[Cite as *State v. Hatch*, 2010-Ohio-53.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C. A. No. 24870
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
JONATHON W. HATCH	STOW MUNICIPAL COURT COUNTY OF SUMMIT, OHIO
Appellant	CASE No. 2009TRC03476

DECISION AND JOURNAL ENTRY

Dated: January 13, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} At approximately 3:00 a.m. on February 21, 2009, Cuyahoga Falls police officer Theodore Davis saw Jonathon Hatch briefly stop his car on the road for no apparent reason. When Mr. Hatch began moving again, Officer Davis followed him and watched him come to a rolling stop at a flashing yellow light. Officer Davis initiated a traffic stop to investigate Mr. Hatch's unusual driving. When he reached the car, he noticed a very strong odor of alcohol coming from it, so he asked Mr. Hatch if he had had anything to drink. After Mr. Hatch told him that he had, Officer Davis decided to administer field sobriety tests. Following the tests, Officer Davis arrested Mr. Hatch for operating a motor vehicle under the influence of alcohol. Mr. Hatch moved to suppress the State's evidence, arguing that Officer Davis did not have reasonable suspicion to stop him and did not have probable cause to arrest him. The municipal court denied Mr. Hatch's motion, concluding that his erratic driving gave Officer Davis

reasonable suspicion for the stop and that there was probable cause to arrest him following the field sobriety tests. This Court reverses because, under the totality of the circumstances, Mr. Hatch's unusual driving did not give Officer Davis reason to suspect that he was engaged in criminal activity.

STANDARD OF REVIEW

{¶2} A motion to suppress evidence presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St. 3d 152, 2003-Ohio-5372, at ¶8. Generally, a reviewing court "must accept the trial court's findings of fact if they are supported by competent, credible evidence." *Id*. But see *State v. Metcalf*, 9th Dist. No. 23600, 2007-Ohio-4001, at ¶14 (Dickinson, J., concurring). Because the State did not file a brief in this case, however, this Court "may accept [Mr. Hatch's] statement of the facts and issues as correct and reverse the judgment [of the trial court] if [his] brief reasonably appears to sustain such action." App. R. 18(C); see *Barberton Police Dep't v. Easley*, 9th Dist. No. 24624, 2009-Ohio-6796, at ¶9.

REASONABLE SUSPICION

{¶3} Mr. Hatch's first assignment of error is that Officer Davis lacked specific, articulable grounds upon which he could effectuate a constitutionally valid traffic stop. Although a police officer generally may not seize a person within the meaning of the Fourth Amendment unless he has probable cause to arrest him for a crime, "not all seizures of the person must be justified by probable cause . . . ." *Florida v. Royer*, 460 U.S. 491, 498 (1983). "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." *State v. Kodman*, 9th Dist. No. 06CA0100-M, 2007-Ohio-5605, at ¶3 (citing *State v. VanScoder*, 92 Ohio App. 3d 853, 855 (1994)). "[He] must be able to point to specific and articulable facts which, taken together with rational inferences from

those facts, reasonably warrant [the] intrusion." *Terry v. Ohio*, 392 U.S. 1, 21 (1968). "[I]t is imperative that the facts be judged against an objective standard: 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?" *Id*. at 21-22 (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

{¶4} Whether a police officer had "an objective and particularized suspicion that criminal activity was afoot must be based on the entire picture – a totality of the surrounding circumstances." *State v. Andrews*, 57 Ohio St. 3d 86, 87 (1991) (citing *United States v. Cortez*, 449 U.S. 411, 417-18 (1981); *State v. Bobo*, 37 Ohio St. 3d 177, 178 (1988)). "[The] circumstances are to be viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold." *Andrews*, 57 Ohio St. 3d at 87-88. "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." *Id*. at 88.

{¶5} Officer Davis testified that he was driving westbound on Portage Trail when he saw Mr. Hatch's car heading eastbound on the same street. He said that Mr. Hatch's car caught his attention because Mr. Hatch stopped it for two seconds in the middle of a block near 10th or 11th street where there was no place to turn. Officer Davis said that, after Mr. Hatch started driving again, he turned around and followed him. He said that Mr. Hatch came to a rolling stop at a flashing yellow light at 3rd street. According to Officer Davis, traffic was extremely light and no vehicles were impeded by Mr. Hatch's actions. He said that, even though what Mr. Hatch did was nothing dangerous and did not violate any traffic laws, he initiated a traffic stop because of his unusual driving. The municipal court concluded that, "given the time of night and

lack of obstructions, traffic, traffic control or other factors that might cause a driver to stop, . . . the stops . . . constitute erratic driving providing a reasonable articulable suspicion."

