# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>December 18, 2018 |
| v | No. 340861<br>Oakland Circuit Court |
| KEVIN SEAN ERNST,<br><br>Defendant-Appellant. | LC No. 2017-261695-FH |

Before: GLEICHER, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

The trial court convicted defendant of operating a motor vehicle while intoxicated (third offense), MCL 257.625(1)(a). On appeal, defendant contends that the trial court should have suppressed the evidence against him because the police lacked cause to stop his vehicle and because the trial court conducted an improper experiment to test the theories raised by defendant in his suppression motion. Whether the police officer was truthful about the driving infractions that occurred before his dashboard camera was activated was a question of credibility and we defer to the trial court's findings in that regard. And the court's experiment, while ill advised, was not outcome determinative. We affirm.

## I. BACKGROUND

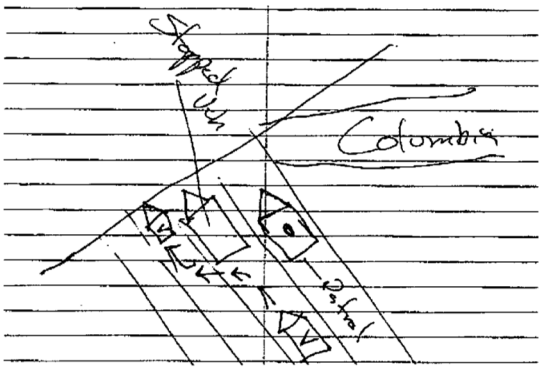
On the evening of November 20, 2016, Berkley Police Officer Scott Smith was patrolling on southbound Woodward Avenue near Columbia Road when he saw defendant pull out of a restaurant parking lot. Defendant merged behind an SUV and did not notice that the vehicle was stopped. Travelling 35 miles an hour, defendant came within a car length of the SUV, slammed on his brakes, and swerved into the neighboring lane, barely avoiding a collision. Unfortunately, Officer Smith was saving earlier footage from his dashboard camera. The camera's recording feature was not activated and did not capture this incident. Officer Smith changed lanes to tail defendant, ultimately pulling him over.

Once stopped, Officer Smith advised defendant, "You almost ran into that car," and defendant responded, "You're right." When asked, defendant indicated that he had not seen the other vehicle because he was looking down to check a text message on his phone. Officer Smith inquired whether defendant had been drinking and defendant admitted that he consumed three pints of beer "just before I left." Defendant also stated, "I'm buzzed but I think I'm fine." Defendant was not fine; a preliminary breathalyzer measured defendant's blood alcohol level as

"substantially over the 0.8 limit" and a blood draw 40 minutes later placed defendant's BAC at 0.16%.

After being bound over to the circuit court, defendant filed a motion to suppress the evidence against him, contending that he was subjected to an illegal traffic stop and challenging Officer Smith's version of events. The trial court agreed that an evidentiary hearing was in order.

We note that at the preliminary examination, Officer Smith described on direct, "There was a car in the number two lane to the right, and that car stopped at the light. I observed a silver Volkswagen come up, directly at speed behind the vehicle that stopped. At the last minute the vehicle . . . applied the brakes, swerved to the left, and just merely missed the stopped vehicle." Smith initially asserted that he was slowing down approaching the light in the far right lane when he observed the incident. Then, "as the traffic signal turned green," defendant's "vehicle abruptly took off, kind of varied its speed, and I also noticed the vehicle continued to sway back and forth." On cross-examination, defense counsel requested that Smith draw a diagram of the near collision. Smith produced the following image, which he labeled "not to scale":




Defense counsel's inquiries led Officer Smith to clarify that he could not remember if he was approaching the light or already stopped when defendant arrived. In either event, Smith contended, he "was back far enough to observe [defendant] come up." Smith asserted that he was certain based on his experience that defendant was travelling approximately 35 mph when he approached the intersection. Smith further described that defendant came "within about eight feet," or "one car length," when he suddenly hit the brakes and swerved into the next lane. On redirect, Smith continued, that defendant "was braking at the last moment, but if he didn't make the lane change, he would have not been able to stop in time," and did not signal his lane change.

At the evidentiary hearing, Officer Smith stated on direct:

> I was in the far right-hand lane, there was a vehicle stopped in the number two lane. I noticed a vehicle coming up behind me which didn't appear to be slowing down at the time. And nearly - - slowed down at the last minute and swerved to the . . . left just missing the car that was stopped at the traffic light. That vehicle did not signal when it did that[.]

Officer Smith described that defendant's lane change was "[m]ore of an emergency swerve stop." Smith testified, "After I observed the near-miss of a collision, I immediately merged over to the left and got behind that vehicle as we were stopped at the traffic light."

On cross-examination, Officer Smith asserted that he effectuated the traffic stop based on defendant's "[n]ear collision and failing to signal." Officer Smith conceded that he could not remember if he was slowing as he approached the light or if he had already stopped when defendant's near miss with the SUV occurred. Defense counsel recounted Smith's preliminary examination testimony that defendant was within eight feet of the SUV when he hit the brakes and veered into the other lane. The officer clarified, "I believe he was within a car-length roughly," and that defendant "was slowing - - it was the emergency stop and swerve at the same time." As to the diagram he drew at the preliminary examination, Smith indicated that his vehicle was actually "farther back" than depicted, as he "stopped back and observed traffic." Upon defense counsel's inquiries, Officer Smith indicated that if the patrol car was positioned as shown in the diagram, he would not have been able to see defendant swerve as described. "That's why I put 'Not to scale,' " the officer asserted, "I'm not an artist."

Defense counsel further questioned Officer Smith's testimony that he quickly maneuvered into the third land behind defendant after witnessing "this dramatic swerve." The officer agreed that if the patrol car was actually positioned as depicted in the diagram, he would have had to drive backward before changing lanes. Again, Smith asserted, "It's a . . . crude drawing," and he was not required to drive in reverse before actually changing lanes.

The dash cam footage began with Officer Smith positioned behind defendant's vehicle in the third lane while stopped at the light at the Woodward/Columbia intersection. Defense counsel noted that no SUV was visible to the right of defendant's car at the light. Officer Smith replied, "There is, it's just not in the video," suggesting that the angle was off. Smith further noted that the roadway was brighter in the lane to the right than in the lane to the left, demonstrating that the subject SUV's headlights were illuminating the roadway. Although Smith testified at the preliminary examination that defendant had come to a stop before the white limit line, he changed his testimony and indicated that defendant was actually over the limit line on the video, further explaining why the SUV was further back. Once defendant and the police cruiser started forward, Officer Smith stated that the SUV started "tailing back."

Defendant also presented the testimony of an expert accident reconstructionist, David Shepardson. Defendant hired Shepardson to render opinions regarding

> the location of the police car, the location of the unknown vehicle said to be stopped at the right [sic] light at lane number two, the movement of [defendant's] vehicle as it approached the red light, the lateral movement of [defendant's] vehicle within the traffic lane. In other words, the side-by-side movement within that. The acceleration rate of [defendant's] vehicle as it accelerated away from the stopped position at the light that was initial red and turned to green. And lastly, at the acceleration rate as it went past Eleven Mile Road.

Shepardson opined that the video footage was not consistent with the officer's diagram. First, Shepardson noted that in the first frame of the video, the patrol car was "very square

behind" defendant's vehicle and not at an angle, suggesting that the patrol car had not recently merged over. Second, Shepardson indicated that in the first and second frames of the video, there was no SUV visible to the right of defendant's car. He also discerned no lighting on the roadway consistent with headlights illuminating the surface. This suggested, Shepardson continued, that any vehicle in the lane to the right of defendant (if its headlights were on) must be at least 100 feet back. Ultimately, Shepardson concluded that there "doesn't appear" to be a vehicle in the lane to the right.

Third, Shepardson challenged that defendant could have stopped and swerved in the distance and at the speed estimated by Officer Smith as against the laws of physics. Shepardson explained that at 35 mph, a vehicle is travelling 51 feet each second. To avoid an object eight feet away, a vehicle would have only 0.15 seconds to stop. To swerve out of the way, Shepardson calculated, the vehicle would have to travel 11 feet to the side at 73 feet per second, or 50 mph. "[T]here just is no force available or, you know, method that . . . could possibly" move a vehicle 50 mph laterally. Shepardson concluded that defendant would have required 47 feet to stop and change lanes while travelling 35 mph as described by Officer Smith. To then come to a complete stop, defendant would have required 51 feet of roadway, much longer than the distance described by the officer. Adding the time necessary to brake and swerve before coming to a complete stop, Shepardson opined would require 98 feet. Based on Officer Smith's observations at the start of the near collision, defendant would have found himself "in the middle of the intersection" before he could stop.

Fourth, Shepardson asserted that defendant did not abruptly accelerate when taking off from the red light. Shepardson used computer measurements of the area to calculate that defendant accelerated at a rate of .12, within normal limits.

Fifth, Shepardson countered Officer Smith's testimony that defendant's vehicle weaved after he left the intersection of Woodward and Columbia. A review of the video and measurements between the lane markers and defendant's rear right tire showed that defendant remained in his lane and drifted only approximately one foot from his initial position.

On cross-examination, Shepardson conceded that the traffic light had already turned green in the first frame of the dashboard camera footage and therefore he could not definitively state what occurred in the moments leading up to the footage. The prosecutor also questioned the expert's decision not to take physical measurements at the scene. Upon inquiry, Shepardson admitted that he did not factor in that defendant may have applied his brakes sooner than eight feet away from the vehicle ahead of him or that he may have continued applying the brakes while swerving. He agreed that defendant could have continued braking while he swerved, but asserted that defendant could not have placed 100% pressure on the brake or the vehicle would have lost control. And, Shepardson concurred, the video showed that defendant was not fully behind the limit line when the video started, so it was "possible" that defendant did not apply the brakes in a timely fashion.

Defendant took the stand at the evidentiary hearing and claimed that he slowly and reasonably moved from the first to the third lane of traffic, using his turn signal, before stopping, at a normal rate of deceleration, at the red traffic light at Woodward and Columbia. Defendant claimed that there were no other vehicles at that traffic light and therefore denied that he almost

collided with any vehicle stopped at the light. Reviewing the video, defendant noted that a Volvo SUV passed him on the left at a high rate of speed after he pulled away from the intersection. Defendant stated his belief that the SUV crossed into his lane and then applied his brakes. It was at that time that defendant looked at his phone. It was this vehicle, defendant claimed, that he believed Officer Smith referenced during their encounter. Defendant denied that he blacked out or was so impaired that he could not discern whether there was a vehicle next to him at the light or to forget that he nearly avoided a collision.

Before denying defendant's suppression motion, the court noted the disputed issues:

> Where [defendant's] car was and where the patrol car was X number of seconds before the video commenced displaying its recording. X representing the range of time within which a vehicle in the right hand lane to move to the point where that vehicle is as depicted in the video. That - - X again representing that - - that quantum of time.
>
> . . . [A]nother undisputed fact. The Defendant . . . accepted at the scene, if not embraced as his own, that he changed lanes, despite a big dispute about when, where, and how the lane change occurred.
>
> The officer testified that [defendant] did not signal. That testimony itself and the lane change is enough to end the hearing, save one thing; if the witness was incredible, be it honest, but wrong, or dishonest, and lying. That officer - - the officer, in a vacuum, in this Court's opinion, presented credibly.
>
> By a preponderance of the evidence, the supposition to discredit the witness failed to do so, discredit him. By a preponderance of the evidence, the Court is persuaded that [defendant] did change lanes, and did not signal, and that alone would justify the stop.

The court found defendant's testimony incredible, partly because his "recall" was "too good." The court did not necessarily find defendant untruthful, "but maybe a mix-up between independent recall and recollection refreshed." Similarly, the court did not believe that the officer manufactured seeing another car at the intersection or falsely accused defendant of a traffic violation. He was either correct or "honestly believed it, but was mistaken." Finding the officer credible, the court determined that the expert witness "was incredible or wrong, or that the science was not so exact as to preclude the possibility that there was a car at the intersection. Given the margins of error and the lack of actual measurement in favor of Google Maps, the Court discounts the expert for that reason."

After discussing the estimations Officer Smith was required to make and how it might affect the outcome, the court took an inappropriate turn in its analysis. The court summarized defendant's argument that it would be physically impossible to stop and veer at the last moment while travelling 35 mph. The court stated:

> The Court hates to burst anyone's bubble that something is obviously untrue; however, this Court, in its minivan, reached 35 miles per hour, and

> decelerated to zero about a half dozen times in the county parking lot, and on County Drive last Thursday evening and Friday morning at 5 a.m. . . .
>
> Despite the inexactitude of the Court's experimentation, i.e., maybe the speed was 34 or 33, not 35, the Court's minivan stopped, for example, in two or two and an eighths car lengths, rather than approximately one and a half, the question is whether the officer's opinion, again depriving him of human error, even if he himself deprived himself of it on the stand, the question is whether that opinion is objectively unreasonable. Decelerating from 35 to zero in approximately one and a half car lengths is possible. It is not objectively unreasonable to believe it to be possible.

