

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 09CA009612

Appellant

v.

MARILYN FIGUEROA

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 08CR076031

Appellee

DECISION AND JOURNAL ENTRY

Dated: January 25, 2010

CARR, Judge.

{¶1} The State of Ohio appeals the judgment of the Lorain County Court of Common Pleas, which granted appellee Marilyn Figueroa’s motion to suppress. This Court reverses.

I.

{¶2} On June 25, 2008, Figueroa was indicted on one count of receiving stolen property in violation of R.C. 2913.51(A), a felony of the fifth degree. She entered a plea of not guilty at arraignment.

{¶3} At a pretrial on December 3, 2008, Figueroa indicated that she would be filing a motion to suppress. Figueroa filed her motion to suppress on February 9, 2009, and the trial court held a hearing on March 4, 2009. On June 17, 2009, the trial court issued a judgment entry granting the motion to suppress and scheduling another pretrial for the same day. The State filed a timely appeal, raising one assignment of error for review.

II.

ASSIGNMENT OF ERROR

“THE TRIAL COURT ERRED WHEN IT GRANTED APPELLEE’S MOTION TO SUPPRESS AS REASONABLE AND ARTICULABLE SUSPICION EXISTED TO STOP APPELLEE’S VEHICLE.”

{¶4} The State argues that the trial court erred by granting Figueroa’s motion to suppress on the grounds that the police had no reasonable and articulable suspicion of criminal activity to stop the defendant’s vehicle. This Court agrees.

{¶5} A motion to suppress presents a mixed question of law and fact:

“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.) *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8.

{¶6} The United States Supreme Court has held:

“The Fourth Amendment [to the United States Constitution] guarantees the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of persons within the meaning of this provision. An automobile stop is thus subject to the constitutional imperative that it not be unreasonable under the circumstances.” (Internal quotations and citations omitted.) *Whren v. United States* (1996), 517 U.S. 806, 809-10.

{¶7} Moreover,

“[t]he essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of reasonableness upon the exercise of discretion by government officials, including law enforcement agents, in order to safeguard the privacy and security of individuals against arbitrary invasions[.] Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual’s Fourth Amendment interests against the promotion of legitimate governmental interests.” (Internal quotations and citations omitted.) *Delaware v. Prouse* (1979), 440 U.S. 648, 653-54.

{¶8} The State argues that the investigatory stop was warranted in this case pursuant to *Terry v. Ohio* (1968), 392 U.S. 1. The Ohio Supreme Court has held:

“In order to warrant a brief investigatory stop pursuant to *Terry*, the police officer involved must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. Such an investigatory stop must be viewed in light of the totality of the surrounding circumstances presented to the police officer. The standard for reviewing such police conduct is an objective one: would the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate? That is, an investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.” (Internal quotations and citations omitted.) *State v. Williams* (1990), 51 Ohio St.3d 58, 60-61.

The *Williams* court further explained:

“*Terry* stands for the proposition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.” (Internal quotations and citations omitted.) *Id.* at 60.

{¶9} In this case, Deputy Anthony Pluta of the Lorain County Sheriff’s Office, who generally works the 11:00 p.m. to 7:00 a.m. shift, testified that he was investigating the theft and misuse of a credit card on April 29, 2008. He testified that the victim informed him that she had lost her credit card after using it at a KFC in Sheffield Township and that subsequent unauthorized purchases were made with her card. Deputy Pluta testified that he asked another detective to gather security video tapes based on the victim’s bank statements showing various unauthorized charges at those locations. Deputy Pluta testified that he viewed the security tapes, including a video taken at a Taco Bell on Route 58 in Amherst, in which two Hispanic males

were seen using the victim's credit card at a drive-through window while in a GMC two-toned truck with a dent in the driver's door.

