

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS

STATE OF OKLAHOMA

DIVISION IV

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

APR 19 2005

MICHAEL S. RICHIE
CLERK

KATHERINE LEIGH MCLEAN,)

Plaintiff/Appellee,)

vs.)

STATE OF OKLAHOMA ex rel.)

DEPARTMENT OF PUBLIC SAFETY,)

Defendant/Appellant.)

Case No. 101,132

APPEAL FROM THE DISTRICT COURT OF
PAYNE COUNTY, OKLAHOMA

HONORABLE ROBERT M. MURPHY, JR., TRIAL JUDGE

AFFIRMED

Cheryl A. Ramsey
SZLICHTA AND RAMSEY
Stillwater, Oklahoma

For Plaintiff/Appellee

Douglas R. Young
STATE OF OKLAHOMA,
DEPARTMENT OF PUBLIC SAFETY
Oklahoma City, Oklahoma

For Defendant/Appellant

OPINION BY RONALD J. STUBBLEFIELD, JUDGE:

This is an appeal by the Department of Public Safety (DPS), from the Trial Court order setting aside DPS's revocation of the driver's license of Katherine Leigh McLean (Driver). After review of the record on appeal and applicable law, we affirm.

FACTS AND PROCEDURAL HISTORY

The undisputed facts are that Driver drove into a Whataburger parking lot in Stillwater around 3 a.m., Sunday, November 16, 2004. Several police officers were in the parking lot as part of an effort to monitor the large number of Oklahoma State University students gathering there in the late night and early morning hours.

Driver entered the restaurant's drive-thru lane, but encountered a long line of vehicles – at least 15 – ahead of her. She began backing up her vehicle towards another vehicle which had pulled into line behind her. The police officers yelled and waved their arms to warn Driver she was going to hit the car behind her, but they failed to get her attention. The other vehicle backed up, giving Driver room to continue backing. Driver backed up about eight to ten feet, pulled out of the lane, made a u-turn, and started to exit the parking lot.

Before Driver could leave, a supervising police sergeant turned on his emergency lights. Driver pulled into a parking space. After noticing an odor of alcohol from the vehicle and Driver's bloodshot eyes and slurred speech, officers performed a sobriety test and then arrested Driver for driving under the influence. At the city jail, Driver registered .15 on a breathalyzer test.

DPS revoked her driver's license. A DPS hearing officer sustained the revocation. Driver filed a petition for a trial *de novo* in district court.

At trial, all issues were stipulated except as to whether the initial stop was valid and whether the officers had probable cause. The only witnesses to testify were the officers. The sergeant characterized Driver's conduct as "improper backing or inattentive backing," but admitted that Driver was backing up slowly and that while she appeared to ignore the warnings of officers, she might not have seen or heard them. He also acknowledged that the backing up was not a breach of the law because Driver did not hit the car behind her. Another officer indicated that he did not believe Driver's actions constituted any traffic infraction.

Following the hearing, the Trial Court issued an unsigned order containing findings of facts and conclusions of law. The Trial Court phrased the issue as: "Did [the supervising sergeant] have a valid basis to stop and arrest the driver for backing up in a crowded drive thru lane in order to exit the parking lot?" The Trial

Court answered the question in the negative, and later issued a final order setting aside the revocation. DPS appeals.

STANDARD OF REVIEW

On appeal from the district court's decision in license revocation matters, this Court considers questions of law without deference to the lower court, but will not disturb factual findings if there is any evidence in the record to support them and they are free of legal error. *Polk v. State ex rel. Dept. of Pub. Safety*, 1996 OK CIV APP 100, ¶ 4, 927 P.2d 55, 56. A traffic stop is a "seizure" within the meaning of the Fourth Amendment; the ultimate determination of reasonableness under the Fourth Amendment is reviewed *de novo*. *U.S. v. Tibbets*, 396 F.3d 1132, 1136 (10th Cir. 2005).

ANALYSIS OF ISSUES

DPS asserts that the Trial Court erred in finding the traffic stop was not justified. In its decision, the Trial Court analyzed and distinguished a decision by another division of this Court, *Rittman v. State ex rel. Department of Public Safety*, 1994 OK CIV APP 19, 875 P.2d 439.

In *Rittman*, several citizens stopped a police officer in a parking lot and asked him to make contact with a driver they believed to be intoxicated. The officer observed the driver drive out of and then back into a parking space. The

officer approached the vehicle and ultimately arrested the driver for being intoxicated. The driver refused to take a breathalyzer test and his license was revoked under the implied consent law. The Trial Court sustained the revocation, and Division III of this Court affirmed. Division III applied the rule that police have a “right and duty to investigate all unusual and suspicious circumstances,” *Id.*, at ¶ 5, 875 P.2d at 440, to the facts of the case, which included the witnesses’ information and the officer’s own observations. Division III held that those facts constituted “specific articulable facts sufficient to authorize the initial investigatory stop.” *Id.* at ¶ 7, 875 P.2d at 441.

Rittman refers to *Atterbery v. State*, 1986 OK CR 147, 726 P.2d 898, where there was evidence of suspicious behavior by the driver, who a witness said had been following and staring at her, and *White v. Oklahoma Department of Public Safety*, 1980 OK 21, 606 P.2d 1131, where the driver weaved across lanes of the road and drove extremely slowly. In *Atterbery*, the Court of Criminal Appeals found that the police properly stopped the driver to investigate his unusual and suspicious behavior. *Atterbery* at ¶ 3, 726 P.2d at 889. In *White*, the Supreme Court held the police had the right to stop the driver because of the erratic way he was driving. *White* at ¶ 8, 606 P.2d at 1132.

DPS argues that the stop in the instance case was justified because of what it terms Driver's "menacing and erratic" driving behavior – inattentive backing up, failure to stop at the officers' request, and an "unusual" u-turn in the parking lot. However, the evidence simply does not support these characterizations. DPS does not specify any true violation of law, and the testifying officers admitted that they saw no traffic violation. DPS claims Driver was "inattentively" backing, but it notes that she was driving slowly, and that the driver behind her backed up to give her room. The fact that Driver did not respond to the officers' entreaties is not unusual since each officer indicated that Driver may not have seen nor heard them. Nothing about the u-turn was stated to be dangerous or a breach of the law.

There was no testimony that supports the contention that Driver was driving erratically. *Webster's* defines "erratic" as unpredictable or deviating from the norm. *Webster's Third New International Dictionary* 772 (1986). Driver's efforts to back up and pull out of the long, congested line at the drive-thru cannot be termed erratic.

We agree with the Trial Court that the instant case is distinguishable from *Rittman*, where witnesses told the officer they believed the driver was intoxicated. No such evidence exists in the instant case. Without other evidence, we conclude, as did the Trial Court, that the stop was not warranted.

Finally, DPS asserts that the Trial Court erred by giving weight to a statement that a criminal case against Driver had been dropped by prosecutors because of the lack of probable cause. Although the Trial Court did hear the statement, it is conjecture about what weight it played in the Court's decision. Given our foregoing analysis, we conclude it is, at most, harmless error.

CONCLUSION

There is evidence in the record from which the Trial Court could, and apparently did, conclude that the actions of Driver were not of a type to justify a stop of her vehicle. From review of the evidence this Court reaches the same conclusion. Accordingly, the judgment of the Trial Court is AFFIRMED.

RAPP, V.C.J., and GOODMAN, P.J., concur.

April 19, 2005