

[Cite as *Westlake v. Gerber*, 2011-Ohio-114.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95067

CITY OF WESTLAKE/BMV

PLAINTIFF-APPELLEE

vs.

TROY GERBER

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED**

Civil Appeal from the
Rocky River Municipal Court
Case No. CR-09 TRC 11487

BEFORE: Jones, J., Stewart, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: January 13, 2011

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Troy Gerber (“Gerber”), appeals the trial court’s order finding no merit to his administrative license suspension (“ALS”) appeal. Finding merit to the appeal, we reverse the decision of the trial court.

{¶ 2} In July 2009, a Westlake police officer pulled over the vehicle Gerber was driving and cited him for operating his vehicle while under the influence of alcohol (“OVI”), in violation of R.C. 4511.19(A)(1)(a); refusing the chemical test

with a prior OVI conviction, in violation of R.C. 4511.19(A)(2)(a); and weaving, in violation of Westlake Codified Ordinance 331.34(b). Upon his arrest, Gerber refused to submit to a breath test, and his license was automatically suspended pursuant to R.C. 4511.191.

{¶ 3} Gerber filed a motion to suppress evidence, arguing that the arresting officer did not have reasonable suspicion to pull him over. A magistrate granted Gerber's motion after a full hearing, finding that the City failed to show that the officer possessed a reasonable suspicion, based upon specific and articulable facts, to support the traffic stop. In short, the officer testified at the hearing that he pulled Gerber's vehicle over after he observed it weaving in and out of its lane, but the officer's dashboard camera showed that Gerber's car did not deviate from its lane.

{¶ 4} Gerber then filed an appeal of his license suspension with the trial court. The magistrate found merit in his appeal finding that the arresting officer did not have reasonable grounds to believe that an OVI violation had been committed before Gerber refused to take the test.

{¶ 5} The City filed objections to the magistrate's decision, which were overruled by the trial court in part and sustained in part. The trial court adopted the magistrate's decision granting the motion to suppress but overruled the magistrate's decision with regard to Gerber's ALS appeal.

{¶ 6} The City filed its notice of appeal, challenging the ruling on the motion to suppress. Gerber also filed a notice of appeal, challenging the suspension of his license. We consolidated the appeals for briefing and disposition but, prior to

oral argument, we sua sponte dismissed the City's appeal finding that the City failed to comply with Crim.R. 12(K). Thus, we proceed solely on Gerber's appeal of his ALS suspension and will only address the assignments of error pertaining to the license suspension.

{¶ 7} On appeal, Gerber raises the following two assignments of error:

{¶ 8} "I. The trial court erred as a matter of law when, after determining no reasonable suspicion existed to stop the Gerber vehicle, it overruled the Magistrate's Decision and denied Gerber's ALS appeal.

{¶ 9} "II. The trial court erred as a matter of law when it sua sponte took judicial notice that Westlake police jailer Paul Gresback was a deputy clerk of the Rocky River Municipal Court, and that R.C. 4511.192(D)(1)(d)(i) had been complied with, and overruled the magistrate's decision and denied Gerber's ALS appeal."

{¶ 10} Gerber argues that because the trial court granted his motion to suppress and found that the police officer had no reasonable articulable suspicion to pull his car over, the stop was not constitutionally valid and his refusal to take an alcohol test could not trigger an ALS. We agree.

{¶ 11} In *Watford v. Ohio Bur. of Motor Vehicles* (1996), 110 Ohio App.3d 499, 674 N.E.2d 776, this court stated that "a lawful arrest, including a constitutional stop, must take place before a refusal to submit to chemical tests of one's blood, breath, urine or other bodily substances triggers a license suspension." Id., citing *Williams v. Ohio Bur. of Motor Vehicles* (1992), 62 Ohio Misc.2d 741, 610 N.E.2d 1229.

{¶ 12} We find *Watford* to be dispositive of this case. The trial court in this case found that the police officer was unable to point to specific and articulable facts that would support the stop. Consequently, because the trial court concluded that the stop was unlawful, the request that Gerber submit to chemical testing and the suspension of his driver's license for refusal to do so was likewise unlawful. See *Watford*. Therefore, the trial court erred in overruling the magistrate's decision and in finding that Gerber should be subjected to a license suspension.

{¶ 13} The first assignment of error is sustained. Due to the disposition of the first assignment of error, the second assignment of error is moot. See App.R. 12.

{¶ 14} Accordingly, the decision is reversed and the case is remanded to the trial court for proceedings consistent with this opinion.

It is ordered that appellant recover of appellee his 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 Rocky River Municipal 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.

LARRY A. JONES, JUDGE

MELODY J. STEWART, P.J., and

FRANK D. CELEBREZZE, JR., J., CONCUR