

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

JENNIFER A. KASTENHUBER,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1002 EDA 2012

Appeal from the Judgment of Sentence March 15, 2012
In the Court of Common Pleas of Montgomery County
Criminal Division at No(s): CP-46-CR-0003787-2011

BEFORE: STEVENS, P.J., BOWES, J., and PLATT, J.*

MEMORANDUM BY STEVENS, P.J.

Filed: February 7, 2013

This is an appeal from the judgment of sentence entered in the Court of Common Pleas of Montgomery County following Appellant Jennifer A. Kastenhuber's conviction on the charge of driving while under the influence of alcohol (DUI), high rate of alcohol, 75 Pa.C.S.A. § 3802(b). Appellant's sole issue on appeal is the trial court erred in denying her motion to suppress. We affirm.

The relevant facts and procedural history are as follows: Appellant was arrested, and she was charged with one count of DUI, general impairment, 75 Pa.C.S.A. § 3802(a)(1), and one count of DUI, high rate of alcohol, 75 Pa.C.S.A. § 3802(b). On October 26, 2011, Appellant filed a counseled

* Retired Senior Judge assigned to the Superior Court.

omnibus pre-trial motion seeking to suppress all statements and physical evidence seized as a result of the police's stop of her motor vehicle on March 14, 2011. Appellant averred, *inter alia*, the police lacked probable cause to stop her motor vehicle.

On February 16, 2012, the matter proceeded to a suppression hearing at which the sole testifying witness was Upper Moreland Township Police Officer Jeffrey Thomas Ford, who was on routine night patrol on March 12, 2011. N.T. 2/16/12, morning session, at 7. The following relevant exchange occurred during the direct examination of Officer Ford regarding the stop at issue:

[OFFICER FORD]: At 2:30 a.m., I was heading south on York Road and the intersection of Fitzwatertown Road.

As you proceed south on York Road from Fitzwatertown Road, the road goes down into what I would call a valley, then climbs a fairly long and steep hill where at the top of the hill it crests down into a plateau several hundred yards before dropping back down in elevation.

The roadway is perfectly straight there from Fitzwatertown Road until you get down probably close to three quarters of a mile later when you get around Lincoln Avenue where it slightly bends to the right.

But as I was patrolling the township, I was headed south on York Road there, going down the hill. In front of me was a green Dodge pickup, Dodge Dakota. It proceeded south and started up the hill. From the bottom of the valley there, the Dodge Dakota drifted to its left, and both driver's side wheels front and back, crossed over the double yellow line into the oncoming northbound lane partially.

The vehicle suddenly jerked back to the right and reoccupied the left-hand southbound travel lane for a period of time.

Just after we passed Lakeview Road, which comes in on your right as you're traveling south, about halfway up the hill I noticed the green Dodge Dakota started drifting to its left again.

As the vehicle drifted to its left again, both wheels again cross over the double yellow line.

As we were continuing south, though, we were approaching the crest of the hill. The problem is when you approach the crest of that hill, you cannot see over the top of the hill to see what's coming at you, nor could a car coming northbound see what would be coming—

As we were approaching the top of the hill, or the crest of the hill, you cannot see what's coming at you at that point, just the same as northbound traffic can't see what would be coming at them on the other side of the hill, the vehicle was still continuing to its left as it traveled south, at which point I reached down and activated my emergency lights and my siren, and the vehicle corrected back into the right hand—to its right-hand side back into its proper lane of travel and continued in that lane of travel for approximately a quarter mile until we reached Lincoln Avenue where she finally pulled over onto Lincoln Avenue and stopped.

[ADA]: The Defendant is—

[OFFICER FORD]: The Defendant that's seated to the left of Defense counsel was operating that vehicle.

[ADA]: When you say that the green Dakota drifted over the—there's a double yellow line that separates—

[OFFICER FORD]: There's a double yellow line separating northbound and southbound, yes.

[ADA]: And how many times did you see her car drift over the yellow line?

[OFFICER FORD]: Two. The second one I activated my emergency lights. Because I was afraid that she would—there would be a collision. There in fact have been collisions in the past at that crest of that hill similar to that.

[ADA]: Approximately how long were you watching her car and observing these two incidents of her crossing over the line?

[OFFICER FORD]: From the bottom of the hill where I first took notice when she crossed, to the top of the hill, it's probably somewhere between a third and a half of a mile.

[ADA]: Why did you pull her over? Why did you activate your sirens at that time?

[OFFICER FORD]: I feared a head-on collision.

[ADA]: So it was for a violation of the Vehicle Code?

[OFFICER FORD]: Yes.

[ADA]: And which violation was that?

[OFFICER FORD]: Failure to maintain lane. She was drifted into the oncoming lane.

[ADA]: You did not cite her for that?

[OFFICER FORD]: I did not, no.

[ADA]: Why not?

