

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-18-067

Appellant

Trial Court No. 2017CR591

v.

John Gray

Appellee

and

State of Ohio

Court of Appeals No. WD-18-068

Appellant

Trial Court No. 2017CR590

v.

Alex Boler

DECISION AND JUDGMENT

Appellee

Decided: June 28, 2019

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
David T. Harold, Assistant Prosecuting Attorney, for appellant.

Autumn D. Adams, for appellee, John Gray.

Brad F. Hubbell, for appellee, Alex Boler.

* * * * *

SINGER, J.

{¶ 1} In this consolidated appeal, the state of Ohio appeals from the August 30, 2018 judgment of the Wood County Court of Common Pleas, where the court granted appellees, John Gray and Alex Boyers', motions to suppress. Finding no error, we affirm.

Assignments of Error

{¶ 2} The state sets forth the following assignments of error:

First Assignment of Error: The trial court erred in suppressing the evidence based on a misinterpretation of R.C. 4511.25(B)(1).

Second Assignment of Error: The trial court erred in suppressing the evidence when the facts demonstrated a violation of R.C. 4511.25(B)(1).

Third Assignment of Error: The trial court erred in suppressing the evidence on the basis that O.A.C. 5537-2-09 was invalid due to a purported conflict with R.C. 4511.25(B)(1).

Fourth Assignment of Error: The trial court erred in suppressing the evidence by erroneously concluding that O.A.C. 5537-2-09 was void for vagueness.

Fifth Assignment of Error: The trial court erred in suppressing the evidence where the exclusionary rule does not apply pursuant to mistake-of-law and *DeFillippo* principles.

Facts

{¶ 3} On December 12, 2017, Ohio State Trooper Ann Malone was stationary, observing traffic on a three-lane highway. At approximately 3:00 p.m., Malone checked the speed of Gray and Boler's vehicle as it passed her.

{¶ 4} According to Malone's testimony, Gray and Boler were traveling in the center lane at 65 m.p.h., in a 70 m.p.h. zone. Malone stated Boler, the driver, was "using the 10 and 2 position in a closed grip position on the steering wheel, staring straight ahead, [and] never looked over at [her] stationary position." Based on the vehicle's speed and Boler's behavior, Malone decided to pursue and pace the vehicle.

{¶ 5} The dash cam video from Malone's patrol cruiser initially showed Gray and Boler's vehicle being trailed by a grey vehicle, with a semi-truck traveling in the far-right lane between the vehicles. As Malone approached Gray and Boler's vehicle, she testified that their speed increased from approximately 67 to 68 m.p.h., in the 70 m.p.h. zone. Malone traveled next to Gray and Boler for a few moments, to further pace their speed. Malone testified that Gray and Boler then abruptly decelerated to 60 m.p.h., in the center lane, which the video reflects resulted in the semi-truck passing by in the far-right lane.

{¶ 6} Malone then pulled behind Gray and Boler's vehicle and activated her lights. As Gray and Boler pulled over, the grey vehicle can be seen in the video passing by.

{¶ 7} Malone alleged Boler violated R.C. 4511.25(B)(1), and Ohio Adm.Code 5537-2-09, and that these violations formed the bases for the stop. The stop led to discovery of numerous credit cards containing stolen information.

{¶ 8} Gray and Boler were charged with forgery in violation of R.C. 2913.31(A)(1) and (C)(1), a felony of the fifth degree; receiving stolen property in violation of R.C. 2913.51(A) and (C), a felony of the fifth degree; and possessing criminal tools in violation of R.C. 2923.24(A) and (C), a felony of the fifth degree.

{¶ 9} On March 14, 2018, Boler moved to suppress the evidence discovered during the stop, and a hearing was held on March 29, 2018. Gray subsequently joined Boler's motion on April 27, 2018. In addressing the motions, the court determined that R.C. 4511.25(B)(1) applies where a driver impedes traffic while traveling too slowly in the far-left lane. The court also determined that Ohio Adm.Code 5537-2-09 conflicted with R.C. 4511.25(B)(1), and that the regulation was void for vagueness. Lastly, the court found no basis for applying the good faith exception.

{¶ 10} The court ordered the evidence suppressed, and the judgment was journalized on August 30, 2018. The state timely appeals.

Standard of Review

{¶ 11} “Appellate review of a motion to suppress presents mixed questions of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact.” *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶ 100. The appellate court must accept the trial court's findings of fact if the facts are supported by competent, credible evidence. *State v. Steed*, 2016-Ohio-8088, 75 N.E.3d 816, ¶ 11 (6th Dist.). The appellate court applies a de novo standard of review to determine if the facts satisfy the applicable legal standard. *State v. Bragg*, 6th Dist. Lucas No. L-07-1162, 2007-Ohio-5993, ¶ 4.

