[Cite as *Cleveland v. Oko*, 2016-Ohio-7774.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103278

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

MICHAEL OKO

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cleveland Municipal Court
Case No. 2014TRD048675

BEFORE: Kilbane, P.J., Boyle, J., and Celebrezze, J.

RELEASED AND JOURNALIZED: November 17, 2016

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MARY EILEEN KILBANE, P.J.:

{¶1} In this pro se appeal, defendant-appellant, Michael Oko ("Oko"), appeals a judgment from the Cleveland Municipal Court finding him guilty of failing to signal a turn in violation of Cleveland Codified Ordinances ("CCO") 431.34, failure to display a taxicab passenger bill of rights in violation of CCO 443.37, and failure to have a taximeter in violation of CCO 443.24. For the reasons set forth below, we affirm.

{¶2} On September 7, 2014, after making a right-hand turn into a parking lot on West St. Clair near West 9th Street, Oko was cited for failing to signal the turn, cruising or soliciting, and failing to have a taxi or "public hack" license and taximeter.[1] Oko pled not guilty to the charges. On February 15, 2015, he filed a motion to dismiss. In the motion to dismiss, Oko acknowledged that his vehicle's rear turn signal lights were not working at the time of the stop, but he maintained that the other charges lacked merit. On April 28, 2015, Oko filed a second "motion to dismiss and/or suppress," complaining that he had been subjected to harassment, racial profiling, and discrimination on the basis of race or immigration status. On May 27, 2015, Oko filed another motion to suppress, in which he challenged the authenticity of the arresting officer's DVD of the arrest.

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[1]CCO 443.11(f) defines "public hack" or "hack" as

> any public vehicle whose owner or driver secures or accepts passengers for hire on the public streets, or in public or quasi-public places, including, but not limited to, hotels as defined by Section 363.08, and excepting carriages as defined in division (a) of Section 447.01 and vehicles operated by the Cleveland Regional Transit Authority.

{¶3} The matter proceeded to a bench trial on June 23, 2015, with Oko representing himself. At that time, the city of Cleveland declined to present the DVD that was the subject of Oko's third motion to dismiss, and presented the testimony of the officer who issued the citations, Cleveland Police Officer Justen Davis ("Officer Davis").

{¶4} Officer Davis testified that while on routine patrol, traveling westbound on St. Clair near West 9th Street, he observed Oko's minivan going eastbound. Oko's vehicle had a "little white bar on top of the vehicle, as if it were a taxi, but no markings * * * identifying it as * * * [a] taxi." It did not have livery plates. According to Officer Davis, there has been a "surge" in illegal taxicab operations, so he ran a check of the license plate and learned that the vehicle was registered to a woman whose name he recognized from other license checks. Officer Davis became suspicious so he made a U-turn to get a closer look at the vehicle. Officer Davis further testified that Oko then made a right turn without signaling and made a second unsignaled right turn into a parking lot behind Bar Louie. Officer Davis followed the vehicle and activated his overhead lights.

{¶5} Officer Davis further testified that he began questioning the occupants who were exiting the vehicle and determined that Oko had charged the passengers for the ride. He then cited Oko for the unsignaled turn as well as operating the vehicle as "in the capacity of a taxi" without having a taxi license, taximeter, and taxi passenger bill of rights.

{¶6} On cross-examination, Officer Davis testified that he had stopped Oko on two other occasions and had issued warnings to him about operating an illegal taxi service. At that point, Oko informed the court that he lodged a complaint against Officer Davis after those initial warnings were issued, but Officer Davis testified that he was unaware of such complaint.

{¶7} Oko presented testimony from Mikky Kafara ("Kafara") and Christopher Inyang ("Inyang"). Kafara testified that he runs a medical transportation and livery business. He stated that Officer Davis pulls him over "all the time" for a "nothing reason" and writes him "a lot of tickets." Kafara further stated that Oko is his friend, and on September 7, 2014, he noticed Oko's vehicle turning into Bar Louie. According to Kafara, Oko used his turn signal before making turns into the parking lot.

{¶8} Inyang testified that he is a livery driver and that Officer Davis has stopped him many times, and he has received many citations. According to Inyang, as a livery driver, he is regulated by the state and not the city. Therefore, he testified that livery drivers are not required to have a hack license, passenger's bill of rights, or taximeter as set forth in the city's ordinances. Inyang further testified that Oko is not a taxi driver and he has never seen him picking up or dropping off passengers for hire.

