

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000474-001 DT

02/08/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA

BRIAN W ROCK

v.

RUBEN F NEAL (001)

MICHAEL J DEW

PHX MUNICIPAL CT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number 14140754.

Defendant-Appellant Ruben F. Neal (Defendant) was convicted in Phoenix Municipal Court of driving under the influence. Defendant contends the trial court erred in denying his Motion To Suppress, which alleged the officers did not have reasonable suspicion to stop and question him. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On May 21, 2011, Defendant was cited for driving under the influence, A.R.S. § 28-1381(A)(1) & (A)(2). On October 4, 2011, Defendant filed a Motion To Suppress. Although the first page of his Motion stated, "Phoenix Police officers had no legal basis to stop and question and arrest Mr. Neal without a warrant," in the body of the Motion it states:

The question in the present case is whether the factors taken collectively show reasonable suspicion of criminal activity in order to allow a stop of the defendant, especially when the officer failed to pull over the vehicle of the defendant for any erratic or poor driving and simply had no basis to suggest or state that criminal activity was afoot. In the initial contact of the Defendant, Defendant made it clear to the officers to go on their way, when he stood in his home driveway.

(Motion at 3, emphasis in original.)

At the hearing on Defendant's motion, Officer Richard Denny testified he was on duty on May 21, 2011, and came into contact with Defendant. (R.T. of Dec. 19, 2011, at 3-5.) He and his partner were driving south on 67th Avenue from Buckeye Road when he saw a vehicle traveling faster than the other vehicles. (*Id.* at 5.) As the vehicle approached Durango Street, it made a left

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turn to the east from the lane of travel rather than the center turn lane. (*Id.* at 6, 8, 28.) As Officer Denny was making his turn onto Durango Street, the vehicle had made a U-turn and was now headed back toward 67th Avenue. (*Id.* at 6, 28, 33.) Officer Denny made a U-turn so he was now behind the vehicle. (*Id.* at 7.) The vehicle turned to go south on 67th Avenue, and Officer Denny again followed. (*Id.* at 8, 29, 33.) The vehicle turned left onto the first street south of Durango Street, and turned right onto the next street. (*Id.* at 8–9, 29, 33.) The vehicle pulled into a driveway in front of an open garage door, but did not go into the garage. (*Id.* at 9, 34.) By that point, Officer Denny had observed the following NHTSA cues of impaired driving: (1) excessive speed; and (2) turning onto the wrong street. (*Id.* at 11.) When Officer Denny stopped in the street behind the vehicle, Defendant stuck his head out the window and said “can I help you?” (*Id.* at 9, 12.) Officer Denny said “can we help you,” whereupon Defendant in a loud voice spoke profanities at them, and Officer Denny told him pull the car into the garage and go into the house. (*Id.* at 12–13.)

Officer Denny drove south a few streets and made a U-turn, and when he returned, Defendant was in his front yard now yelling at them. (R.T. of Dec. 19, 2011, at 13, 15.) Officer Denny stopped his vehicle and approached Defendant, and noticed he had slurred speech, poor balance, and the odor of alcohol. (*Id.* at 13–17, 35–36.) Defendant continued to say to Officer Denny, “Fuck the police.” (*Id.* at 14.) Defendant yelled to someone inside the house to come out. (*Id.* at 15–16.) Defendant then entered the house and come out with a female, and was very aggressive toward Officer Denny. (*Id.* at 16.) Officer Denny approached Defendant, whereupon Defendant ran back to the house and tried to get in the door, but Officer Denny grabbed the collar of his shirt. (*Id.* at 18.) Officer Wood then arrived and grabbed Defendant, and then placed handcuffs on him. (*Id.* at 19.)

Defendant was not being cooperative, so the officers had to drag him to the patrol vehicle. (R.T. of Dec. 19, 2011, at 19.) They then transported him to the Estrella Mountain precinct. (*Id.* at 20.)

