

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2013-000085-001 DT

05/10/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA

JON ELIASON

v.

SHELLY ANN NELSON (001)

MARK N WEINGART

MESA MUNICIPAL COURT - COURT
ADMINISTRATOR
MESA MUNICIPAL COURT -
PRESIDING JUDGE
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number 2012-009097.

Defendant-Appellant Shelly Ann Nelson (Defendant) was convicted in Mesa Municipal Court of driving under the influence. Defendant contends the trial court erred in denying her Motion To Suppress, which alleged the officer did not have reasonable suspicion to stop her vehicle. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On January 13, 2012, Defendant was cited for driving under the influence, A.R.S. § 28-1381(A)(1) & (A)(2); and improper right turn, A.R.S. § 28-751(1). Prior to trial, Defendant filed a Motion To Suppress alleging the officer did not have reasonable suspicion to stop her vehicle.

At the hearing on Defendant's motion, Officer Joe Johnston testified he was on duty on January 13, 2012, in the area of Main Street and Sunvalley Boulevard in Mesa. (R.T. of Jul. 17, 2012, at 7-9.) At about 11:45 p.m., he saw a white truck heading south on 74th Street and turning right to go west on Main Street. (*Id.* at 8, 11.) Rather than turning into the number 3 (curb) lane, the truck turned into the number 1 (median) lane. (*Id.* at 13-14, 48-49.) The truck continued in the number 1 lane and then moved into the left-turn lane and made a U-turn to go east on Main Street. (*Id.* at 18-19, 29.) Officer Johnston said he saw nothing that would have prevented the truck from turning into the number 3 lane. (*Id.* at 25, 29.) Officer Johnston then stopped the vehicle for making an improper right turn. (*Id.* at 21-22, 28.) Officer Johnston identified Defendant as the driver of the truck. (*Id.* at 23-24.) He described her as having slurred speech, bloodshot, watery eyes, droopy eyelids, and slow movements. (*Id.* at 50.)

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Defendant testified and acknowledged turning right from 74th Street onto Main Street. (R.T. of Jul. 17, 2012, at 33–34.) She said she turned into the number 2 lane, which she said was as sharply as she could turn that truck. (*Id.* at 36–37, 43–45, 46–47.) She acknowledged she never told Officer Johnston that night she was turning as sharply as she could. (*Id.* at 41.)

After hearing arguments from the attorneys, the trial court found Officer Johnston had a reasonable, articulable reason for the stop and therefore denied Defendant’s Motion To Suppress. (R.T. of Jul. 17, 2012, at 78–79; R.T. of Sep. 5, 2012, at 8.) Defendant later submitted the matter on the record. (R.T. of Sep. 5, 2012, at 3.) The trial court found Defendant guilty of both DUI charges and not responsible for the civil traffic violation. (*Id.* at 8–9.) The trial court then imposed sentence. (*Id.* at 10–12.) 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 her 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).

The Arizona Supreme Court has said reasonable suspicion requires a particularized and objective basis for suspecting a person is engaged in criminal activity. *State v. Boteo-Flores*, 230 Ariz. 105, 280 P.3d 1239, ¶ 12 (2012), *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 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); *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).

The applicable statute provides as follows:

Both the approach for a right turn and a right turn shall be made as close as practicable to the right-hand curb or edge of the roadway.

A.R.S. § 28–751(1). Officer Johnston said he stopped Defendant because he believed she made a wide turn and thus had violated that statute. (R.T. of Jul. 17, 2012, at 21–22, 28.) The trial court found Officer Johnston was reasonable in his belief that Defendant violated that statute. (*Id.* at 78, ll. 8–20.) The trial court therefore properly denied Defendant’s Motion To Suppress.

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Defendant makes several arguments in support of her position. She contends, because of the length of her truck, she could not turn from the number 3 lane on 74th Street into the number 3 lane on Main Street. Reviewing the trial court's ruling, this Court cannot see anywhere where the trial court accepted that argument. (R.T. of Jul. 17, 2012, at 74–79.) Defendant's exhibits (particularly Exhibit #5) show a curb from 74th Street to Main Street with a wide radius. Further, Exhibit #5 shows an SUV on Main Street headed west. Judging from the size of that SUV, even if Defendant's truck were somewhat longer than that SUV, Defendant's truck still would have been able to turn from behind the stop line in the number 3 lane on 74th Street into the number 3 lane on Main Street.

