STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODNEY DUANE MENGEL,

Defendant-Appellant.

UNPUBLISHED
June 24, 2021

No. 354983
Newaygo Circuit Court
LC No. 19-012322-FH

Before: STEPHENS, P.J., and BECKERING and O'BRIEN, JJ.

PER CURIAM.

In this interlocutory appeal, defendant, Rodney Duane Mengel, appeals by delayed leave granted[1] an order denying his motion to suppress evidence. We affirm.

I. BACKGROUND

This case arises from a traffic stop on November 14, 2019, at approximately 1:30 a.m. At that time, Michigan State Trooper Robert Watson observed defendant drive past him in a 1994 Chevy Blazer. Watson asserted that the basis for the stop was his observations of apparent equipment violations. He stated that as the vehicle passed him, he heard a loud "growling" noise coming from the exhaust system and when the vehicle came to a stop, Watson noticed that the left brake light went out and the backup lights came on. Defendant was charged as a fourth-offense-habitual-offender, MCL 769.12, with operating a motor vehicle while intoxicated, third offense, MCL 257.625; and operating a motor vehicle while subject to a license suspension, second offense, MCL 257.904. Defendant filed a motion to suppress challenging the legality of the stop.

An evidentiary hearing was held regarding the motion to suppress. Defense counsel represented that he had trouble getting certain witnesses to appear for the hearing. The prosecutor

[1] See *People v Mengel*, unpublished order of the Court of Appeals, entered November 3, 2020 (Docket No. 354983).

agreed to accept an offer of proof in lieu of the unavailable witnesses. Defense counsel proffered that Andrew Jonkers would testify:

> (1) he was the owner of the vehicle in question;
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> (2) he never had a complaint about the exhaust or the brake lights;
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> (3) defendant was driving the vehicle on the day in question because Jonkers wanted him to look into a steering problem; and
>
> (4) after the traffic stop, Jonkers examined and drove the vehicle, and "there was no problem with the exhaust, there was no problem with the brake lights, and there was no defective-sounding exhaust".

Defendant further made an offer of proof that Rick Ellis, a mechanic, would testify that he inspected the vehicle and found nothing wrong with the "tail lights [sic] or the exhaust" and "found them to be in perfect working order". Ellis would further testify that "he drove [the vehicle] several times experiencing no sound of any defective exhaust". Finally, counsel stated that Shannon Fessenden "was the tow truck driver" and that Fessenden "inspected the vehicle, and took it to the mechanic shop where they started it up and [found] no evidence of any defective exhaust and nothing wrong with the brake lights or how they were operating".

Watson and defendant testified in person. Watson testified that he had been employed by the state police for 24 years and had spent all but approximately 2½ years of that time on road patrol. He testified that the noise coming from defendant's vehicle and the left brake light going out led him to believe that the vehicle was possibly defective. Watson also testified that when he addressed the exhaust and light issue with defendant during the stop, defendant acknowledged being aware of both issues. Watson testified that he was unable to duplicate the light issue during the stop. Defendant admitted to there being previous problems with the light and exhaust, but testified that both had been fixed before the traffic stop. Defendant testified that there. Had been no problems with the vehicle since it was released from the impound lot. He estimated that Watson had been sitting about 50 yards from him before the traffic stop.

The trial court denied the motion to suppress from the bench. The court found that Watson had a reasonable suspicion that defendant's vehicle had defective equipment based on the exhaust having sounded unusual or loud and that the reasonable suspicion validated the stop.

This appeal followed.

II. ANALYSIS

Defendant argues that the traffic stop was unjustified and, therefore, the charges arising from the stop should be dismissed. This Court reviews "a trial court's factual findings in a ruling on a motion to suppress for clear error. To the extent that a trial court's ruling on a motion to suppress involves an interpretation of the law or the application of a constitutional standard to uncontested facts, [this Court's] review is de novo." *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001).

"A traffic stop for a suspected violation of law is a 'seizure' of the occupants of the vehicle and therefore must be conducted in accordance with the Fourth Amendment." *Heien v North Carolina*, 574 US 54, 60; 135 S Ct 530; 190 L Ed 2d 475 (2014). A person's right against unreasonable searches and seizures[2] is guaranteed by both the United States Constitution and the Michigan Constitution. US Const, Am IV; Const 1963, art 1, § 11.