Immediately after the court's ruling, defendant waived his right to a jury trial and the parties agreed to have the court try defendant on a stipulated statement of facts and on the preliminary examination testimony. The court convicted defendant as charged. Defendant now appeals.

## II. ANALYSIS

We review de novo a trial court's ruling in a suppression motion. *People v Steele*, 292 Mich App 308, 313; 806 NW2d 753 (2011). We review for clear error the trial court's underlying factual findings. *Id*. "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *People v Swirles (After Remand)*, 218 Mich App 133, 136, 553 NW2d 357 (1996). Furthermore, "regard shall be given to the special opportunity of the trial court to judge the credibility of witnesses who appeared before it." MCR 2.613(C).

The question in this case is whether Officer Smith legally effectuated a traffic stop of defendant's vehicle. The United States and Michigan Constitutions protect individuals from unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. "Under the Fourth Amendment, stopping a vehicle and detaining the occupants amounts to a seizure." *People v Simmons*, 316 Mich App 322, 326; 894 NW2d 86 (2016). "[T]he reasonableness of a search or seizure depends on 'whether the officer's action was justified at its inception, and whether it was reasonably related in scope of the circumstances which justified the interference in the first place.' " *People v Williams*, 472 Mich 308, 314; 696 NW2d 636 (2005), quoting *Terry v Ohio*, 392 US 1, 20; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

"A traffic stop is justified if the officer has 'an articulable and reasonable suspicion that a vehicle or one of its occupants is subject to seizure for a violation of law.' " *Simmons*, 316 Mich App at 326, quoting *People v Williams*, 236 Mich App 610, 612 n 1; 601 NW2d 138 (1999).[1] "This includes a violation of a traffic law." *Simmons*, 316 Mich App at 326, citing *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002). " 'The determination whether a traffic

[1] Defendant contends that an officer must have probable cause to effectuate a traffic stop. This is not the standard articulated in Michigan law.

stop is reasonable must necessarily take into account the evolving circumstances with which the officer is faced.' " *Simmons*, 316 Mich App at 326, quoting *Williams*, 472 Mich at 315.

Officer Smith cited defendant's near collision and veering from the second to third lane without signaling as the reasons for his traffic stop. Failing to signal and "operat[ing] a vehicle upon a highway . . . in a careless or negligent manner likely to endanger any person or property" are civil traffic infractions. MCL 257.648(1) and (7); MCL 257.626b.

The trial court credited Officer Smith's testimony that defendant came to the intersection at 35 mph and applied the brakes and veered at the last minute to avoid colliding with an SUV stopped at the light. To the extent that the officer's description seemed "dramatic," the court determined that Smith estimated based upon his personal observations and that any discrepancies or inaccuracies were errors in memory, not lies. An officer acting reasonably does not have to be right about what is actually going on. "To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them fair leeway for enforcing the law in the community's protection." *Heien v North Carolina*, ___ US ___; 135 S Ct 530, 536; 190 L Ed 2d 475 (2014) (cleaned up).[2]

The court's review of the dashboard camera footage supported its determination that Officer Smith was a credible witness. Although the SUV was not visible in the footage, the court rejected defendant's theory that the SUV did not exist. The court noted that the lane to the right of defendant's car was illuminated while the lane to the left was dark. The court discounted Shepardson's opinion that this light was not caused by the SUV's headlights. Moreover, Officer Smith asserted that the SUV hung back as he followed defendant's vehicle and pulled him over. Accepting that defendant came up to the light too quickly and was forced to brake and swerve, it is reasonable to assume that he skidded past the SUV at the light. Officer Smith would then have been situated next to the SUV (rather than adjacent to but slightly behind the SUV) when he changed lanes to follow defendant. This would reasonably explain the absence of the SUV in the dashboard camera footage.

