[Cite as *State v. James,* 2010-Ohio-4556.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-P-0082**
- vs -	:	
JULIANNE JAMES,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Municipal Court, Kent Division, Case No. 2009 TRC 1233 K.

Judgment: Reversed and remanded.

Victor V. Vigluicci, Portage County Prosecutor, and *Kimberly Quinn*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Matthew A. Lallo and *Michael J. Feldman*, Lallo & Feldman Co., L.P.A., Interstate Square Building I, 4230 State Route 306, #240, Willoughby, OH 44094 (For Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Ms. Julianne James appeals from the judgment of the Portage County Municipal Court, Kent Division, which denied her motion to suppress for a traffic stop that resulted in OVI charges. We, however, agree with Ms. James, as our review of the suppression hearing reveals that under the totality of the circumstances, the officer failed to articulate a reasonable suspicion that warranted initiating a traffic stop.

{¶2} **Substantive and Procedural Facts**

{¶3} On March 27, 2009, Ms. James was charged with operating a motor vehicle under the influence of alcohol (OVI), in violation of R.C. 4511.19(A)(1)(a) and R.C. 4511.19(A)(1)(d).[1]

{¶4} Ms. James pled not guilty at her arraignment in the Portage County Municipal Court, Kent Division. She then filed a motion to suppress, challenging the police officer's reasonable suspicion for initiating the stop.

{¶5} On June 18, 2009, following a hearing on June 11, the municipal court orally denied the motion to suppress. That same day, Ms. James entered a plea of no contest. The court sentenced her to serve 180 days in the Portage County Jail, with 177 days suspended, and imposed a fine of $1,075, with $700 suspended, provided she comply with certain conditions; and suspended her driver's license for six months.

{¶6} On October 30, 2009, the municipal court entered a nunc pro tunc judgment entry, issuing findings of fact and conclusions of law on the motion to suppress. The court made the following findings:

{¶7} "Officer Croy testified that on March 27, 2009, at about 12:30 A.M. he observed a vehicle driven by [Ms. James] approach the exit to Barrington, a gated community in Aurora, Ohio, and try to enter through the exit gate. When that attempt proved unsuccessful, [Ms. James] backed up and tried to get in the entrance gate. When that also failed, Ms. James backed up for a second time and began to drive down an access road to Barrington Blvd. At that point the officer turned in from S.R. 306 and initiated a traffic stop.

1. Subsection (A)1(a) prohibits the operation of a motor vehicle "under the influence of alcohol;" subsection (d) prohibits the operation of a motor vehicle with "a concentration of eight-hundredths of one gram or more but less than seventeen-hundredths of one gram by weight of alcohol per two hundred ten liters of the person's breath."

{¶8} "The court finds the above facts to be accurate and based upon the totality of the circumstances finds that there was a reasonable suspicion to stop [Ms. James] for her unusual and suspicious activity at such an early time in the morning."

{¶9} Ms. James filed a notice and motion for leave to file a delayed appeal, which this court granted. Now on appeal, Ms. James raises the following assignment of error:

{¶10} "The trial court committed prejudicial error in denying defendant-appellant's, JULIANNE JAMES', motion to suppress based upon its opinion that the officer possessed reasonable and articulable suspicion that criminal activity was afoot when he stopped the defendant-appellant's vehicle."

{¶11} **Motion to Suppress – Standard of Review**

{¶12} "At a hearing on a motion to suppress, the trial court functions as the trier of fact, and, therefore, is in the best position to weigh the evidence by resolving factual questions and evaluating the credibility of any witnesses." *State v. McGary*, 11th Dist. No. 2006-T-0127, 2007-Ohio-4766, ¶20, quoting *State v. Molek*, 11th Dist. No. 2001-P-0147, 2002-Ohio-7159, ¶24, citing *State v. Mills* (1992), 62 Ohio St.3d 357, 366. Thus, "[a]n appellate court must accept the findings of fact of the trial court as long as those findings are supported by competent, credible evidence." Id., quoting *Molek* at ¶24, citing *State v. Retherford* (1994), 93 Ohio App.3d 586, 592; *City of Ravenna v. Nethken*, 11th Dist. No. 2001-P-0040, 2002-Ohio-3129, ¶13. "After accepting such factual findings as true, the reviewing court must then independently determine, as a matter of law, whether or not the applicable legal standard has been met." Id.

{¶13} **Investigative Stops**

{¶14} "The standard for judging the constitutional validity of an investigative stop is well established under both federal and state law." *State v. Gray* (July 14, 2000), 11th Dist. 99-G-2249, 2000 Ohio App. LEXIS 3197, 5, citing *State v. Stamper* (1995), 102 Ohio App.3d 431, 436. "The Fourth Amendment to the United States Constitution guarantees 'the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures ***.' See, also, Section 14, Article I of the Ohio Constitution ('The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated[.]')." Id.

