

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2015-000229-001 DT

08/19/2015

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT

J. Eaton

Deputy

STATE OF ARIZONA

WEBSTER CRAIG JONES

v.

ERIC LOUIS WATTENBARGER (001)

SIMONE ANNE ATKINSON

MESA MUNICIPAL COURT - COURT

ADMINISTRATOR

MESA MUNICIPAL COURT -

PRESIDING JUDGE

REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

**Lower Court Case Number 2014-014659.**

Defendant-Appellant Eric Louis Wattenbarger (Defendant) was convicted in Mesa 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, and erred in denying his Motion To Dismiss, which alleged the conduct of the officer interfered with his right to consult with counsel. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On March 2, 2014, Defendant was cited for driving under the influence, A.R.S. § 28-1381(A)(1) & (A)(2); and driving under the extreme influence, A.R.S. § 28-1382(A)(1) (0.15 or more). On September 23, 2014, Defendant's attorney filed a Motion To Dismiss that alleged the conduct of the officer interfered with Defendant's right to consult with counsel, and filed a Motion To Suppress alleging the officer did not have reasonable suspicion to stop Defendant's vehicle.

At the hearing on Defendant's motions, Officer Jamie Bernau testified he was on duty on March 2, 2014, directing traffic at the Cub's Stadium in an area that had a posted speed limit of 35 miles per hour. (R.T. of Dec. 15, 2014, at 7, 9-11.) At about 4:00 p.m., he saw a vehicle traveling at a speed he estimated to be at least 50 miles per hour. (*Id.* at 9-11.) He then saw the vehicle swerve from the curb lane to the number one lane. (*Id.* at 12.) He then signaled to Officer Moresco to stop that vehicle. (*Id.* at 12-13.) Officer Bernau approached the vehicle and identified Defendant as the driver. (*Id.* at 13-14.) He noticed Defendant had bloodshot, watery eyes and a dazed expres-

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2015-000229-001 DT

08/19/2015

sion, and he could smell the odor of alcohol coming from him. (*Id.* at 14–15.) Once Defendant exited the vehicle, Officer Bernau noticed Defendant had difficulty maintaining his balance. (*Id.* at 15, 18.) Defendant said he had consumed two beers. (*Id.* at 18.) Officer Bernau gave Defendant the HGN test and observed six out of six cues. (*Id.* at 19.) Defendant said he would not do any more tests because his father was a police officer and then asked to talk to his father by telephone, which Officer Bernau allowed him to do. (*Id.* at 19–20, 37–38.) He then read Defendant the *Miranda* warnings and told him he could call an attorney at the police station if he wanted to do so. (*Id.* at 20–21, 22–23, 39.)

Another officer transported Defendant to the police station, and Officer Bernau met Defendant there. (R.T. of Dec. 15, 2014, at 21–22.) Officer Bernau asked Defendant if he would do a blood test, and Defendant said no; he asked Defendant if he wanted to talk to an attorney, and Defendant said no. (*Id.* at 22, 51.) He explained to Defendant the Admin Per Se/Implied Consent procedure, that Defendant could lose his driver’s license for 1 year, and that he could get a search warrant to obtain Defendant’s blood sample. (*Id.* at 23–24, 41.) He again asked Defendant if he wanted to talk to an attorney, and Defendant said he did not. (*Id.* at 24, 41, 53.) Defendant continued to refuse to give a blood sample. (*Id.* at 44.) Defendant finally gave a blood sample when Officer Bernau served him with a search warrant. (*Id.* at 46.)

Defendant testified and said he “legally changed lanes” after giving a signal. (R.T. of Dec. 15, 2014, at 54, 57.) He said he was not traveling over 37 or 38 miles per hour. (*Id.* at 58.) He acknowledged that Officer Bernau allowed him to telephone his father. (*Id.* at 62.) He denied that Officer Bernau read him the *Miranda* warnings. (*Id.* at 82.) He acknowledged he did not ask to talk to an attorney at the scene, but said he asked to talk to an attorney once they were at the police station. (*Id.* at 63–64.) He said he was never allowed to talk to an attorney. (*Id.* at 65–66.) When asked if he felt impaired by the alcohol, Defendant said, “I didn’t feel that I was at the legal limit.” (*Id.* at 78.)

