

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93197

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROBERTO LOPEZ

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-511338

BEFORE: Boyle, J., Gallagher, A.J., and Dyke, J.

RELEASED: June 3, 2010

JOURNALIZED:
ATTORNEY FOR APPELLANT

Brian R. McGraw
1280 West Third Street
Third Floor
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
BY: Carrie Heindrichs
Assistant County Prosecutor
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Roberto Lopez, appeals the trial court's decision denying his motion to suppress. His assignment of error is set forth as follows:

{¶ 2} "Officer Denney's probable cause to stop and detain Roberto Lopez was extinguished when he observed a properly mounted, readable and unobstructed temporary tag. As no new probable cause was subsequently developed, the detention and questioning of Lopez and the search of the vehicle must be suppressed."

{¶ 3} Finding merit to his appeal, we reverse and remand.

Procedural History and Factual Background

{¶ 4} The Grand Jury indicted Lopez on one count of drug trafficking, in violation of R.C. 2925.03(A)(2), and one count of drug possession, in violation of R.C. 2925.11(A). He entered a plea of not guilty to both charges and moved to suppress the evidence, claiming his Fourth Amendment rights were violated.

{¶ 5} Officer David Denney of the Rocky River Police Department testified at the suppression hearing that he was working the midnight shift, in a stationary position "watching traffic," when he observed Lopez's vehicle coming toward his patrol car without a front license plate on the car. When

Lopez passed him, Officer Denney could not see a rear license plate on the vehicle either. He began to follow Lopez, who immediately turned into a driveway where Officer Denney activated his overhead lights and pulled in behind Lopez.

{¶ 6} Officer Denney said he could not see a rear license plate on Lopez’s car “until he stepped out” of his patrol car. Officer Denney explained, “[o]nce I got out of my vehicle and stood up out of a seated position, I could see the plate on the vehicle.” Officer Denney further explained, “[w]hen I stepped out of my vehicle ***, I could see a temporary Ohio license plate in the rear window mounted on top of the inside of the window.”

{¶ 7} According to Officer Denney, he could not initially see the tag because, “[t]he rear window [had] an angle to it, about 45 degrees ***. The plate was mounted flush to the window, so it was facing almost at a 45 degree angle. That, coupled with, *** the lighting conditions, it’s a lighted roadway but there is a glare that comes across glass, and even with that I couldn’t see it. And it was a short duration, as well.” He further stated that the lights from his patrol car, his overhead lights and spotlights, provided sufficient light to see the license plate, although “there was a glare.”

{¶ 8} Officer Denney explained that when he initially pulled Lopez over, he believed Lopez to be in violation of Rocky River Codified Ordinance

(“RRCO”) 335.09, which requires license plates to be displayed on the front and rear of a vehicle. But he stated that “[o]nce the traffic stop was conducted and [he] could see a plate, 335.10” applied, which requires that license plates be unobstructed.

{¶ 9} Officer Denney approached Lopez and his passenger and informed Lopez why he stopped him. Officer Denney then ran a LEADS on Lopez and the passenger and discovered that Lopez was driving under a suspended license. He then arrested Lopez. Cocaine was found in the center console of the vehicle and an electronic scale with white powder, later confirmed to be cocaine, was found in the passenger’s coat pocket. Lopez claimed responsibility for both items.

{¶ 10} On cross-examination, Officer Denney agreed that once he got out of his vehicle, he could see the plate in its entirety, but he could not read it because “it was not legible in its entirety from left to right.” When asked to further explain what he meant by that, Officer Denney stated that it was not legible because of the glare from the lights and the 45-degree angle of the rear window, which he described as an “obscure angle.” When asked if there was anything else that may have obstructed the temporary tag, Officer Denney said the window may have had a slight tint to it (although he agreed he did not put that in his police report), but he could not be sure without seeing it in

daylight. Officer Denney did not claim that any possible tint obstructed the license plate. And he agreed that there was nothing else obstructing the plate. He further agreed that the only reason he approached Lopez was because of the license plate obstruction violation.

{¶ 11} The trial court denied Lopez’s motion to suppress. Lopez withdrew his former plea of not guilty and pled guilty to both charges.

{¶ 12} The trial court sentenced Lopez to one year in prison on each charge and ordered that they be served concurrently. The trial court stayed his sentence pending appeal.

Standard of Review

{¶ 13} A motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶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. *** Consequently, an appellate court must accept the trial court’s findings of fact if they are supported by competent, credible evidence. *** Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard.” (Internal citations omitted.) *Id.*

{¶ 14} This case, however, turns on whether the trial court properly applied the law since the facts are undisputed.

