[Cite as *State v. Ohler*, 2010-Ohio-4060.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	Julie A. Edwards, P.J.
	:	Sheila G. Farmer, J.
Plaintiff-Appellee	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 2009 CA 00217
	:	
	:	
DARREN OHLER	:	O P I N I O N

Defendant-Appellant

CHARACTER OF PROCEEDING:	Criminal Appeal from Canton Municipal Court, Stark County, Ohio Case No. 2009 TRC 03381
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 23, 2010

APPEARANCES:

For Plaintiff-Appellee

JOSEPH MARTUCCIO
Canton Law Director

TYRONE D. HAURITZ
Canton City Prosecutor

BRIAN J. WALTER
Assistant City Prosecutor
218 Cleveland Ave., S.W.
Canton, Ohio 44702

For Defendant-Appellant

DANIEL M. WALPOLE
411 Quaker Square
120 E. Mill Street
Akron, Ohio 44308

Edwards, P.J.

{¶1} Appellant, Darren Ohler, appeals a judgment of the Canton Municipal Court convicting him of speeding (R.C. 4511.21(B)(2)) and Operating a Vehicle While Intoxicated (R.C. 4511.19(A)(1)(e)) upon a plea of no contest. Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} At 10:22 p.m. on May 4, 2009, Patrolman Robert Lowe of the Waynesburg Police Department was stationed on North Mill Street, also known as State Route 183, while on routine patrol in the village of Waynesburg. The patrolman was checking for speeding violations. The posted speed limit on North Mill Street in the village is 25 mph. After his radar alerted Patrolman Lowe that an approaching vehicle was traveling at 39 mph, he initiated a traffic stop. Appellant was operating the vehicle.

{¶3} Appellant was subsequently cited for speeding and for operating a vehicle while intoxicated (OVI). The OVI was based on a urine test.[1] He moved to dismiss the charges for failure to specify the time and place of the offense. He further moved to suppress on the basis that the posted speed limit of 25 mph was unlawful, and the officer, therefore, lacked a reasonable suspicion of criminal activity to justify the stop. He argued that all evidence relating to the OVI was fruit of the poisonous tree because the stop was not supported by a reasonable suspicion of criminal activity.

{¶4} The case proceeded to a suppression hearing in the Canton Municipal Court. The court allowed the state to amend the ticket to reflect the time and place of the offense. The state further amended the charge of speeding from a violation of R.C.

[1] Because appellant has not provided this Court with a transcript of his plea hearing and because the suppression hearing was not directed toward appellant's arrest for OVI subsequent to the initial traffic stop, the facts concerning his OVI conviction are not a part of the record before this Court on appeal.

4511.21(D) to a charge of R.C. 4511.21(B)(2). Following the hearing, the court overruled the motion, finding that whether or not the posted speed limit of 25 mph was unlawful was irrelevant, because an officer has a right to rely on the posted speed limit in stopping a motor vehicle, and, therefore, had a reasonable suspicion of criminal activity to support the stop.

{¶5} Appellant assigns four errors on appeal:

{¶6} "I. THE TRIAL COURT ERRONEOUSLY DETERMINED THAT APPELLANT'S CONDUCT WAS OBSERVED WITHIN A BUSINESS DISTRICT.

{¶7} "II. THE CANTON MUNICIPAL (SIC) ERRONEOUSLY CONCLUDED THAT POSTED SPEED LIMITS ON STATE ROUTE 183 ARE UNLAWFUL (SIC).

{¶8} "III. BECAUSE APPELLANT WAS NOT VIOLATING THE LAWFUL SPEED LIMIT, THERE WAS NO LEGAL BASIS FOR THE TRAFFIC STOP.

{¶9} "IV. ALL EVIDENCE OBTAINED AS A RESULT OF APPELLANT'S TRAFFIC STOP IS INADMISSIBLE AS FRUIT OF THE POISONOUS TREE."