After hearing arguments from the attorneys, the trial court said it “ha[d] to determine credibility of people and their opportunity to perceive and recall the events.” (R.T. of Dec. 15, 2014, at 105.) It noted Defendant had “admitted he was very tired that day, he had taken allergy medicine, and he had had at least two pints of beer at the game.” (*Id.* at 105–06.) The trial court said it “ha[d] to give less credibility to Mr. Wattenbarger’s perception of the events that occurred that night” and that Officer Bernau’s testimony was credible. (*Id.* at 106.) It found no deprivation of the right to consult with counsel and thus denied Defendant’s Motion To Dismiss. (*Id.*) It further found Officer Bernau had reasonable suspicion to stop Defendant’s vehicle and thus denied Defendant’s Motion To Suppress. (*Id.* at 106–08.)

On February 19, 2015, Defendant submitted the matter on the record, which included the report showing Defendant’s BAC was 0.141. (R.T. of Feb. 19, 2015, at 3–4.) The trial court found Defendant guilty of both § 28–1381 charges and imposed sentence. (*Id.* at 7–10.) On that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZ. CONST. Art. 6, § 16, and A.R.S. § 12–124(A).

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2015-000229-001 DT

08/19/2015

II. ISSUES.

A. *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 Officer Bernau 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) (motion to suppress). 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").

*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 the present case, Officer Bernau testified Defendant was exceeding the posted speed limit and made an unsafe lane change. Defendant testified he was only slightly over the posted speed limit and that he "legally changed lanes" after giving a signal. In addressing the role of an appellate court in reviewing conflicting evidence and testimony, the Arizona Supreme Court has said the following:

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2015-000229-001 DT

08/19/2015

Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers and witnesses, and who can better assess the impact of what occurs before him. Where a decision is made on that basis, it is truly discretionary and we will not substitute our judgment for that of the trial judge; we will not second-guess. Where, however, the facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual or equitable considerations, the resolution of the question is one of law or logic. Then it is our final responsibility to determine law and policy and it becomes our duty to “look over the shoulder” of the trial judge and, if appropriate, substitute our judgment for his or hers.

*State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983) (citation omitted). Because this issue involves “an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge” rather than a “question . . . of law or logic,” it is not appropriate for this Court to “substitute [its] judgment for that of the trial judge.” The trial court therefore correctly denied Defendant’s Motion To Suppress.

B. *Did the trial court abuse its discretion in finding the officer did not interfere with Defendant’s right to consult with counsel.*

Defendant contends the trial court erred in finding Officer Bernau did not interfere with his right to consult with counsel. Again, 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. *Moody* at ¶¶ 75, 81; *Gonzalez-Gutierrez*, 187 Ariz. at 118, 927 P.2d at 778; *Olm* at ¶ 7.

In the present case, Officer Bernau testified he told Defendant on several occasions he had the right to talk to an attorney, but that Defendant never asked to talk to an attorney. On the other hand, Defendant testified he asked to talk to an attorney on several occasions, but that Officer Bernau refused to allow him to do so. Again, this issue involves “an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge” rather than a “question . . . of law or logic,” it is not appropriate for this Court to “substitute [its] judgment for that of the trial judge.” The trial court therefore correctly denied Defendant’s Motion To Dismiss.

III. CONCLUSION.

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

....

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2015-000229-001 DT

08/19/2015

**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

081920151300•

NOTICE: LC cases are not under the e-file system. As a result, when a party files a document, the system does not generate a courtesy copy for the Judge. Therefore, you will have to deliver to the Judge a conformed courtesy copy of any filings.