Fourth Amendment Jurisprudence

{¶ 15} Lopez does not argue that the initial stop of him was illegal. Rather, he maintains that once Officer Denney observed his validly displayed temporary tag, Officer Denney had no further reasonable suspicion to detain him for questioning. Lopez relies on *State v. Chatton* (1984), 11 Ohio St.3d 59, 463 N.E.2d 1237, in support of his position.

{¶ 16} In *Chatton*, a police officer stopped Chatton after he observed his vehicle on the roadway without a front and a rear license plate. The officer approached Chatton's vehicle on foot, and upon reaching his vehicle, the officer observed a cardboard temporary license tag lying on the rear deck of the vehicle below the rear window. The officer continued to proceed to the driver's side of the vehicle, and he asked Chatton for his license, based upon the officer's experience that temporary tags often conceal the identity of stolen vehicles. A computer check of the driver's license revealed that Chatton's license had been suspended. Chatton was placed under arrest. The subsequent search of his vehicle produced a firearm and, although Chatton's license was in fact erroneously listed as suspended, he was indicted for carrying a concealed weapon.

{¶ 17} The Ohio Supreme Court held:

{¶ 18} “[W]here a police officer stops a motor vehicle which displays neither front nor rear license plates, but upon approaching the stopped vehicle observes a temporary tag which is visible through the rear windshield, the driver of the vehicle may not be detained further to determine the validity of his driver’s license absent some specific and articulable facts that the detention was reasonable. As a result, any evidence seized upon a subsequent search of the passenger compartment of the vehicle is inadmissible under the Fourth Amendment to the United States Constitution.” Id. at 63.

{¶ 19} The high court explained that the case turned upon whether the officer had continuing justification to detain Chatton and demand production of his driver’s license once the police officer viewed the temporary tags lying on the rear deck of Chatton’s vehicle. Id. at 60-61. The Supreme Court found that the officer did not, noting that “[i]t is firmly established that the detention of an individual by a law enforcement officer must, at the very least, be justified by ‘specific and articulable facts’ indicating that the detention was reasonable.” Id. at 61, citing (inter alia) *Terry v. Ohio* (1968), 392 U.S. 1, 21-22, 88 S.Ct. 1868, 20 L.Ed.2d 889.

{¶ 20} The Ohio Supreme Court further reasoned:

{¶ 21} “In our view, because the police officer no longer maintained a reasonable suspicion that appellee’s vehicle was not properly licensed or registered, to further detain appellee and demand that he produce his driver’s license is akin to the random detentions struck down by the Supreme Court in *Delaware v. Prouse* [(1979), 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 669 (the United States Supreme Court condemned the use of random stops of vehicles to check the validity of the operator’s driver’s license)]. Although the police officer, as a matter of courtesy, could have explained to appellee the reason he was initially detained, the police officer could not unite the search to this detention, and appellee should have been free to continue on his way without having to produce his driver’s license. Cf. *United States v. Place* (1983), 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (prolonged detention unreasonable under *Terry*).” *Chatton* at 63.

{¶ 22} We find *Chatton* to be directly on point with this case. The state contends, however, that *Chatton* is no longer good law because the statute the Ohio Supreme Court addressed in that case, R.C. 4503.21, has since been amended. We disagree.

{¶ 23} It is true that R.C. 4503.21 was amended subsequent to the Supreme Court’s holding in *Chatton*. See *State v. Phillips*, 155 Ohio App.3d 149, 2003-Ohio-5742, 799 N.E.2d 653. But we do not find that the Fourth

Amendment law and reasoning in *Chatton* are no longer good because of it. A police officer *still* must be able to point to specific facts before the driver of the vehicle may be “detained further to determine the validity of his driver’s license.” *Chatton* at 63.

{¶ 24} R.C. 4503.21 was amended to require operators of vehicles with a temporary tag to “display the temporary license placard in plain view from the rear of the vehicle either in the rear window or on an external rear surface of the motor vehicle.”¹ *Id.* at ¶18 (in *Chatton*, the license plate was lying on the deck, not in the window or on the outside rear of the vehicle).

{¶ 25} The state claims that the court in *Phillips* “stated the change made *Chatton* inapplicable since the new law required that the plate be visible.” We disagree. The court in *Phillips* held that *Chatton* was not applicable because the facts were distinguishable. *Id.* at ¶18.