{¶9} The trial court found Oko guilty of failing to signal a turn, failure to display a taxicab passenger bill of rights, and failure to have a taximeter. The court found him not guilty of the remaining offenses.

{¶10} Oko now appeals and assigns the following three errors for our review:

Assignment of Error One

> The trial court erred in overruling defendant-appellant's unobjected pre-trial motions to dismiss charges and motion to suppress without a finding of facts and conclusion of law.

Assignment of Error Two

> The trial court erred to defendant-appellant's prejudice when overruling [Oko's] pretrial written motions to suppress electronic evidence alleged to have been tampered with without any findings of fact and conclusions of law.

Assignment of Error Three

> The judgment and finding of guilt by the trial court was based upon: (1) bogus charges; (2) hearsay evidence; distorted fact [and] is not supported by any evidence and denied defendant-appellant's right to a fair trial.

Motions to Dismiss

{¶11} In his first and second assignments of error, Oko argues that the trial court erred in rejecting his motions to dismiss on the basis of: (1) selective prosecution, racial profiling, and harassment; (2) violation of his Fourth Amendment rights; and (3) Officer Davis's failure to appear for a pretrial hearing. Oko further argues that the trial court erred in failing to prepare written findings of fact and conclusions of law to support the denial of these motions. In opposition, the city argues that Oko's motions were untimely and were properly denied.

{¶12} With respect to procedure, we note that *State v. Michailides*, 8th Dist. Cuyahoga No. 99682, 2013-Ohio-5316, this court stated as follows:

> It is well established that a motion to suppress is a pretrial motion according to Crim.R. 12(C)(3). *State v. Perry*, 3d Dist. Marion No. 9-12-09, 2012-Ohio-4656, ¶ 12. Crim.R. 12(D) further provides that all pretrial

> motions are to be made within the earlier of 35 days after arraignment or seven days before trial, although in the interest of justice a court may extend the time for making pretrial motions. *Id.*, Crim.R. 12(D), (H). "Failure to move for suppression of evidence on the basis that it was illegally obtained within the Crim.R. 12(D)'s time constraint constitutes a waiver of the error." *Id.*, citing *State v. Campbell*, 69 Ohio St.3d 38, 44, 1994 Ohio 492, 630 N.E.2d 339 (1994).
>
> "The trial court's decision whether to permit leave to file an untimely motion to suppress is within its sound discretion." *Perry* at ¶ 13, citing *State v. Monnette*, 3d Dist. Marion No. 9-08-33, 2009-Ohio-1653, ¶ 17. An abuse of discretion implies a decision that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 5 Ohio B. 481, 450 N.E.2d 1140 (1983). When applying the abuse of discretion standard, a reviewing court may not substitute its judgment for that of the trial court. *Id.*

Id. at ¶ 6-7.

{¶13} Additionally, Crim.R. 12(F) provides that "[w]here factual issues are involved in determining a motion, the court shall state its essential findings on the record." However, this rule does not require a trial court to issue separate factual findings if the court's reasoning is set forth in the record and the record as a whole provides an appellate court with sufficient basis for review. *State v. Atkinson*, 8th Dist. Cuyahoga No. 95602, 2011-Ohio-5918, ¶ 23; *Bedford v. McLeod*, 8th Dist. Cuyahoga No. 94649, 2011-Ohio-3380, ¶ 17, citing *State v. Bennett*, 8th Dist. Cuyahoga No. 86962, 2006-Ohio-4274, *appeal not allowed*, 114 Ohio St.3d 1425, 2007-Ohio-2904, 868 N.E.2d

679; *State v. Ogletree*, 8th Dist. Cuyahoga No. 86285, 2006-Ohio-448; *State v. Martin*, 8th Dist. Cuyahoga No. 89030, 2007-Ohio-6062.

{¶14} In this case, the citations were issued to Oko on September 7, 2014. His first motion to dismiss (acknowledging that one of the rear light bulbs of his vehicle was burned out) was filed on February 15, 2015. His second motion (asserting racial discrimination) was filed on April 28, 2015, and his third motion (challenging the DVD from the stop) was filed on May 28, 2015. Therefore, the motions were not timely. In an abundance of caution, however, we shall further address the merits of his arguments on appeal.