Officer Brian Wood testified he was riding with Officer Denny on May 21, 2011, when he came into contact with Defendant at about 2:00 a.m. (R.T. of Dec. 19, 2011, at 43–44, 50.) He saw a vehicle make a left turn onto Durango Street without signaling. (*Id.* at 45.) After the vehicle made a U-turn, it went through a stop sign without stopping. (*Id.*) The vehicle ultimately stopped at 2224 South 66th Lane. (*Id.* at 46.) After Defendant left his vehicle, Officer Wood noticed Defendant had bloodshot watery eyes and slurred speech, and had difficulty walking. (*Id.* at 47.) Officer Wood described Defendant’s actions, including yelling profanities at them. (*Id.* at 48–54.)

Defendant’s girlfriend, Sharon Stewart, then testified. (R.T. of Dec. 19, 2011, at 69.) She described Defendant’s arrival at about 2:00 a.m. on May 21, 2011, and described the actions of the police officers. (*Id.* at 70–78.)

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In his final argument, Defendant's attorney contended the officers had no probable cause to arrest Defendant, and had no arrest warrant. (R.T. of Dec. 19, 2011, at 82–84.) In his final argument, the prosecutor argued Defendant's driving behavior and his yelling at the officers gave them reasonable suspicion to detain him. (*Id.* at 85–88.) In rebuttal, Defendant's attorney contended the officers had no basis for their conduct. (*Id.* at 89–90.) The trial court denied Defendant's Motion, finding the officers had reasonable suspicion to stop. (*Id.* at 91–96.)

Defendant's trial began with the selection of the jurors. (R.T. of Jan. 30, 2012, at 100, 118.) The trial court was not able to get enough jurors from the first panel, so they had to start over the next day. (*Id.* at 230, 233–34; R.T. of Jan. 31, 2012, Vol. I, at 236, 253–88; R.T. of Jan. 31, 2012, Vol. II, at 290–498.) After hearing the evidence, arguments, and instructions, the jurors found Defendant guilty of both charges. (R.T. of Feb. 3, 2012, at 879.) The trial court later imposed sentence. (R.T. of Feb. 24, 2012, at 887–91.) 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. ISSUES:

A. *Did the trial court abuse its discretion in finding the officers had reasonable suspicion to stop and question Defendant.*

Defendant contends the trial court abused its discretion in finding the officers had reasonable suspicion to stop and question him. 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). For reasonable suspicion, the Arizona Supreme Court has said:

Police officers may briefly detain an individual who they have reasonable suspicion to believe is involved in a crime. In assessing the reasonableness of a *Terry* stop, we examine “(1) whether the facts warranted the intrusion on the individual's Fourth Amendment rights, and (2) whether the scope of the intrusion was reasonably related to the circumstances which justified the interference in the first place.”

. . . Reasonable suspicion requires “a particularized and objective basis for suspecting that a person is engaged in criminal activity.” Officers [may not] act on a mere hunch, but seemingly innocent behavior [may] form the basis for reasonable suspicion if an officer, based on training and experience, can “perceive and articulate meaning in given conduct[,] which would be wholly innocent to the untrained observer.” The totality of the circumstances, not each factor in isolation, determines whether reasonable suspicion exists. (Noting that *Terry* forbids a “divide-and-conquer analysis”).

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State v. Boteo-Flores, 230 Ariz. 105, 280 P.3d 1239, ¶¶ 11–12 (2012) (citations omitted), *accord*, *State v. Lawson*, 144 Ariz. 547, 551, 698 P.2d 1266, 1270 (1985) (police officer has reasonable suspicion to detain person if there are articulable facts for officer to suspect person is involved in criminal activity or commission of a traffic offense). 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). In this context, the Arizona Supreme Court has said:

The fourth amendment to the United States Constitution guarantees the right to be secure against unreasonable search and seizure. This guarantee requires arrests to be based on probable cause and permits limited investigatory stops based only on an articulable reasonable suspicion of criminal activity. Such stops are permitted although they constitute seizures under the fourth amendment. Officer Hohn testified that he stopped Blake because Blake's car had been weaving in its lane, and he suspected the driver to be under the influence of alcohol. We find that Blake's weaving was a specific and articulable fact which justified an investigative stop.

State v. Superior Court (Blake), 149 Ariz. 269, 273, 718 P.2d 171, 175 (1986) (citations omitted). 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); *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). Thus, in order for a trial court to find an officer was legally justified in stopping a suspect, it must find the officer (1) knew of articulable facts that (2) raised a reasonable suspicion of criminal activity or a traffic violation.

