[Cite as *Geneva v. Fende*, 2009-Ohio-6380.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

CITY OF GENEVA,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2009-A-0023**
- vs -	:	
NICOLE M. FENDE,	:	
Defendant-Appellee.	:	

Criminal Appeal from the Ashtabula County Court, Western Division, Case No. 2008 TRC 2112.

Judgment: Affirmed.

Lauren A. Gardner, City of Geneva Law Director, 44 North Forest Street, Geneva, OH 44041 (For Plaintiff-Appellant).

Daniel J. Kolick and *Michael T. Schroth*, Kolick & Kondzer, 24500 Center Ridge Road, #175, Westlake, OH 44145 (For Defendant-Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, the city of Geneva, appeals the judgment of the Ashtabula County Court, Western Division, granting appellee Nicole M. Fende's motion to suppress. At issue is whether police had reasonable suspicion to subject her to an investigative stop. Because we hold appellee's stop was not warranted, we affirm.

{¶2} Appellee was charged in the trial court with operating a motor vehicle under the influence of alcohol ("OVI"), in violation of Geneva Codified Ordinances, Sec.

434.01(a)(1). Appellee pled not guilty. She also filed a motion to suppress, arguing that her stop was not lawful and that all evidence, including police observations, obtained from the stop should be suppressed.

{¶3} At the suppression hearing, Officer Roger Wilt of the Geneva Police Department testified that on July 29, 2008, at about 1:16 a.m., he was dispatched on a call of a car in a ditch along North Avenue just west of Austin Road in Geneva. Traffic was very light in that area because Austin Road, with which North Avenue intersects, was closed to all but local traffic due to construction.

{¶4} Officer Wilt approached the scene driving his marked cruiser eastbound on North Avenue. Upon arrival, he observed a car off the road in high weeds. The vehicle was facing westbound along the side of the road for eastbound traffic. It appeared that the car had been travelling westbound when it crossed the center line and the eastbound lane of traffic, left the road, and then stopped in a bank of weeds.

{¶5} Officer Wilt exited his cruiser and approached the vehicle, but saw no one inside or near the car. He found the vehicle was not running, no keys were in the ignition, and the car was locked. The car had not been damaged and there was no evidence that anyone had been injured. Officer Wilt testified he decided to drive east to the intersection at Austin Road to see if he could locate anyone walking who might have been injured or might have information about the vehicle. As he was entering his cruiser, a purple car passed him travelling westbound on North Avenue. The purple car had two occupants, the driver and a passenger, in the front seat.

{¶6} Officer Wilt drove a short distance east to the intersection at Austin Road. He saw no one walking there and returned to the scene to further investigate the

abandoned vehicle. As he approached the scene, he saw a car with its headlights on sitting in an elementary school parking lot about one-quarter mile west of the scene. The vehicle was not in the parking lot when Officer Wilt initially arrived, and he estimated it had been there for about two minutes. Officer Wilt found this to be "a little bit odd" because school was not in session for the summer and it was 1:30 in the morning. He decided that after investigating the car in the ditch, he would "make contact" with the car in the parking lot to see what its occupants were doing there.

{¶7} As Officer Wilt exited his cruiser, the car left the parking lot and drove past him travelling eastbound toward Austin Road. As the car went past him, he saw it was the same purple car with two occupants that had passed him a few minutes earlier driving westbound. He testified he decided to stop the vehicle because it was 1:30 a.m.; he was investigating a car in a ditch; the vehicle had passed him twice; it had been in the school parking lot; and he thought the occupants might have information about the vehicle in the ditch. He turned his cruiser around and activated his overhead lights. Appellee stopped her vehicle and Officer Wilt approached it on foot. Appellee told Officer Wilt that she had recently received a phone call from a friend of hers named Nicole Phillips, who said she had driven her car in a ditch and asked appellee to check on it. Appellee said she had driven up and down North Avenue, but was unable to find the car.

{¶8} While Officer Wilt was speaking with appellee, he noticed her eyes were glassy, her pupils were large and fixed, her hand movements were lethargic, and her speech was "slurred a little bit." However, he did not detect an odor of an alcoholic beverage. Based on his observations, Officer Wilt decided to perform field sobriety

tests. He saw multiple clues of impairment during appellee's performance of these tests. As a result, he arrested her for OVI.

{¶9} Following the hearing on appellee's motion to suppress, the trial court granted the motion finding that appellee's conduct in driving past the officer twice and briefly stopping in the school parking lot did not give rise to a reasonable suspicion of criminal activity. The court also found the City had failed to prove Officer Wilt was entitled to detain appellee as a witness to a crime. Appellant appeals the judgment of the trial court, asserting the following as its sole assignment of error:

{¶10} "THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION TO SUPPRESS ALL EVIDENCE COLLECTED AFTER THE INITIAL LEGAL AND APPROPRIATE TRAFFIC STOP."

