

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING
AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

STATE OF FLORIDA

Appellant,

Appeal No. CRC 09-00043APANO
UCN: 522009CT007252XXXXXX
UCN: 522009TR007250XXXXXX

ERIC W. GRISMER

Appellee.

Opinion filed _____.

Appeal from an Order Granting
Motion to Suppress
entered by the Pinellas County Court
County Judge John Carassas

Jacqueline Brown, Esquire
Office of the State Attorney
Attorney for Appellant

Rick A. Buchwalter, Esquire
Attorney for Appellee

ORDER AND OPINION

PETERS, Judge.

THIS MATTER is before the Court on Appellant, State of Florida's appeal from an order of the Pinellas County Court granting Appellee's Motion to Suppress. After reviewing the briefs and record, this Court reverses the order of the trial court.

Factual Background and Trial Court Proceedings

On January 16, 2009, at about 1:29 in the morning, Officer Douglass Bailey of the Clearwater Police Department was in uniform on routine patrol in a marked police cruiser at the intersection of Drew Street and North Myrtle Avenue in Clearwater. Officer Bailey stopped his vehicle at the traffic light, which was red, directly behind a stopped vehicle operated by the Appellee, Eric W. Grismer. Mr. Grismer's vehicle was stopped completely past the stop bar; it was stopped in the crosswalk of the inside westbound lane of Drew Street just east of North Myrtle Avenue. When the traffic light turned green Officer Bailey initiated a traffic stop of Mr. Grismer because he had stopped his vehicle over the stop bar and into the crosswalk in violation of Florida Statute § 316.074(1).

Mr. Grismer filed a motion to suppress asserting that there was no lawful basis for the traffic stop. After an evidentiary hearing, the trial court granted the motion. The trial court found, and Appellee agreed, that a stop bar is a traffic control device pursuant to 316.003(23) and that there was a stop bar at the involved intersection. The trial court stated in its ruling, "[t]he evidence here in court, at least the demonstrative evidence, indicates that the car, the defendant's vehicle, I believe it was a van, straddled the stop bar. What we did not answer, and I did not hear an answer to, is whether the vehicle stopped before the stop bar and then proceeded forward, which would, in the Court's opinion satisfy the statute and therefore could not be a violation." The trial court continued, "[t]herefore, this is my conclusion. Since there was no affect on other traffic or pedestrian, since there is no clear indication that the defendant did not already stop at the red -- before the stop bar and then proceed with caution, which I think is permissible under the statute, I'm going to find that the stop was not valid and is a pretextual stop.

And therefore the motion to suppress has to be granted because of those reasons.” The State appeals the order granting the motion to suppress.

Standard of Review

Our review of a trial court's ruling on a motion to suppress evidence involves a mixed question of law and fact. We accord a presumption of correctness with regard to the trial court's determination of facts where the trial court's factual findings are supported by competent, substantial evidence. All evidence and reasonable inferences therefrom must be construed in a manner most favorable to upholding the trial court's ruling. However, we review the trial court's application of the law to those facts de novo. *Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); *Connor v. State*, 803 So.2d 598 (Fla.2001); *State v. Pruitt*, 967So2d 1021 (Fla. 2nd DCA 2007); *Newkirk v. State*, 964 So2d 861, 863 (Fla. 2nd DCA 2007).

Involved Points of Law

1. *Traffic Stops*. It is well established that the prohibition against unreasonable searches and seizures contained in the Fourth Amendment of the United States Constitution applies to investigatory stops of automobiles. *United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981). An examination of the validity of a traffic stop under the Fourth Amendment thus requires courts to determine whether the stop was reasonable. *Terry v. Ohio*, 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The constitutional reasonableness of a traffic stop under the Fourth Amendment does not depend on the actual, subjective motivations of the individual officers involved in conducting the stop, but rather it depends on the validity of the basis asserted by the officers involved in the stop. *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135

L.Ed.2d 89 (1996); *Holland v. State*, 696 So2d 757 (Fla. 1997). The correct test to be applied is whether the particular officer who initiated the traffic stop had an objectively reasonable basis for making the stop. *Dobrin v. Department of Highway Safety & Motor Vehicles*, 874 So2d 1171 (Fla. 2004). Specifically, in the *Whren* case, the United States Supreme Court held that the temporary detention of a motorist is reasonable when an officer has *probable cause* to believe that the motorist has committed a traffic infraction.

2. *Traffic Stops for Noncriminal Traffic Infractions.* In order for a traffic stop to be proper, the police must have a *reasonable suspicion* of criminal activity, or *probable cause* to believe a traffic infraction has been committed. *Jones v. State*, 842 So2d 889 (Fla. 2nd DCA 2003). “*Probable cause* exists when the facts and circumstances within an officer's knowledge are sufficient to warrant a person of reasonable caution to believe that an offense has been committed. See *Benefield v. State*, 160 So.2d 706, 708 (Fla.1964); *Curtis v. State*, 748 So.2d 370, 374 (Fla. 4th DCA 2000).” *Chaney v. State*, 956 So.2d 535, 537 -538 (Fla. 4th DCA 2007). *Probable cause* is a fluid concept that deals in probabilities, which include common sense conclusions by law enforcement officers. *Probable cause* is not the same standard as *beyond a reasonable doubt*, and the facts constituting *probable cause* need not meet the standard of conclusiveness and probability required of the circumstantial facts upon which a conviction must be based. *State v. Catt*, 839 So2d 757 (Fla. 2nd DCA 2003). The court determines the stop's legitimacy by considering the totality of the circumstances surrounding the stop. *McMaster v. State*, 780 So2d 1026, 1029 (5th DCA Fla. 2001).

