

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA,

Appellant,

v.

NHANH VAN DANG, and
NHI THI NGUYEN,

Appellees.

NOT FOR PUBLICATION

Case No. S-2012-214

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

AUG 13 2012

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

LUMPKIN, JUDGE:

Appellees, Nhanh Van Dang and Nhi Thi Nguyen, were each charged by separate Information April 14, 2011, in the District Court of Canadian County, Case Nos. CF-2011-131 and CF-2011-132, with Trafficking in Illegal Drugs (Count 1) (Marijuana) (63 O.S.Supp.2007, § 2-415), and Conspiracy to Traffic in Illegal Drugs (Count 2) (63 O.S.2001, § 2-408). The Honorable Gary E. Miller, District Judge, ordered the State's evidence suppressed and the case dismissed at a pre-trial hearing. The State appeals this order pursuant to 22 O.S.Supp.2009, § 1053(5).

Section 1053 provides, in relevant part, that the State may appeal,

Upon a pretrial order, decision, or judgment suppressing or excluding evidence where appellate review of the issue would be in the best interests of justice.

We find that the State's appeal is proper and review of this issue is in the best interests of justice.

The State raises the following propositions of error in support of this appeal:

- I. There was a sufficient basis for the initial traffic stop, based upon the agents' probable cause to believe they had witnessed violations of Oklahoma law.
- II. The issues raised in Appellees' motion to suppress, in light of the evidence produced at preliminary hearing, do not constitute a sufficient legal basis for suppression of evidence.
- III. No issues, other than those explicitly detailed in Appellees' motion to suppress, were before the court, and therefore could not constitute a legal basis for suppression of evidence.

We review appeals pursuant to 22 O.S.Supp.2009, § 1053 to determine if the trial court abused its discretion. *State v. Love*, 1998 OK CR 32, ¶ 2, 960 P.2d 368, 369. "An abuse of discretion has been defined as a conclusion or judgment that is clearly against the logic and effect of the facts presented." *Id.*, citing *Walker v. State*, 1989 OK CR 65, ¶ 5, 780 P.2d 1181, 1183. This is the same standard applied when we review a trial court's ruling on a motion to suppress. *Gomez v. State*, 2007 OK CR 33, ¶ 5, 168 P.3d 1139, 1141-42.¹

In Proposition One, we find that the trial court did not abuse its discretion in determining that the OBN agents' stop of Appellees' vehicle was not supported by reasonable suspicion that Appellees' vehicle had "violated 'any one of the multitude of applicable traffic and equipment regulations' of the jurisdiction." *Lozoya v. State*, 1996 OK CR 55, ¶ 32, 932 P.2d 22, 32) (*quoting*

¹ I maintain that whether the court is reviewing a question of fact or reviewing an issue of law intertwined with those facts, the court should apply the law to those facts as determined by the judge or jury absent a showing of abuse of discretion, i.e. the clearly erroneous test. *Seabolt v. State*, 2006 OK CR 50, ¶ 15, 152 P.3d 235, 243 (Lumpkin, V.P.J., dissenting).

Delaware v. Prouse, 440 U.S. 648, 661, 99 S.Ct. 1391, 1400, 59 L.Ed.2d 660 (1979)). Although the agent alleged that the vehicle committed the traffic offenses of following too closely (47 O.S.2001, § 11-310(a)), and failure to operate vehicle as nearly as practicable entirely within a single lane (47 O.S.2001, § 11-310(a)), the State did not present a particularized and objective basis for the agent's suspicion. *Nilsen v. State*, 2009 OK CR 6, ¶ 6, 203 P.3d 189, 191; *Dufries v. State*, 2006 OK CR 13, ¶ 10, 133 P.3d 887, 889 (finding stop of vehicle reasonable where "Trooper had objectively justifiable reasons for pulling Appellant over."). This Court is bound by the record presented to it. In this case, the evidence adduced at the preliminary hearing comprises the facts of the case. The preliminary hearing magistrate made specific findings of the State's failure to produce evidence to meet the "particularized and objective basis" for the agent's suspicion that the vehicle was following too closely. There was no evidence as to the actual time interval between the vehicles or, alternatively, the speed of the vehicles.² The District Judge's decision, based in part on the magistrate's findings, was not an abuse of discretion. There was no evidence that the vehicle crossed the fog line for an appreciable time or in an appreciable manner. This proposition is denied.

The State's remaining propositions of error are rendered moot by our determination in Proposition One. As such, they are denied.

² The agent cited the Oklahoma Driver's manual as recommending an interval of three seconds at highway speeds.

DECISION

The district court's order suppressing the evidence is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2012), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CANADIAN COUNTY
THE HONORABLE GARY E. MILLER, DISTRICT JUDGE

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OPINION BY: LUMPKIN, J.
A. JOHNSON, P.J.: CONCUR
LEWIS, V.P.J.: CONCUR
C. JOHNSON, J.: CONCUR
SMITH, J.: CONCUR

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