[Cite as *State v. Fears*, 2011-Ohio-930.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94997

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTHONY FEARS

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-525172

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

RELEASED AND JOURNALIZED: March 3, 2011

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MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Anthony Fears, appeals from his conviction on counts of drug possession and possession of criminal tools, arguing that the court erred by denying his motion to suppress evidence of drugs seized during a traffic stop based on his failure to turn while his turn signal was activated. His primary argument is that the court erred by finding that the police could effectuate a traffic stop based only on a reasonable, articulable

suspicion of criminal activity — he maintains that to justify a traffic stop the police must satisfy the higher standard of probable cause to arrest.

{¶ 2} The facts are not disputed for purposes of appeal. Police officers on routine patrol saw a car driven by Fears make a left turn. After completing the turn, Fears activated his left turn signal. He drove through the next intersection with his turn signal activated, but did not turn. He then turned left at the second intersection he approached. The police stopped Fears because they believed that he had violated Cleveland Codified Ordinances 431.14 relating to signaling before changing course. Computer records indicated that Fears had a "possible" outstanding warrant, so the officers alerted him of this fact. They ordered him out of the car and conducted a pat-down search for their own safety. They found no weapons. Concerned that he might be concealing a weapon in his shoes, they asked Fears if he had anything in his shoes. Fears replied, "[i]f you want, go ahead and look." The officers found a single rock of crack cocaine near Fears's left ankle.

{¶ 3} The court found that the officers had a reasonable belief that they had witnessed a traffic infraction, so they were justified in making the traffic stop. It also found that information showing that there was a "possible" outstanding warrant against Fears justified that pat-down search for officer safety. Finally, the court found that the officers were permitted to ask Fears

if he possessed any contraband or weapons, and that Fears voluntarily consented to a search of his shoes.

I

{¶ 4} Fears's first argument is that the court incorrectly applied the "reasonable, articulable suspicion" standard to justify the traffic stop. Acknowledging that Ohio courts are bound by Ohio Supreme Court precedent applying that same standard, Fears nonetheless argues that Ohio courts should apply the more stringent "probable cause" standard to determine whether a traffic stop is justified.

{¶ 5} "Reasonable, articulable suspicion" is a "less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." *Illinois v. Wardlow* (2000), 528 U.S. 119, 123, 120 S.Ct. 673, 145 L.Ed.2d 570. As Fears concedes, in *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, 894 N.E.2d 1204, the Supreme Court of Ohio held that "if an officer's decision to stop a motorist for a criminal violation, including a traffic violation, is prompted by a reasonable and articulable suspicion considering all the circumstances, then the stop is constitutionally valid." Id. at ¶8. *Mays* is a decision by a superior court that we are bound to follow — we have no authority to deviate from it. It follows that the court did not err by applying the reasonable suspicion standard when reviewing the propriety of the traffic stop.

{¶ 6} Even if we had authority to consider whether *Mays* is good law, we remain unconvinced that the probable cause standard should apply to traffic stops.

{¶ 7} Traffic stops are considered "seizures" for purposes of the Fourth Amendment, *Delaware v. Prouse* (1979), 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660, and the "reasonable, articulable suspicion" standard set forth in *Terry v. Ohio* (1968), 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889, has for many years been accepted as the standard governing traffic stops. See, e.g., *United States v. Brignoni-Ponce* (1975), 422 U.S. 873, 884, 95 S.Ct. 2574, 45 L.Ed.2d 607 ("officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country."); *United States v. Cortez* (1981), 449 U.S. 411, 417-18, 101 S.Ct. 690, 66 L.Ed.2d 621. In fact, the reasonable, articulable suspicion standard requires only a "minimal level of objective justification" to justify a *Terry* stop. *United States v. Sokolow* (1989), 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1.