3. *Traffic Stops for Failing to Stop at a Stop Bar.* In a case involving the failure to stop at a stop sign, the court stated “[a]lthough it may come as a revelation to some, the

failure to stop at the stop line or bar rather than the stop sign itself, is a traffic infraction.”

State v. Robinson, 756 So.2d 249, 250 (Fla. 5th DCA 2000). The *Robinson* court continued:

The officer's unrefuted testimony established that Robinson failed to stop at the clearly marked stop line at the Sanford intersection, and this in turn was sufficient to constitute probable cause that Robinson committed a traffic infraction. Based on those objective facts, the stop was not illegal. *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996); *Holland v. State*, 696 So.2d 757 (Fla.1997); *State v. Chaney*, 744 So.2d 595 (Fla. 2d DCA 1999); *Covington v. State*, 728 So.2d 1195 (Fla. 4th DCA 1999); *State v. Girard*, 694 So.2d 131 (Fla. 5th DCA 1997). The subjective intent of the police officer who made the stop as whether the officer would have stopped another vehicle for that infraction and whether he and the canine unit were on a hunt for suspected drug dealers is not relevant under the controlling case law. See *State v. Chambliss*, 752 So.2d 114 (Fla. 5th DCA 2000).

Robinson, 756 So.2d at 250.

4. *The Traffic Infraction.* Florida Statute § 316.074(1) provides:

The driver of any vehicle shall obey the instructions of any *official traffic control device* applicable thereto, placed in accordance with the provisions of this chapter, unless otherwise directed by a police officer, subject to the exceptions granted the driver of an authorized emergency vehicle in this chapter. (Emphasis Added)

Official traffic control devices are defined as “[a]ll signs, signals, markings, and devices, not inconsistent with this chapter, placed or erected by authority of a public body or official having jurisdiction for the purpose of regulating, warning, or guiding traffic.” § 316.003 (23) Fla. Stat. (2008). In the present case all parties agree that the stop bar was a traffic control device. A violation of Florida Statute § 316.074 constitutes a noncriminal traffic infraction, for which an individual may be stopped by law enforcement. See *State v. Osuji*, 804 So.2d 501, 502 (Fla. 2nd DCA 2001); *Willis v. State*, 762 So.2d 1005 (Fla. 5th DCA 2000).

5. *Attorney's Argument as Evidence.* An attorney's argument interspersed with unsworn representations of fact cannot support a factual finding by a trial court. *Neal v. State*, 697 So2d 903, 905 (Fla. 2nd DCA 1997).

The Present Case

It is undisputed in the present case that there was a stop bar at the involved intersection, that the stop bar was a traffic control device and that Mr. Grismer's stopped vehicle "straddled the stop bar" when Officer Bailey stopped his vehicle behind Mr. Grismer at the traffic signal which was red, requiring all traffic to stop. The issue to be decided at the suppression hearing was simply whether there was *probable cause* to justify the traffic stop. Namely did the facts and circumstances within Officer Bailey's knowledge warrant a person of reasonable caution to believe that Mr. Grismer had stopped his vehicle over the stop bar at the traffic signal and thereby failed to obey that official traffic control device, the stop bar? The acknowledged circumstances known by Officer Bailey at the time he initiated the stop were sufficient to constitute *probable cause* to believe that Mr. Grismer had committed the traffic infraction. The traffic stop was lawful.

The trial court's concern there was no clear indication that the defendant did not already stop at the stop bar and then proceed with caution and stop again is irrelevant. There has been no pertinent or persuasive legal authority cited, and this court is aware of none, to establish such actions are permitted the involved traffic statute. Moreover, as the trial court acknowledged, there was no evidence that Mr. Grismer had, in fact, previously stopped at the stop bar. Even if he had, the facts known by Officer Bailey at the time he initiated the stop provided *probable cause*. Again, the traffic stop was legal. Further the

trial court's finding that the stop was pretextual is also irrelevant pursuant to the above cited controlling case authority. The constitutional reasonableness of a traffic stop under the Fourth Amendment does not depend on the actual, subjective motivations of the individual officers involved in conducting the stop, but rather it depends on the validity of the basis asserted by the officers involved in the stop. The defense counsel's argument at hearing that very few such stops are made is fallacious and cannot support a factual finding by a trial court .

Conclusion

The order of the trial court granting Appellee's Motion to Suppress should be reversed.

IT IS THEREFORE ORDERED that the order of the trial court granting Appellee's Motion to Suppress is reversed.

ORDERED at Clearwater, Florida this 21 day of April, 2010.

Original order entered on April 21, 2010 by Circuit Judges Michael F. Andrews, Raymond O. Gross, and R. Timothy Peters.

cc: Honorable John Carassas
Office of the State Attorney
Rick A. Buchwalter, Esquire