First Assignment of Error

{¶ 12} The state argues that the trial court improperly added elements to R.C. 4511.25(B)(1) by interpreting it with reference to R.C. 4511.22, and incorrectly determining that there must be impediment of traffic in addition to slow speed for a violation. Gray and Boler contend that the trial court was correct in its approach and interpretation of R.C. 4511.25(B)(1).

{¶ 13} Slow speed alone is generally not enough to justify a traffic stop. *See State v. Huth*, 133 Ohio App.3d 261, 265-66, 727 N.E.2d 931 (7th Dist.1999); *State v. Crockrell*, 4th Dist. Ross No. 93CA1957, 1994 Ohio App. LEXIS 3372, *8-10 (July 25, 1994); *State v. Bahen*, 2016-Ohio-7012, 76 N.E.3d 438, ¶ 23 (10th Dist.). Exceptions exist, including where the slow speed is in violation of R.C. 4511.25 or 4511.22. *Huth*.

{¶ 14} R.C. 4511.25(B), provides in pertinent part:

(1) Upon all roadways any vehicle or trackless trolley proceeding at less than the prevailing and lawful speed of traffic at the time and place and under the conditions then existing shall be driven in the right-hand lane then available for traffic, and far enough to the right to allow passing by faster vehicles if such passing is safe and reasonable, except under any of the following circumstances:

(a) When overtaking and passing another vehicle or trackless trolley proceeding in the same direction;

(b) When preparing for a left turn;

(c) When the driver must necessarily drive in a lane other than the right-hand lane to continue on the driver's intended route.

{¶ 15} R.C. 4511.22(A), provides:

No person shall stop or operate a vehicle * * * at such an unreasonably slow speed as to impede or block the normal and reasonable movement of traffic, except when stopping or reduced speed is necessary for safe operation or to comply with law.

{¶ 16} The Seventh District Court analyzed both statutes in *Huth*, holding that Huth violated R.C. 4511.25(B), because her slow speed caused cars to back up behind her as she drove in the far-left lane. *Id.* at 267. Huth set cruise control and traveled at 60-65 m.p.h., in a 65 m.p.h. zone. *Id.* Despite her traveling at or around the speed limit, the court noted that other vehicles could have proceeded at a constant 65 m.p.h., and her duty was to move to the right lane. *Id.* at 267. A focus was placed on Huth's speed fluctuating below 65 m.p.h., to 60 m.p.h., and how other cars had to pass her using the center lane. *Id.* at 265-67. The court held that the R.C. 4511.25(B) violation was supported by the showing that Huth's slow speed impeded traffic, as this was evidence the vehicle was traveling slower than the prevailing speed of traffic at the time. *Id.*

{¶ 17} We find both R.C. 4511.25(B) and R.C. 4511.22(A), *supra*, aim to prevent traffic impediments and unsafe conditions due to the unreasonably slow speed of drivers proceeding in the far-left lane.

{¶ 18} The state specifically argues that the trial court committed error by adding R.C. 4511.22(A)'s necessary element of traffic impediment, to R.C. 4511.25(B). The August 30, 2018 judgment entry, in pertinent part, states:

Therefore, the Sixth District, in reviewing R.C. 4511.25(B)(1) in *Clark, supra* states that slow speed is not enough for a stop but there must be a showing that a vehicle is being operated at a slow speed that is less than the prevailing speed that is unreasonable for the existing conditions.

Considering the conclusion in *Clark, supra* regarding R.C. 4511.25(B)(1) with the well-held principle applicable to R.C. 4511.22 that slow speed alone is not a violation of the law, it is this Court's conclusion that simply articulating that a vehicle is traveling slower than the speed limit on any road in Ohio— single lane roads to multilane interstates and every other kind of road— without a showing that traffic was impeded or that the slow speed was unreasonable for the conditions cannot be a basis for a stop.

{¶ 19} Although we find that traffic impediment in the far-left lane may be sufficient, but not necessary, to violate R.C. 4511.25(B), the state's contention that the trial court committed error by requiring an element of impediment mischaracterizes the judgment. In the entry, the court specifically held that a violation of R.C. 4511.25(B) occurs when in addition to driving slowly in the far-left lane, there is “a showing that traffic was impeded *or that the slow speed was unreasonable for the conditions* * * * [.]” (Emphasis added.).

{¶ 20} Accordingly, the state’s first assignment of error is not well-taken.