> Generally, if evidence is unconstitutionally seized, it must be excluded from trial. But a police officer may stop and detain a motor vehicle on the basis of an articulable and reasonable suspicion that the vehicle or one of its occupants is violating the law, including a law regulating equipment.[3] This Court's determination of whether there was reasonable suspicion to justify a stop must be made on a case-by-case basis, evaluated under the totality of the circumstances, and based on common sense. The subjective intent of the police officer is irrelevant to the validity of the stop. [*People v Dillon*, 296 Mich App 506, 508-509; 822 NW2d 611 (2012).]

"A court is required to suppress evidence otherwise lawfully seized during a traffic stop only if the officer did not have reasonable suspicion to justify the stop." *Id*. at 509. Also, officers may rely on their experience and specialized training to make inferences that might elude an untrained person. *United States v Cortez*, 449 US 411, 418; 101 S Ct 690; 66 L Ed 2d 621 (1981). The likelihood of criminal activity need not rise to the level required for probable cause, nor must it meet a preponderance-of-the-evidence standard. *United States v Sokolow*, 490 US 1, 7; 109 S Ct 1581; 104 L Ed 2d 1 (1989).

An inoperable taillight is a violation of the motor vehicle code. In *People v Williams*, 236 Mich App 610, 611; 601 NW2d 138 (1999), officers "observed a moving vehicle with an inoperative tail lamp on the passenger's side" and stopped the vehicle. The Court considered whether having only one operative tail lamp was legal and ultimately concluded that if a vehicle is designed with more than one taillight, they must all be working in order to satisfy the second sentence of MCL 257.686(2).[4] *Id*. at 613-615. The Court concluded that the traffic stop was legal,

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[2] "Stopping an automobile and detaining its occupants constitutes a 'seizure' within the meaning of the Fourth Amendment, even if the purpose of the stop is limited and the resulting detention is brief." *People v Williams*, 236 Mich App 610, 612 n 1; 601 NW2d 138 (1999).

[3] In *Williams*, 236 Mich App at 612, the Court stated, "[O]n reasonable grounds shown, a police officer may stop and inspect a motor vehicle for an equipment violation."

[4] MCL 257.686 states, in part:

> (1) A motor vehicle, trailer, semitrailer, pole trailer, or vehicle which is being drawn in a train of vehicles shall be equipped with at least 1 rear lamp mounted on the rear, which, when lighted as required by this act, shall emit a red light plainly visible from a distance of 500 feet to the rear.

stating, "[W]e conclude that a motor vehicle equipped with multiple tail lamps is in violation of subsection 686(2) of the Vehicle Code if one or more of its tail lamps is inoperative." *Id*. at 615. *Williams* provides support for the stopping of a vehicle on the basis of malfunctioning lighting.

MCL 257.697b states that vehicles aside from mopeds and motorcycles must be "equipped with 2 rear stop lamps." In addition, MCL 257.697 states, in part:

> (a) A motor vehicle may be equipped and when required under this chapter shall be equipped with the following signal lamps or devices:
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> (1) A stop lamp on the rear which shall emit a red or amber light and which shall be actuated upon application of the service or foot brake and which may but need not be incorporated with a tail lamp.
>
> (2) A lamp or lamps or mechanical signal device which conveys an intelligible signal or warning to another driver approaching from the rear.
>
> (b) A stop lamp shall be capable of being seen and distinguished from a distance of 100 feet to the rear both during normal sunlight and at nighttime and a signal lamp or lamps indicating intention to turn shall be capable of being seen and distinguished during daytime and nighttime from a distance of 100 feet both to the front and rear. When a vehicle is equipped with a stop lamp or other signal lamps, the lamp or lamps shall at all times be maintained in good working condition. A stop lamp or signal lamp shall not project a glaring or dazzling light.