{¶11} Appellate review of a trial court's ruling on a motion to suppress evidence presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 154, 2003-Ohio-5372. During a hearing on a motion to suppress evidence, the trial judge acts as the trier of fact and, as such, is in the best position to resolve factual questions and assess the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366. An appellate court reviewing a motion to suppress is bound to accept the trial court's findings of fact where they are supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594. Accepting these facts as true, the appellate court independently reviews the trial court's legal determinations de novo. *State v. Djisheff*, 11th Dist. No. 2005-T-0001, 2006-Ohio-6201, at ¶19.

{¶12} Appellant asserts two issues under its assigned error. For its first issue, appellant argues Officer Wilt's stop of appellee's vehicle was reasonable in light of her

"suspicious driving pattern" and his suspicion that the occupants of appellee's vehicle might have information concerning the abandoned vehicle or may be in need of assistance.

{¶13} A stop is constitutional if it is supported by either a reasonable suspicion or probable cause. *City of Ravenna v. Nethken*, 11th Dist. No. 2001-P-0040, 2002-Ohio-3129, at ¶30-31. "*** [T]he concept of an investigative stop allows a police officer to stop an individual for a short period if the officer has a reasonable suspicion that criminal activity has occurred or is about to occur." *State v. McDonald* (Aug. 27, 1993), 11th Dist. No. 91-T-4640, 1993 Ohio App. LEXIS 4152, *10. "'In justifying the particular intrusion, the police officer must be able to point to specific and articulable facts which would warrant a man of reasonable caution in the belief that the action taken was appropriate.'" Id., quoting *State v. Klein* (1991), 73 Ohio App.3d 486, 488. "*** [T]he stop and inquiry must be 'reasonably related in scope to the justification for their initiation.'" *United States v. Brignoni-Ponce* (1975), 422 U.S. 873, 881, quoting *Terry v. Ohio* (1968), 392 U.S. 1, 29. "Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." *Berkemer v. McCarty* (1984), 468 U.S. 420, 439.

{¶14} Since the determination of whether an officer had reasonable suspicion depends on the specific facts of the case, the Ohio Supreme Court has consistently held the propriety of such a stop "must be viewed in light of the totality of the surrounding circumstances." *State v. Bobo* (1988), 37 Ohio St.3d 177, at paragraph one of the syllabus.

{¶15} Further, it is well-established that a police officer can stop a motorist if he has a reasonable suspicion the driver may be in need of assistance. "While *Terry* and much of its progeny stand for the proposition that a police officer generally needs a reasonable suspicion, based on specific and articulable facts, that an occupant of a vehicle is or has been engaged in criminal activity, nothing in the Fourth Amendment requires that the 'specific and articulable facts' relate to suspected criminal activity. Were we to insist that every investigative stop be founded on such suspicion, we would be overlooking the police officer's legitimate role as a public servant designed to assist those in distress and to maintain and foster public safety. That is, law enforcement officers may legitimately approach persons and vehicles for purposes other than criminal investigation." *State v. Norman*, 136 Ohio App.3d 46, 53, 1999-Ohio-961, citing *Cady v. Dombrowski* (1973), 413 U.S. 433. In *Cady*, the United States Supreme Court held:

{¶16} "Because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office. "Some such contacts will occur because the officer may believe the operator has violated a criminal statute, but many more will not be of that nature. Local police officers *** frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." Id. at 441.

{¶17} Thus, under appropriate circumstances, a police officer will be justified in approaching a vehicle to provide assistance, without needing any reasonable basis to suspect criminal activity. "Police officers without reasonable suspicion of criminal activity are allowed to intrude on a person's privacy to carry out 'community caretaking functions' to enhance public safety. The key to such permissible police action is the reasonableness required by the Fourth Amendment. *When approaching a vehicle for safety reasons, the police officer must be able to point to *** articulable facts upon which to base [his or] her safety concerns*." (Emphasis added.) *Norman*, supra, at 54.

{¶18} This court recognized this obligation on the part of police officers in *State v. Pelsue* (May 23, 1997), 11th Dist. No. 95-P-0149, 1997 Ohio App. LEXIS 2245. In that case the officer observed a truck parked in the road. The engine was running and its headlights were illuminated, but the vehicle remained stationery. Concerned that this was a disabled vehicle, the officer pulled alongside the truck to inquire whether he could be of assistance. This court held that when the officer asked whether the driver needed assistance, he acted reasonably in investigating whether this was a disabled vehicle or stranded motorist. Id. at *13.

