

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2013-000126-001 DT

05/28/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA

KENT C KEARNEY

v.

JUSTIN T WATSON (001)

TODD K COOLIDGE

PHX MUNICIPAL CT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number 14007022.

Defendant-Appellant Justin T. Watson (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 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 December 30, 2011, Defendant was cited for driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2); and improper left turn from other than a marked two-way left turn lane, A.R.S. § 28–751(4)(a). Prior to trial, Defendant filed a Motion To Suppress alleging the officer did not have reasonable suspicion to stop his vehicle.

At the hearing on Defendant's motion, Officer Kemp Layden testified he was on duty on December 30, 2012, at 2:00 a.m., going south on 7th Avenue near Campbell Avenue. (R.T. of Sep. 12, 2012, at 91.) At that point, 7th Avenue has two southbound through lanes, three northbound through lanes, and a two-way left turn lane. (*Id.* at 101.) He saw a vehicle in front of him move into the two-way left turn lane prior to Roma Avenue, pass Roma Avenue without turning left, and continue to drive in the two-way left turn lane. (*Id.* at 92, 104–05.) Because that was both a traffic violation and a NHTSA impaired driver cue, he turned on his emergency lights and sounded his siren. (*Id.* at 92–93, 105.) The vehicle then turned left at the next available street, which was Turney Avenue. (*Id.* at 105–06.) Officer Layden identified Defendant as the driver of the vehicle. (*Id.* at 93–94.) Officer Layden noted Defendant had bloodshot, watery eyes and an odor of alcohol coming from him. (*Id.* at 95.) After having Defendant perform some field sobriety tests, Officer Layden placed him under arrest for DUI. (*Id.* at 96.)

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2013-000126-001 DT

05/28/2013

Kyle Porter testified that, on December 30, 2011, he was a passenger in a vehicle driven by Defendant. (R.T. of Sep. 12, 2012, at 5–6.) On cross-examination, he testified he and Defendant were coming from a bar called Charlie’s at 7th Avenue and Camelback Avenue and going to his apartment at Central Avenue and Indian School Road. (*Id.* at 22.) He was not sure exactly what route Defendant was going to take to get to the apartment. (*Id.* at 23–25.)

Defendant acknowledged that, on December 30, 2011, he had been drinking alcohol at Charlie’s and was southbound on 7th Avenue. (R.T. of Sep. 12, 2012, at 61–62, 78.) He testified he was in the two-way left turn lane, drove past Roma Avenue, and then turned onto Turney Avenue. (*Id.* at 62–65, 78–80.)

After hearing arguments of counsel, the trial court found Officer Layden suspected Defendant of committing a traffic violation and thus had reasonable suspicion to stop Defendant’s vehicle. (R.T. of Sep. 12, 2012, at 147.) The trial court therefore denied Defendant’s Motion To Suppress. (*Id.*) Defendant submitted the matter on the record, which included a Report on the Examination of Physical Evidence showing testing of the samples of Defendant’s blood gave BAC readings of 0.1048 and 0.1051. (*Id.* at 147–53.) The trial court found Defendant guilty of both DUI offenses and not responsible for the civil traffic violation, and imposed sentence. (R.T. of Sep. 28, 2012, at 156, 158–61.) On October 5, 2012, 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 dismiss, 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 [that] 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”).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2013-000126-001 DT

05/28/2013

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). The Arizona Court of Appeals has stated, however:

When officers make traffic stops based on facts that neither constitute a violation of the law nor constitute reasonable grounds to suspect the driver has committed an offense, they run afoul of the Fourth Amendment requirement that they possess objectively reasonable grounds for the intrusion.

State v. Livingston, 206 Ariz. 145, 75 P.3d 1103, ¶ 9 (Ct. App. 2003).

Officer Layden testified he stopped Defendant because he believed Defendant violated the following statute:

A driver shall not drive a vehicle in [a two-way left turn lane] except if preparing for or making a left turn from or into the roadway or if preparing for or making a u-turn if otherwise permitted by law.

A.R.S. § 28–751(4)(b). Defendant first contends the stop was unreasonable because he did not violate that statute. The Arizona Supreme Court has held, however, that whether or not the person has, in fact, violated the statute is not dispositive:

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:

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2013-000126-001 DT

05/28/2013

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. Solow, 490 U.S. 1, 7 (1989) (citations omitted); *accord, Illinois v. Wardlaw*, 528 U.S. 119, 123 (2000). Thus, the fact that Defendant may not have violated A.R.S. § 28-751(4)(b) did not negate Officer Layden's right to stop Defendant's vehicle as long as he had reasonable grounds to suspect Defendant had violated that statute.

Defendant next contends Officer Layden did not have reasonable grounds to suspect he had violated that statute. Defendant was driving his vehicle in the two-way left turn lane, which is prohibited by the statute. The statute does allow such driving "if preparing for or making a left turn." The facts showed Defendant entered the two-way left turn lane somewhere between Campbell and Roma, continued past Roma, and then turned onto Turney. It appears that, if Defendant had entered that lane between Campbell and Roma, continued to drive in that lane, and then turned left at Indian School Road, which is ½ mile south of Campbell, Defendant would have violated that statute. It also appears that, if Defendant had entered that lane between Campbell and Roma, and then turned left at Roma, Defendant would not have violated that statute. The question then is, when on the continuum between Roma and Indian School Road would it be reasonable for an officer to suspect a driver has violated that statute.

