[Cite as *State v. Elliott,* 2009-Ohio-6006.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

State of Ohio,	:	
Plaintiff-Appellee,	:	Case No. 08CA50
v.	:	
John W. Elliott,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	**Released 10/28/09**

APPEARANCES:

Paul G. Bertram, III, Bertram & Halliday, LLC, Marietta, Ohio, for appellant.

Roland Riggs, Marietta City Law Director, and Mark C. Sleeper, Marietta Assistant City Law Director, Marietta, Ohio, for appellee.

Harsha, J.

{¶1} After pleading no contest to operating a motor vehicle while intoxicated, John W. Elliott appeals the trial court's denial of his motion to suppress evidence obtained from a traffic stop on the basis that the arresting officer lacked a reasonable articulable suspicion to conduct an investigatory stop of Elliott's automobile. Elliott argues that it was unreasonable to conduct an investigatory stop of his vehicle to determine whether he was driving under suspension where: at 1:00AM, a police officer observed someone enter an automobile in a parking lot adjacent to a bar and tattoo parlor; after running the license plate number, the officer learned that the registered owner of the automobile had a suspended license with limited driving privileges; and the car left the parking lot and traveled on public roadways.

{¶2} We reject Elliott's contention that the investigatory stop was unconstitutional. A police officer has a constitutionally legitimate basis to stop a vehicle when: 1) the officer learns that the registered owner of the vehicle has a suspended license with limited driving privileges; and 2) both the late hour when the driver is operating the vehicle and the location from which the vehicle is driven provide a reasonable inference that the driver may not be operating the vehicle within the scope of his limited driving privileges. Accordingly, we affirm the trial court's judgment.

I. Statement of Facts

{¶3} Patrolman Brandon H. Chapman was on patrol at 12:59AM in Marietta, Ohio when he observed an individual walking along the wall of a building and enter an automobile in a parking lot located on the north side of a tattoo shop. After Chapman observed the individual attempting to start the car, which was parked near the Four Seasons Bar, Chapman ran the plates of the automobile while he continued on his patrol.

{¶4} Police dispatch informed Chapman that the automobile's owner had a license under suspension with limited driving privileges. Chapman turned around to see if the car would leave the parking lot only to find that it had already left. Chapman radioed another patrolman in the area who by that point happened to be traveling behind the suspect's automobile. Chapman caught up to the vehicle and initiated an investigatory traffic stop. The subsequent stop led to Elliott's arrest for operating a motor vehicle while intoxicated.

{¶5} At the suppression hearing Elliott argued that Chapman did not possess reasonable articulable suspicion to conduct the investigatory stop because, although

Chapman was aware that the registered owner had a suspended license, he also knew that the owner had limited driving privileges. Elliott argued that even though it was late at night, he might have been coming from work, and thus permitted to drive. On cross, Chapman admitted that there were other businesses in the area of the tattoo parlor, including a leasing office (MKB Leasing), a supply company (American Producers), and an automobile dealership (J.D. Byrider). He further admitted that he did not observe Elliott leave the Four Seasons Bar and that he did not know whether Elliott had come from any of the other businesses in the area.

{¶6} Chapman stated that he initiated the investigatory stop due to his knowledge that the registered owner of the vehicle had a suspended license. He explained, "[t]o me, coming from a bar area, more than likely limited driving privileges isn't going to state that you can go to an establishment of that sort." In the following exchange, Chapman revealed more about the basis of his suspicion:

> Defense counsel: Okay. If this had happened at four o'clock in the afternoon or one o'clock in the afternoon, would that have made a difference to you?
>
> Chapman: I can't really answer that. I mean, we run registrations for status checks on the registered owner all the time.
>
> Defense counsel: But being that it's one o'clock in the morning and close to a bar, that had some effect on your thought process?
>
> Chapman: I'm sure it did.

{¶7} The court concluded that Chapman had reasonable articulable suspicion that Elliott was operating his motor vehicle under suspension when he observed an individual operating a vehicle at 1:00AM in the area of the Four Season Bar and a tattoo

parlor and learned that the registered owner of the automobile was under suspension with limited driving privileges. The trial court also found that at 1:00AM, both the tattoo parlor and Four Seasons Bar were the only active businesses in the immediate area. After the court denied the motion to suppress, Elliott pled "no contest" to operating a motor vehicle while intoxicated.

II. Assignment of Error

{¶8} Elliott has appealed the trial court's judgment and raises a sole assignment of error:

> THE TRIAL COURT ERRED WHEN IT FOUND THAT THE ARRESTING OFFICER HAD REASONABLE ARTICULABLE SUSPICION TO MAKE AN INVESTIGATORY STOP OF THE DEFENDANT/APPELLANT'S MOTOR VEHICLE.

III. Standard of Review

{¶9} Appellate review of a trial court's decision regarding a motion to suppress involves mixed questions of law and fact. See *State v. Featherstone*, 150 Ohio App.3d 24, 2002-Ohio-6028, 778 N.E.2d 1124, at ¶10, citing *State v. Vest*, Ross App. No. 00CA2576, 2001-Ohio-2394; *State v. Long* (1998), 127 Ohio App.3d 328, 332, 713 N.E.2d 1. 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*, 73 Ohio St.3d 308, 314, 1995-Ohio-243, 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*; *Long*; *State v. Metcalf* (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. 99CA11, 1999 WL 1125120.