[OFFICER FORD]: Because when I cited her for the DUI I wasn't (inaudible).

N.T. 2/16/12, morning session, at 9-13.

On cross-examination, Officer Ford admitted that Appellant was not speeding during the roughly forty-five seconds he followed her vehicle. N.T. 2/16/12, morning session, at 15. He also admitted that he followed directly behind Appellant and no traffic passed them during the encounter. N.T. 2/16/12, morning session, at 16. Officer Ford clarified that, the second time he observed Appellant's vehicle's wheels cross the double-yellow line, which is when they were almost at the crest of the hill, Appellant did not pull her vehicle back into its lane of travel until after Officer Ford activated his lights and siren. N.T. 2/16/12, morning session, at 16-17.

At the conclusion of cross-examination, the relevant exchange occurred between the suppression court and Officer Ford:

[THE COURT]: And it was during the ascension of the hill, as I understand it, that you observed what you testified to?

[OFFICER FORD]: That's correct.

[THE COURT]: When you saw what you testified to, you did observe the second time, why did you activate your lights?

[OFFICER FORD]: I feared a collision, Your Honor. I feared that she was going over the line there, and if we continued with her crossing into oncoming traffic, going over the hill, then there could be a crash....

My initial reaction was: Oh, my God. We're going to have a crash here possibly.

[THE COURT]: Are you able to see oncoming traffic from the vantage point that you had, as you were ascending the hill?

[OFFICER FORD]: Not until you actually physically crest the hill.

N.T. 2/16/12, morning session, at 19-20.

At the conclusion of all testimony, the suppression court denied Appellant's motion to suppress. Specifically, the suppression court, stating in open court that it found Officer Ford's testimony to be credible in its entirety, concluded Officer Ford had probable cause to stop Appellant's vehicle for a violation of 75 Pa.C.S.A. § 3309, driving on roadways laned for traffic. N.T. 2/16/12, afternoon session, 5-6.

The matter then proceeded immediately to a stipulated bench trial, at which the Commonwealth withdrew Count 1, DUI, general impairment. The trial court convicted Appellant on the remaining Count, which was Count 2, DUI, high rate of alcohol.

On March 15, 2012, Appellant proceeded to a sentencing hearing, and the trial court, noting this was Appellant's second offense under 75 Pa.C.S.A. § 3802(b), imposed a sentence of thirty days to six months in prison, plus a fine of \$750. This timely appeal followed, and all Pa.R.A.P. 1925 requirements have been met.

Appellant's sole issue is the suppression court erred in finding the stop of her vehicle to be valid. Specifically, Appellant contends that, pursuant to ***Commonwealth v. Feczko***, 10 A.3d 1285 (Pa.Super. 2010) (*en banc*), and its progeny, Officer Ford needed probable cause to stop her Dodge Dakota

since the stop was based on a violation of 75 Pa.C.S.A. § 3309(1), pertaining to driving on roadways laned for traffic. Moreover, Appellant contends Officer Ford did not have the requisite probable cause.

Our standard for reviewing an order denying a motion to suppress is well-established.

We are limited to determining whether the lower court's factual findings are supported by the record and whether the legal conclusions drawn therefrom are correct. We may consider the evidence of the witnesses offered by the Commonwealth, as verdict winner, and only so much of the evidence presented by [the] defense that is not contradicted when examined in the context of the record as a whole. We are bound by facts supported by the record and may reverse only if the legal conclusions reached by the court were erroneous.

Feczko, 10 A.3d at 1285 (quotation omitted).

Here, Trooper Ford testified, and the suppression court accepted as credible, the stop of Appellant's Dodge Dakota was based on a violation of 75 Pa.C.S.A. § 3309(1).¹

The Vehicle Code states, in relevant part:

Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others not inconsistent therewith shall apply:

- (1) Driving within single lane.—A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that the movement can be made with safety.

¹ The fact Trooper Ford did not ultimately cite Appellant for a violation of 75 Pa.C.S.A. § 3309 does not alter our conclusion. ***See generally Commonwealth v. Benton***, 655 A.2d 1030 (Pa.Super. 1995).

75 Pa.C.S.A. § 3309(1).

In *Feczko, supra*, an *en banc* panel of this Court reviewed the constitutionality of a traffic stop for failure to drive within a single lane.² Ultimately, this Court held that, where either criminal activity is afoot or that a violation of the Motor Vehicle Code is occurring and the stop would serve an investigatory purpose (*i.e.*, suspicion that the driver is under the influence of alcohol), the vehicular stop must be supported by reasonable suspicion. *Feczko, supra*. However, under circumstances where further investigation is not necessary because the violation of the Motor Vehicle Code is self-evident (*i.e.*, the driver ran a red light), the vehicular stop must be supported by probable cause. *Id.* Thus, in *Feczko*, this Court held that, where the police stops a vehicle for a violation of 75 Pa.C.S.A. § 3309(1), which is a non-investigable offense, the applicable standard is probable cause to justify the stop.