1. Selective Prosecution

{¶15} The review of a trial court's determination regarding a motion to dismiss on selective prosecution grounds presents a mixed question of law and fact. *State v. Michel*, 181 Ohio App.3d 124, 2009-Ohio-450, 908 N.E.2d 456 (9th Dist.). The reviewing court must accept the trial court's findings of fact if they are supported by competent, credible evidence, whereas the application of the law to those facts will be reviewed de novo. *Id.*, citing *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, and *State v. Searls*, 118 Ohio App.3d 739, 741, 693 N.E.2d 1184, ¶ 8 (5th Dist.1997).

{¶16} In *Pepper Pike v. Dantzig*, 8th Dist. Cuyahoga No. 85287, 2005-Ohio-3486, this court held that in order to support a claim of selective prosecution, a defendant bears the heavy burden of establishing, at least prima facie, that

> "(1) while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights."

Id. at ¶ 18, quoting *State v. Flynt*, 63 Ohio St.2d 132, 134, 407 N.E.2d 15 (1980), quoting *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir.1974). *See also Lakewood v. Calanni*, 8th Dist. Cuyahoga No. 95610, 2011-Ohio-3465, ¶ 13.

{¶17} In this matter, there was no evidence to establish either element of the selective prosecution claim. First, there was no evidence that Kafara and Inyang are similarly situated to, or received more favorable treatment than Oko. Rather, the evidence demonstrated that both Kafara and Inyang have been stopped many times by Officer Davis and have received many citations. There was no evidence that Oko had been singled out for unfair treatment. Rather, Officer Davis testified that his actions were a response to a concern over an increase in illegal cab operations. Secondly, while Oko testified that he filed a complaint against Officer Davis, the evidence demonstrated that Officer Davis was unaware of any such complaint. Additionally, Officer Davis testified that he noticed Oko's vehicle because of the white bar on top of the vehicle, as if it were a taxi, and he became concerned once he learned that the vehicle was registered to a woman who owned several other cars. There was no evidence that Oko was subjected to unfair treatment because of his race. From the foregoing, the record does not support

the claim of selective prosecution. This portion of the assignment of error is without merit.

2. Fourth Amendment Violation, Racial Profiling, and Harassment

{¶18} Appellate review of the denial of a motion to suppress presents a mixed question of law and fact. *Burnside*, 100 Ohio St.3d at ¶ 8, 2003-Ohio-5372, 797 N.E.2d 71. The reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *Id.*; *State v. Shabazz*, 8th Dist. Cuyahoga No. 97563, 2012-Ohio-3367, ¶ 11. The application of the law to those facts is subject to de novo review. *State v. Polk*, 8th Dist. Cuyahoga No. 84361, 2005-Ohio-774, ¶ 2; *State v. Anderson*, 100 Ohio App.3d 688, 691, 654 N.E.2d 1034 (4th Dist.1995).

{¶19} In *Terry v. Ohio*, 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the United States Supreme Court held that a police officer may stop and detain an individual if the officer possesses a reasonable suspicion, based upon specific and articulable facts, that the person stopped has committed or is committing a crime. *See also State v. Andrews*, 57 Ohio St.3d 86, 565 N.E.2d 1271 (1991). Thus, if the specific and articulable facts available to an officer indicate that a motorist may be committing a criminal act, which includes the violation of a traffic law, the officer is justified in making an investigative stop. *State v. Davenport*, 8th Dist. Cuyahoga No. 83487, 2004-Ohio-5020, ¶ 15-16, citing *State v. Carlson*, 102 Ohio App.3d 585, 596, 657 N.E.2d 591 (9th Dist.1995). *See also Westlake v. Kaplysh*, 118 Ohio App.3d 18, 20, 691 N.E.2d 1074 (8th Dist.1997), citing *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135

L.Ed.2d 89 (1996); *State v. Grigoryan*, 8th Dist. Cuyahoga No. 93030, 2010-Ohio-2883, ¶ 17. An officer may expand the scope of the stop and may continue to detain the vehicle without running afoul of the Fourth Amendment if the officer discovers further facts that give rise to a reasonable suspicion that additional criminal activity is afoot. *State v. Robinette*, 80 Ohio St.3d 234, 240, 1997-Ohio-343, 685 N.E.2d 762.

{¶20} All challenges to the validity of a traffic stop are subject to the same *Terry* standard of review, even where the defendant raises allegations of pretext. *Davenport* at ¶ 15. The defendant must then present evidence to support the claim of pretext and racial profiling. *Id*.