{¶19} Further, this court in *State v. Beauregard*, 11th Dist. No. 2006-A-0080, 2007-Ohio-3369, held that there is nothing in the Ohio or United States Constitutions prohibiting law enforcement officers from approaching and engaging in a conversation with a motorist who they believe may be in need of assistance. Id. at ¶14, citing *Norman*, supra.

{¶20} Appellant's first issue has two parts. First, it argues Officer Wilt was authorized to stop appellee because of her "suspicious driving pattern" in driving by him

twice, because she parked briefly in a nearby school parking lot, and because he believed the occupants of her car might have information about the car in the ditch. However, appellant has failed to draw our attention to any legal authority for the proposition that such circumstances provided specific and articulable facts warranting a reasonable suspicion that appellee had committed or was about to commit a crime.

{¶21} In *State v. Gray, II* (Jul. 14, 2000), 11th Dist. No. 99-G-2249, 2000 Ohio App. LEXIS 3197, the officer, who was on routine patrol at 1:30 a.m., stopped the defendant who had driven behind a closed gas station to an exit onto another road. This court held the officer did not have reasonable suspicion that the defendant was about to engage in criminal activity because his actions were "wholly consistent with innocent behavior." Id. at *9. This court held:

{¶22} "*** [T]he very nature of a gas station is to provide a place for public use. While the gas station may have been closed at the time appellant was stopped, that fact, standing alone, does not obviate the public's access to the business. There was no testimony of any posted prohibitions regarding a limited right of access at night.

{¶23} "There are numerous legitimate reasons why a person may travel through a business' parking lot after hours. While such an event may become one factor which can be considered in determining the existence of a reasonable suspicion, it is not, by itself, a factor that can be *reasonably* construed as criminal in nature." (Emphasis sic.) Id. at *12.

{¶24} In support of this court's holding in *Gray*, this court cited *State v. Brown* (1996), 116 Ohio App.3d 477. In *Brown*, the officer was on routine patrol at about 3:00 a.m. when he noticed the defendant's vehicle parked off the road with its headlights on,

in front of and blocking the entrance to a closed gas station. In holding the officer lacked reasonable suspicion to stop the defendant, the Seventh District in *Brown* held:

{¶25} "*** [A]ppellant's conduct was not indicative of criminal behavior. Neither appellant nor any passenger was observed outside of the vehicle or engaged in any type of activity which would lead to a reasonable suspicion that criminal activity was about to take place. Further, appellant's vehicle was not observed in motion; there could thus be no reasonable suspicion of any traffic violation. ***

{¶26} "Our opinion should not be read as a proscription of an officer's *** investigation of any situation giving rise to a reasonable suspicion of criminal activity. Indeed, Deputy Richards *** was justified in *** approaching the vehicle ***. However, once appellant began to pull away and it was obvious to the officer that appellant had not seen the cruiser pull in (thus not indicating that appellant was fleeing), and absent any indication of illegal activity, any justification for the stop ceased to exist." Id. at 481.

{¶27} In *Sylvania v. Comeau*, 6th Dist. No. L-01-1232, 2002-Ohio-529, 2002 Ohio App. LEXIS 468, the officer had been advised that an employee of a driving school in a local strip mall had recently been fired and might attempt to damage the school's property in retaliation. At 2:00 a.m., when the driving school was closed, the officer saw a parked vehicle in the parking lot about 200 feet from the driving school with its lights on. No other vehicles were in the parking lot. When the vehicle pulled out of the parking lot, the officer stopped its driver, who was the defendant, because the officer found his presence in the parking lot to be suspicious. The Sixth District held these facts were insufficient to give rise to a reasonable, articulable suspicion that the defendant was engaged in criminal activity.

{¶28} Turning to the facts of the instant case, Officer Wilt did not observe appellee engage in erratic driving or commit any traffic violation. While the school was closed at the time, this did not prohibit the public's access to it. *Gray*, supra. As this court held in *Gray*, there are any number of legitimate reasons why a person would enter a public parking lot after hours. Further, neither appellee nor her passenger left appellee's car, and appellee left the parking lot of her own accord while Officer Wilt was still on scene without any indication she was attempting to flee from him. Once appellee left the parking lot without any evidence of illegal activity or flight, any justification for the stop ceased to exist. *Brown*, supra. We therefore hold the trial court did not err in finding appellee's conduct did not give rise to a reasonable suspicion of criminal activity justifying an investigative stop.

{¶29} Next, under appellant's first issue, it argues Officer Wilt's stop of appellee was authorized by his reasonable suspicion that she needed assistance. Appellant's reliance on this court's holding in *State v. Chrzanowski*, 180 Ohio App.3d 324, 2008-Ohio-6993, is misplaced. In that case the state trooper, while on routine patrol, saw the defendant's vehicle with its headlights on stopped in the road. The trooper was concerned the vehicle was having mechanical problems or its driver was experiencing some medical condition. The trooper was also concerned that other motorists coming upon the defendant's vehicle would not expect a car to be stopped in the roadway and that this could cause a crash. He testified these facts raised a public safety concern, and it was for this reason that he decided to approach the defendant who was still in his vehicle. With these facts as a backdrop, this court in *Chrzanowski* affirmed the trial court's denial of the defendant's motion to suppress.