{¶ 26} In *Phillips*, the defendant was stopped because the police officers could not see a front license plate on his vehicle, in violation of R.C. 4503.21.

¹R.C. 4503.21(A) did not have a provision addressing temporary tags prior to *Chatton*. It now provides in pertinent part: “[n]o person to whom a temporary license placard or windshield sticker has been issued for the use of a motor vehicle under section 4503.182 of the Revised Code, and no operator of that motor vehicle, shall fail to display the temporary license placard in plain view from the rear of the vehicle either in the rear window or on an external rear surface of the motor vehicle, or fail to display the windshield sticker in plain view on the rear window of the motor vehicle. No temporary license placard or windshield sticker shall be covered by any material that obstructs its visibility.”

Phillips's front did not have a temporary tag, but his permanent license plate was actually lying on his front dashboard.

{¶ 27} In a motion to suppress, Phillips argued that the license plate lying on the dashboard of the vehicle satisfied the statutory requirements with respect to the display of its front-side license plate because the license plate was “in plain view” to a person who, looking through the windshield, could see it. Phillips relied on *Chatton*, “which held that a temporary tag lying on a vehicle’s rear deck and visible through its rear window did not violate a display requirement because the relevant statute did not state how temporary tags must be displayed.” *Phillips* at ¶17.

{¶ 28} The *Phillips* court stated that *Chatton* was inapplicable because Phillips did not have a temporary tag and explained:

{¶ 29} “A license plate may be ‘in plain view’ for purposes of R.C. 4503.21 to a person who sees it positioned on the dashboard of a vehicle, but so long as it is inside the vehicle, the plate is not displayed ‘on the front’ of the vehicle. To satisfy that requirement, the plate must be mounted to the vehicle’s exterior, on its front side, and in plain view. Because the plate located on the dashboard of the vehicle defendant drove failed those requirements, the officers had probable cause to stop him in order to cite him

for a violation of R.C. 4503.21. The stop was therefore reasonable for purposes of the Fourth Amendment.” Id. at ¶19.

{¶ 30} Thus, we disagree with the state that the *Phillips* court held that *Chatton* was no longer good law because R.C. 4503.21 was amended subsequent to its release.

{¶ 31} The state also argues that the facts of this case are similar to the facts in *State v. Colton*, 2d Dist. No. 20760, 2005-Ohio-4494, where the court held that the police officer had probable cause because the defendant violated R.C. 4503.21. But we find *Colton* to be distinguishable. The officer stopped Colton because he could not see a license plate on Colton's vehicle. The court reasoned, "[o]nly when [the officer] was approaching Colton's vehicle on foot did he see the tag laying in the rear window." Id. at ¶16. Further, Colton's temporary tag had whiteout on it; thus, it did not appear to be valid. Here, Lopez's valid temporary tag was not "laying in the rear window"; it was affixed to the rear window, flush with it, and not obstructed in any way, in full compliance with R.C. 4503.21.

{¶ 32} Finally, the state contends that Officer Denney had sufficient probable cause because Lopez was cited for RRCO 335.10, and not R.C. 4503.21. The state claims that RRCO 335.10 is “more stringent than the language in R.C. 4503.21.”

{¶ 33} RRCO 335.10 states that “[n]o person shall operate a motor vehicle, upon which license plates are required by law to be displayed, unless the license plates legally registered and issued for such vehicle shall be fastened in such a manner, and not covered, obscured or concealed by any part or accessory of such vehicle or by any foreign substance or material, to be readable in its entirety from left to right.”

{¶ 34} We do not find RRCO 335.10 and R.C. 4503.21 to be in conflict. Based on Officer Denney’s testimony, Lopez was not in violation of RRCO 335.10. His temporary license was not “fastened in such a manner” that it was “covered, obscured or concealed” by any part of the vehicle. Further, we cannot fault Lopez for the angle of his rear window or the glare of the lights. Without the angle and the glare, his temporary tag was “readable in its entirety from left to right.” Indeed, Officer Denney stated that he could immediately see the temporary tag affixed to Lopez’s rear window as soon as he got out of his patrol car and it was not obstructed by anything. Officer Denney further admitted that he had no other reason to stop Lopez beyond the suspected license plate violations, i.e., he did not have any reasonable suspicion of any criminal activity. Accordingly, we find the trial court erred when it denied Lopez’s motion to suppress.

{¶ 35} Judgment reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

SEAN C. GALLAGHER, A.J., and
ANN DYKE, J., CONCUR