{¶21} In this matter, Oko conceded that his vehicle had a burned out rear light bulb. In addition, the record demonstrates that Officer Davis had been concerned about an increase in illegal taxicab operations in the city and that Oko's vehicle had a light suggesting that it was a cab, but had no other identifying information. After Officer Davis ran the license plate, he learned that the vehicle was owned by a woman who has several other vehicles. After further observation, Officer Davis noticed passengers exiting the vehicle.

{¶22} Therefore, because the record contains specific and articulable facts that Oko committed a traffic infraction, Officer Davis was justified in making the stop. Oko admitted in his motion to dismiss that a rear bulb of the vehicle did not work. Further observation indicated that Oko did have multiple passengers and one of them spoke to the

officer and indicated that Oko was now no longer charging them a fare. In this connection, we note that

> [l]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.

Florida v. Royer, 460 U.S. 491, 497, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). "The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way." *Id*.

{¶23} Furthermore, there was no evidence that Oko was targeted because of his race or that the citations for traffic offenses and taxicab-related infractions were simply a pretext for unlawful discrimination.

{¶24} From the foregoing, the trial court did not err in denying the motion to dismiss.

Officer Davis's Failure to Appear at a Pretrial

{¶25} A trial court is vested with inherent power to regulate its proceedings and has discretion to dismiss a case where the citing officer fails to appear for trial of the traffic matter. *Cleveland v. Bacho*, 8th Dist. Cuyahoga No. 81600, 2002-Ohio-6832; *Cleveland v. Pavarini*, 8th Dist. Cuyahoga No. 85185, 2005-Ohio-3552.

{¶26} In this matter, the record suggests that Officer Davis did not attend a pretrial hearing in August 2014, but the record does not demonstrate that he was required to do so. Moreover, Officer Davis did appear for trial. The record further indicates that Oko

was permitted to continue the matter on three separate occasions. Accordingly, we are unable to conclude that the trial court erred in failing to dismiss the case after the officer failed to attend a pretrial.

{¶27} The first and second assignments of error are without merit.

Manifest Weight

{¶28} In his third assignment of error, Oko complains that his convictions are against the manifest weight of the evidence.

{¶29} In *State v. Thompkins,* 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541, the Ohio Supreme Court set forth the following standard for determining whether a conviction is against the manifest weight of the evidence:

> "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction."

Id. at 387, quoting *State v. Martin,* 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). Further, "the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass,* 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. A factfinder is free to believe all,

some, or none of the testimony of each witness appearing before it. *State v. Ellis*, 8th Dist. Cuyahoga No. 98538, 2013-Ohio-1184, ¶ 18. Although the reviewing court considers the credibility of witnesses in a challenge to the manifest weight of the evidence, it does so "with the caveat that the trier of fact is in the best position to determine a witness's credibility through its observation of his or her demeanor, gestures, and voice inflections." *State v. Campbell*, 8th Dist. Cuyahoga Nos. 100246 and 100247, 2014-Ohio-2181, ¶ 39.

{¶30} In this matter, we cannot conclude that the trial court lost its way in convicting Oko of the offenses. As to the turn signal violation, Oko admitted in his first motion to dismiss that a light bulb in the rear of the vehicle did not work and that this offense occurred. As to the offenses of failure to display a taxicab passenger bill of rights and failure to have a taximeter, the trial court did not lose its way in accepting Officer Davis's testimony over Oko's claim that he was not operating the vehicle as a taxi. The court noted that it relied upon information about the passengers and the statements made to Officer Davis. Although Oko complains that the court relied upon impermissible hearsay, the record demonstrates that the court did not permit this evidence during the city's case-in-chief, but the court permitted it during Oko's cross-examination of this witness as Oko tested the officer's credibility on the issue of whether he had observed any interactions between Oko and the passengers. Therefore, any error was invited. *State v. Jackson*, 8th Dist. Cuyahoga No. 86105, 2006-Ohio-174, ¶ 28. In any event, the trial court, sitting as the finder of fact, is presumed to have considered only

relevant, admissible evidence. *State v. Crawford*, 8th Dist. Cuyahoga No. 98605, 2013-Ohio-1659, ¶ 61; *State v. Chandler*, 8th Dist. Cuyahoga No. 81817, 2003-Ohio-6037, ¶ 17. Accordingly, the convictions are not against the manifest weight of the evidence.

{¶31} The third assignment of error is without merit.

{¶32} Judgment is affirmed.

It is ordered that appellee recover of 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 municipal court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

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

MARY EILEEN KILBANE, PRESIDING JUDGE

MARY J. BOYLE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR