STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED August 6, 2009
v	No. 282100 Oakland Circuit Court
ANTHONY KEITH WILLIAMS, Defendant-Appellee.	LC No. 2006-212089-FH

Before: Zahra, P.J., and O'Connell and Fort Hood, JJ.

ZAHRA, P.J. (*dissenting*).

I respectfully dissent. Because there is sufficient evidence to support the trial court's conclusion that the arresting officer did not observe the traffic violation captured on videotape and only discovered the violation during the evidentiary hearing, I would affirm the trial court's suppression of evidence and dismissal of the charges brought against defendant.

The majority correctly states that a police officer's subjective reason for his action is not dispositive of whether the officer's conduct is constitutional. "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren v United States*, 517 US 806, 813; 116 S Ct 1769; 135 L Ed 2d 89 (1996).

> [T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action. [*People v Arterberry*, 431 Mich 381, 384; 429 NW2d 574 (1988), quoting *Scott v United States*, 436 US 128, 138; 98 S Ct 1717; 56 L Ed 2d 168 (1978).]

See also *Williams, supra,* p 314 n 7.

However, the assessment whether a stop was justified is based on the objective facts that are known to the officer who effectuated the stop. *People v Oliver*, 464 Mich 184, 200; 627 NW2d 297 (2001), cert den sub nom *Taylor v Michigan*, 534 US 1115; 122 S Ct 925; 151 L Ed 2d 888 (2002), cert den *Oliver v Michigan*, 534 US 1116; 122 S Ct 926; 151 L Ed 2d 889 (2002). The significance of what is known to the arresting officer as it relates to the analysis of probable cause is explained in *Devenpeck v Alford*, 543 US 146, 153, 155; 125 S Ct 588; 160 L Ed 2d 537 (2004):

> Our cases make clear that an arresting officer's state of mind (*except for the facts that he knows*) is irrelevant to the existence of probable cause. That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause.
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> Those are lawfully arrested whom the facts known to the arresting officer[] give probable cause to arrest. [Emphasis added. Citations omitted.]

Consistent with *Devendeck, supra*, the United States Court of Appeals for the Sixth Circuit observed:

> [P]robable cause determinations are not entitled to the benefit of hindsight; "[i]f an officer testifies at a suppression hearing that he in fact did not see the traffic violation or did not have probable cause to believe a violation had occurred, but only discovered after the stop or the arrest that the suspect had committed a traffic violation, a court could not find that probable cause existed." [*United States v Copeland*, 321 F3d 582, 592 (CA 6, 2003), quoting *United States v Ferguson*, 8 F3d 385, 391 (CA 6,1993), cert den sub nom *Ferguson v United States*, 513 US 828; 115 S Ct 97; 130 L Ed 2d 47 (1994).]

The prosecution has the burden of establishing the legality of the stop. *People v Galloway*, 259 Mich App 634, 638; 675 NW2d 883 (2003). Where the prosecution is relying on a particular traffic violation as the basis for the stop, the prosecution must show that the officer effectuating the stop actually observed the actions constituting the violation.

Here, a reasonable view of the testimony supports the trial court's conclusion that Officer Harshberger did not observe the lane change infraction that was captured on the videotape and played in the trial court during the evidentiary hearing addressing defendant's motion to suppress. Significantly, at the close of the evidentiary hearing the assistant prosecuting attorney admitted that the civil infraction upon which the prosecution now relies was not known to the officer at the time of the stop:

> There are two bases, really three bases for the stop here, *one of which we just discovered. And that—the one we just discovered was the fact that the defendant committed a civil infraction when he changed lanes without a signal*, as you saw on Telegraph [Road]. (Emphasis added.)

Where, as here, the police are not cognitive of the facts of the civil infraction, the infraction does not provide a valid justification for the traffic stop. Because the prosecution did not demonstrate a valid basis for the traffic stop that led to the discovery of the contraband, the trial court did not err in granting defendant's motion to suppress and dismissing the charges brought against defendant. *People v Coscarelli*, 196 Mich App 724, 728; 493 NW2d 525 (1992). I would affirm.

/s/ Brian K. Zahra