Second Assignment of Error

{¶ 21} The state argues that Malone lawfully stopped and searched Boler because Boler operated the vehicle in violation of R.C. 4511.25(B), and because of other indicia of criminality. Gray and Boler assert the evidence does not reveal such violation or indicia of criminality, and that the resulting stop and search were unconstitutional.

{¶ 22} “The Fourth Amendment to the United States Constitution and the Ohio Constitution, Article I, Section 14, prohibit unreasonable searches and seizures.” *State v. Emerson*, 134 Ohio St.3d 191, 2012-Ohio-5047, 981 N.E.2d 787, ¶ 15. To effectuate a traffic stop, an officer must have probable cause to believe the driver is violating a traffic law or there is reasonable suspicion that the vehicle or its occupant is subject to seizure for violating the law. *Delaware v. Prouse*, 440 U.S. 648, 661-663, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). When police stop a vehicle without probable cause or reasonable suspicion, the seizure is unconstitutional and evidence derived from such a stop must be suppressed. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

{¶ 23} We first point to *Clark* as an example, where an officer stopped Clark’s vehicle on the grounds that Clark violated both Ohio Adm.Code 5537-2-09 and R.C. 4511.25(B) when he traveled in the center lane at 66 m.p.h. in a 70 m.p.h. zone. *State v. Clark*, 2018-Ohio-2029, 101 N.E.3d 758, ¶ 6 (6th Dist.). With specific regard to R.C. 4511.25(B), we held it “only requires a driver to be in the far-right lane when he or she is not traveling at a rate of speed comparable to other reasonable and lawful drivers at that

time and under those conditions.” *Id.* at ¶ 32. Because we found Clark was traveling at a comparable rate of speed as nearby vehicles, we held the record was insufficient to demonstrate he violated R.C. 4511.25(B). *Id.* at ¶ 35.

{¶ 24} Furthermore, in *Lu* we held that a driver did not violate R.C. 4511.25(B), despite traveling 5 m.p.h. under the posted speed limit. *State v. Lu*, 6th Dist. Wood No. WD-18-040, 2018-Ohio-5009, ¶ 18. Trooper Malone was also the officer in *Lu*, and she testified that Lu violated both R.C. 4511.25(B) and Ohio Adm.Code 5537-2-09. *Id.* at ¶ 18-21. The dash cam video, however, showed that Malone “rapidly accelerating for about 10 seconds” to catch up to Lu’s car, that Lu passed other vehicles, and that there was no evidence he was nearby or impeded other traffic. *Id.* at ¶ 18. We found competent and credible evidence to support that Lu’s travel within the center lane was lawful and reasonable, and we affirmed suppression of the evidence because we found Malone lacked probable cause or reasonable, articulable suspicion. *Id.*

{¶ 25} Here, we find Gray and Boler were traveling in the center lane at a consistent speed, maintaining a noticeable distance from the other vehicles. The video does reveal that, as Malone pulled over and paced next to Gray and Boler, they reduced their speed for a period of about 20 seconds, and a semi-truck can be seen passing them in the far-right lane. Malone then almost immediately initiated the stop, and we find at that point there was insufficient basis to determine that Gray and Boler’s speed was inconsistent with the prevailing speed of the surrounding traffic.

{¶ 26} The state further contends that Gray and Boler’s speed caused the nearby gray car to rapidly close the gap between them. To the contrary, we find the video demonstrates that there was enough space between their vehicles for Malone’s cruiser to pull in between. Moreover, there is no indication the grey car was impeded when it is seen traveling in the far left-hand lane after Malone activated her emergency lights.

{¶ 27} Lastly, the state asserts Malone testified that Boler drove the vehicle with his “hands at 10-and-2 position with that very closed grip on that steering wheel, staring straight ahead, never looked at my location,” and, that behavior was further indicia of criminality. We disagree, and consistent with *Clark* and *Lu, supra*, find that the circumstances here did not justify the intrusion upon Gray and Boler’s rights.

{¶ 28} Accordingly, the state’s second assignment of error is not well-taken.

Third Assignment of Error

{¶ 29} The state argues that the trial court erred in determining Ohio Adm.Code 5537-2-09 improperly adds an element of speed to R.C. 4511.25(B). Gray and Boler assert that the court correctly determined Ohio Adm.Code 5537-2-09 conflicts with R.C. 4511.25(B).

{¶ 30} We decided this specific issue in *Clark*, in which we found that Ohio Adm.Code 5537-2-09 conflicted with R.C. 4511.25(B), and thus held the regulation invalid. *Clark*, 2018-Ohio-2029, 101 N.E.3d 758, at ¶ 32-37. Under the invalidated regulation, “[a]nyone traveling 69 m.p.h. or under in that center lane, where the posted limit is 70 m.p.h. * * * is subject to being stopped * * *.” *Id.* at ¶ 46. Here, we find Gray

and Boler’s traveling below the speed limit was lawful under R.C. 4511.25(B), but would violate Ohio Adm.Code 5537-2-09. Thus, the court properly held that the regulation was invalid.