{¶10} Deputy Pluta testified that he investigated the KFC where the card was stolen for nearly two weeks. During that time, he testified that he saw the same two-toned Suburban with a dent in its door in the KFC parking lot on May 3, 2008. Deputy Pluta testified that he was about to attempt to make contact with the vehicle's owner when he was dispatched to address another matter. The deputy testified that he noted the license plate of the vehicle and ran it through the system. He testified that he discovered that the vehicle was registered to Marilyn Figueroa.

{¶11} Deputy Pluta testified that sometime after midnight on May 11, 2008, he saw the above-referenced truck driving from the direction of the KFC. He testified that he called Deputy James Rico for back up because he intended to stop the vehicle in furtherance of his investigation. He admitted that Figueroa had not violated any traffic law before he stopped her.

{¶12} Deputy Pluta testified that he told Figueroa, who was alone in the vehicle, that he was investigating a credit card theft. He testified that he informed her that he stopped her vehicle because it matched the vehicle in the Taco Bell security video in which the stolen credit card was being used and because her vehicle matched the vehicle he observed in the KFC parking lot where the credit card was last used before its theft. Deputy Pluta testified that he suspected that the vehicle he stopped was relevant to his on-going criminal investigation because of its use in relation to the credit card theft. He based his suspicions on information he had already gathered during his investigation. He emphasized that it was important to identify any driver of the vehicle his investigation showed was used in relation to the credit card theft.

{¶13} After he stopped Figueroa, Deputy Pluta showed her some pictures of people making unauthorized purchases with the stolen credit card in a Wal-Mart. The deputy testified

that Figueroa identified her boyfriend in the photographs and admitted that he had recently brought new gaming and video equipment into their home. Deputy Pluta testified that he read Figueroa her *Miranda* warnings. He testified that she consented to a search of her vehicle, during which the deputies found receipts matching unauthorized purchases with the stolen credit card. The deputy testified that he brought Figueroa home, at which time she consented to a search of her home, during which the deputies found electronic equipment purchased with the stolen credit card.

{¶14} When questioned during cross-examination regarding why he did not make contact with the owner of the two-toned dented truck earlier after seeing it in the KFC parking lot on May 3, 2008, Deputy Pluta testified that he was waiting for the opportunity to review more security video tapes relevant to his investigation. He testified that he also wanted to make sure that he had merchant receipts which would link the purchases made from the vehicle with the stolen credit card. Deputy Pluta further testified that he drove by Figueroa's home after running her vehicle's plate number, but he did not stop because the vehicle was not at the home at the time. He admitted that there was no emergency necessitating the stop after midnight on May 11, 2008; rather, he was merely pursuing his on-going investigation.

{¶15} Deputy James Rico of the Lorain County Sheriff's Office testified that Deputy Pluta called him to assist in the traffic stop on May 11, 2008. He testified that he was not sure why they were stopping her vehicle at the time, but as he listened, he realized that Figueroa was a suspect in the credit card theft at KFC.

{¶16} Figueroa testified that she was working the closing shift at the KFC on North Ridge Road on May 10, 2008. She testified that she left the restaurant in her Suburban vehicle around midnight. Figueroa testified that the deputy who stopped her vehicle told her he was

conducting an investigation. She testified that the deputy showed her some photographs taken at various stores, and she identified her boyfriend in the photographs. She testified that the deputy told her that her boyfriend went on a shopping spree with a credit card that was lost at KFC, so he suspected that she gave it to him. She testified that Deputy Pluta already knew she worked at KFC because she did not tell him. Figueroa testified that she denied having the stolen credit card, and the deputy explained that he was investigating to determine where the card was.

{¶17} Figueroa testified that Deputy Pluta never asked her name or for any identification, although she later admitted that she showed her driver's license to him. She also admitted that she drives a two-toned Suburban. While she denied there was a dent in the driver's door, she admitted that there were other dents in her truck. Figueroa testified that she was surprised that her vehicle was involved in a theft incident, but she admitted that she routinely let her boyfriend use her vehicle.