{¶15} "The Fourth Amendment is only applicable in situations where an actual 'search' or 'seizure' has occurred. Here, there is no question that the protections of the Fourth Amendment apply because [Ms. James] was the subject of a traffic stop. A stop of a motorist in transit constitutes a seizure for Fourth Amendment purposes." Id. at 5-6, citing *State v. Carleton* (Dec. 18, 1998), 11th Dist. No. 97-G-2112, 1998 Ohio App. LEXIS 6163, 5, citing *State v. Durfee* (Mar. 6, 1998), 11th Dist. Nos. 96-L-198 and 96-L-199, 1998 Ohio App. LEXIS 865, 5.

{¶16} "Despite the protections afforded by the United States and Ohio Constitutions, certain exceptions are recognized. For example, pursuant to *Terry v. Ohio* (1968), 392 U.S. 1, a police officer may, under limited circumstances detain an individual and conduct a brief investigative stop. In order for an investigative stop to fall within constitutional parameters, the police officer must be able to cite articulable facts that give rise to a reasonable suspicion that the individual is currently engaged in or is about to engage in criminal activity." Id. at 6, citing *Terry* at 21.

{¶17} "In the context of a traffic stop, the police officer must have a reasonable and articulable suspicion that the motorist was operating the vehicle in violation of the law." Id. at 7, citing *Delaware v. Prouse* (1979), 440 U.S. 648. "Stopping a vehicle based on the reasonable suspicion that a traffic offense has occurred is not improper 'even if the officer had some ulterior motive for making the stop, such as suspicion that the violator was engaging in more nefarious criminal activity.'" Id. quoting *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, syllabus.

{¶18} "In evaluating the propriety of an investigative stop, the reviewing court must examine the totality of the circumstances surrounding the stop as 'viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold.'" Id. at 8, quoting *State v. Shacklock* (Apr. 30, 1999), 11th Dist. Nos. 98-T-0005 and 98-T-0083, 1999 Ohio App. LEXIS 2020, 4, quoting *State v. Andrews* (1991), 57 Ohio St. 86, 87-88. "The court reviewing the officer's actions must give due weight to the officer's experience and training, and view the evidence as it would be understood by those in law enforcement." Id., citing *Andrews* at 88, citing *United States v. Cortez* (1981), 449 U.S. 411, fn. 2.

{¶19} Upon a review of the totality of the circumstances present, we cannot agree with the trial court's conclusion that Officer Croy was justified in making the investigative stop of Ms. James. During the suppression hearing, Officer Croy testified that he did not observe Ms. James break any traffic laws. Instead, the officer stopped her solely because she had attempted to enter her friend's gated community through a side entrance, to which only residents could access.

{¶20} "Through the years, the Supreme Court of Ohio has found several factors to be relevant when determining whether an officer possessed reasonable suspicion to initiate a traffic stop. Some of those factors include: (1) whether the location of the stop was in a high crime area; (2) whether the officer was aware of recent criminal activity in the area; (3) the time of the stop; (4) whether the defendant's conduct was suspicious; and (5) the officer's training and experience." *Gray* at 10, citing *State v. Freeman* (1980), 64 Ohio St.2d 291, 295.

{¶21} Officer Croy testified that he initiated the traffic stop based on Ms. James' attempt to access the side entrance. When she turned around to drive to the front entrance, the stop was initiated. Markedly absent was any testimony that this occurred in a high-crime area, whether there had been any recent criminal activity, and what exactly the officer found suspicious about Ms. James' conduct. At no time did Officer Croy observe Ms. James violate a traffic law, drive erratically, or speed. The hour was not so late and her behavior not so unusual that her attempt to access the wrong gate, without more, did not provide a reasonable suspicion.

{¶22} Our review of the officer's testimony at the suppression hearing does not meet any objective standard. While it is true that a reasonable suspicion may be based upon conduct that is entirely lawful, *Terry* mandates that an investigatory stop is predicated upon a suspicion that is both reasonable and *articulable*.

{¶23} Even after the extensive examination and prompting of the trial judge at the hearing, the officer did not give any explanation of his suspicions. Thus, under any objective standard, there is nothing in this record to support the stop let alone any

articulable facts upon which we can draw an inference that Ms. James was "attempting to gain *unlawful* access to that property."

{¶24} At best, Officer Croy had a hunch that Ms. James was engaged in criminal activity based upon the sole observation of two failed attempts to enter through the gates. As we succinctly stated in *Gray*, "We certainly agree that the Fourth Amendment does not require an officer, who lacks the precise level of information necessary for reasonable suspicion to stop a motorist, to ignore potential criminal conduct. The officer in the case at bar, however, could have simply followed appellant without stopping [her]. This was especially true when the officer's initial concern did not focus on the potential of an impaired driver. ***" Id. at 12-13.

{¶25} Based on the foregoing, Ms. James' assignment of error has merit. The judgment of the Portage County Municipal Court, Kent Division, is reversed, and this case and remanded for further proceedings consistent with this opinion.

COLLEEN MARY O'TOOLE, J., concurs,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

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{¶26} The trial court properly denied defendant-appellant, Julianne James' Motion to Suppress. Accordingly, I respectfully dissent.

{¶27} The majority acknowledges that, when reviewing the propriety of an investigative stop, we "must give due weight to the officer's experience and training and

view the evidence as it would be understood by those in law enforcement." *State v. Andrews* (1991), 57 Ohio St.3d 86, 88 (citation omitted).

