[Cite as *State v. McWhorter*, 2011-Ohio-1074.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95108

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

LARRY MCWHORTER

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-534220

BEFORE: Sweeney, J., Kilbane, A.J., and Blackmon, J.

RELEASED AND JOURNALIZED: March 10, 2011

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JAMES J. SWEENEY, J.:

{¶ 1} The State of Ohio appeals the trial court's judgment that granted defendant-appellee's, Larry McWhorter, ("defendant"), motion to suppress the evidence. For the reasons that follow, we affirm.

{¶ 2} Defendant was charged with one count of drug trafficking and two counts of drug possession. The trial court held a hearing on defendant's motion to suppress the evidence, which alleged that the police lacked the requisite reasonable suspicion to stop defendant's vehicle thereby rendering the ensuing search unlawful.

{¶ 3} At the hearing the State presented the testimony of the Cleveland police officer who conducted the stop and arrested defendant on February 11, 2010. According

to the officer, defendant's vehicle passed him at the intersection of East 71st Street and Fullerton. The officer said he saw a crack across defendant's windshield in the line of sight that obstructed the driver's view. The officer was passing defendant's car from the opposite direction when he first noticed the cracked windshield. This observation occurred around midnight and it was snowing. When asked to describe the crack, the officer said he believed there were multiple cracks, possibly two but "one for sure," that ran across the windshield in the line of sight of the driver. The officer insisted defendant's view was obstructed despite that defendant was driving and the officer could not see the angle from which defendant was driving. The officer stated "I believe if you were able to sit up properly and drive the correct way, yes, it [the crack] would be in your line of sight." According to the officer, the driver could still see through the window but it was the officer's opinion that the crack would distort the view in front when looking straight ahead.

{¶ 4} The officer stated he was concerned for public safety in that the crack obstructed the driver's view and secondarily affected the integrity of the windshield. The officer believed this constituted violations of Cleveland Codified Ordinances 431.25, driver view obstructed, and 437.01, unsafe motor vehicle. On these bases, the officer initiated a stop. Prior to stopping defendant's vehicle, the officer drove behind him for a few blocks; during which time the officer did not observe any odd or erratic driving. At no time did the officer observe anything erratic about defendant's driving.

{¶ 5} The officer arrested defendant upon discovering that he was driving under a suspended license. The officer found a plastic bag containing suspected crack cocaine, along with three white pills, in defendant's right coat pocket. The officer cited defendant for driving under suspension, failure to wear a seat belt, and driver view obstructed.

{¶ 6} The trial court found that Cleveland Codified Ordinances 431.25 had no application to the facts in this case and did not serve to justify the stop. In regard to Cleveland Codified Ordinances 437.01 the trial court found that the cracked windshield "as described by the police officer" did not constitute "an unsafe vehicle that would be such an unsafe condition to endanger any person or property." The trial court concluded that there was no justification for the stop and granted the defendant's motion to suppress.

{¶ 7} The State's appeal presents the following error for review:

{¶ 8} "The trial court erred in finding that the initial stop of the defendant's vehicle was unlawful and in granting the defendant's motion to suppress the evidence."

{¶ 9} The facts set forth above will only be repeated here to the extent necessary for ease of discussion.

{¶ 10} The issue raised by the State in this case is 'whether the facts of this case warranted the stop and detention of appellee's vehicle." The trial court resolved these facts in defendant's favor.

{¶ 11} Appellate courts should give great deference to the judgment of the trier of fact. *Ornelas v. United States* (1996), 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911; *State v. George* (1989), 45 Ohio St.3d 325, 544 N.E.2d 640. Accordingly, we are bound

to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Armstrong* (1995), 103 Ohio App.3d 416, 420, 659 N.E.2d 844; *State v. Williams* (1993), 86 Ohio App.3d 37, 41, 619 N.E.2d 1141. However, the reviewing court must independently determine as a matter of law, without deference to the trial court's conclusion, whether the trial court's decision meets the appropriate legal standard. *State v. Claytor* (1993), 85 Ohio App.3d 623, 627, 620 N.E.2d 906.

{¶ 12} The Fourth Amendment to the United States Constitution prohibits warrantless searches and seizures, rendering them per se unreasonable unless an exception applies. *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576. An investigative stop, or *Terry* stop, is a common exception to the Fourth Amendment warrant requirement. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. Under the Terry stop exception, an officer properly stops an automobile if the officer possesses the requisite reasonable suspicion based on specific and articulable facts. *Delaware v. Prouse* (1979), 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660; *State v. Gedeon* (1992), 81 Ohio App.3d 617, 618, 611 N.E.2d 972; *State v. Heinrichs* (1988), 46 Ohio App.3d 63, 545 N.E.2d 1304.

{¶ 13} Whether a crack in the windshield provides reasonable suspicion that would justify stopping a vehicle as being unsafe is a fact specific inquiry. The courts that have addressed this issue have found reasonable suspicion only when the evidence establishes that the crack was substantial. See *State v. Cooper*, Montgomery App. No. 23719, 2010-Ohio-1120, ¶ 15-16, quoting *State v. Latham*, Montgomery App. No. 20302,

2004-Ohio-2314, ¶14, other citations omitted (surveying case law that has addressed whether a cracked windshield justified stopping a vehicle).

