdemeanor).

{¶ 9} Davis testified that he provided *Miranda* warnings to Wilson and that Wilson answered a few questions and then requested an attorney. For reasons that Davis could not explain at the suppression hearing, the *Miranda* warnings and statements by Wilson following those warnings were not recorded on the cruiser video.

{¶ 10} On January 17, 2017, Wilson was indicted for improper handling of a firearm in a motor vehicle, in violation of R.C. 2923.16(B), a fourth-degree felony, and having weapons while under disability, in violation of R.C. 2923.13(A)(2), a third-degree felony. Wilson subsequently moved to suppress the evidence against him. The trial court conducted a hearing on the motion on May 26, 2017, during which Officer Davis was the sole witness.

{¶ 11} On July 25, 2017, the trial court granted Wilson’s motion to suppress. With respect to the basis for the stop, the trial court concluded that the “clearly pretextual stop” was unlawful. It reasoned:

First, the Court finds as **a matter of fact and law** that Defendant did not fail to yield to the cruiser because the cruiser was **not proceeding in a lawful manner**. Rather, the cruiser was itself speeding on a dark, rainy night at low visibility further compromised by road glare. By proceeding in such a reckless manner – and in violation of both state and local law – Ofc. Davis forfeited the preferential status afforded a lawful driver under the right-of-way statute.

Further, Defendant did not pull out two to three car lengths in front of the cruiser causing Ofc. Davis to slam on his breaks. Rather, in pulling onto Hoover, Defendant allowed at least **eighteen (18) car lengths** between his SUV and the cruiser. Indeed, Ofc. Davis merely slowed to the posted speed limit in order to easily maintain his assured clear distance. Simply put, Defendant did not create any hazard by pulling ou[t]; rather, any hazard was caused by the cruiser’s excessive speed under the conditions.

(Emphasis in original.)

{¶ 12} The trial court further found that the good-faith exception to the exclusionary rule did not apply. The trial court expressly found, as a matter of fact, that Davis’s version of the incident was “contrived and synthesized – not mistaken.” The court further stated that, to the extent that Davis was mistaken about his speed, the number of car lengths between the vehicles, or his slamming on his brakes, “the mistakes are unreasonable on

their face and not attributable to any honest misunderstanding of fact or law.” The trial court thus concluded: “The officers observed no specific, articulable facts sufficient to generate reasonable suspicion, for the traffic stop. Thus, the same was **unconstitutional** and therefore the fruits of the search and seizure are **inadmissible** and will be suppressed.” (Emphasis in original.)

{¶ 13} The State appeals from the trial court’s decision.

II. Reasonableness of the Traffic Stop for Failure to Yield

{¶ 14} In its sole assignment of error, the State claims that the “trial court erred when it found that the officers lacked reasonable articulable suspicion to conduct a valid traffic stop and suppressed all evidence as fruit of the poisonous tree.”

{¶ 15} In deciding a motion to suppress, the trial court assumes the role of trier of facts and is in the best position to resolve questions of fact and evaluate the credibility of witnesses. *State v. Pence*, 2d Dist. Clark No. 2013 CA 109, 2014-Ohio-5072, ¶ 7, citing *State v. Hopfer*, 112 Ohio App.3d 521, 548, 679 N.E.2d 321 (2d Dist.1996). The court of appeals must accept the trial court’s findings of fact if they are supported by competent, credible evidence in the record. *State v. Isaac*, 2d Dist. Montgomery No. 20662, 2005-Ohio-3733, ¶ 8, citing *State v. Retherford*, 93 Ohio App.3d 586, 639 N.E.2d 498 (2d Dist.1994). Accepting those facts as true, the appellate court must then determine as a matter of law, without deference to the trial court’s legal conclusion, whether the applicable legal standard is satisfied. *Id.*

