**[Cite as *State v. Whitacker*, 2014-Ohio-2220.]**

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

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| State of Ohio | Court of Appeals No. WD-13-061 |
| Appellee | Trial Court No. 13TRC04824 |
| v. | |
| Christine Whitacker | **DECISION AND JUDGMENT** |
| Appellant | Decided: May 23, 2014 |

* * * * *

Matthew L. Reger, Bowling Green City Prosecutor, and
Paul A. Skaff, Assistant Prosecutor, for appellee.

LeAnn R. Schemrich, for appellant.

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**PIETRYKOWSKI, J.**

**{¶ 1}** Defendant-appellant, Christine Whitacker, appeals the August 20, 2013 judgment of the Bowling Green Municipal Court which, following her plea of no contest to operating a vehicle under the influence of alcohol or drugs and endangering children, was sentenced, respectively, to 33 days in jail with 30 suspended, and 180 days in jail

with 160 suspended and was placed on probation for one year. Because we find that the trial court erred when it denied appellant's motion to suppress, we reverse.

**{¶ 2}** The relevant facts are as follows. On July 3, 2013, appellant was charged with operating a vehicle under the influence of alcohol or drugs ("OVI"), R.C. 4511.19(A)(1)(a), operating a vehicle under the influence prohibited alcohol content, R.C. 4511.19(A)(1)(b), child restraint violation, R.C. 4511.81, and endangering children, R.C. 2919.22. At her July 17, 2013 appearance she entered not guilty pleas to the charges.

**{¶ 3}** On July 24, 2013, appellant filed a motion to suppress all evidence recovered as a result of her warrantless seizure. Appellant argued that the anonymous tip received by police was not sufficient to support a reasonable suspicion basis for the stop. On August 16, 2013, a hearing on the motion was held and the following evidence was presented.

**{¶ 4}** Bowling Green Police Officer Jason Broshious testified that on July 3, 2013, he was on-duty in a marked police cruiser when dispatch put out a call that an individual had telephoned the police department and stated that there were intoxicated females with children in a red vehicle behind Checker's Bar in Bowling Green, Ohio. Officer Broshious stated that he approached the bar's back parking lot from the alley and observed two vehicles in the lot; one was gray and parked by the back door and one was red and driving east in the lot, approaching the alley. Broshious stated that he observed that there were two women in the vehicle and some children.

**{¶ 5}** Officer Broshious testified that he pulled in the lot stopping short of appellant's vehicle; she then stopped. There were two other police cruisers with him. None of the cruisers had activated the lights or siren. Broshious stated that he stopped parallel to appellant's car, a few car widths apart and their driver's windows adjacent. He denied that any of the cars were blocking appellant's exit from the parking lot.

**{¶ 6}** Officer Broshious testified that when he approached the vehicle he identified himself and explained his presence. Broshious stated that he smelled the odor of alcohol emanating from the vehicle and that appellant admitted that she had been drinking. According to Broshious, appellant indicated that she was at the bar to call for a ride because she had her granddaughters with her and she had been drinking.

**{¶ 7}** During cross-examination, Officer Broshious was questioned about the positioning of the three police cruisers when they pulled in to the parking lot. Broshious stated that one of the cruisers pulled up along his passenger side door, he denied that the other cruiser pulled directly in front of appellant's vehicle. Officer Broshious testified that Officers Houser and Kern approached the front passenger in appellant's vehicle. Finally, Broshious was asked whether his testimony was that the stop was not an investigative stop. Broshious stated: "It was an investigative stop."

**{¶ 8}** Next, Bowling Green Police Officer Brian Houser testified that upon arriving at the Checker's Bar parking lot, he pulled in parallel to Officer Broshious. As to the third cruiser, Houser stated that "it would have been perpendicular to Patrolman Broshious' car to hit the rear of his car." He stated that appellant was not restricted from

leaving the parking lot. Officer Houser testified during cross-examination that he approached the passenger side of appellant's vehicle to aid in securing the vehicle.

**{¶ 9}** Appellant testified that the officers "boxed" her vehicle in with two cruisers on the driver's side of her vehicle and one in the front. She stated that it was impossible for her to move. She clarified that all the cruisers were stopped about 15 feet from her vehicle. Appellant again stated that she did not leave when the officer's approached her vehicle because she was blocked in.

**{¶ 10}** During cross-examination, appellant admitted that she told the officer that she had been at a funeral and that she had been drinking. She again stressed that she could not have pulled out of the alley because she was blocked in. Appellant agreed that because she had been drinking, her memory might not have been as clear as if she had not been intoxicated. She agreed that the best evidence of the incident would be the dash cam video. This video was then reviewed by the court.

**{¶ 11}** Following the presentation of the evidence, the trial court denied appellant's motion to suppress. The court found that appellant's encounter with police was consensual and that although appellant's car stopped upon the arrival of the police, it was not a "stop as the court interprets a stop." The court found that it was more of a "caretaking" contact.

**{¶ 12}** Following the court's ruling, appellant withdrew her not guilty pleas and entered no contest pleas to OVI, R.C. 4511.19(A)(1)(a), and child endangering, R.C.

2919.22. The operating a vehicle under the influence prohibited alcohol content and child restraint violations were dismissed. This appeal followed.

**{¶ 13}** Appellant now raises the following assignment of error for our review:

> The trial court committed prejudicial error by denying appellant's motion to suppress by finding that reasonable suspicion was not required as the police officer made a consensual encounter.

