

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000511-001 DT

01/15/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA

GARY L SHUPE

v.

DAVID LAWRENCE FAISON (001)

MICHAEL J DEW

PHX MUNICIPAL CT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number 14006694.

Defendant-Appellant David Lawrence Faison (Defendant) was convicted in the Phoenix Municipal Court of driving under the influence. Defendant contends the trial court erred in denying his Motion To Suppress/Dismiss, which alleged the officer did not have reasonable suspicion to stop his vehicle. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On October 29, 2011, Defendant was cited for driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2), and no proof of insurance, A.R.S. § 28–4135(C). Prior to trial, Defendant filed a Motion To Suppress/Dismiss alleging the officer did not have reasonable suspicion to stop his vehicle.

At the hearing on Defendant’s motion, Sergeant Jerry Hester testified he was on duty on October 29, 2011, driving east on Indian School Road. (R.T. of Apr. 19, 2012, at 3, 5–6.) At about 11:00 p.m., he was at 47th Avenue and was driving at about 45 miles per hour when a vehicle “sped past” him. (*Id.* at 5–6, 9, 14, 65–66.) He testified the speed limit was either 40 miles per hour or 45 miles per hour, and described Indian School Road as a “crowded street.” (*Id.* at 6, 8, 14, 21.) In the traffic citation, he listed the lawful speed as 40 miles per hour, and Officer Dawn Barlow wrote in her report the speed limit was 40 miles per hour. (*Id.* at 60.) Sergeant Hester estimated the vehicle’s speed at 60 miles per hour. (*Id.* at 16–17.) Once the driver in the vehicle passed the police vehicle and had gone about 20 to 30 yards, the driver reduced speed. (*Id.* at 10–11, 17.) At that point, Sergeant Hester turned on his emergency lights and siren and made a traffic stop. (*Id.* at 11, 18.) He identified Defendant as the driver of the vehicle. (*Id.* at 19.) Sergeant Hester told Defendant the reason for the stop was Defendant’s exceeding the speed limit, and Defendant apologized for driving too fast. (*Id.* at 56–58, 64.)

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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01/15/2013

After hearing arguments from the attorneys, the trial court denied Defendant's Motion To Suppress/Dismiss. (R.T. of Apr. 19, 2012, at 75.) The matter then proceeded to a jury trial. (R.T. of May 14 and 15, 2012.) The evidence presented included testimony that Defendant's BAC was 0.106. (R.T. of May 15, 2012, at 292-93.) The jurors found Defendant not guilty of the (A)(1) charge, but found him guilty of the (A)(2) charge. (*Id.* at 417.) The trial court then imposed sentence. (*Id.* at 422.) On that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12-124(A).

II. ISSUE: DID THE TRIAL COURT ABUSE ITS DISCRETION IN FINDING THE OFFICER HAD REASONABLE SUSPICION TO STOP DEFENDANT'S VEHICLE.

Defendant contends the trial court abused its discretion in finding the officer had reasonable suspicion to stop his vehicle. In reviewing a trial court's ruling on a motion to suppress, an appellate court is to defer to the trial court's factual determinations, including findings based on a witness's credibility and the reasonableness of inferences the witness drew, but is to review de novo the trial court's legal conclusions. *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 75, 81 (2004); *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996); *State v. Olm*, 223 Ariz. 429, 224 P.3d 245, ¶ 7 (Ct. App. 2010).

A police officer has reasonable suspicion to detain a person if there are articulable facts for the officer to suspect a person is involved in criminal activity or the commission of a traffic offense. *State v. Lawson*, 144 Ariz. 547, 551, 698 P.2d 1266, 1270 (1985) The Arizona statutes provide that a peace officer may stop and detain a person as is reasonably necessary to investigate an *actual* or *suspected* violation of any traffic law committed in the officer's presence. A.R.S. § 28-1594; A.R.S. § 13-3883(B). The Arizona Court of Appeals has held a traffic violation provides sufficient grounds to stop a vehicle. *State v. Orendain*, 185 Ariz. 348, 352, 916 P.2d 1064, 1068 (Ct. App. 1996). As stated by the Arizona Court of Appeals:

It is uncontestable that traveling at any speed over the posted speed limit is a traffic offense and a trooper is justified in stopping a vehicle for the offense.

