

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CITY OF NEWARK	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellant	:	Hon. Julie A. Edwards, J.
	:	
-vs-	:	
	:	Case No. 2009-CA-00012
JEREMY LARUE	:	
	:	
Defendant-Appellee	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Licking Municipal Court, Case No. 08TRD09889

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: September 3, 2009

APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee

JAMIE KORNOKOVICH
Assistant Law Director
40 West Main Street
Newark, OH 43055

JOHN F. HILT
BRYAN K. ELLIOTT
3793 Broadway
Grove City, OH 43123

Gwin, P.J.

{¶1} Plaintiff-appellant the City of Newark appeals the February 3, 2009 Judgment Entry of the Licking County Municipal Court sustaining Defendant-appellee Jeremy Larue's motion to suppress evidence.

STATEMENT OF THE CASE AND FACTS

{¶2} On the morning of October 2, 2008, Officer Troy Cochran of the Newark Police Department was observing traffic near the intersection of State Route 16 and Cherry Valley Road, in the City of Newark, Ohio. At approximately 8:30 a.m., Officer Cochran observed three similar commercial vehicles traveling east on State Route 16. Each of the vehicles appeared to be transporting the same cargo, large concrete beams; and each of the vehicles displayed a banner indicating "oversized load."

{¶3} The third of these vehicles was being driven by appellee. When the appellee's vehicle passed, Officer Cochran noticed that the second axle on the vehicle was in the up position, i.e., the wheels were not touching the road and were not supporting any of the vehicle's weight, while the first two hauling a similar load of concrete beams had each respective axle in use. Seeing this, Officer Cochran pulled out to follow the vehicle and did so for approximately one mile. As he followed the vehicle, Officer Cochran claimed to have noticed that the rear tires were bulging and that the vehicle appeared to be leaning to one side. Officer Cochran signaled the driver to pull over.

{¶4} In speaking with the driver, Officer Cochran discovered that the vehicle had been issued an overweight permit by the Ohio Department of Transportation. According to the permit, the weight of the vehicle was authorized, but the permit

required that the load be supported by each of the vehicle's axles. The permit allowed an axle to be raised during turning maneuvers where there would be excessive tire and pavement scuffing or control of the vehicle would be hindered.

{¶15} Appellee informed Officer Cochran that he had raised the axle approximately three miles back when he turned, but apparently forgot to re-engage the axle after the turn. After obtaining this information, Officer Cochran charged the appellee with operating an overweight vehicle, in violation of Newark Ordinance 440.021; and with violating the terms of an overweight permit, in violation of R.C. 4513.34.

{¶16} Appellee filed a motion to suppress claiming that the stop of the vehicle was without constitutional basis. A hearing was conducted on the appellee's motion on December 9, 2008. Officer Cochran was the only witness to testify at the hearing. By Judgment Entry filed February 3, 2009, the trial court sustained appellee's motion to suppress.

{¶17} The City of Newark now appeals the judgment of the trial court suppressing the evidence raising the following assignment of error:

{¶18} "I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FINDING THAT THE ARRESTING OFFICER DID NOT HAVE A REASONABLE SUSPICION, BASED ON SUFFICIENTLY ARTICULATED FACTS TO BELIEVE THAT THE COMMERCIAL VEHICLE WAS OVER THE LEGAL WEIGHT LIMITS OR ITS LOAD WAS UNLAWFUL."

I.

{¶9} In the sole Assignment of Error, appellant maintains that the officer possessed a reasonable, articulable suspicion that the weight of the appellee's vehicle and its load was unlawful so as to justify the stop.

{¶10} There are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's finding of fact. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. Finally, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in the given case. *State v. Curry* (1994), 95 Ohio App. 3d 93, 96; *State v. Claytor* (1993), 85 Ohio App. 3d 623, 627; *State v. Guysinger* (1993), 86 Ohio App. 3d 592. As the United States Supreme Court held in *Ornelas v. U.S.* (1996), 517 U.S. 690, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911, "... as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal."

{¶11} When ruling on a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and to evaluate witness credibility. See *State v. Dunlap* (1995), 73 Ohio St.3d 308, 314, 652 N.E.2d 988; *State v. Fanning* (1982), 1 Ohio St.3d 19, 20, 437 N.E.2d 583. Accordingly, a reviewing court must defer to the trial court's factual findings if competent, credible evidence exists to support those findings. See *Dunlap*, supra; *State v. Long* (1998), 127 Ohio App.3d 328, 332, 713 N.E.2d 1; *State v. Medcalf* (1996), 111 Ohio App.3d 142,

675 N.E.2d 1268. The reviewing court then must independently determine, without deference to the trial court, whether the trial court properly applied the substantive law to the facts of the case. See *Featherstone; State v. Fields* (Nov. 29, 1999), Hocking App. No. 99 CA 11. See, generally, *United States v. Arvizu* (2002), 534 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740; *Ornelas v. United States* (1996), 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911.

