[Cite as *State v. Grigoryan*, 2010-Ohio-2883.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93030

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

LEON GRIGORYAN

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-508700

BEFORE: Dyke, J., Blackmon, P.J., and Celebrezze, J.

RELEASED: June 24, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

ANN DYKE, J.:

{¶ 1} The state of Ohio appeals from the order of the trial court that suppressed the evidence obtained in connection with the stop of an automobile operated by defendant Leon Grigoryan. For the reasons set forth below, we affirm.

{¶ 2} On April 2, 2008, defendant was indicted for driving under the influence of alcohol or other drug of abuse, with furthermore clauses alleging that he refused to submit to chemical tests, and that he had been convicted of the crime of driving under the influence of alcohol in 2002. Defendant pled not guilty and moved to suppress the state's evidence. He asserted that he had been stopped without a lawful basis, and committed no offense.

{¶ 3} The trial court held a hearing on the motion on June 25, 2008. Lyndhurst Police Officer Christopher Cianciolo testified that, at approximately 2:30 a.m., on February 25, 2007, a patrolman who was working a part-time job at the Russian Tea Room reported a suspected impaired driver leaving the parking lot of that establishment. Officer Cianciolo located defendant's vehicle traveling northbound on Richmond Road at Spencer Road.

{¶ 4} Officer Cianciolo followed defendant's vehicle for approximately one mile. According to this officer, as the vehicle passed the intersection of Richmond and Ridgebury Roads, it drifted to the left, drifted to the right, and defendant then crossed over the yellow lane line on the left. The drifting continued for less than a minute. The officer further testified that he stopped the vehicle, based upon the drifting and the call from the other patrolman. The

officer then activated his overhead lights and the video camera of his cruiser.

{¶ 5} Officer Cianciolo testified that he smelled a very strong odor of alcohol as he spoke to defendant. He asked if defendant had been drinking and defendant reportedly said that he had not been. Defendant's face was red, and his eyes appeared bloodshot and glassy. The officer decided to administer in-car sobriety tests. The officer stated that defendant did not pass the in-car tests, so he administered field sobriety tests. Officer Cianciolo administered the horizontal gaze nystagmus test and the walk and turn test. The officer stated that he arrested defendant after defendant failed to properly perform these field sobriety tests.

{¶ 6} On cross-examination, Officer Cianciolo acknowledged that he told defendant that he was being stopped for weaving within his lane. He also clarified his statement that defendant had crossed the yellow lane on the left, and explained that defendant drove on the yellow line but did not go beyond it. The court was also advised that defendant was cited for violating Lyndhurst Ordinances 432.28, which prohibits operating a vehicle "in a weaving or zigzag course unless such irregular course is necessary for safe operation or in compliance with the law."

{¶ 7} The trial court granted the motion to suppress and stated:

{¶ 8} "[T]he question in this case is, assuming that [the tip provided by the patrolman] is in the nature of an anonymous tip, which I think is the correct analysis, is the subsequent behavior observed by Officer Cianciolo the

independent corroboration that would be sufficient to support probable cause to stop the vehicle?

{¶ 9} "I find that it is not. I find that the behavior described by the police officer, again, up until the stop, is insufficient to support probable cause, particularly where the driver of the vehicle or the vehicle was observed operating substantially lawfully, except for this one small instance of weaving, and as described by this officer."

{¶ 10} The state now appeals and assigns the following assignments of error:

{¶ 11} "The arresting officer had the requisite reasonable suspicion under *Terry* [*v. Ohio* (1969), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889] to justify an investigative stop of Mr. Grigoryan's vehicle."

{¶ 12} "The trial court erred in applying the legal standard of probable cause to the traffic stop, as opposed to the correct legal standard of reasonable suspicion."

{¶ 13} "The trial court erred when it granted Mr. Grigoryan's motion to suppress on the ground that the arresting officer did not have probable cause to initiate a traffic stop of Mr. Grigoryan's vehicle."

{¶ 14} "The trial court erred when it granted Mr. Grigoryan's motion to suppress on the ground that the arresting officer did not have probable cause to initiate a traffic stop of Mr. Grigoryan's motor vehicle."