Watson stated that one reason he stopped the vehicle was because he observed a malfunctioning brake light as defendant approached an intersection. After testimony about roadside testing showing that the brake light was then working, the prosecutor asked, "And after you saw that working correctly, did that change your opinion about what you observed when you were on the road?" Watson replied, "No. I saw what I saw when I was sitting stationary." When asked why he had defendant step on the brakes while at the roadside, Watson answered that he "wanted to check to see if it was a continuous problem because I've had vehicles that I stopped before with a headlight out and then the headlight comes back on or you have a tail light [sic] out and then the tail light [sic] comes back on; it's a wiring issue."

There was significant evidence that in fact the lights were, at best, only momentarily malfunctioning. Regardless, the issue here is whether the officer had a reasonable, articulable suspicion of a violation. *Illinois v Wardlow*, 528 US 119, 125-126; 120 S Ct 673; 145 L Ed 2d

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> (2) Either a tail lamp or a separate lamp shall be constructed and placed so as to illuminate with a white light the rear registration plate and render it clearly legible from a distance of 50 feet to the rear. A tail lamp or tail lamps, together with any separate lamp for illuminating the rear registration plate, shall be wired so as to be lighted whenever the head lamps or auxiliary driving lamps are lighted.

570 (2000); *Dillon*, 296 Mich App at 508-509. In part, this is a question of credibility. The trial court found Watson's testimony credible.

Defendant contends that *United States v Walters*, 492 F Supp 2d 754 (WD Mich, 2007), precludes the brake-light issue from being used as the justification for the traffic stop. In that case, after a traffic stop allegedly predicated on a nonworking rear light, the court concluded, partly on the basis of photographic evidence, that the light had, in fact, been working, and the court invalidated the stop. *Id*. at 757. *Walters* is distinguishable because the *federal district court* was sitting as the fact-finder in that case; the court went through its fact-finding analysis in detail and stated that it was giving little weight to the police officer's testimony. *Id*. at 757 n 3. The present case is entirely different because this Court does not assess credibility anew. See, e.g., *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988). In reviewing a motion to suppress, this Court "defer[s] to the trial court's special opportunity to determine the credibility of witnesses appearing before it." *People v Dagwan*, 269 Mich App 338, 342; 711 NW2d 386 (2005). A trial court has a superior ability to make these judgments. *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011). The trial court found Watson's testimony about the brake light to be credible.

Defendant additionally contends that (1) the exhaust issue could not be used as a justification for the traffic stop, because all the other witnesses aside from Watson testified that the exhaust system and muffler were working properly, and no audio or visual evidence corroborated Watson's testimony about an allegedly defective exhaust system; (2) the trial court, in assessing whether the exhaust issue justified the traffic stop, should have taken into account the decibel levels set forth in MCL 257.707c; and (3) the statute prohibiting "excessive or unusual noise" from a muffler, MCL 257.707, is unconstitutionally vague. We need not address these issues because the brake-light issue itself justified the traffic stop.[5]

[5] We will, at any rate, briefly address defendant's arguments. The trial court was entitled to accept the trooper's testimony that the exhaust sounded defective and properly concluded that this testimony justified the stop. See *Daniels*, 172 Mich App at 378; *Dagwan*, 269 Mich App at 342; *Shann*, 293 Mich App at 305; *Wardlow*, 528 US at 125-126; and *Dillon*, 296 Mich App at 508-509. See also *People v Nadeau*, unpublished per curiam opinion of the Court of Appeals, issued March 22, 2018 (Docket No. 336853). Although an unpublished opinion is not precedentially binding under the rule of stare decisis, MCR 7.215(C)(1), such opinions can be instructive or persuasive, *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010). The reasoning in *Nadeau* regarding the propriety of a traffic stop based on an articulation of a possibly defective exhaust system is persuasive. The trial court did not clearly err by finding that Watson's articulation of an unusual "growl" sound was a proper justification for the traffic stop. In addition, the plain language of MCL 257.707b(1) (stating that "a motor vehicle, while being operated on a highway or street, shall be equipped with an exhaust system in good working order to prevent excessive or unusual noise *and* shall be equipped to prevent noise in excess of the limits established in this act" (emphasis added)) reveals that the statutory prohibition against excessive or unusual noise is something different and *in addition to* the decibel limits set forth in MCL 257.707c. Finally, defendant has not established that the prohibition against an "unusual" noise