I, II, III, IV

{¶10} We address all four assignments together because all relate to the issue of whether the trial court erred in overruling appellant's motion to suppress because the State failed to prove that the posted speed limit of 25 mph was the lawful speed limit on North Mill Street. Appellant argues that the area does not qualify as an urban district or business district under R.C. 4511.01(NN) or (PP), and, therefore, the prima facie speed limit is 50 mph, not 25 mph as posted.

{¶11} An appellate court's review of a ruling on a motion to suppress evidence presents a mixed question of law and fact. *State v. Long* (1998), 127 Ohio App.3d 328,

332, 713 N.E.2d 1. During a suppression hearing, the trial court assumes the role of the trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972; *State v. Hopfer* (1996), 112 Ohio App.3d 521, 679 N.E.2d 321. As a result, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594, 621 N.E.2d 726. An appellate court must then independently determine without deference to the trial court's legal conclusions whether, as a matter of law, evidence should be suppressed. *State v. Russell* (1998), 127 Ohio App.3d 414, 416, 713 N.E.2d 56; *State v. Klein* (1991), 73 Ohio App.3d 486, 488, 597 N.E.2d 1141.

{¶12} An investigatory stop is permissible if a law enforcement officer has a reasonable suspicion, based on specific and articulable facts, that the individual to be stopped may be involved in criminal activity. *Terry v. Ohio* (1968), 392 U.S. 1, 21-22, 88 S.Ct. 1868. When determining whether or not an investigative traffic stop is supported by a reasonable, articulable suspicion of criminal activity, the stop must be viewed in light of the totality of circumstances surrounding the stop. *State v. Bobo* (1988), 37 Ohio St.3d 177, 524 N.E.2d 489, paragraph one of the syllabus, cert. denied (1988), 488 U.S. 910, 109 S.Ct. 264. In determining whether an officer has a reasonable suspicion of criminal activity to justify a stop, the facts are viewed from the standpoint of an objectively reasonable police officer. *Ornelas v. United States* (1996), 517 U.S. 690, 696, 116 S.Ct. 1657, 1661-1662, 134 L.Ed.2d 911, 919.

{¶13} Appellant’s reliance on *Village of Kirtland Hills v. McGrath* (1993), 89 Ohio App.3d 282, 624 N.E.2d 255, is misplaced. In *McGrath*, the appellant was cited with

traveling at a speed in excess of the posted speed limit. However, the evidence adduced at trial established that the speed limit was not posted in the area where appellant was traveling, raising a reasonable doubt that appellant was violating the lawful speed limit. Id. at 287. The court stated in dicta that based on its ruling that the state failed to prove the speed limit was lawful because it was not posted, there was no legal basis to stop appellant and all evidence obtained therefrom was fruit of the poisonous tree. Id. However, the court did not discuss the reasonable suspicion of criminal activity standard for the traffic stop and noted that appellant failed to file a motion to suppress. Id.

{¶14} In the instant case, there is no dispute that the speed limit of 25 mph was posted. We agree with the trial court that, regardless of whether or not that speed limit is correct based on the statutory standards, the officer had a reasonable suspicion of criminal activity based on appellant's failure to follow the posted speed limit.

{¶15} In *State v. Stiebner* (Feb. 23, 1994), Hamilton App. Nos. C-930246, C-930247, C-930248, unreported, the trial court granted a defendant's motion to suppress on the basis that although the defendant was traveling over the posted speed limit, the officer testified that his speed was not unreasonable for the conditions and therefore the officer lacked a reasonable suspicion of criminal activity to justify the stop. The appellate court reversed, finding that the evidence was uncontroverted that the defendant was exceeding the posted speed limit by 12 miles an hour, which was sufficient to provide a reasonable suspicion of criminal activity even though a person who exceeds the posted speed limit but is traveling at a speed that is reasonable may be found not guilty of speeding. Id.