IV. Reasonableness of the Stop

{¶10} The Fourth and Fourteenth Amendments and Section 14, Article 1 of the Ohio Constitution are implicated in this appeal because stopping an automobile and detaining its occupant constitutes a "seizure" within the meaning of those federal and state Constitutional provisions, even though the purpose of the stop is limited and the resulting detention may be brief. *Delaware v. Prouse* (1979), 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660. The touchstone of any search and seizure inquiry is whether the challenged actions of the government, including law enforcement agents, were "reasonable." See *State v. Dunfee,* Athens App No. 02CA37, 2003-Ohio-5970 at ¶25, citing *Pennsylvania v. Mimms* (1977), 434 U.S. 106, 108-109, 98 S.Ct. 330, 54 L.Ed.2d 331.

{¶11} A traffic stop is reasonable when an officer possesses probable cause to believe that an individual has committed a traffic offense. See *Whren v. United States* (1996), 517 U.S. 806, 809, 116 S.Ct. 1769, 135 L.Ed.2d 89; see, also, *City of Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 11-12, 665 N.E.2d 1091. Probable cause has been defined as "facts and circumstances within [an officer's] knowledge . . . sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Beck v. Ohio* (1964), 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142.

{¶12} In the absence of probable cause, a law enforcement officer may not stop an automobile unless the officer observes facts giving rise to a reasonable articulable suspicion of criminal activity. See, generally, *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct.

1868, 20 L.Ed.2d 889; *State v. Andrews* (1991), 57 Ohio St.3d 86, 565 N.E.2d 1271. To justify a traffic stop based upon reasonable suspicion, the officer must be able to articulate specific facts that would warrant a person of reasonable caution in the belief that the person stopped has committed or is committing a crime. See *Erickson,* 76 Ohio St.3d at 11-12. Reasonable suspicion cannot be justified by mere intuition, but instead must be based upon specific, articulable facts and such rational inferences as may be drawn from those facts. *Terry,* 392 U.S. at 21-22.

{¶13} The proper question is whether an officer "could reasonably *surmise* that the particular vehicle they stopped was engaged in criminal activity." *State v. Cunningham* (May 3, 1995), Ross. App. No. 94 CA 2023, 1995 WL 262284, at *11 (Harsha, J., concurring), citing *United States v. Cortez* (1981), 449 U.S. 411, 66 L.E.2d 621, 101 S.Ct. 690. "Surmise means to 'form a notion on slight proof.'" Id., citing Lafave, Search and Seizure (1978), Section 9.3(a) at fn. 17, in turn, citing *Cortez* and Webster's Third New International Dictionary (1961) 2301. "The possibility of innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct. Indeed, the principal function of his investigation is to resolve that very ambiguity and to establish whether the activity is in fact legal or illegal – to enable the police to quickly determine whether they should allow the suspect to go about his business or hold him to answer charges." Id., citing Lafave, Section 9.3(b). The propriety of an investigative stop by an officer must be viewed in light of the totality of the circumstances surrounding the stop. *State v. Bobo* (1988), 37 Ohio St.3d 177, 524 N.E.2d 489, paragraph one of the syllabus; *State v. Freeman* (1980), 64 Ohio St.2d 291, 414 N.E.2d 1044, paragraph one of the syllabus.

{¶14} Elliott argues that Chapman lacked reasonable suspicion because the investigatory stop was premised on a mere hunch of criminal activity. Elliott contends that Chapman knew he had limited driving privileges and there are no other meaningful factors present that would reasonably indicate to Chapman that Elliott was driving in violation of those privileges.

{¶15} The State contends that Chapman had a reasonable articulable suspicion of illegal activity based on his knowledge that the registered owner of the automobile was under suspension with limited driving privileges and the time and location of the incident sufficiently indicated that Elliott was not operating his vehicle within the scope of his limited driving privileges.

{¶16} In *State v. Yeager* (Sept. 24, 1999), Ross App. No. 99CA2492, 1999 WL 769965, we held that an officer's investigative stop of an automobile is justified solely on the basis of information that the automobile's owner does not possess a valid driver's license and the reasonable inference that the owner is the driver of the automobile. Here, Chapman had a reasonable basis to suspect Elliott was driving under suspension, i.e., the license plate check and the dispatcher's reply. And Officer Chapman could reasonably surmise that an individual operating the automobile was the owner.

{¶17} Thus, absent some indication that the registered owner is not driving the automobile, police may conduct an investigatory stop if they learn that the registered owner has a suspended license. Id. But here there is an additional circumstance: the officer knew the registered owner has limited driving privileges. Because there is nothing in the record that indicates Chapman was able to determine the actual scope and terms of Elliott's limited driving privileges, there must be additional factors present

that led Chapman to reasonably believe that Elliott was nonetheless driving illegally. Thus, if Chapman's justification for the investigatory stop was premised entirely on the information he obtained from police dispatch regarding the owner's driving status, the reasonableness of the stop would be in question. But here there are two additional facts from which Chapman was able to reasonably infer that illegal activity was afoot.