Defendant notes, however, the curb on Main Street east of 74th Street is offset to the north when compared to the curb on Main Street west of 74th Street, and contends a vehicle turning right must move past the crosswalk in order to see the westbound traffic on Main Street. She further contends, if a vehicle goes directly south across the crosswalk to where the driver is able to see the westbound traffic, a vehicle as long as hers is not able to turn into the number 3 lane from that point, and will only be able to turn into the number 2 lane, which is then "as close as practicable to the right-hand curb or edge of the roadway." This Court finds three defects with that argument.

First, the exhibits show all four directions of the intersection at 74th Street and Main Street are controlled by traffic lights. If a driver wants to turn right from 74th Street onto Main Street, the driver could wait for a green light and then turn right without having to be so concerned with the westbound traffic on Main Street, which then would be stopped at the red light.

Second, if a driver wanted to turn right onto Main Street on a red light and thus would have to make sure there is no oncoming westbound traffic, the driver would not have to proceed directly south in order to see that westbound traffic. The driver could start making the right turn following the curb, and stop at a point just past the crosswalk and then be able to see down Main Street and thus be able to see any oncoming westbound traffic. From that point, the driver would be able to make the turn into the number 3 lane on Main Street.

Third, although Defendant contended she turned into the number 2 lane, Officer Johnston testified he saw Defendant turn into the number 1 lane. (R.T. of Jul. 17, 2012, at 13–14, 28–29.) It appears the trial court accepted Officer Johnston's testimony. (*Id.* at 77, ll. 13–25; at 78, ll. 8–14.) Thus, even assuming it was physically impossible to turn Defendant's truck any closer to the curb than the number 2 lane, a turn into the number 1 lane would not have been "as close as practicable to the right-hand curb or edge of the roadway."

Defendant contends the trial court re-wrote the statute when it stated she would have to move into the number 3 lane after she turned into the number 2 lane. (R.T. of Jul. 17, 2012, at 76, ll. 13–25; at 77; at 78, ll. 1–7.) This Court concludes the trial court was correct in its interpretation of the statute. In *State v. Bouck*, 225 Ariz. 527, 241 P.3d 524 (Ct. App. 2010), the court said the following:

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[A] rule that a right turn must be made “as close as practicable to the right-hand curb” necessarily requires a turn into the lane closest to the curb *at the end of the turn*.

Bouck at ¶ 15 (emphasis added). Thus, even assuming, once she turned onto Main Street and moved west past the crosswalk on Main Street, the number 2 lane was “as close as practicable to the right-hand curb or edge of the roadway” as she could get at that point, she still could have continued her turn and moved into the number 3 lane. Thus, when she reached the end of her turn, she would have been in the number 3 lane, which then truly would have been “as close as practicable to the right-hand curb or edge of the roadway” as she could get.

Finally, accepting Defendant’s argument at face value still would not mean Officer Johnston did not have reasonable suspicion to stop her vehicle. Defendant’s argument is as follows:

(1) She had to drive directly south on 74th Street past the crosswalk to see any westbound traffic on Main Street.

(2) At that point, it was physically impossible to turn into the number 3 lane, so the number 2 lane was “as close as practicable to the right-hand curb or edge of the roadway” as she could get.

(3) Once she had turned into the number 2 lane, she was permitted to stay in that lane, and did so until she moved into the number 1 lane and the left-turn lane to make her U-turn.

(4) She did not commit a violation of A.R.S. § 28–751(1), thus Officer Johnston had no legal right to stop her.

The trial court found this “was a good defense” to the A.R.S. § 28–751(1) charge and thus found Defendant not responsible for that civil traffic violation. (R.T. of Sep. 5, 2012, at 8, ll. 14–23.) The fact that the trial court ultimately concluded Defendant did not violate A.R.S. § 28–751(1) did not, however, negate Officer Johnston’s statutory right to stop and detain Defendant to investigate 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 is less than the level for probable cause for an arrest, and 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).

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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. Sololow, 490 U.S. 1, 7 (1989) (citations omitted); *accord, Illinois v. Wardlaw*, 528 U.S. 119, 123 (2000). The trial court recognized this exact concept:

[T]here’s no way the officer could have known anything regarding the nature of the vehicle, the turning circumference of the vehicle, and things of that nature. [Defendant’s attorney] made a great argument for why somebody might not be responsible for a wide right turn, but not necessarily a great argument on reasonable suspicion.

(R.T. of Sep. 5, 2012, at 8, ll. 7–13.) This Court concludes the trial court was correct that a finding that Defendant did not violate A.R.S. § 28–751(1) did not negate Officer Johnston’s reasonable suspicion that Defendant did violate that traffic law.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court properly found Officer Johnston had reasonable suspicion that Defendant committed a traffic violation, and therefore correctly denied Defendant’s Motion To Suppress

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

IT IS FURTHER ORDERED remanding this matter to the Mesa 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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