{¶28} The majority asserts that Officer Croy stopped James "solely because she had attempted to enter her friend's gated community through a side entrance, to which only residents could access." This is a mischaracterization of Officer Croy's suppression hearing testimony:

{¶29} Officer Croy: I observed the defendant's vehicle try to gain access to Barrington apartments by way of going in the exit, there is -- it's a gated community. And then she backed out and tried to go in the entrance, still couldn't gain access. And then she went northbound on the access road toward Barrington Boulevard. At that point I stopped her for suspicious activity.

{¶30} Prosecutor: You say you stopped her for suspicious activity. Why exactly was her activity suspicious?

{¶31} Officer Croy: Well, if you belong there and you live there you should be able to gain access through the correct gate. She tried to go in the exit gate.

{¶32} ***

{¶33} Officer Croy: She was trying to get in, it didn't look like she belonged after she could not gain access and she tried to enter through an exit gate, which threw up a red flag.

{¶34} Contrary to the majority's conclusion, Officer Croy's justification is readily articulable: James tried to enter the apartment property by the exit, and failed; she tried to access by the entrance, and failed; James was driving toward another entrance.[2]

{¶35} Yet, the majority chides Officer Croy for "not giv[ing] any explanation of his suspicions," despite "the extensive examination and prompting of the trial judge." Again, I disagree. In the testimony cited above, Officer Croy clearly set forth the

2. The majority's characterization of Officer Croy's testimony also contains embellishments not found in the record. For instance, there is no evidence that James was attempting to visit a "friend" or that she even has a friend that resides at the Barrington apartments. Nor is there any conclusive evidence that

reasons for his suspicion. On cross-examination, Officer Croy reiterated, "just trying to go into an exit gate, that was erratic."

{¶36} As a legal matter, Officer Croy's observations are sufficient to justify a stop. By attempting to access the apartments by the exit gate, James was necessarily on the wrong side of the road. Such infractions are routinely found to justify an investigatory stop. See, e.g., *Bowling Green v. Godwin*, 110 Ohio St.3d 58, 2006-Ohio-3563, at ¶16 (driver violated posted signs by exiting a parking lot through the entrance); *Columbus v. Ellyson*, 10th Dist. No. 05AP-573, 2006-Ohio-2075, at ¶¶9-10 (vehicle drove over the curb while entering a roadway); *United States v. Bailey* (C.A.6, 2002), 302 F.3d 652, 655-656 (vehicle entered a trailer park on the wrong side of the road).

{¶37} The majority cites no cases to support its conclusion that the present facts are insufficient to justify a stop "under any objective standard." As shown above, Officer Croy testified succinctly as to his observations of James. This court need not consider his subjective motivations and should not speculate that he acted on a hunch where the record demonstrates the existence of articulable facts.

{¶38} "Since a *Terry* stop is an investigatory tool, it does not require certainty or probability that criminal activity is occurring, just a reasonable suspicion." *State v. Wortham*, 145 Ohio App.3d 126, 129, 2001-Ohio-1506 (citations omitted). In the present case, James' failed and erratic efforts to enter the apartment complex create such a reasonable suspicion. This court and other courts have upheld investigatory automobile stops based on comparable factual situations. See, e.g., *State v. Freeman* (1980), 64 Ohio St.2d 291, 295 (officer observed the defendant sitting in his car for

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only residents could access the apartments. Officer Croy's testimony regarding how the apartments could be accessed was less than certain, since he does not live there.

approximately 20 minutes with the engine off in an area of recent criminal activity); *Pepper Pike v. Parker* (2001), 145 Ohio App.3d 17, 20 (officer observed the defendant make a wide turn, drive under the speed limit, and weave within his lane); *State v. Gedeon* (11th Dist., 1992), 81 Ohio App.3d 617, 619 (officer observed the defendant weaving within his lane and the vehicle's back window completely covered with snow).

{¶39} Officer Croy's suspicions of James' activity were reasonable; therefore, justifying the investigatory stop. It was not necessary, as the majority recommends, for Officer Croy to continue following James. "The process [of formulating a reasonable suspicion] does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain commonsense conclusions about human behavior; jurors as factfinders are permitted to do the same -- and so are law enforcement officers." *United States v. Cortez* (1981), 449 U.S. 411, 418.

{¶40} The evidence in the record in this case supports the trial court's denial of James' Motion to Suppress. The majority's reversal of that legally correct decision, which essentially allows a drunk driver[3] off the hook, is a miscarriage of justice. Impaired drivers cause numerous unnecessary deaths in Ohio every year. While this appellate court should assure that the constitutional rights of accused individuals are duly protected, the judges of this court should not distort the facts and law to void lawful OVI convictions, such as James' conviction in this case.

3. James was cited for violating R.C. 4511.19(A)(1)(a) and 4511.19(A)(1)(d). Subsection (a) prohibits the operation of a motor vehicle "under the influence of alcohol"; subsection (d) prohibits the operation of a motor vehicle with "a concentration of eight-hundredths of one gram or more but less than seventeen-hundredths of one gram by weight of alcohol per two hundred ten liters of the person's breath."