

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,) NOT FOR PUBLICATION
)
 Appellant,)
)
 v.) Case No. S-2013-103
)
 URIEL ALAJANDRO LOPEZ AND)
 MARIA MAGANA,)
)
 Appellee.)

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

OCT - 2 2013

SUMMARY OPINION

C. JOHNSON, JUDGE:

MICHAEL S. RICHIE
CLERK

Appellees, Uriel Alajandro Lopez and Maria Magana, were charged with Trafficking in Illegal Drugs, in the District Court of McIntosh County, Case Nos. CF-2011-300A and CF-2011-300B. Prior to trial, Appellees each filed a Motion to Suppress and Motion to Quash. A hearing was held on these motions on December 20, 2012 and the motions were granted by the Honorable James R. Pratt on January 25, 2013. The State appeals this order pursuant to 22 O.S.2011, § 1053(5).

Title 22 O.S.2011, § 1053(5) provides, in relevant part, that the State may appeal, "[u]pon 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:

1. The stop of the Appellees' vehicle was justified based upon Trooper Koch's observation of two separate driving violations committed by Appellee, Maria Magana.

2. The warrantless search of Appellees' vehicle, which was based on numerous indicators of criminal activity, the consent of both Appellees and a positive alert by trooper Koch's drug detecting K-9 was a lawful search based upon probable cause.

In appeals prosecuted pursuant to 22 O.S.2011, § 1053, this Court reviews the trial court's decision for an abuse of discretion. *State v. Hooley*, 2012 OK CR 3, ¶ 4, 269 P.3d 949, 950. *See also State v. Love*, 1998 OK CR 32, ¶ 2, 960 P.2d 368, 369. An abuse of discretion is "a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented." *Glossip v. State*, 2007 OK CR 12, ¶ 80, 157 P.3d 143, 157. 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.

In its first proposition the State argues that the district court erred in sustaining Lopez's and Magana's motions to suppress because Trooper Koch stopped Magana based upon his reasonable suspicion that she had committed the traffic offenses of following too closely and failing to move into the inside lane when passing an emergency vehicle with its lights activated. "The validity of a traffic stop under the Fourth Amendment turns on whether th[e] particular officer had reasonable suspicion that th[e] particular motorist violated any one of the multitude of applicable traffic and equipment regulations of the jurisdiction." *United States v. Valenzuela*, 494 F.3d 886, 888 (10th Cir. 2007) (quoting *United States v. Tibbetts*, 396 F.3d 1132, 1137 (10th Cir. 2005). *See also Lozoya v. State*, 1996 OK CR 55, ¶ 32, 932 P.2d 22, 32. A reasonable

suspicion is “a particularized and objective basis for suspecting criminal activity.” *U.S. v. Mabry*, __ F.3d __, __. 2013 WL 4734083 (10th Cir. 2013).

In reviewing the district court’s ruling, this Court is bound by the record before it. Regarding the alleged offense of following too closely, Trooper Koch testified at the preliminary hearing that he stopped Magana after he observed her vehicle traveling less than two seconds behind a semi-truck. The trooper admitted on cross-examination that the “two-second rule” is not in the statutory definition of the offense of following too closely. He opined, however, that it is a generally accepted rule that is mentioned in “numerous driver’s safety handbooks and websites.” The trooper acknowledged that he was using radar and that Magana was not speeding although he did not testify as to how fast she was driving.¹ He testified that he believed the two-second rule to be applicable no matter how fast a person is driving. The trooper did not testify about the road conditions or visibility at the time of the stop.

The district court issued a nineteen page order setting forth findings of fact and conclusions of law in support of its ruling in this case. The district court noted that this Court applies the rule of strict construction in the application of criminal statutes and has admonished that courts are required not to enlarge the meaning of words included in the statute to create a crime not defined by that statute. *State v. Duc Hong Pham Tran*, 2007 OK CR 39, ¶ 8, 172 P.3d 199, 200. The traffic statute Magana was alleged to have violated

¹ Although the State asserts that the Trooper did testify about how fast Magana was driving, when read in context it is clear that Trooper Koch was speaking hypothetically when he testified that “using the two-second rule, assuming the pickup was traveling around 65 miles per hour, which is 95 feet per second, it would require 190 feet to meet the two-second rule.”

requires that a driver “not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.” 47 O.S.2011, § 11-310(1). The district court noted that the statute contains no language reflecting the two-second rule utilized by Trooper Koch. It found that the non-statutory criteria used by Trooper Koch made it impossible for “a reasonable person to understand the prohibited conduct.” Further, the court added, there was absolutely no testimony about whether the use of the Trooper’s subjective standard was reasonable and prudent with regard to the speed the vehicles were traveling or the traffic upon and conditions of the highway at the time of the alleged offense.² Thus, the district court concluded that the use of the two-second rule alone, as a “general rule of thumb,” to determine that the offense of following too closely had been committed, was subjective and not an objective interpretation of the statute. Based upon this, the district court granted the motion to suppress and quash the evidence. We find that district court’s conclusion that the trooper did not have a reasonable suspicion that a violation of law had occurred was not an abuse of discretion.

The State also argues that the district court erred in failing to consider Trooper Koch’s observation of a second offense when he testified that Magana failed to move her vehicle into the left lane as she approached an emergency

² The district court noted that its review of the video taken from the Trooper’s dash recorder revealed that the condition of the highway was “dry, the sun was shining, visibility was clear, and there was a good road surface.” The district court added that “the only semi visible in the video, presumably the one [Appellees] had been following, was well ahead of the Defendants’ vehicle, in the inside, not the outside lane.”

vehicle parked on the right shoulder of the highway with its emergency lights activated. The commission of this offense was not developed at preliminary hearing but rather was mentioned by the trooper almost as an aside. Trooper Koch testified that he took no action based upon this perceived traffic violation – he wrote no warning for this alleged violation and did not make the stop based upon this alleged violation. The district court did not address this alleged violation in its order as it was not developed or set forth as a basis for the stop. Based upon this record this Court cannot find that the district court abused its discretion in failing to consider Magana’s alleged violation of this traffic law as a basis for the stop.

The State alleges in its second proposition that the warrantless search of Appellees’ vehicle, which was based on numerous indicators of criminal activity, the consent of both Appellees and a positive alert by trooper Koch’s drug detecting K-9 was a lawful search based upon probable cause. Because the State’s first proposition warrants no relief as the district court was found not to have abused its discretion in granting the motion to suppress, this Court need not address the issue raised in the second proposition as it has been rendered moot.

DECISION

The District Court’s ruling granting the Motion to Suppress is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF MCINTOSH COUNTY
THE HONORABLE JIM PRATT, ASSOCIATE DISTRICT JUDGE**

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HEARING**

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OPINION BY C. JOHNSON, J.

LEWIS, P.J.: CONCUR
SMITH, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR IN RESULTS
A. JOHNSON, J.: CONCUR

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