Therefore, applying our standard of review and the dictates of *Feczko*, in the case *sub judice*, we have no choice but to conclude Officer Ford needed probable cause to stop Appellant's vehicle. However, this does not end our inquiry as Appellant contends that the suppression court erred in

² As in *Feczko*, in this case, the officer's testimony established the stop of the defendant's vehicle was based on a suspected violation of 75 Pa.C.S.A. § 3309(1). *See Feczko*, 10 A.3d at 1286, 1292.

finding Officer Ford had the requisite probable cause to stop Appellant's vehicle.

Where probable cause is required, "it is incumbent [*sic*] upon the officer to articulate specific facts possessed by him, at the time of the questioned stop, which would provide probable cause to believe that the vehicle or the driver was in violation of some provision of the Code." ***Feczko***, 10 A.3d at 1291 (quotation, citation, and emphasis omitted). Determining whether probable cause of a Section 3309(1) violation exists requires a fact-specific inquiry in which the court must ascertain at what point a driver's failure to stay in his lane reflects a safety hazard sufficient to justify a stop. ***See Feczko, supra***. In making this determination, we must consider all relevant facts under the totality of the circumstances. ***See Commonwealth v. Hernandez***, 594 Pa. 319, 935 A.2d 1275 (2007).

In the case *sub judice*, we agree with the suppression court that Appellant's deviation from her lane of travel in such a manner as to lead Officer Ford to believe she was going to crash into another vehicle as she crested a hill where oncoming traffic could not be viewed "created a significant safety hazard on the roadway." ***Feczko***, 10 A.3d at 1292. We specifically point to the following portion of the lower court's Pa.R.A.P. 1925(a) opinion, which further explains the suppression court's ruling in this regard:

In the instant case, Officer Ford testified that he twice observed the left wheels of [Appellant's] Dodge Dakota cross

over the double yellow line and into the lane reserved for oncoming traffic....Officer Ford further testified that, the second time [Appellant's] vehicle moved across the double yellow line, the vehicle was coming to the crest of a hill, risking a collision with oncoming traffic that could not have been observed prior to actually cresting the hill....

Officer Ford testified:

In front of me was a green Dodge pickup, Dodge Dakota. It proceeded south and started up the hill. From the bottom of the valley there, the Dodge Dakota drifted to its left, and both driver's side wheels, front and back, crossed over the double yellow line into the oncoming northbound lane partially.

The vehicle suddenly jerked back to the right and reoccupied the right lane for a period of time.

Just after we passed Lakeview Road, which comes in on your right as you're travelling south, about halfway up the hill, I noticed the green Dodge Dakota started drifting up to the left again. As the vehicle drifted to its left again, both wheels again cross over the double yellow line.

As we were continuing south, though, we were approaching the crest of the hill. The problem is when you approach the crest of that hill you cannot see over the top of the hill to see what's coming at you, nor could a car coming northbound see what would be coming.

(N.T., Suppression, February 16, 2012, P. 10).

* * *

Officer Ford testified that he was very familiar with the stretch of road where the incident occurred, and that he knew there had been collisions in the past at the crest of the hill. (N.T., Suppression, February 16, 2012, p. 12). He testified that he stopped [Appellant] out of fear of a head-on collision occurring, and that it was his intention to cite [Appellant] for failing to stay within her lane. The officer testified: "My initial reaction was: Oh, my God. We're going to have a crash here possibly," and he specifically testified that a driver at that location was unable to see oncoming traffic "until you actually physically crest the hill."...Officer Ford thus had probable cause to believe that [Appellant] violated [Section] 3309, and his stop of [Appellant's] vehicle was fully justified.

[D]efense counsel...[posits] that Officer Ford did not have probable cause to effect the traffic stop because he did not himself actually observe any oncoming traffic in the northbound lane on York Road. We strongly disagree. Again, Officer Ford testified that it was not *possible*-for either himself or [Appellant]-to see over the crest of the hill to ascertain whether oncoming traffic was present in the northbound lane, nor was it possible for any drivers who might be present in the northbound lane to see [Appellant's] vehicle. Obviously, if [Appellant] herself could not have seen if vehicles were present in the northbound lane, she could not have first ascertained that the movement can be made with safety-as required by the statute-prior to intruding into the lane.

* * *

In the instant case, for all of the aforementioned reasons, Officer Ford had probable cause under the totality of the circumstances to believe [Appellant] had violated [Section] 3309(1).

Trial Court Pa.R.A.P. 1925(a) Opinion filed 5/3/12 at 5-8 (footnote, quotation marks, and citations to record omitted) (italics in original).

We agree with the trial court's analysis in this regard and conclude the suppression court properly denied Appellant's motion to suppress. Therefore, we affirm Appellant's judgment of sentence.

Affirmed.