{¶ 31} Accordingly, the state’s third assignment of error is not well-taken.

Fourth Assignment of Error

{¶ 32} The state asserts that the trial court erred in concluding that Ohio Adm.Code 5537-2-09 is unconstitutionally vague. Gray and Boler assert that the court correctly ruled the regulation was void for vagueness.

{¶ 33} “It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand.” *United States v. Mazurie*, 419 U.S. 544, 550, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975). “[A]n ordinance is unconstitutionally vague under a void-for-vagueness analysis when it does not clearly define what acts are prohibited under it.” *Viviano v. City of Sandusky*, 2013-Ohio-2813, 991 N.E.2d 1263, ¶ 13 (6th Dist.), citing *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

{¶ 34} In *Clark*, we applied the following legal test of *Grayned* to determine if Ohio Adm.Code 5537-2-09 was void on vagueness grounds:

1. The regulation must provide fair warning to the ordinary citizen of what conduct is proscribed,
2. The regulation must preclude arbitrary, capricious, and discriminatory enforcement, and
3. The regulation must not impinge constitutionally protected rights.

See *Clark*, 2018-Ohio-2029, 101 N.E.3d 758, at ¶ 55, citing *Grayned* at 108-109.

{¶ 35} We found the regulation did not meet the first prong of the *Grayned* test, and therefore, held the regulation to be unconstitutionally vague. *Id.* at ¶ 61.

{¶ 36} More specifically, we held that an ordinary citizen would not know what conduct is proscribed when reviewing language of Ohio Adm.Code 5537-2-09, which we found confusing when read in conjunction with R.C. 4511.25(B), and in conjunction with signs located on the highway showing slower traffic can proceed in the center lane. *Id.*

{¶ 37} Here, the state contends that, unlike in *Clark*, the trial court failed to apply the law to the specific facts of this case. We disagree, and hold that Ohio Adm.Code 5537-2-09 is unconstitutionally vague.

{¶ 38} Accordingly, the state's fourth assigned error is not well-taken.

Fifth Assignment of Error

{¶ 39} The state lastly argues that even if the facts do not show traffic violations, evidence retrieved after the stop should not have been suppressed because Malone employed a reasonable interpretation of the law, and because Malone relied on a then-existing valid regulation. Gray and Boler contend that the exclusionary rule properly applies, and that the court did not commit error in suppressing the evidence.

{¶ 40} If an initial traffic stop was unlawful, the evidence obtained from the illegal stop may be excluded as fruits of the poisonous tree. *Lu*, 6th Dist. Wood No. WD-18-040, 2018-Ohio-5009, at ¶ 15, citing *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Evidence will not be excluded, however, if a good

faith exception applies. *United States v. Leon*, 468 U.S. 897, 918-23, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). An officer acts in good faith when he relies on a law that is later declared unconstitutional. *Illinois v. Krull*, 480 U.S. 340, 359-69, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987).

{¶ 41} The U.S. Supreme Court has held that “no justification existed to differentiate between reasonable mistakes of fact, which may form the basis of a valid stop, and mistakes of law.” *State v. Lane*, 6th Dist. Erie No. E-18-008, 2018-Ohio-5284, ¶ 15, citing *Heien v. North Carolina*, 574 U.S. 54, 135 S.Ct. 530, 190 L.Ed.2d 475 (2014). For the good faith exception to apply to mistakes of law, the officer’s reliance on the law must be objectively reasonable. *Id.*

{¶ 42} Here, Malone stopped Gray and Boler on December 12, 2017. Ohio Adm.Code 5537-2-09 was not held to be void and unconstitutionally vague until *Clark* issued on May 25, 2018. Nevertheless, although Malone relied on a regulation that had not yet been invalidated, we find her reliance was not objectively reasonable.

{¶ 43} As discussed in the first assigned error, Ohio law before *Clark* mandated that a stop based solely on slow speed is generally not justified. *Huth*, 133 Ohio App.3d 261, 727 N.E.2d 931, at 265-66. The existence of this long-established principle leads us to find that Malone’s reliance on Ohio Adm.Code 5537-2-09 was not objectively reasonable. Gray and Boler’s motion to suppress evidence was properly granted.

{¶ 44} Accordingly, the state’s fifth assignment of error is not well-taken.

Conclusion

{¶ 45} The August 30, 2018 judgment of the Wood County Court of Common Pleas is affirmed. The state is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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