{¶6} The municipal court did not cite any authority in support of its conclusion that a driver who briefly stops his car in an unusual location is engaged in erratic driving. In *State v. Cooke*, 9th Dist. No. 2425-M, 1995 WL 622923 (Oct. 25, 1995), a deputy observed Mr. Cooke's car weaving within its own lane, frequently braking on straightaways for no apparent reason, signaling for a turn where there was no place to turn, and, finally, turning into the driveway of a closed water treatment facility. This Court concluded that the record supported the trial court's conclusion that the deputy had a reasonable, articulable suspicion for stopping Mr. Cooke. *Id*. at *2. Unlike in *Cooke*, Officer Davis did not observe Mr. Hatch weaving, braking frequently, or signaling for a turn where there was no place to turn.

{¶7} Unusual driving does not necessarily give a law enforcement officer a reasonable, articulable suspicion that the driver is engaged in criminal activity. In *State v. Bacher*, 170 Ohio App. 3d 457, 2007-Ohio-727, a police officer stopped Mr. Bacher at 3:00 a.m. after observing him driving 23 miles per hour slower than the highway's posted speed limit. The First District noted that Mr. Bacher's slow speed did not violate any traffic laws, he was not impeding traffic, and he was not "engaged in other unusual driving behavior that would suggest intoxication, such as swerving, driving on the shoulder of the road, straddling a lane, crossing the center line, or weaving." *Id*. at ¶12. The court concluded that the officer did not have reasonable suspicion for the stop, noting that the record was "devoid of circumstances suggesting criminal activity . . . ." *Id*. at ¶13. It recognized that, if she had "followed Bacher for a more extended period of time, the requisite suspicion might have developed." *Id*.

{¶8} Having reviewed the totality of the circumstances, this Court concludes that Officer Davis did not have a reasonable, articulable suspicion that Mr. Hatch was engaged in criminal activity. While Mr. Hatch's first unexplained stop may have given him a reason to pay closer attention to Mr. Hatch's driving, the stop did not violate any traffic laws and was not accompanied by any other indications of erratic driving. Regarding Mr. Hatch's actions at the flashing yellow light, under Section 4511.15(B) of the Ohio Revised Code, when a driver approaches a "[f]lashing yellow caution signal," he "may proceed through the intersection or past such signal only with caution." Although Mr. Hatch may have used more caution than necessary, his decision to bring his car to an almost complete stop also did not violate any traffic laws. It is possible Mr. Hatch initially mistook the yellow light for one that was about to turn red, but started driving again when he realized it was a flashing yellow. As Officer Davis acknowledged, Mr. Hatch did not come to a full stop at the intersection, only a rolling stop. While Officer Davis may have observed additional unusual conduct if he had continued to follow Mr. Hatch, his limited observations did not support the municipal court's determination that Mr. Hatch had engaged in erratic driving.

{¶9} There were not "facts which, taken together with rational inferences from those facts, reasonably warrant[ed] [Officer Davis's] intrusion." *Terry v. Ohio*, 392 U.S. 1, 21 (1968). Mr. Hatch's first assignment of error is sustained. This Court's conclusion renders Mr. Hatch's second assignment of error moot, and it is overruled on that basis. See App. R. 12(A)(1)(c).

CONCLUSION

{¶10} The municipal court incorrectly denied Mr. Hatch's motion to suppress. The judgment of the Stow Municipal Court is reversed and this cause is remanded for further

proceedings consistent with this decision.

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 Stow Municipal Court, County of Summit, 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.

CLAIR E. DICKINSON
FOR THE COURT

WHITMORE, J.
BELFANCE, J.
CONCUR

APPEARANCES:

THOMAS M. DICAUDO, attorney at law, for appellant.

JOHN CHAPMAN, assistant law director, for appellee.