{¶12} Accordingly, we review determinations of historical facts only for clear error. *Ornelas, supra; State v. Gillard* (1997), 78 Ohio St.3d 548, 552, 679 N.E.2d 276, 281. Moreover, due weight should be given “to inferences drawn from those facts by resident judges and local law enforcement officers.” *Ornelas, supra* at 698, 116 S.Ct. at 1663.

{¶13} The first issue in the case at bar is whether the factual findings, as determined by the lower court at the evidentiary hearing on the motion to suppress evidence, were clearly erroneous. *State v. Prigmore*, 5th Dist. No. 2005-CA-00115, 2005-Ohio-6952 at ¶ 15. “A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *United States v. United States Gypsum Co.* (1947), 333 U.S. 364, 395. Moreover, where the evidence would support several conclusions but the lower court has decided to weigh more heavily in one direction, “[s]uch a choice between ... permissible views of the weight of evidence is not ‘clearly erroneous’.” *United States v. Yellow Cab Co.* (1949), 338 U.S. 338, 342.

{¶14} In the trial court's Judgment Entry granting appellee's motion to suppress, the trial court found.

{¶15} “In this case, the court must consider whether Officer Cochran had reasonable suspicion that the Defendant's vehicle was overweight or violating a weight restriction. At the hearing, there were a number of reasons offered to justify the suspicion. First, the officer testified that the second axle on the Defendant's vehicle was in the up position, unlike the other two vehicles carrying the same load. The officer also claimed that he observed bulging tires and that the load was leaning.

{¶16} “As an initial matter, it is clear that bulging tires and a leaning load can provide an officer with reasonable suspicion that a vehicle was overweight. In this case, however, the court places no weight in this testimony because the photographic evidence disputes the claim on both points. The tires were not bulging and the load was not leaning. Even if the photographs did not dispute this point, the Court would have a hard time concluding that the officer observed bulging tires when the mud flaps would have prevented his ability to do so. For these reasons, the Court places no evidentiary value on the claims of bulging tires and a leaning load.

{¶17} “The only other justification the Court must consider in determining whether there was sufficient cause to initiate the stop is the fact that the second axle on the vehicle was in the raised position as it passed Officer Cochran. There is no dispute that it was. The Court must consider whether this fact, and this fact alone, constitutes reasonable suspicion that the vehicle was violating a weight restriction. The Court finds that it does not. Although the vehicle's banner indicated an ‘oversized load’, Officer Cochran had no information regarding the vehicle. He knew nothing about the particular weight of the vehicle; the weight of the load; whether or not the vehicle had been issued a permit; or whether or not the permit required all axles to be engaged while in

transport. The only reason he was suspicious was because the Defendant's vehicle was different than the two preceding it. In the Court's view, that conclusion is precisely the type of ill-defined hunch that the Fourth Amendment protects against.”

{¶18} As an appellate court, we neither weigh the evidence nor judge the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St. 3d 357, 582 N.E. 2d 972. Our role is to determine whether there is relevant, competent and credible evidence upon which the fact finder could base its judgment. *Cross Truck Equipment Co., Inc. v. Joseph A. Jeffries Co.* (February 10, 1982), Stark App. No. CA-5758. Reviewing courts should accord deference to the trial court's decision because the trial court has had the opportunity to observe the witnesses' demeanor, gestures, and voice inflections that cannot be conveyed to us through the written record, *Miller v. Miller* (1988), 37 Ohio St. 3d 71.

{¶19} We conclude that the trial court's factual findings do not constitute clear error. Due weight has been given to the inferences drawn by the trial court and the testifying law enforcement officer. After careful review of the record, there is no indication that the trial court has made a mistake. The trial court has the authority to decide in whose favor the weight of the evidence will lie. Here, the trial court decided in favor of appellee. Such a choice is not clearly erroneous. *Yellow Cab*, 338 U.S. at 342; *Prigmore*, supra at ¶ 17.

{¶20} We accept the trial court's conclusion that Officer Cochran's observations did not provide a reasonable suspicion to stop appellee's vehicle because the factual findings made by the trial court are supported by competent and credible evidence. Thus, the trial court did not err when it granted appellee's motion to suppress on the

basis that the initial stop of his vehicle was invalid. *State v. Busse*, Licking App. No. 06 CA 65, 2006-Ohio-7047 at ¶ 20.

{¶21} Accordingly, we overrule appellant's sole assignment of error.

{¶22} The judgment of the Licking Municipal Court is affirmed.

By Gwin, P.J.,

Hoffman, J., and

Edwards, J., concur

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. JULIE A. EDWARDS

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