{¶ 15} A review of the denial of a motion to suppress involves mixed

questions of law and fact. *State v. Burnside,* 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71. With respect to the trial court's conclusions of law, however, our standard of review is de novo and we must decide whether the facts satisfy the applicable legal standard. *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539.

{¶ 16} A traffic stop initiated by a law enforcement officer implicates the Fourth Amendment. *Whren v. United States* (1996), 517 U.S. 806, 809, 116 S.Ct. 1769, 135 L.Ed.2d 89; see, also, *Brendlin v. California* (2007), 551 U.S. 249, 127 S.Ct. 2400, 168 L.E.2d 132. Such a traffic stop must comply with the Fourth Amendment's general reasonableness requirement. *Whren v. United States*.

{¶ 17} As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. Id.; *Pennsylvania v. Mimms* (1977), 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331. “Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed.” In *State v. Perez,* 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, the Ohio Supreme Court stated that, “where an officer has an articulable reasonable suspicion or probable cause to stop a motorist for any criminal violation, including a minor traffic violation, the stop is constitutionally valid regardless of the officer's underlying subjective intent or motivation for stopping the vehicle in question.” *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 11, 665

N.E.2d 1091.

{¶ 18} Further, under *Terry v. Ohio,* a temporary investigative stop of an automobile is proper if the stop is based upon reasonable suspicion, based on specific and articulable facts, that an occupant is or has been engaged in criminal activity. *United States v. Brignoni-Ponce* (1975), 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607; *Delaware v. Prouse* (1979), 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660. Accord *State v. Epling* (1995), 105 Ohio App.3d 663, 664 N.E.2d 1299. The propriety of an investigative stop must be viewed in light of the totality of the surrounding circumstances. *State v. Batchili,* 113 Ohio St.3d 403, 2007-Ohio-2204, 865 N.E.2d 1282, paragraph two of the syllabus.

{¶ 19} Furthermore, "[r]easonable suspicion is something less than probable cause." Id., citing *State v. VanScoder* (1994), 92 Ohio App.3d 853, 855, 637 N.E.2d 374. Accord *State v. Mays,* 119 Ohio St.3d 406, 2008-Ohio-4539, 894 N.E.2d 1204 (an officer who has probable cause necessarily has a reasonable and articulable suspicion to justify a stop).

{¶ 20} An informant's tip may provide officers with the reasonable suspicion necessary to conduct an investigative stop. *Maumee v. Weisner*, 87 Ohio St.3d 295, 1999 -Ohio- 68, 720 N.E.2d 507; *Alabama v. White* (1990), 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301. When officers base reasonable suspicion upon an informant's tip, the Supreme Court of Ohio has identified several factors including the informant's veracity, reliability, and basis of knowledge that are considered to be highly relevant in determining the value of the informant's report.

Id.

{¶ 21} In *Alabama v. White*, the Supreme Court considered whether an anonymous tip, as corroborated by independent police work, exhibited sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop. Id. The Court found it significant that the tip contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted, and concluded that "the independent corroboration by the police of significant aspects of the informer's predictions imparted some degree of reliability to the other allegations," including the claim that the object of the tip was engaged in criminal activity. Id.

{¶ 22} A tip, in addition to personal observations, may also be used to form probable cause. *Adams v. Williams* (1972), 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612. When a trial court evaluates whether an informant provides probable cause, the "totality of the circumstances" standard must be used. *Illinois v. Gates* (1983), 462 U.S. 213, 230-33, 103 S.Ct. 2317, 76 L.Ed.2d 527. *State v. Huggins,* Lucas App. No. L-02-1289, 2003-Ohio-3843.