{¶16} The trial court in the instant case relied on *State v. Kuno* (1976), 46 Ohio St.2d 203, 346 N.E.2d 768, in which the defendant was driving to Cleveland from New Jersey with a load of propane gas when he was stopped by police. The patrolman's dispatcher had informed him that the defendant had bypassed the truck weighing scale. The patrolman directed the defendant to follow him back to the scale. As they were en route, the dispatcher informed the patrolman that the defendant had stopped at the scale and his vehicle was overweight. The patrolman then stopped the defendant again, at which time the defendant became belligerent and was arrested for disorderly conduct.

{¶17} Upon returning back to the scale, two attendants identified the defendant and told the patrolman that the first time the defendant went through the scale, the equipment indicated that he was overweight on one axle, but the second time through the vehicle appeared to be legal. The defendant was told to park behind the scale house and come in with his license and registration, but he drove off instead.

{¶18} R.C. 4513.33 allows a police officer having reason to believe that the weight of a vehicle is unlawful to require the driver to stop and submit to weighing. The defendant argued that the officer did not have reason to believe that the vehicle was overweight. However, the Ohio Supreme Court held that the information given to the patrolman by the dispatcher, even if erroneous, was sufficient to give the patrolman reason to believe that appellant's vehicle was overweight. Id. at 205-206.

{¶19} In the instant case, whether or not the posted speed limit of 25 mph was erroneous or correct, the patrolman had a reasonable suspicion of criminal activity to justify the stop of appellant. R.C. 4511.21(B)(2) provides:

{¶20} "(B) It is prima-facie lawful, in the absence of a lower limit declared or established pursuant to this section by the director of transportation or local authorities, for the operator of a motor vehicle, trackless trolley, or streetcar to operate the same at a speed not exceeding the following:

{¶21} "(2) Twenty-five miles per hour in all other portions of a municipal corporation, except on state routes outside business districts, through highways outside business districts, and alleys;"

{¶22} Business district is defined:

{¶23} "(NN) 'Business district' means the territory fronting upon a street or highway, including the street or highway, between successive intersections within municipal corporations where fifty per cent or more of the frontage between such successive intersections is occupied by buildings in use for business, or within or outside municipal corporations where fifty per cent or more of the frontage for a distance of three hundred feet or more is occupied by buildings in use for business, and the character of such territory is indicated by official traffic control devices."

{¶24} The evidence presented at the suppression hearing demonstrates that the area in which the speed limit of 25 mph was posted is within the village limits of Waynesburg and the businesses in the area included Rocky's Marathon, an ice cream shop, Wendell Ford, two car lots, A-1 Starfire and Juke Box Pizza. Patrolman Lowe testified that based on the information he received through his training program, the area is a business district. Chief William Bath of the Waynesburg Police Department testified that the area where appellant was stopped is inside the village and is basically the business district of Waynesburg. He testified that the posted speed limit had been

25 mph for at least 35 years. He further testified that the 25 mph signs had been posted by ODOT, not by the village of Waynesburg.

{¶25} The officer relied on the posted 25 mph signs. He had no reason to believe the area might not meet the detailed requirements for a 25 mph zone on a state highway, particularly as there were numerous businesses located in the area. The information known to the police department indicated that the signs were posted by ODOT, not the village. When the officer clocked appellant traveling over the posted speed limit, he had a reasonable suspicion of criminal activity to justify the stop.

{¶26} The first, second, third and fourth assignments of error are overruled.

{¶27} The judgment of the Canton Municipal Court is affirmed.

By: Edwards, P.J.

Farmer, J. and

Delaney, J. concur

s/Julie A. Edwards

s/Sheila G. Farmer

s/Patricia A. Delaney

JUDGES

JAE/r0518

[Cite as *State v. Ohler*, 2010-Ohio-4060.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
DARREN A. OHLER	:	
Defendant-Appellant	:	CASE NO. 2009 CA 00217

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Canton Municipal Court, Stark County, Ohio is affirmed. Costs assessed to appellant.

s/Julie A. Edwards

s/Sheila G. Farmer

s/Patricia A. Delaney

JUDGES