{¶ 8} Fears argues that the United States Supreme Court changed the standard to "probable cause" in *Whren v. United States* (1996), 517 U.S. 806, 810, 116 S.Ct. 1769, 135 L.Ed.2d 89, when it stated: "As a general matter, the decision to stop an automobile is reasonable where the police have

probable cause to believe that a traffic violation has occurred." Id. at 810. This one-off statement has been described as "dicta," *United States v. Delfin-Colina* (C.A.3, 2006), 464 F.3d 392, 396, and, in any event, the Court has since used the "reasonable, articulable suspicion" standard when referencing the validity of traffic stops. See *United States v. Arvizu* (2002), 534 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740. It is highly unlikely that *Whren* intended to change the standard for reviewing traffic stops when it engaged in no specific analysis on that point of law, and its subsequent reversion to the reasonable, articulable suspicion standard reinforces that conclusion. *United States v. Lopez-Soto* (C.A.9, 2000), 205 F.3d 1101, 1104-1105. We thus find no basis for imposing the more stringent probable cause standard to justify traffic stops.

II

{¶ 9} The state concedes that Fears's conduct did not constitute a violation of Cleveland Codified Ordinances 431.14,[1] but argues that the police

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[1]Cleveland Codified Ordinances 431.14, states in relevant part:

"No person shall turn a vehicle or move right or left upon a highway unless and until such person has exercised due care to ascertain that the movement can be made with reasonable safety, nor without giving an appropriate signal in the manner hereinafter provided.

"When required, a signal of intention to turn or move right or left shall be given continuously during not less than the last 100 feet traveled by the vehicle before turning."

It is apparent that the ordinance only penalizes a driver who turns without giving an

did not learn of their mistake until after the arrest had been made so they were acting with a good faith belief that they had witnessed a traffic infraction. Fears maintains that the good faith exception cannot apply because the state failed to raise it below and the good faith exception does not apply to mistakes of law.

{¶ 10} In *United States v. Miller* (C.A.5, 1998), 146 F.3d 274, the United States Court of Appeals for the Fifth Circuit considered an identical fact pattern — Miller was erroneously stopped for having a turn signal on without changing lanes — and rejected the application of the good faith exception based on the arresting officer's good faith belief that Miller had violated the law. The court noted that regardless of what the arresting officer's subjective intent was in making the traffic stop, "legal justification [for the stop] must be objectively grounded." Id. at 279. The court of appeals found no basis for concluding that Miller had violated the law. Thus, "no objective basis for probable cause justified the stop * * *." Id.

{¶ 11} The United States Court of Appeals for the Seventh Circuit reached a similar conclusion in a case where the police mistakenly stopped a driver for displaying a turn signal on a road with a 90-degree turn. Citing to *Miller*, the Seventh Circuit stated:

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appropriate turn signal, not a driver who signals but does not make a turn.

{¶ 12} "We agree with the majority of circuits to have considered the issue that a police officer's mistake of law cannot support probable cause to conduct a stop. Probable cause only exists when an officer has a 'reasonable' belief that a law has been broken. [*United States v.*] *Muriel* [(C.A.7, 2005)], 418 F.3d [720,] at 724. Law enforcement officials have a certain degree of leeway to conduct searches and seizures, but 'the flip side of that leeway is that the legal justification must be objectively grounded.' *Miller*, 146 F.3d at 279. An officer cannot have a reasonable belief that a violation of the law occurred when the acts to which an officer points as supporting probable cause are not prohibited by law." *United States v. McDonald* (C.A.7, 2006), 453 F.3d 958, 961.[2]

{¶ 13} The state concedes that the arresting officers made a mistake of law by concluding that Fears violated Cleveland Codified Ordinances 431.14. Whether they did so in good faith is immaterial. We therefore conclude that the officers' mistake of law regarding Fears's use of a turn signal without turning meant that the officers lacked a reasonable, articulable suspicion for the stop. It follows that the court erred by denying Fears's motion to suppress evidence.

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[2]We recognize that both *Miller* and *McDonald* refer to "probable cause" to support the traffic stops, not the "reasonable, articulable suspicion" standard we employ. Nevertheless, the controlling point of law in each case — that a police officer's mistake of law could not justify a traffic stop — is consistent with our holding even under the higher standard that we reject.

{¶ 14} This cause is reversed and remanded 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 be sent to the Cuyahoga County Court of Common Pleas 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.

MELODY J. STEWART, JUDGE

PATRICIA ANN BLACKMON, P.J., and
LARRY A. JONES, J., CONCUR