{¶18} Figueroa testified that she was never read her *Miranda* warnings. She denied giving consent for a search of her vehicle, but she admitted that she consented to the search of her home.

{¶19} The trial court found the testimony of the deputies to be more credible than Figueroa's testimony. Therefore, the trial court found that Figueroa's statements were elicited in compliance with *Miranda v. Arizona* (1966), 384 U.S. 436, and that she consented to the search of both her vehicle and her home. The trial court granted the motion to suppress, however, upon concluding that the deputy did not have reasonable suspicion to justify the initial stop. The trial court premised its conclusion on its findings that a male in a two-toned truck used a credit card that had earlier been lost or stolen at KFC. The trial court found that the deputy did not know the "make, model, year or color" of the vehicle used during the unauthorized purchase by a male,

while they stopped a lone female ten days later in a two-toned Suburban which left the KFC where the card disappeared. The trial court reasoned that “the police were operating with limited facts” which did not give rise to reasonable suspicion to justify Figueroa’s stop.

{¶20} This Court must only accept the trial court’s findings of fact if they are supported by competent, credible evidence. *Burnside* at ¶8. In this case, there was evidence to establish the following. A victim reported that someone was making unauthorized purchases using her credit card which the victim last used at a KFC on North Ridge Road in Sheffield Township. Deputy Pluta knew that unauthorized credit card purchases had been made at a restaurant drive-through window by someone with access to a two-toned GMC (make) Suburban (model) with a dent in the driver’s door. During his investigation, the deputy monitored the KFC and saw a matching two-toned Suburban with a dented driver’s door parked in the lot. As he was about to attempt to make contact with the vehicle’s owner, he was dispatched to address another matter at another location. The deputy wrote down the vehicle’s license plate number and ran the number through the system. Deputy Pluta learned that the vehicle was registered to a woman, specifically Marilyn Figueroa.

{¶21} Figueroa testified that Deputy Pluta knew that she worked at the KFC relevant to this case before he stopped her. Although he knew that a male was using the stolen credit card to make unauthorized purchases, Deputy Pluta knew that the vehicle used during those purchases belonged to a female. Although he went to the vehicle owner’s home, he did not seek out the owner because the vehicle was not there.

{¶22} Although Figueroa was stopped after midnight, Deputy Pluta stopped her during his normal shift. Moreover, Figueroa herself had just left work at the KFC when Deputy Pluta recognized the vehicle he had identified as the one used during the commission of a theft

offense. The deputy knew that the stolen credit card had recently been used in that vehicle. Therefore, the deputy had information gained during the course of his investigation to link this vehicle to the commission of a crime. Accordingly, the trial court's finding of fact that "the police were operating with limited facts" is not supported by competent, credible evidence.

{¶23} Under these circumstances, the deputy had a reasonable and articulable suspicion of criminal activity to justify stopping a vehicle he had previously identified as having been used recently in relation to a credit card theft. He knew the owner of this vehicle was a woman who worked in the restaurant where the credit card was last used before its theft. Accordingly, he was justified in stopping her briefly to determine her identity and obtain more information. See *Williams*, 51 Ohio St.3d at 60. Figueroa identified her boyfriend in security photographs taken during the unauthorized use of the credit card, and she admitted that she let him use her vehicle. Because Deputy Pluta learned during the course of his investigation that Figueroa worked at the KFC where the credit card was stolen, he could reasonably infer that she gave the credit card to another person with access to her vehicle. Based on the totality of the circumstances, the State presented evidence that Deputy Pluta had a reasonable suspicion of criminal activity which justified his stop of Figueroa's vehicle. Accordingly, the trial court erred by granting the motion to suppress. The State's assignment of error is sustained.

III.

{¶24} The State's sole assignment of error is sustained. The judgment of the Lorain County Court of Common Pleas is reversed and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
CONCURS

MOORE, P. J.
DISSENTS, SAYING:

{¶25} I respectfully dissent from the majority’s conclusion that the facts in the instant case amounted to reasonable suspicion to justify the investigative traffic stop.