{¶ 14} In both *Cooper* and *Latham*, the appellate court rejected the argument that any crack in the windshield, regardless of how minor, would justify a stop. Instead, the court reasoned that "the simple appearance of a crack in a windshield does not give rise to a reasonable suspicion of a violation of R.C. 4513.02(A)" and the court "must determine whether the particular facts surrounding the crack in the windshield *** [give] rise to a reasonable suspicion that *** [the vehicle] was in an unsafe condition such that its operation would endanger persons." *Latham*, 2004-Ohio-2314, ¶19. Where the evidence fails to establish a substantial crack in the windshield that would render operation of a vehicle unsafe, the crack does not supply an officer with reasonable suspicion to stop the vehicle. *Cooper*, 2010-Ohio-1120, ¶21; *Latham*, 2004-Ohio-2314, ¶19.

{¶ 15} In urging reversal, the State relies on case law where courts have upheld findings that substantial windshield cracks provide a reasonable suspicion that would justify an officer in stopping the vehicle as being unsafe. See *State v. Heinery*, Portage App. No. 2000-P-0081, 2001-Ohio-4287 and *State v. Repp*, Knox App. No. 01-CA-11, 2001-Ohio-7034.

{¶ 16} In *Repp*, the appellate court confirmed from "photographs that there was a substantial crack on the driver's side of the front windshield. Said crack appears to be between one and two feet long and extends into the driver's viewing area. The size and

placement of this crack was sufficient to create a reasonable suspicion that R .C. § 4513.02 was being violated." *Repp*, 2001-Ohio-7034. There are no photographs in this record from which we could ascertain the size or location of the alleged windshield crack.

{¶ 17} In *Heinery*, the officer in that case was on duty in a stationery position when she observed a vehicle "with a 'spider crack' in the center of the windshield which was about one foot from top to bottom." *Heinery*, 2001-Ohio-4287. The trial court found this created a reasonable suspicion that justified the stop, which the appellate court affirmed finding the crack was "substantial." Id. In this case, the trial court found that the officer's description of the alleged crack did not describe an unsafe condition that would justify stopping defendant's vehicle as being unsafe. The trial court is in a better position to assess the credibility of the witnesses. *State v. Klein* (1991), 73 Ohio App.3d 486, 597 N.E.2d 1141. Beyond the officer's testimony, the State offered no other evidence that would establish an unsafe condition on defendant's vehicle, such as photographs depicting the size and location of the alleged crack. Based on this record, we defer to the factual findings of the trial court. The sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant 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.

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JAMES J. SWEENEY, JUDGE

PATRICIA ANN BLACKMON, J., CONCURS;

MARY EILEEN KILBANE, A.J., DISSENTS. (SEE ATTACHED DISSENTING OPINION)

MARY EILEEN KILBANE, A.J., DISSENTING:

{¶ 18} I respectfully dissent from the majority opinion and would reverse the trial court's judgment granting McWhorter's motion to suppress.

{¶ 19} The officer testified that the crack in McWhorter's windshield was the reason he initiated the traffic stop. The officer was concerned with the obstructed view of the driver and the integrity of the windshield. When "an officer has an articulable reasonable suspicion or probable cause to stop a motorist for any criminal violation, including a minor traffic violation, the stop is constitutionally valid regardless of the officers underlying subjective intent or motivation for stopping the vehicle in question." *Dayton v. Erickson*, 76 Ohio St.3d 3, 11-12, 1991-Ohio-431, 665 N.E.2d 1091.

{¶ 20} Here, the officer ultimately cited McWhorter for violation of Cleveland Codified Ordinances Section 431.25 — Driver's View and Control to be Unobstructed by Load or Persons, when he should have cited McWhorter under Section 437.01 — Driving Unsafe Vehicles.[1]

{¶ 21} Ohio courts have held that a crack in the windshield renders the vehicle unsafe. See *State v. Smith*, Clermont App. No. 2007-05-064, 2008-Ohio-4431 (finding

[1]Section 437.01(a) provides that "[n]o person shall drive or move, or cause or knowingly permit to be driven or moved, on any street any vehicle or combination of vehicles which is in such unsafe condition as to endanger any person or property."

that a long and wide crack in the defendant's windshield gave the officer probable cause to believe a traffic violation had occurred); *State v. Repp*, Knox App. No. 01-CA-11, 2001-Ohio-7034 (finding that a one to two foot long crack across the middle of the driver's side windshield was sufficient to create a reasonable suspicion to stop a vehicle as unsafe pursuant to R.C. 4513.02(A)); *State v. Heiney*, Portage App. No. 2000-P-0081, 2001-Ohio-4287 (finding that a one foot long spider crack in the middle of a vehicle's windshield was "substantial" and gave a state highway patrolman reasonable suspicion that the crack rendered the vehicle unsafe and a violation of R.C. 4513.02); *State v. Goins* (May 24, 1996), Ross App. No. 95CA2106 (finding that a state highway patrolman had reasonable suspicion to stop a vehicle with a large linear crack in the front windshield for an equipment violation pursuant to R.C. 4513.02(A) and (B)).[2]

{¶ 22} Therefore, I would find that the officer had reasonable and articulable suspicion that McWhorter committed a traffic offense by driving an unsafe vehicle, and that the officer conducted a lawful traffic stop. Thus, I would deny the motion to suppress and reverse the trial court's judgment.

[2]The ordinance in the instant case mirrors R.C. 4513.02(A).