{¶ 23} In this matter, the arresting officer testified that he stopped the vehicle, based upon the drifting, driving on the yellow line, and the patrolman's call regarding a suspected impaired driver. As to the drifting, we note that in *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, 894 N.E.2d 1204, the Ohio Supreme Court held that, because R.C. 4511.33 requires a driver to drive a

vehicle entirely within a single lane of traffic, when an officer observes a vehicle drifting back-and-forth across an edge line, the officer has a reasonable and articulable suspicion that the driver has violated R.C. 4511.33. The *Mays* Court explained:

{¶ 24} "The court in *Hodge* also stated that it did not intend for its decision to stand for 'the proposition that movement within one lane is a per se violation giving rise to reasonable suspicion, nor does inconsequential movement within a lane give law enforcement carte blanche opportunity to make an investigatory stop.' Id., 147 Ohio App.3d 550, 2002-Ohio-3053, 771 N.E.2d 331, at ¶45. However, when an officer could reasonably conclude from a person's driving outside the marked lanes that the person is violating a traffic law, the officer is justified in stopping the vehicle."

{¶ 25} We find the drifting noted herein, followed by brief driving on the left yellow edge line, to be "inconsequential movement within a lane" that does not give rise to articulable suspicion to make an investigatory stop, under *State v. Mays*. It also follows that this driving is not sufficient to establish probable cause to stop.

{¶ 26} Further, the tip from the patrolman regarding a suspected impaired driver does not, when combined with the other evidence, provide reasonable suspicion necessary to conduct an investigative stop, as there was no supporting or corroborating information, and the basis of his knowledge was not detailed.

{¶ 27} In accordance with the foregoing, we affirm the judgment of the trial

court. Despite the fact that the trial court couched its ruling in terms of probable cause rather than reasonable suspicion, the trial court correctly determined that the stop was unlawful, and we therefore affirm that ruling. Accord *State v. Abernathy,* Scioto App. No. 07CA3160, 2008-Ohio-2949 ("Although the trial court used a probable cause analysis, we may nevertheless uphold its judgment on other grounds").

{¶ 28} The state's assignments of error are without merit.

Affirmed. It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, JUDGE

PATRICIA ANN BLACKMON, P.J., CONCURS;
FRANK D. CELEBREZZE, JR., J., DISSENTS. (SEE ATTACHED DISSENTING OPINION.)

FRANK D. CELEBREZZE, JR., J., DISSENTING:

{¶ 29} I respectfully dissent. Based on an analysis of cases involving

violations of R.C. 4511.33, the majority finds that the instances of weaving in this case did not give rise to a reasonable suspicion to justify an investigatory stop. However, Officer Cianciolo stated that he stopped appellant for weaving within his lane of travel. This is a violation of Lyndhurst Codified Ordinances 432.38(a), which prohibits "operat[ing] a motor vehicle or motorcycle upon any street or highway in a weaving or zigzag course unless such irregular course is necessary for safe operation or in compliance with law." Similar statutes have survived constitutional challenges and have served as the basis for valid stops of individuals suspected of driving while intoxicated. See *City of Cuyahoga Falls v. Morris* (Aug. 19, 1998), Summit App. No. 18861 (where the Ninth District upheld a similar Cuyahoga Falls ordinance as a proper justification for a traffic stop); *City of Lakewood v. Tate* (May 24, 2001), Cuyahoga App. No. 78023 (finding that "the circumstances here passed the threshold of reasonable suspicion because, even though minor incidents of weaving do not justify an investigatory stop, significant weaving, even within a single lane, can give rise to reasonable suspicion"); *City of Eastlake v. Reithmann*, Lake App. Nos. 2003-L-076 and 2003-L-079, 2005-Ohio-137, ¶24-25.

{¶ 30} Officer Cianciolo testified that he observed appellant weave three times — first to the right, then to the left, then to the right — within approximately one mile. In my opinion, the observation of the violation of the local ordinance coupled with the tip Officer Cianciolo received provide a reasonable suspicion to

stop appellant based on the totality of the circumstances. The trial court correctly classified Officer Tracy's tip as anonymous, requiring independent corroboration to justify a stop. See *Alabama v. White* (1990), 496 U.S. 325, 329-330, 110 S.Ct. 2412, 110 L.Ed.2d 301. In this case, I find the instances of weaving provide that corroboration. For those reasons, I would reverse the decision of the trial court.