{¶ 16} The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Under *Terry*, police officers may briefly stop and/or

temporarily detain individuals in order to investigate possible criminal activity if the officers have a reasonable, articulable suspicion that criminal activity may be afoot, including a minor traffic violation. *Id.*; *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, 894 N.E.2d 1204, ¶ 7-8; *State v. Martin*, 2d Dist. Montgomery No. 20270, 2004-Ohio-2738, ¶ 10, citing *Terry*. A traffic violation gives an officer a reasonable articulable suspicion justifying a traffic stop, notwithstanding that the traffic stop may also have been a pretext to investigate suspected drug activity. *Mays* at ¶ 22; *State v. Wilcox*, 177 Ohio App.3d 609, 2008-Ohio-3856, 895 N.E.2d 597, ¶ 13 (2d Dist.); *State v. Cole*, 2d Dist. Montgomery No. 26576, 2015-Ohio-5295, ¶ 17.

{¶ 17} “ ‘Reasonable, articulable suspicion’ is a ‘less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.’ ” *State v. Fears*, 8th Dist. Cuyahoga No. 94997, 2011-Ohio-930, ¶ 5, citing *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000); *State v. Scott*, 2d Dist. Clark No. 2013 CA 104, 2014-Ohio-4963, ¶ 12. The existence of reasonable suspicion is determined by evaluating the totality of the circumstances, considering those circumstances “through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold.” *State v. Heard*, 2d Dist. Montgomery No. 19323, 2003-Ohio-1047, ¶ 14, quoting *State v. Andrews*, 57 Ohio St.3d 86, 87-88, 565 N.E.2d 1271 (1991).

{¶ 18} On appeal, the State argues that the trial court should not have considered whether Wilson had a defense to the underlying failure-to-yield charge (the officers’ exceeding the speed limit) and, instead, should have focused on whether the officers had a reasonable suspicion to believe that a traffic offense occurred. The State further claims

that the trial court's decision was not based on competent, credible evidence, and thus the trial court's factual findings should not be afforded deference. The State argues that "the trial court's physics calculations are inherently flawed, resulting in the trial court's erroneous determination of facts."

{¶ 19} It is apparent that the trial court's factual findings were based, in large part, on its careful review of the cruiser video. The cruiser video begins at 22:54:04 military time (10:54 p.m. and 4 seconds). As found by the trial court, it was a dark, rainy night, and the cruiser's windshield wipers were on; there was significant glare. When the video begins, the cruiser was traveling eastbound at a speed of 37 mph. Wilson's SUV can be seen at the intersection of Hoover and Elmhurst at 22:54:43, i.e., 39 seconds later; at this juncture, the cruiser was still some distance away and was traveling at 43 mph. The SUV promptly turned onto Hoover (approximately five seconds before the cruiser reached the intersection).² As documented on the video, the cruiser braked for three seconds (22:54:44 to 22:54:47), reducing its speed from 43 mph to 35 mph. Without depressing the brake, the cruiser slowed for another few seconds to 30 mph, and then accelerated up to 42 mph, at which time the cruiser braked again.

{¶ 20} Officer Davis testified that, when Wilson turned in front of him, only two or three car lengths separated the vehicles. From this court's review of the video, there was credible evidence for the trial court's finding that the cruiser braked from 43 mph to

² The trial court found that Wilson turned at 22:54:42, not 22:54:43. As a result, the trial court found that Wilson turned six seconds before the cruiser reached the intersection of Hoover and Elmhurst. The trial court then calculated that the cruiser was 308 feet (35 mph x 1.46667 feet/second x 6 seconds) from the intersection when Wilson turned. Dividing that distance by the length of the SUV, the court concluded that there were 18 car lengths between the cruiser and Wilson's vehicle when Wilson turned onto Hoover.

35 mph and reached the intersection of Hoover and Elmhurst approximately five seconds after Wilson turned. Even without mathematical calculations and regardless of whether it was five or six seconds, it is apparent from the cruiser video that there was significantly more space than Davis claimed in his testimony. Likewise, even without knowing the exact length of the SUV, the video reflects that Davis underestimated the number of car lengths between the vehicles when Wilson turned onto Hoover.