{¶26} The Fourth Amendment to the United States Constitution prohibits “unreasonable searches and seizures.” See, also, *Terry v. Ohio* (1968), 392 U.S. 1, 8-9. A stop is a seizure under the Fourth Amendment. *Id.* at 16-17. “A police officer may stop a car if he has a reasonable, articulable suspicion that *a person* in the car is or has engaged in criminal activity.” (Internal quotations and citations omitted.)(Emphasis added.) *State v. Wagner-Nitzsche*, 9th

Dist. No. 23944, 2008-Ohio-3953, at ¶ 10. To justify the stop, the deputy needed to point to “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Maumee v. Weisner* (1999), 87 Ohio St.3d 295, 299, quoting *Terry*, 392 U.S. at 21. “A court reviewing the officer’s actions must give due weight to his experience and training and view the evidence as it would be understood by those in law enforcement.” *State v. Andrews* (1991), 57 Ohio St.3d 86, 88 “[A]n officer’s reliance on a mere ‘hunch[,]’ [however,] is insufficient to justify a stop[.]” (Citations and quotations omitted.) *United States v. Arvizu* (2002), 534 U.S. 266, 274.

{¶27} In order to justify the stop of Figueroa’s car, the deputy was required to point to specific and articulable facts, taken together with rational inferences, that *Figueroa* engaged in criminal activity. *Wagner-Nitzsche*, supra, at ¶ 10. The majority’s opinion recounts facts about which the deputy became aware relative to the involvement of a *vehicle* similar to that driven by Figueroa, but none of the facts articulated by the deputy remotely suggested that *she* was or had been engaged in criminal activity. The majority relied on Figueroa’s testimony that the deputy knew that she worked at the KFC in question. There are three problems with this approach. First, her testimony as to the deputy’s personal knowledge carries absolutely no evidentiary value. Second, as the majority noted, the trial court did not find Figueroa’s testimony credible. Finally, the deputy himself never testified that he knew that Figueroa worked at the KFC where the credit card was last legitimately used. It was the State’s burden to show that the deputy had a reasonable, articulable suspicion to justify the stop. *State v. Neuhoff* (1997), 119 Ohio App.3d 501, 504, citing *Xenia v. Wallace* (1988), 37 Ohio St.3d 216, paragraph two of the syllabus. See, also, *State v. McDonald* (Apr 24, 2001), 5th Dist. No. 2000-CA-51 (applying the Ohio Supreme Court’s statements regarding the burden of proof as found in *Xenia v. Wallace* to a motion to

suppress contesting whether an officer had reasonable suspicion to justify an initial stop.) Therefore, I believe the majority's reliance upon this fact is misplaced.

{¶28} Although the deputy testified that he learned that Figueroa owned the car he observed in the KFC parking lot, he did not testify to any facts upon which the trier of fact could make a rational inference that Figueroa was involved in any unlawful activity. He did not testify that this led him to be suspicious of Figueroa as to any involvement in wrongdoing. Instead, he stated that he stopped the vehicle because it was the one he observed at the KFC and it matched the surveillance video from the restaurant drive-through. He explained that he suspected that the vehicle was *relevant* to his ongoing criminal investigation based upon information he had gathered throughout the investigation. The car certainly might have been relevant to the deputy's investigation. Discovery of the vehicle would have prompted continued investigation to determine whether there was any involvement of the vehicle in the theft. I disagree, however, that its discovery on the night in question gave rise to a reasonable, articulable suspicion that *Figueroa* was involved in the theft.

{¶29} Therefore, I would affirm the trial court's judgment granting the motion to suppress.

APPEARANCES:

DENNIS P. WILL, Prosecuting Attorney, and CHRISTOPHER J. PIERRE, Assistant Prosecuting Attorney, for Appellant.

DENISE G. WILMS, Attorney at Law, for Appellee.