State v. Acosta, 166 Ariz. 254, 257, 801 P.2d 489, 492 (Ct. App. 1990), quoting *United States v. Garcia*, 897 F.2d 1413, 1419 (7th Cir. 1990). Because it appeared that Defendant was committing a traffic violation, Sergeant Hester had the legal authority to stop Defendant's vehicle.

Defendant contends "the sum total of the Sergeant's knowledge consisted of a 'guess' that the vehicle he stopped was going an unknowing speed higher than the officer's unknown speed." Sergeant Hester knew he was going 45 miles per hour because he looked at his speedometer when the vehicle passed him. (R.T. of Apr. 19, 2012, at 6, 14.) Further, he testified that the vehicle "sped past" him and "blew past" him, and then abruptly slowed down. (*Id.* at 6, 10, 11, 17, 57-58, 62, 65.) Based upon his 16 years' experience as a traffic enforcement officer, he estimated the vehicle's speed at 60 miles per hour. (*Id.* at 16-17.) Although Sergeant Hester could not give an exact figure for Defendant's speed, he did say, "The only thing I can accurately tell you a hundred per cent is that it was a speed greater than I was traveling." (*Id.* at 63.) As a result, he believed Defendant was "traveling beyond the speed limit." (*Id.* at 64.)

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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01/15/2013

It is true that traveling beyond the speed limit is not an offense in itself because driving over the posted speed limit is only prima facie evidence that the speed is too great and therefore unreasonable, and the circumstances may have been such that a speed of 60 miles per hour in a 40 miles per hour zone was reasonable and prudent. On that point, the Arizona Court of Appeals has said the following:

The statutory provisions that establish or permit the establishment of prima facie safe speed limits are rules of evidence and not rules of substantive law. They raise rebuttable presumptions, which may be overcome by evidence. Driving over the posted speed limit merely creates a presumptive violation of the basic speed law, i.e., the legislature has expressed its intent that speeds in excess of the prima facie limits be considered evidence of speeds greater than are prudent and reasonable and that such driving upon a public highway, at such speed, endangers the life, limb or property of another.

State v. Rich, 115 Ariz. 119, 121, 563 P.2d 918, 920 (Ct. App. 1977) (citations omitted). An it is possible that a court of law could have ultimately concluded a speed of 60 miles per hour in a 40 miles per hour zone was reasonable and prudent. This would not, however, have negated Sergeant Hester's statutory right to stop and detain Defendant to investigate either an actual or a *suspected* violation of the traffic laws. As stated by the Arizona Supreme Court:

Moreover, when the police make an arrest based upon probable cause, it is not material that the person arrested may turn out to be innocent, and the arresting officer is not required to conduct a trial before determining whether or not to make the arrest.

Cullison v. City of Peoria, 120 Ariz. 165, 168, 584 P.2d 1156, 1159 (1978). As explained by the United States Supreme Court, this is because the level for reasonable suspicion for a stop and for probable cause for an arrest is considerably less than proof of wrongdoing by a preponderance of the evidence for a civil violation or beyond a reasonable doubt for a criminal conviction:

Although an officer's reliance on a mere "hunch" is insufficient to justify [an investigatory] stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.

United States v. Arvizu, 534 U.S. 266, 274 (2002) (citations omitted).

The officer, of course, must be able to articulate something more than an "inchoate and unparticularized suspicion or 'hunch.'" The Fourth Amendment requires "some minimal level of objective justification" for making the stop. That level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence.

United States v. Soloway, 490 U.S. 1, 7 (1989) (citations omitted); *accord, Illinois v. Wardlaw*, 528 U.S. 119, 123 (2000). Thus, an ultimate conclusion that a speed of 60 miles per hour in a 40 miles per hour zone was reasonable and prudent would not have negated Sergeant Hester's reasonable suspicion that Defendant was violating the traffic law.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000511-001 DT

01/15/2013

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court properly denied Defendant's Motion To Suppress/Dismiss.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Phoenix Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Phoenix Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen

THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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