In the present case, the officers had observed Defendant commit three traffic violations: (1) making an improper turn from the wrong lane; (2) making a turn without signaling; and (3) going through a stop sign without stopping. These three traffic violations alone were sufficient to give the officers reasonable suspicion to stop and question Defendant. Additionally, after the officers had told Defendant to go into his house and they returned to where Defendant was, he yelled profanities at them, such as, "Fuck the police." This showed a certain level of impaired judgment, which would be a sign of judgment impaired by alcohol. The trial court therefore was correct in finding the officers had reasonable suspicion to stop and question him.

B. *Did the officers have probable cause to arrest Defendant.*

Defendant contends the officers did not have probable cause to arrest him. A police officer has probable cause for an arrest if the officer has reasonable grounds to believe the person arrested has committed or is committing an offense. *Lawson*, 144 Ariz. at 553, 698 P.2d at 1272. In reviewing whether probable cause exists, courts look to the totality of the facts and circumstances known to the officers at the time of the arrest. *Lawson*, 144 Ariz. at 553, 698 P.2d at 1272. In the present case, by the time the officers took Defendant into custody by handcuffing him, they had observed him commit three traffic violation, had observed two NHTSA cues of impaired driving,

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and noted Defendant had bloodshot watery eyes, slurred speech, difficulty walking and balancing, and the odor of alcohol. This was sufficient to give them probable cause to believe Defendant had committed the offense of driving under the influence of alcohol. Additionally, Defendant's conduct of yelling at them at 2:00 a.m. gave them probable cause to believe Defendant had committed the offense of disorderly conduct. The officer therefore had probable cause to arrest Defendant.

C. *Were the officers required to have a warrant to arrest Defendant.*

Defendant contends the officers were required to have a warrant to arrest him. Under Arizona law, a peace officer may arrest a person without a warrant if the officer has probable cause to believe the person has committed a misdemeanor in the officer's presence. A.R.S. § 13-3883(A)(2). As noted above, the officers had probable cause to believe Defendant had committed the offenses of driving under the influence and disorderly conduct in their presence. The officers therefore were not required to obtain a warrant before arresting Defendant.

D. *Has Defendant waived any issue of entry into his house without a warrant by not raising that issue with the trial court.*

Defendant contends the officers were required to have a warrant before they could enter his home to arrest him. The Arizona Supreme Court has held failure to raise an issue at trial waives the right to raise the issue on appeal. *State v. Gendron*, 168 Ariz. 153, 154-55, 812 P.2d 626, 627-28 (1991); *State v. Gatliff*, 209 Ariz. 362, 102 P.3d 981, ¶ 9 (Ct. App. 2004). It has further held it is particularly inappropriate to consider an issue for the first time on appeal when the issue is a fact intensive one. *State v. Rogers*, 186 Ariz. 508, 511, 924 P.2d 1027, 1030 (1996); *State v. West*, 176 Ariz. 432, 440-41, 862 P.2d 192, 200-01 (1993); *State v. Brita*, 158 Ariz. 121, 124, 761 P.2d 1025, 1028 (1988). In the present case, Defendant did state on the first page of his Motion To Suppress the officers "had no legal basis to stop and question and arrest Mr. Neal without a warrant," but in the body of the Motion, he only argued the officers did not have reasonable suspicion to stop and question him. And in argument to the trial court, Defendant's attorney mentioned "warrant" only in the context of probable cause to arrest. (R.T. of Dec. 19, 2011, at 84, ll. 16-17.) As such, Defendant never made a claim with the trial court that the officers needed a warrant before they could enter his house to make an arrest. The trial court therefore never addressed certain issues, such as whether exigent circumstances existed when officers had probable cause to arrest and the suspect manages to escape into a house before they are able to arrest, and what evidence is subject to suppression when there has been an entry without a warrant, but the only evidence the officers obtained was a test of Defendant's blood pursuant to a search warrant later issued by a court. Because these are all very fact-intensive issues, this Court considers them inappropriate to consider for the first time on appeal.

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III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court did not abuse its discretion in denying Defendant's Motion To Suppress.

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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