This question is illustrated by comparing *Livingston* with *Acosta*. Both cases involved A.R.S. § 28-729(1), which provides, "A person shall drive a vehicle as nearly as practicable entirely within a single lane." In *Livingston*, the officer "characterized that stretch of highway as rural, curved, and dangerous," and saw "Livingston's right side tires had crossed the white shoulder line on one occasion." *Livingston* at ¶¶ 4, 5. The court held the "nearly as practicable" language "demonstrate[d] an express legislative intent to avoid penalizing brief, momentary, and minor deviations outside the marked lines," and thus "the trial court did not abuse its discretion when it found that Livingston committed no violation." *Livingston* at ¶¶ 10, 12. In *Acosta*, the driver was on Interstate Highway 40 in northern Arizona, and the trial court found "the defendant had crossed the line dividing the lanes by a tire's width as many as six times." 166 Ariz. at 256, 801 P.2d at 491. The court stated "the defendant's car crossed the dividing line numerous times, thus constituting the offense of unsafe lane usage," and therefore "there was reasonable suspicion to stop the vehicle." 166 Ariz. at 257, 801 P.2d at 492.

....

....

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2013-000126-001 DT

05/28/2013

As a result of *Livingston* and *Acosta*, an officer would know two things: First, crossing the white shoulder line on one occasion on a rural, curved, and dangerous road is not a violation of § 28-729(1), thus an officer would not have reasonable suspicion to stop the vehicle upon seeing that driving behavior. Second, crossing the line dividing the lanes as many as six times on an Interstate highway constitutes the offense of unsafe lane usage, thus an officer would have reasonable suspicion to stop the vehicle upon seeing that driving behavior. An officer thus would face the following questions: (1) Is it a violation to cross the white shoulder line on a rural, curved, and dangerous road on two and five occasions; (2) is it a violation to cross the line dividing the lanes on an Interstate highway on one to five occasions; and (3) does the officer have reasonable suspicion to stop the vehicle in either of these situations. The answer is in *Cullison* cited above, which held “is not material that the person arrested may turn out to be innocent” as long as the officer is reasonable in the belief that the person has violated the statute. This is, essentially, the definition of “reasonable suspicion.”

Based on the above, this Court concludes Officer Layden was reasonable in his belief that Defendant violated the statute. There is no statutory or case authority stating how far a driver is permitted to drive in a two-way left turn lane before they would be considered to have violated the statute. Defendant could have turned left at Roma but did not do so. Defendant did turn left at the next street, Turney, but that was after Officer Layden had turned on his lights and siren, so Officer Layden had no way of knowing, before he stopped Defendant’s vehicle, whether Defendant had planned to turn at Turney or continue further south in the two-way left turn lane. Defendant’s failure to turn left onto Roma gave Officer Layden the legal right to stop Defendant’s vehicle and then leave it to the court to determine whether his suspicion was reasonable.

Defendant notes A.R.S. § 28-754(b) requires a driver to signal for 100 feet or more before turning, and thus argues that he would have violated that statute if he had turned onto Roma. For three reasons, this Court concludes that argument does not defeat Officer Layden’s reasonable suspicion. First, although Defendant testified he used his left-turn signal before entering the two-way left turn lane prior to Roma, and Officer Layden testified Defendant used his left-turn signal before entering the two-way left turn lane and that he entered that lane roughly 50 feet north of Roma, no one ever asked Defendant or Officer Layden for how many feet Defendant had his left-turn signal on before he entered that two-way left turn lane. (R.T. of Sep. 12, 2012, at 62-63, 78-80, 104 109-11.) Thus, Defendant may have had his left-turn signal on for 100 feet or more before he reached Roma and therefore could have legally turned left onto Roma. Second, there is no statute that provides a driver may drive in the two-way left turn lane for up to 100 feet from the point of turning on the left-turn signal before the driver must turn left. And third, if there are two streets 50 feet apart and a driver wants to turn into the second one, there is nothing that precludes a driver from turning on the left-turn signal while in the number 1 lane 100 feet or more before the second street, drive past the first street while still in the number 1 lane with the left-turn signal on, and then move into the two-way left turn lane just before reaching the second street and then turn left.

....

....

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2013-000126-001 DT

05/28/2013

Finally, Officer Layden testified Defendant's driving behavior was a NHTSA impaired driver cue. (R.T. of Sep. 12, 2012, at 92-93.) Defendant was driving from 7th Avenue and Camelback, which is an area where bars are located, and was driving at 2:00 a.m., which is when bars close. As noted by the Arizona Supreme Court, an officer, based on training and experience, can perceive and articulate meaning in given conduct that would be wholly innocent to the untrained observer. *Boteo-Flores* at ¶ 12. By beginning his left turn prior to Roma, Defendant may not have realized that Roma was not Turney, which would mean his powers of observation were impaired or his judgment was impaired. This behavior was a specific and articulable fact that justified an investigative stop. *Superior Court (Blake)*, 149 Ariz. at 273, 718 P.2d at 175. Thus, the trial court properly denied Defendant's Motion To Suppress.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court correctly found Officer Layden had reasonable suspicion to stop Defendant's vehicle and there properly denied 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

052820131630•