{¶30} In stark contrast to the facts in *Chrzanowski*, in the instant case, when Officer Wilt discovered the abandoned vehicle, it was not in the roadway causing a public safety concern; no occupant of the vehicle was present; no key was in the ignition; the vehicle was locked; and it was not running. It therefore did not present a risk of injury to its driver or to other motorists on the road. Further, unlike the trooper in *Chrzanowski*, Officer Wilt did not testify the abandoned vehicle presented a public safety concern or that he believed appellee might need assistance. Thus, Officer Wilt did not point to any specific, articulable facts justifying a stop for public safety reasons. In light of the factual differences between the two cases, we hold that *Chrzanowski* does not apply here. For this additional reason, we hold the trial court did not err in finding the officer did not have a reasonable suspicion justifying his stop of appellee.

{¶31} We also note that, upon stopping appellee, Officer Wilt did not ask her if she needed assistance. The purpose of a *Terry* stop is for the officer to obtain information to confirm or dispel his suspicion that criminal activity is afoot or, in this context, that the motorist is in need of assistance. Officer Wilt's failure to ask appellee whether she needed assistance indicates he did not suspect she had such need.

{¶32} We observe the trial court did not base its decision granting appellee's motion to suppress on Officer Wilt's failure to point to specific, articulable facts justifying a stop for public safety reasons. Instead, the court granted appellee's motion in part on the ground that Officer Wilt detained appellee as a witness to a crime without meeting the necessary test to stop a witness. However, Officer Wilt did not testify that he stopped appellee as a witness to a crime. The trial court's analysis of Officer Wilt's stop

on this basis was therefore not germane, and we do not agree with this reason for granting appellee's motion.

{¶33} However, it is well-established that a reviewing court may look into the record and if the judgment being reviewed on appeal is right for any reason, it is the duty of the appellate court to affirm it. In *Agricultural Ins. Co. v. Constantine* (1944), 144 Ohio St. 275, the Supreme Court of Ohio held: "*** it is the definitely established law of this state that where the judgment is correct, a reviewing court is not authorized to reverse such judgment merely because erroneous reasons were assigned as the basis thereof." Id. at 284. "It is the duty of the reviewing court to affirm the judgment if it can be supported on any theory, although a different theory from that of the trial court." *Newcomb v. Dredge* (1957), 105 Ohio App. 417, 424. This is so because reviewing courts affirm and reverse judgments, not the reasons for the judgments.

{¶34} For its second issue, appellant argues that because appellee briefly parked her vehicle in the nearby school parking lot, Officer Wilt was justified in stopping her to investigate her involvement in a possible trespass at the school. This second issue is merely a reworking of the first part of appellant's first issue, now focusing on appellee parking her car in the parking lot. As noted supra, appellee left the parking lot on her own without any evidence of criminal activity or flight. Based on this court's holding in *Gray*, supra, and the related cases cited above, we hold the trial court did not err in finding appellee's conduct did not provide reasonable suspicion that she was engaged in criminal activity.

{¶35} We note that, contrary to appellant's argument, Officer Wilt did *not* testify he stopped appellee because he believed a trespass was occurring at the time. To the

contrary, he testified he did not observe appellee commit a crime before she left the parking lot. He testified as follows:

{¶36} "Q. *** [D]id you observe a crime before you stopped the vehicle ***?

{¶37} "A. In regards to that, no.

{¶38} "Q. And you did not observe any crime about to be committed, did you?

{¶39} "A. I don't know. I can't speak for the future, sir.

{¶40} "***

{¶41} "Q. And this vehicle, I mean, sitting in a parking lot with the lights on is not a crime, is it?

{¶42} "A. By – in and of itself, no."

{¶43} Appellant's reliance on *State v. Gottfried* (1993), 86 Ohio App.3d 106 is misplaced because in that case the officer testified he stopped the defendant's vehicle in a private park because he believed the defendant was trespassing on railroad property. Id. at 108.

{¶44} We observe that Officer Wilt never questioned appellee about a possible trespass. The officer's failure to ask her any questions about her being in the parking lot indicates he did not suspect she was involved in a trespass at the school.

{¶45} For the reasons stated in the Opinion of this court, the assignment of error is not well taken. It is the judgment and order of this court that the judgment of the Ashtabula County Court, Western Division, is affirmed.

MARY JANE TRAPP, P.J.,
COLLEEN MARY O'TOOLE, J.,
concur.