

COURT OF APPEALS
MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellant	:	Hon. William B. Hoffman, J.
	:	
-vs-	:	
	:	Case No. 2009-CA-0010
LAWRENCE G. KENDALL	:	
	:	
Defendant-Appellee	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Morrow County Municipal Court, Case No. 2009TRC1420

JUDGMENT: Dismissed

DATE OF JUDGMENT ENTRY: November 30, 2009

APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee

ERIC C. PENKAL
Assistant Morrow County Prosecutor
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Mt. Gilead, OH 43338

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Gwin, J.,

{¶1} Plaintiff-appellant the State of Ohio appeals the August 12, 2009 Judgment Entry of the Morrow County Municipal Court granting defendant-appellee Lawrence G. Kendall's motion to suppress evidence.

STATEMENT OF THE FACTS AND CASE

{¶2} On May 22, 2009, the Defendant-Appellee was stopped and subsequently cited for operating a vehicle with a cracked windshield in violation of R.C. 4513.24, failure to wear a safety belt in violation of R. C. 4513.263(B)(1), and for OVI in violation of R.C. 4511.19(A)(1)(a)/(A)(2).

{¶3} Appellee challenged the basis for the charges by filing a Motion to Suppress. The Trial Court conducted a hearing on the Motion, at which time appellant offered the testimony of Ohio State Highway Patrol Trooper Mason Boyce.

{¶4} Trooper Boyce testified that on May 22, 2009 at 3:00 P.M. he stopped appellee after observing the appellee driving a vehicle with a cracked windshield and failing to wear a safety belt. Trooper Boyce stated in his report that he immediately detected a strong odor of alcohol coming from the appellee's breath and from inside the vehicle. Trooper Boyce placed appellee into the patrol car, when doing so he observed that the appellee had bloodshot and glassy eyes, slurred speech, and an unsteady gate.

{¶5} The appellee's passenger, when confronted by the officer for providing false information, attempted to flee the scene. The trooper had to pursue the appellee's passenger and left appellee in his patrol car until other officers arrived. The passenger was soon apprehended and charged with possessing drug paraphernalia, providing false information, and resisting arrest. Due to the commotion caused by the passenger

appellee was not requested to submit to field sobriety tests, until after he was arrested and transported to the Morrow County Jail.

{¶16} Appellee was cited under R.C. 4513.24, which states in relevant part:

{¶17} “(A) No person shall drive any motor vehicle on a street or highway in this state, other than a motorcycle or motorized bicycle that is not equipped with a windshield.”

{¶18} At the conclusion of Trooper Boyce’s testimony, the trial court observed:

{¶19} “Now, we have more problem than what you gentlemen are bringing forth in [sic.] on this case. I’m going to go back to reasonable articulable suspicion to stop.

{¶10} “During the film I watched that gentleman’s windshield the best I could. I could not see where it was obstructed at all. And then I went to the statute and I couldn’t find in the statute cited where it said that a crack was a violation. So maybe there is an incorrect citation ...

{¶11} “* * *

{¶12} “Now, it is my understanding that if the statute does say cracked windshield, the case law says it has to obstruct your vision. I could not see where it obstructed the gentleman's vision. So if you guys want to submit some information on that, I think that is all the further we have to go on this case. There is no bad driving, no lack of a turn signal. Officer admitted he pulled him over for a cracked windshield and a seat belt. Seat belt he can't pull him over for.

{¶13} “So we are down to the cracked windshield and again, it is my understanding it has to interfere with his ability to see and if it doesn't then that's not an offense either. So we don't have any offense to pull him over for.

{¶14} “I’ll give you a couple of weeks to provide me information on that. Like I say, I couldn’t even find in the statute, in the ticket, cited in the ticket, where it said anything about cracked windshield. One paragraph had to do with putting placards and stickers on your windshield and you had to have a windshield, but I didn’t see anything about a cracked windshield.

{¶15} “So I always understood that there was a statute on a cracked windshield, but it had to obstruct your vision. In other words, it had to be spider webbed to the extent you couldn’t see through your windshield safely.

{¶16} “And like I said, I was watching it on the tape and I could see all the cars looking through his back window and his windshield I could see -- watch all the cars go by the front of his van and there wasn’t any testimony on that anyway.”

{¶17} (T. at 53-54).

{¶18} After reviewing the written briefs submitted by the parties, the court granted the appellee’s motion to suppress on the basis that the trooper lacked reasonable and articulable suspicion to stop the appellee’s vehicle.

{¶19} Appellant now appeals, assigning as error:

{¶20} “I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO FIND THAT THE TROOPER HAD REASONABLE AND ARTICULABLE SUSPICION TO STOP THE DEFENDANT-APPELLE’S [SIC.] VEHICLE WHERE THE TROOPER OBSERVED A VIOLATION OF BOTH ORC § 4513.24 AND ORC § 4513.26.3.”

I.

{¶21} The state presents a single assignment of error for review in which it argues that the trial court should not have granted appellee’s motion to suppress.

However, we cannot reach the merits of this assignment of error. We conclude that because the state failed to comply with the procedural requirements outlined in both the Ohio Revised Code and the Rules of Criminal Procedure, this appeal must be dismissed.

{¶22} A court of appeals has jurisdiction to entertain the state's appeal from a trial court's decision to suppress evidence only where the state has complied with Crim.R. 12(K). *State v. Perez*, Hamilton App. Nos. C-040363, C-040364, C-040365, 2005-Ohio-1326, ¶ 12, citing *State v. Buckingham* (1980), 62 Ohio St.2d 14, 402 N.E.2d 536, syllabus (interpreting former Crim.R. 12(J)); See also, *State v. Bassham*, 94 Ohio St.3d 269, 271, 2002-Ohio-79, 762 N.E.2d 963, 966; *State v. McKnight*, Richland App. No. 07 CA 62, 2008-Ohio-3931 at ¶10.

{¶23} Crim.R. 12(K) states in pertinent part:

{¶24} "When the state takes an appeal as provided by law from an order suppressing or excluding evidence, the prosecuting attorney shall certify that both of the following apply:

{¶25} "(1) the appeal is not taken for the purpose of delay;

{¶26} "(2) the ruling on the motion or motions has rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed.

{¶27} "The appeal from an order suppressing or excluding evidence shall not be allowed unless the notice of appeal and the certification by the prosecuting attorney are filed with the clerk of the trial court within seven days after the date of the entry of the judgment or order granting the motion. * * *."

{¶28} Our review of the record reveals no certifying statement by the prosecutor as outlined in Crim.R. 12(K). We are therefore without jurisdiction to proceed to the merits of this appeal.

{¶29} For the foregoing reasons, the appeal of the judgment of the Morrow County Municipal Court is hereby dismissed.

By Gwin, J.,

Farmer, P.J., and

Hoffman, J., concur

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

HON. WILLIAM B. HOFFMAN

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