Defendant contends that if this Court relies solely on the brake-light issue in determining that the traffic stop was legal, we must remand for the trial court to make a determination solely about the brake light. We disagree. The trial court clearly found that Watson's testimony about the brake light was credible and that a stop based on a suspicion of defective equipment was justified. Taking the exhaust issue out of the equation does not alter this analysis. In *People v White*, 294 Mich App 622; 823 NW2d 118 (2011), the Court, in the context of a Fifth Amendment issue, stated:

> This Court reviews a trial court's ruling on a motion to suppress evidence for clear error; it reviews attendant questions of law de novo. What this means is that if factual findings are made by the trial court in relation to the motion to suppress, we defer to those findings by use of the clearly erroneous standard of review. The application of those facts to the constitutional provision at issue . . . is a legal determination to which we owe no deference to the trial court, and therefore we apply a de novo standard of review to the ultimate conclusion. [Citations omitted.]

Here, the trial court accepted Watson's testimony about the malfunctioning brake light, and this acceptance was not clearly erroneous. The application of that testimony to the law of search-and-seizure reveals no constitutional error.

Defendant contends that the police impermissibly expanded the scope of the traffic stop beyond anything pertaining to the alleged equipment problems. For purposes of investigation, "a police officer may stop and detain a motor vehicle on the basis of an articulable and reasonable suspicion that the vehicle or one of its occupants is violating the law, including a law regulating equipment." *Dillon*, 296 Mich App at 508. A stop of this investigatory nature is referred to as a *Terry*[6] stop. *People v Barbarich (On Remand)*, 291 Mich App 468, 473; 807 NW2d 56 (2011). "[U]nder *Terry*, a police officer may approach and temporarily detain a person for the purpose of investigating possible criminal behavior even if probable cause does not exist to arrest the person." *Id*. "The scope of any search or seizure must be limited to that which is necessary to quickly confirm or dispel the officer's suspicion." *Id*. In addition, an officer may not conduct a full search of a car in connection with a traffic citation in the absence of consent, custodial arrest, concern for

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was unconstitutionally vague as applied to the specific circumstances of this case. *People v Vronko*, 228 Mich App 649, 652; 579 NW2d 138 (1998). Indeed, a person of ordinary intelligence and those applying the statute would be able to discern that a growling exhaust in a Chevrolet Blazer is "uncommon" or "rare." *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "unusual"); *People v Harris*, 495 Mich 120, 134-135; 845 NW2d 477 (2014) (discussing considerations applicable to vagueness challenges); *State v Olsson*, 78 Wash App 202, 205-207; 895 P2d 867 (1995) (upholding a statute with the same wording as MCL 257.707). Defendant's reference to certain brands of vehicles specifically designed to "growl" is misguided because the analysis in this case is to be focused *on the facts at hand*. *Vronko*, 228 Mich App at 652.

[6] *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

officer safety, the need to preserve evidence, or probable cause. *Knowles v Iowa*, 525 US 113, 114-119; 119 S Ct 484; 142 L Ed 2d 492 (1998).[7]

Defendant argues that the trooper prolonged defendant's detention after the trooper obtained information dispelling his suspicion of an equipment violation without probable cause to do so. This issue was not presented during the evidentiary hearing nor has the defendant provided this Court with record evidence to support the unpreserved argument.[8] An appellant bears "the burden of furnishing the reviewing court with a record to verify the factual basis of any argument upon which reversal [is] predicated." *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). Defendant has not done so and no basis for reversal is apparent.

Affirmed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Jane M. Beckering
/s/ Colleen A. O'Brien

[7] *Knowles* is the case on which defendant relies.

[8] The prosecutor represented in her brief in opposition to defendant's motion to suppress that Watson confirmed that defendant did not have a driver's license; that the trooper smelled a strong odor of intoxicants coming from defendant; that defendant admitted to having consumed two to three beers before driving; and that defendant consented to field sobriety tests, which he did not perform accurately. A traffic stop may be extended when new suspicions are raised during the stop. See, e.g., *People v Burrell*, 417 Mich 439, 453; 339 NW2d 403 (1983).