{¶ 21} Although the cruiser applied its brakes when Wilson turned onto Hoover, there is no indication that the cruiser was at risk of hitting the rear of Wilson's vehicle when it (the cruiser) decelerated to 35 mph, the posted speed limit. And, while the video perhaps leaves some room for interpretation, there is competent, credible evidence to support the trial court's factual finding that the officer did not "slam" on his brakes and merely "gently decelerated" to maintain an assured distance from Wilson's vehicle.

{¶ 22} We turn, therefore, to whether the officers had a reasonable articulable suspicion of criminal activity to justify the stop of Wilson's vehicle.

{¶ 23} At the outset, the trial court found that the stop of Wilson's vehicle was pretextual, and it expressed concern that some of the officers' statements suggested racial profiling. The fact that the stop may have been pretextual does not render it unconstitutional. *E.g., Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.E.2d 89 (1996). As the Ohio Supreme Court has stated, "the question whether a Fourth Amendment violation occurred * * * depends upon an objective assessment of the officer's actions at the time of the traffic stop, and not upon the officer's actual (subjective) state of mind." *Dayton v. Erickson*, 76 Ohio St.3d 3, 6, 665 N.E.2d 1091 (1996). And while the United States Constitution "prohibits selective enforcement of the law based on

considerations such as race,” the United States Supreme Court has indicated that “the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.” *Whren* at 813.

{¶ 24} Davis testified, and the trial court found, that the stop was based solely on Wilson’s alleged failure to yield. R.C. 4511.43(A) reads:

Except when directed to proceed by a law enforcement officer, every driver of a vehicle or trackless trolley approaching a stop sign shall stop at a clearly marked stop line, but if none, before entering the crosswalk on the near side of the intersection, or, if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering it. *After having stopped, the driver shall yield the right-of-way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard during the time the driver is moving across or within the intersection or junction of roadways.*

(Emphasis added.) In this context, “right-of-way” means “[t]he right of a vehicle * * * to proceed uninterrupted in a lawful manner in the direction in which it * * * is moving in preference to another vehicle * * * approaching from a different direction into its * * * path.” R.C. 4511.01(UU)(1).

{¶ 25} On this record and with deference to the trial court’s factual findings, we cannot find error in the trial court’s legal conclusion that the officers lacked a reasonable suspicion of criminal activity, namely a violation of R.C. 4511.43(A), to justify the traffic stop. The trial court specifically found that the officers were exceeding the speed limit

when Wilson turned onto Hoover Avenue and that the cruiser merely “gently decelerated” to the posted speed limit after Wilson turned onto the road; there was adequate distance (regardless of the specific number of feet or car lengths) between the cruiser and Wilson. Given the trial court’s findings, which are substantially supported by the record, the officers had no reasonable suspicion that Wilson’s actions created an “immediate hazard” and that he failed to yield when he turned onto Hoover.³ In the absence of a reasonable suspicion of criminal activity, the trial court did not err in suppressing any evidence found as a result of the unlawful stop.

{¶ 26} The State’s assignment of error is overruled.

III. Conclusion

{¶ 27} The trial court’s judgment will be affirmed.

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HALL, P.J. and WELBAUM, J., concur.

Copies mailed to:

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- Hon. Steven K. Dankof

³ The State argues that the trial court erred in finding, as a matter of fact and law, that Wilson did not fail to yield, a matter beyond the scope of a motion to suppress. Whether or not we might agree with the State that the trial court should not have determined the merits of whether Wilson failed to yield, the trial court’s statements in that regard were superfluous considering that the trial court also found that the officers lacked a reasonable articulable suspicion that Wilson failed to yield, which was the proper question before the trial court at the suppression hearing.