Defendant makes much of Officer Smith's "revised" testimony, accusing Officer Smith of changing his testimony to continue supporting a narrative that was contradicted by the video footage. It is just as likely, however, as the trial court noted, that Officer Smith forgot the minutia surrounding this single traffic stop. Viewing the video footage could have refreshed Officer Smith's memory. Moreover, the changing details to Officer Smith's version of events were not as essential as defendant now contends. Officer Smith never wavered from claiming that defendant approached the intersection at approximately 35 mph and was required to brake and swerve to the left to avoid a rear-end collision with an SUV stopped at the light. Officer Smith stated from the beginning that he could not remember if his patrol car was stopped or slowing at the intersection. He admitted his mistaken memory about when he merged into the

[2] This opinion uses the new parenthetical (cleaned up) to improve readability without altering the substance of the quotation. The parenthetical indicates that nonsubstantive clutter such as brackets, alterations, internal quotation marks, and unimportant citations have been omitted from the quotation. See Metzler, Cleaning Up Quotations, 18 J App Pract & Process 143 (2017).

third lane to follow defendant. And Smith was clear from the beginning that his diagram of the scene was "not to scale," requiring him to explain the positions of the various vehicles at the intersection.

Defendant further contends that the trial court improperly relied upon the fruits of the illegal seizure to justify the reason for the seizure. The trial court did note that defendant admitted to nearly colliding with another vehicle when questioned by Officer Smith at the scene. However, this finding was not necessary to the court's determination; the court denied the motion to suppress after finding that Officer Smith credibly testified that he observed defendant commit traffic infractions. Any potential error in this regard was harmless.

However, we cannot approve the trial court's decision to undertake private experiments to test the officer's description of the incident and the expert's debunking of the same. MRE 2.01(b) permits a judge to take judicial notice of generally known facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Factfinders, even judges, may rely on "their own common sense and everyday experience," as well as "general knowledge upon matters notorious and unquestioned." *People v Simon*, 189 Mich App 565, 567-568; 473 NW2d 785 (1991) (cleaned up). The court's experiment does not fall within this framework. Michigan's criminal jury instructions similarly prohibit juries from considering extraneous, extrajudicial information, directing that jurors "must not investigate the case on [their] own or conduct any experiments concerning the case." M Crim JI 2.16.

A private experiment without witnesses is not capable of accurate and ready determination by unquestionable sources. The resort to experimentation demonstrates that the information tested is not part of the factfinder's general knowledge base. Private judicial experiments also violate the mandate that judges in a bench trial resolve the case based on the evidence before them rather than on "extraneous evidence." *Simon*, 189 Mich App at 568. The trial court's experiment in this case created new evidence regarding a disputed fact. Appellate courts have held that judicial experimentation (as well as reliance on the judge's specialized experience in another field and ex parte judicial investigation of the scene) violates a criminal defendant's right to confront the witnesses against him, pierces the veil of judicial impartiality, and transforms the judge into a witness or advocate for one side in a dispute. See *id*. See also *United States v Alabi*, 597 Fed App 991, 995-996 (CA 10, 2015); *Lillie v United States*, 953 F2d 1188 (CA 10, 1992); *Price Bros Co v Philadelphia Gear Corp*, 629 F2d 444 (CA 6, 1980).

Here, the trial court made sufficient independent findings to support the denial of defendant's motion to suppress without relying upon its improper experiment. In *Lillie*, 953 F2d at 1192, for example, the Court of Appeals for the Tenth Circuit reasoned that the trial judge's improper inspection of the crime scene was akin to improperly admitted evidence. Relief was only warranted if the error was not harmless. Stated differently, relief was not justified "if other competent evidence is sufficiently strong to permit the conclusion that the proper evidence had no effect on the decision." *Id*. (cleaned up). As held by Michigan courts, "not every instance of mention before a jury of some inappropriate subject matter warrants a mistrial" or other relief. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999), reversed in part on other grounds *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007). Rather, a defendant must establish

prejudice to warrant reversal or a new trial. *People v Schaw*, 288 Mich App 231, 237; 791 NW2d 743 (2010).

The trial court relied on Officer Smith's testimony regarding his personal observation of defendant's near collision with an SUV to uphold the officer's decision to effectuate a traffic stop. The court discounted the defense expert's opinion that the incident could not have occurred as described and therefore rejected that the traffic stop was actually illegal. The court's experiment was not a necessary component of its decision to uphold the charges against defendant. Accordingly, defendant is not entitled to relief.

We affirm.

/s/ Elizabeth L. Gleicher
/s/ Stephen L. Borrello
/s/ Jane M. Beckering