{¶18} The late hour when the incident occurred directly supports the rational inference that Elliott may not have been operating his automobile in accordance with his limited driving privileges, i.e., 1:00 AM is not a time typically associated with traveling to or from work. Even though Chapman was unaware of the actual terms of the registered owner's limited driving privileges, a police officer is not acting unreasonably when he assumes that limited driving privileges restrict travel to a place of employment. We have previously recognized that "such privileges are generally occupational privileges, allowing operators to commute back and forth to work." *State v. Seward*, Ross App. No. 05CA2864, 2006-Ohio-2058, at ¶11. In the absence of "shift work," the morning and evening hours are times typically associated with occupational travel. 1:00AM is not. Thus Chapman could reasonably infer that the driver was not on route to or from his place of employment.

{¶19} That Elliott was parked near the bar and tattoo shop, by itself, would not reasonably indicate to Chapman that Elliott was driving under suspension. However, bars and tattoo parlors are businesses primarily associated with recreational or social activities. Granted, these businesses employ people. But if you observe a person walk out of an open bar or tattoo parlor at 1:00 AM, it is rational to assume that they are a patron. Chapman did not observe Elliott exit either business. But the trial court found

that the only active businesses in the vicinity of the parking lot were the bar and tattoo parlor. Because they were the only active businesses in the area, Chapman could reasonably suspect that Elliott was parked in that lot because he was a recent patron of one or the other and was not leaving work. Under these circumstances, Chapman's belief that Elliott did not have limited driving privileges to "go to an establishment of that sort" was reasonable.

{¶20} Elliott established at the suppression hearing that many other businesses were located in the area of the bar and tattoo parlor. But he submitted no evidence to establish that any of these businesses were actually open. Based upon the late hour and the absence of contrary evidence, we conclude the trial court's factual finding that the only active businesses in the area were the bar and tattoo shop was reasonable.

{¶21} Under the totality of circumstances, Chapman acted on more than an "inarticulate hunch." See *Terry*, supra, at 21. Combined, these observations and the rational inferences drawn from them led Chapman to form a reasonable suspicion that the driver of the automobile might be driving illegally notwithstanding his limited driving privileges.

{¶22} Elliott compares this case to *State v. Klein* (1991), 73 Ohio App.3d 486, 597 N.E.2d 1141, in which we determined that the officer there lacked reasonable suspicion to conduct an investigatory stop. In *Klein*, the officer observed the defendant sitting in a vehicle in a private lot at 1:35AM. Id. at 487. When the officer entered the lot in his police cruiser, the defendant drove away. Id. at 488. The officer pulled the defendant over shortly after and an investigation led to a conviction for operating a motor vehicle under the influence. Id. The articulable facts in *Klein* were: "(1) the area

in which the [defendant] was observed had experienced a problem with vandalism and theft; (2) the area in which [defendant] was observed was private property; (3) the time of the observation was 1:35 a.m.; and (4) [defendant] turned out of the area as [the officer's] police cruiser approached the area." Id. at 489. We found that under the totality of the circumstances, the officer's observations supported no more than an inarticulate hunch of criminal activity. Id.

{¶23} We believe that *Klein* is distinguishable. Here, Chapman possessed specific knowledge that the owner of the automobile had a suspended license, albeit with limited driving privileges. Additional factors, including the late hour and the location where Elliott was observed entering the vehicle, supported Chapman's suspicion that Elliott was not driving in accordance with those privileges. The officer in *Klein* initiated an investigatory traffic stop absent any specific details about the license status of the defendant, or with any other specific facts that would suggest criminal activity on the part of the defendant. Nothing in the record in *Klein* indicated the officer observed any signs of vandalism or theft after Klein departed.

{¶24} We hold that Chapman possessed a reasonable articulable suspicion that Elliott was driving under suspension when he observed Elliott enter his car at 1:00AM in a parking lot near a tattoo parlor and bar and subsequently learned that the registered owner had a suspended license with limited driving privileges. When the owner has a suspended license with limited driving privileges and is present at 1:00AM in the immediate vicinity of an open bar, the officer may also surmise that person may not be operating his automobile in accordance with his limited driving privileges. Thus, the specific articulable facts supporting the stop are: (1) Chapman's knowledge that the

registered owner of the automobile had a suspended license with limited driving privileges; (2) the time of day -- 1:00AM -- a time not typically associated with traveling to and from work; and (3) the only active businesses in the area were a bar and a tattoo parlor. A person leaving one of these two businesses while it is open is probably a patron rather than an employee.

{¶25} Under these circumstances Chapman was permitted to conduct an investigatory stop of Elliott to determine whether he was driving his automobile in violation of his suspended license.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Marietta Municipal Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Kline, P.J.: Concurs in Judgment and Opinion.
McFarland, J.: Dissents.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.