**{¶ 14}** In her sole assignment or error, appellant challenges the trial court's denial of her motion to suppress the evidence seized during the warrantless traffic stop by police. Appellant argues that based on the show of authority from police, she had no reason to believe that the initial encounter was consensual and that she was free to leave.

**{¶ 15}** The Supreme Court of Ohio has determined that appellate review of a motion to suppress comprises a mixed question of law and fact. An appellate court must not reject the trial court's factual findings if they are supported by competent, credible evidence. If so supported, the appellate court then independently determines whether these facts satisfy the proper legal standard. *State v. Boyd,* 6th Dist. Lucas No. L-04-1173, 2005-Ohio-3044, ¶ 10.

**{¶ 16}** Beginning our analysis, we must determine whether the police contact with appellant was an investigatory stop or a consensual encounter. An investigatory traffic stop may only be legitimately effectuated when there is a reasonable and articulable suspicion of criminal activity. *State v. Swanson,* 6th Dist. Wood No. WD-05-065, 2006-Ohio-4798, ¶ 15. On the other hand, police may initiate a consensual encounter without

first establishing a reasonable suspicion of criminal activity. Consensual encounters include "'approaching a person in a public place, engaging the person in conversation, requesting information from the person, examining the person's identification, and asking for the person's permission to search his or her belongings.'" *State v. Lewis*, 179 Ohio App.3d 159, 2008-Ohio-5805, 900 N.E.2d 1084, ¶ 11 (6th Dist.), quoting *State v. Wolske*, 6th Dist. Wood No. WD-97-061, 1998 WL 336623 (May 29, 1998).

**{¶ 17}** Whether an encounter is an investigatory stop or consensual encounter turns on whether a reasonable, innocent person would feel free to leave or end the encounter with police. *State v. Wallace*, 145 Ohio App.3d 116, 122, 761 N.E.2d 1143 (6th Dist.2001), citing *Florida v. Bostick*, 501 U.S. 429, 439, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991). Various circumstances have led courts to conclude that an encounter may change from consensual to a prohibited seizure under the Fourth Amendment. Such circumstances include the activation of the police cruiser's overhead lights, a known signal for the motorist to stop, *State v. Lynch*, 196 Ohio App.3d 420, 2011-Ohio-5502, 963 N.E.2d 890 (8th Dist.), where the police vehicle has physically prevented the individual from leaving, *State v. Maitland*, 9th Dist. Summit No. 25823, 2011-Ohio-6244, citing *Wallace*, *supra*, at 122-123, or the presence of multiple police officers, the displaying of a weapon or the use of threatening language. *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).

**{¶ 18}** Upon review, we find that the encounter was an investigatory stop rather than a consensual encounter. Our conclusion does not turn on whether or not the police

cruiser physically blocked appellant's exit of the parking lot. The video of the stop was recorded from Officer's Broshious vehicle, the second of three police cruisers to pull into the parking lot. The first cruiser did pull perpendicular to appellant's vehicle, though the video does not establish how close it was to the front of appellant's vehicle. We are more troubled, however, by the fact that appellant's vehicle was moving when it was approached by multiple police cruisers. The video depicts that appellant stopped only after the cruisers approached. We find that a reasonable, innocent person would not feel free to leave when her vehicle is surrounded by police. Thus, this was not a consensual police encounter.

**{¶ 19}** Accordingly, because we find that the officers' initial approach of the moving vehicle was an investigatory stop, it required reasonable suspicion of prohibited activity. The anonymous telephone call which prompted police response, while specific in its description of the vehicle, passengers, and location failed to provide a reasonable basis to suspect criminal activity. When the stop is based solely on the information from an anonymous informant, it is generally insufficient to form the basis of an officer's reasonable suspicion of criminal activity. *Maitland* at ¶ 9, citing *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, ¶ 36. In addition, because the specificity of the information, such as location and make/model of the vehicle, does not provide evidence of knowledge of the concealed criminal activity, its reliability is limited to aiding officers in locating the vehicle. *Id.* at ¶ 10, citing *Florida v. J.L.*, 529 U.S. 266, 272, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000).

**{¶ 20}** This court has examined when an informant's telephone call was sufficient to establish a reasonable basis to believe that an individual was driving under the influence of alcohol. *State v. Sabo*, 6th Dist. Lucas No. L-08-1452, 2009-Ohio-6979. In *Sabo*, a citizen informant contacted police with a description of the defendant from observing him in a gas station convenience store. *Id.* at ¶ 2. The informant also relayed the location, model, make, color and license plate number of his vehicle. *Id.* Most importantly, the informant gave his name and contact information and visually observed appellant going into a nearby restaurant and kept him in sight until police arrived. *Id.* Meanwhile, a second identified citizen informant telephoned after observing appellant at the drive-thru window of the restaurant. *Id.* at ¶ 3. Affirming the court's denial of appellant's motion to suppress we noted that, based upon the totality of the circumstances which included "identified citizen informants" combined with their observations of appellant staggering, slurring his speech with "weird eyes" and the information regarding his vehicle and location, the officer had reasonable suspicion to effectuate the warrantless stop. *Id.* at ¶ 21.

**{¶ 21}** As explained above, the facts in this case are distinguishable from *Sabo* and we find that the information given by the anonymous informant was not sufficient to establish reasonable suspicion to stop appellant's vehicle. Accordingly, we find that appellant's assignment of error is well-taken.

**{¶ 22}** On consideration whereof, we find that substantial justice was not done the party complaining and the judgment of the Bowling Green Municipal Court is reversed. The matter is remanded for proceedings consistent with this decision. Pursuant to App.R. 24, appellee is ordered to pay the costs of this appeal.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE