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No. 16-115956-A

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

REBECCA A. BLACKBURN
Defendant-Appellant

BRIEF OF APPELLEE

Appeal from the District Court of Clay County, Kansas
The Honorable John F. Bosch, District Judge
District Court Case No. 15 CR 56

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Oral Argument Requested:
15 minutes

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No. 16-115110-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

REBECCA A. BLACKBURN
Appellant-Appellant

BRIEF OF APPELLEE

NATURE OF CASE

The Defendant, Rebecca A. Blackburn, was charged in Clay County District Court with one count of felony possession of methamphetamine and one count of operating a vehicle with a broken taillight. Prior to trial, the Defendant filed a Motion to Suppress that was denied by the district court. The case was tried to the bench on stipulated facts on December 18, 2015, and the Defendant was found guilty of both counts. She was sentenced to the standard sentence of 15 months with the Department of Corrections on the possession of methamphetamine count, and fined on the traffic infraction. Her sentence with the Department of Corrections was deferred and she was placed on 12 months of supervised probation. The Defendant then filed the instant appeal.

STATEMENT OF THE ISSUES

Issue. The trial court properly denied the Defendant's Motion to Suppress Evidence.

A. The Deputy had sufficient reasonable suspicion for the traffic stop.
B. The Deputy was authorized to search the Defendant incident to arrest.

STATEMENT OF THE FACTS

On March 20, 2015, Deputy Jeff Browne of the Clay County Sheriff Department was on routine patrol in Clay Center when he observed a vehicle with the driver's side taillight emitting a white light to the rear. (Vol. VI, p. 4, 5) The deputy noted the light was quite bright and that he did not recognize the vehicle. (Vol. VI, p. 5) Deputy Browne conducted a traffic stop, and as he approached the vehicle, he noticed the two people seated to the right of the driver in the single seat pickup moving around. (Vol. VI, p. 5, 6) Deputy Browne had Deputy Tessaro riding with him, and Browne approached the left side of the pickup with Tessaro approaching the right side. (Vol. VI, p. 6)

Deputy Browne then made contact with the Defendant, who was driving the vehicle, and told her the reason for the stop. (Vol. VI, p. 6) The Defendant told him she had rolled the vehicle which had caused damage to the side, the windshield, and the taillight. (Vol. VI, p. 7) Deputy Browne recognized the two passengers as Dawn Nelson and Aaron Bowser, both of whom, as well as Ms. Blackburn, were known to the officer to have a drug history. (Vol. VI, p. 8, 33) The officer also examined the taillight and found pieces of the red lens to be missing, although the lens itself was still in place. (Vol. VI, p. 8) Deputy Browne went back to his vehicle to run Ms. Blackburn's driver's

license and registration and while there, requested the department's K-9 unit come to his location. (Vol. VI, p. 8, 9)

Deputy Tessaro advised Ms. Blackburn's two passengers were not wearing their seatbelts, so Browne began writing tickets as well. (Vol. VI, p. 9) In addition, the officers discovered that one of Ms. Blackburn's passengers, Dawn Nelson, had an active warrant for her arrest. (Vol. VI, p. 9) Undersheriff Jim Bogart, the department K-9 officer, arrived and ran the dog; the dog alerted on the vehicle. (Vol. VI, p. 10)

After the alert, the officers asked the occupants to exit the vehicle, and upon her exit, Deputy Browne patted down the Defendant for any weapons. (Vol. VI, p. 10, 11) Nothing was discovered in the pat down of the Defendant or her remaining companion, Mr. Bowser, and the officers began a search of the vehicle. (Vol. VI, p. 11, 12) In the passenger side floorboard, the deputy found a cut down straw with white residue and in the glove box, a small black, plastic mirror type object. (Vol. VI, p. 12) The deputy believed both the cut down straw and the mirror like object to be drug paraphernalia, and when he tested the straw, it tested positive for the presence of amphetamine. (Vol. VI, p. 14, 16)

Upon receiving the positive test for amphetamine, the deputy performed a more thorough search of the Defendant, this time he found a baggie in her shoe that contained half a gram of a white, crystalline substance that later tested positive for methamphetamine. (Vol. VI, p.16, 17) Immediately after finding the methamphetamine, Deputy Browne arrested the Defendant. (Vol. VI, p. 17)

After arraignment and prior to trial, the Defendant filed a Motion to Suppress arguing that since the taillight was emitting both a white light and the statutorily required

red light, the officer lacked reasonable suspicion to stop the vehicle. (Vol. I, p. 21) The Defendant further argued that even if there was reasonable suspicion for the stop, after the straw tested negative for methamphetamine, the officer lacked probable cause to conduct the second search that resulted in the discovery of the methamphetamine in her shoe. (Vol. I, p. 27, 29) At the hearing on the Motion to Suppress, the deputy testified that based on his training and experience, when white light is emitted to the rear, the further to the rear you are, the more dominant the white light becomes. (Vol. VI, p. 29) He also testified that when he first saw the vehicle he was about half a block behind the vehicle, and that because the statute requires the red light to be visible for 1000 feet, it would have required him to be over three blocks behind the vehicle to judge the visibility. (Vol. VI, p. 28-29) Deputy Browne was not allowed to speculate whether or not the white light would have obscured the red light at that distance but did note that at half a block, he was already getting quite a bit of white light. (Vol. VI, p. 29)

The deputy further testified at the hearing on the Motion that the presence of items he believed to be drug paraphernalia in the Defendant's vehicle gave him probable cause to arrest the defendant. (Vol. VI, p. 32-34) The deputy further noted that in addition to the paraphernalia, he also took into consideration that the straw tested positive for amphetamine, the dog alerted on the car, all three people in the car had drug history, and that the people in the car were moving around prior to him making contact. (Vol. VI, p. 32-34) Based on this testimony, the district court denied the Defendant's Motion to Suppress. (Vol. VI, p. 59)

Eventually the Defendant waived her right to a jury trial, and the case proceeded to a bench trial on stipulated facts. (Vol. I, p. 127-28; Vol VII, p. 2-4) The trial court

found the Defendant guilty of both counts, and eventually the Defendant was sentenced to 15 months with the Department of Corrections. (Vol. VII, p. 5-6; Vol. VIII, p. 4-5) The Defendant was placed on probation in lieu of prison for a period of 12 months and fined $50.00 for the taillight infraction. (Vol. VIII, p. 4-5) The Defendant had preserved the issue of the denial of her Motion to Suppress and timely filed the instant appeal, seeking review of the denial of the Motion, the conviction, and sentencing. (Vol. I, p. 139)

ARGUMENTS AND AUTHORITIES

Issue. The trial court properly denied the Defendant's Motion to Suppress Evidence.

A. The Deputy had sufficient reasonable suspicion for the traffic stop.

Standard of Review

The standard of review for an appellate court reviewing a motion to suppress evidence is that the appellate court determines whether the factual underpinnings of the district court's decision are supported by substantial competent evidence. The appellate court does not reweigh the evidence. The ultimate legal conclusion drawn from those facts is a legal question requiring *de novo* review. *State v. Vandervort*, 276 Kan. 164, 169, 72 P.3d 925 (2003).

Argument and Authorities

In the instant case, the contested issues begin with Deputy Browne's stop of the Defendant's vehicle. Deputy Browne observed a taillight emitting white light to the rear of the vehicle. The standard for an officer making a stop is that he must have a

reasonable and articulable suspicion that the seized person is committing, has committed, or is about to commit a crime. *State v. Griffin*, 31 Kan.App.2d 149, Syl. ¶ 2, 61 P.3d 112, (2003). The *Griffin* Court went on to hold that the standard of reasonableness is "based on the totality of circumstances and is viewed in terms as understood by those versed in the field of law enforcement." 31 Kan. App.2d 149 at Syl. ¶ 3. The Court also said "We make our determination with deference to a trained law enforcement officer's ability to distinguish between innocent and suspicious circumstances, remembering that reasonable suspicion represents a minimum level of objective justification which is considerably less than proof of wrongdoing by a preponderance of the evidence." *Id.* at Syl. ¶ 4.

Here, Deputy Browne did not recognize the vehicle and stopped it solely because he observed the white light emitting from the taillight, which he believed to be a traffic infraction. (Vol. VI, p. 5) The Defendant readily admitted the problem with the taillight, telling the officer she had recently rolled the vehicle. (Vol. VI, p. 7)

K.S.A. 8-1706, in its entirety, reads as follows:

> (a) Every motor vehicle, trailer, semitrailer and pole trailer, and any other vehicle which is being drawn at the end of a combination of vehicles, shall be equipped with at least two (2) tail lamps mounted on the rear, which, when lighted as required in K.S.A. 8-1703, shall emit a red light plainly visible from a distance of one thousand (1,000) feet to the rear, except that passenger cars manufactured or assembled prior to July 1, 1959, shall have at least one (1) tail lamp. On a combination of vehicles, only the tail lamps on the rearmost vehicle need actually be seen from the distance specified. On vehicles equipped with more than one (1) tail lamp, the lamps shall be mounted on the same level and as widely spaced laterally as practicable.
>
> (b) Every tail lamp upon every vehicle shall be located at a height of not more than seventy-two (72) inches nor less than fifteen (15) inches.

> (c) Either a tail lamp or a separate lamp shall be so constructed and placed as to illuminate with a white light the rear registration plate and render it clearly legible from a distance of fifty (50) feet to the rear. Any tail lamp or tail lamps, together with any separate lamp or lamps for illuminating the rear registration plate, shall be so wired as to be lighted whenever the head lamps or auxiliary driving lamps are lighted.

Clearly, the statute does not prohibit a taillight from emitting a white light to the rear, or for that matter, a green light, blue light, or any other light one might find in the color spectrum so long as a red light can also be seen. As noted by the Defendant, the officer testified that at a distance of about half a block, he could see the red light being emitted as well as the white light. (Vol. VI, p. 19) However, he also testified that even at that close distance "I pretty much saw the white light before I saw any other form of taillight." (Vol. VI, p. 4) Although he was not allowed to speculate on whether or not the white light would have completely obscured the red light at 1000 feet, the officer did testify that based on his training and experience, the further away you are, the more dominant the white light becomes because it is brighter. (Vol. VI, p. 29) As noted above, the officer testified at half a block, the white light was already making the red light hard to see and that the average city block in Clay Center is about 300 feet long. (Vol. VI, p. 29) The statute requires the red light from a taillight to be visible for 1000 feet to the rear of the vehicle, which in Clay Center would mean visible for over three city blocks to the rear of the vehicle. This certainly, when "viewed in terms as understood by those versed in the field of law enforcement," would give the officer reasonable suspicion to believe that tail light would not be visible 1000 feet to the rear of the vehicle as required by the statute.

In addition, the fact the statute does not prohibit lights of other colors to be displayed to the rear does not mean it is permissible or safe. K.S.A. 8-1716 requires a white light to be emitted from the front of a vehicle but does not prohibit other colors, just as K.S.A. 8-1706 does not prohibit colors other than red emitting from the rear. However, it is absurd to think that the legislature intended that motorists could emit any color they chose from the rear of their vehicle so long as there were two red taillights and any color they chose from the front of their vehicle so long as there were two white headlights. The Defendant argues this Court must use plain language in construing a statute, a long held standard with which the State has no argument. However, it is well settled law in Kansas that a statute should not be construed to yield unreasonable or absurd results. See *State v. Le*, 260 Kan. 845, 850, 926 P.2d 638 (1996); *Todd v. Kelly*, 251 Kan. 512, 520, 837 P.2d 381 (1992); *State ex rel Beck v. Gleason*, 148 Kan. 1, 79 P.2d 911 (1938). To say that K.S.A. 8-1706 does not forbid other colors of light to be emitted to the rear would be to construe the statute to yield an unreasonable or an absurd result.

During the hearing on the Defendant's Motion to Suppress, the State pointed out a number of appellate cases in which a defective taillight was held to be reasonable suspicion for a traffic stop in Kansas. (Vol. I, p. 93) Unfortunately, in many of these cases, the exact problem with the taillight was not briefed, so the reader is left wondering if the taillight was completely dark, working intermittently, or perhaps the lens was broken as in the instant case. (Vol. I, p. 93-94) The common theme in all of these case is that a defective taillight constituted reasonable suspicion for the stop. To the best of the State's knowledge, there is no existing appellate case in which a defendant was

stopped because of a broken taillight lens that allowed white light to emit to the rear of the vehicle. However, once Deputy Browne saw the white light emitting to the rear of the Defendant's vehicle, there was only one way in which he could determine if her vehicle was in compliance with the statute and that was to stop the vehicle and examine the taillight. (Vol. VI, p. 30)

Further, K.S.A. 8-1702 reads in its entirety:

> (a) The secretary of transportation is hereby required to approve or disapprove any lighting device or other safety equipment, components or assemblies of a type for which approval is specifically required in this act within a reasonable time after such approval has been requested. Such approvals may be based upon certificates of approval and test reports furnished to the secretary by the American association of motor vehicle administrators.
>
> (b) The secretary of transportation is further authorized to establish the procedure to be followed when request for approval of any lighting device or other safety equipment, component or assembly is submitted under this section.
>
> (c) The secretary of transportation shall maintain and publish lists of all such devices, components or assemblies which have been approved by the secretary or under authority contained in this act.

It would be hard to imagine that the secretary of transportation would approve a taillight, attached to the rear of a vehicle, that emitted two different colors of light; the exact fact pattern of this case. The Defendant was clearly guilty of driving a vehicle that had an unapproved light configuration attached to the rear of the vehicle.

Finally, the Defendant argues that Deputy Browne "misinterpreted" K.S.A. 8-1706, and therefore he cannot base reasonable suspicion on such a misinterpretation. To buttress this argument, the Defendant cites *State v. Knight*, 33 Kan.App.2d 325, 104 P.3d 403 (2004), for the proposition that if an officer misinterprets a statute, even in good faith, that cannot constitute reasonable suspicion for the stop. However, this is no longer good law. In *Heien v. North Carolina*, 135 S.Ct. 530, 534, 190 L.Ed.2d 475, 82 USLW 4021 (2014), a driver in North Carolina was stopped when an officer observed only one of the driver's two taillights illuminated when he applied the brakes. Heien was eventually charged with possession of cocaine, and filed a motion seeking to suppress the stop based on the fact North Carolina law only required a vehicle to have one working taillight. 135 S.Ct. at 535. The trial court denied the motion and Heien was convicted, but the North Carolina Court of Appeals reversed and, like the Defendant argues here, held that the stop was objectively unreasonable under the Fourth Amendment because the law only required one brake light. *Id.*

The North Carolina Supreme Court reversed the Court of Appeals, holding that although the officer made a mistake of law because of a misunderstanding of the statute, the stop was still valid because it was objectively reasonable. *Id.* The North Carolina Supreme Court went on to hold that when an officer makes an objectively reasonable mistake as to the law, it does not violate the Fourth Amendment. *Id.* The United States Supreme Court agreed, holding "But just because mistakes of law cannot justify either the imposition or the avoidance of criminal liability, it does not follow that they cannot justify an investigatory stop." *Id.* at 540. The *Heien* Court then went on to note that the North Carolina stop lamp statute had never been construed by North Carolina appellate

courts so the officer's mistake was reasonable under the circumstances and held that so long as the officer's mistake was reasonable, it could be used as reasonable suspicion for an investigatory stop. *Id.*

Here the stop is on all fours with *Heien*. Although the State does not concede that the statute allows a broken taillight to emit a white light to the rear, no Kansas appellate court has construed the statute either way. It was objectively reasonable under these set of facts for Deputy Browne to believe that the statute did not allow a broken taillight to emit white light to the rear or that the red light would not have been visible at 1000 feet. Since Deputy Browne's mistake, if there was one, was objectively reasonable under the circumstances, the stop did not violate the Defendant's Fourth Amendment rights.

Even if this Court should distinguish this stop from the stop in *Heinen*, the case cited by the Defendant, *State v. Knight*, differs significantly from the case at bar. In *Knight*, the officer believed he could stop a car because it failed to use a signal to turn from a private parking lot onto a public street. 33 Kan.App. 2d at 327. There was nothing to investigate in *Knight*; the officer believed that the driver violated a traffic statute and stopped the car.

In the instant case, no matter what the other facts are, there is a consensus that the Defendant's taillight was emitting a white light to the rear. If the deputy knew nothing else, he knew there was something wrong with that taillight, and he could not determine the extent of the problem until he stopped the vehicle and investigated further. He had *reasonable suspicion* to believe the statute was being violated; he could not be certain until looking at the taillight more closely. Fortunately, he did not need proof beyond a reasonable doubt or even probable cause, he simply needed reasonable suspicion that the

Defendant was committing a traffic infraction. A taillight emitting two different colors constitutes that reasonable suspicion.

B. The Deputy was authorized to search the Defendant incident to arrest.

Next the Defendant argues that there was not sufficient probable cause to search and arrest the Defendant when the officer located methamphetamine on her person. Upon asking the Defendant to exit the vehicle, Deputy Browne performed a Terry-type frisk on the outside of her clothing. (Vol. VI, p. 11, 23) Then, after discovering drug residue and paraphernalia in the car, the officer performed a second search of the Defendant, this time locating a baggie containing methamphetamine in her shoe or sock. (Vol. VI, p. 30) Immediately upon conclusion of the second search, the Defendant was placed under arrest. (Vol. VI, p. 17)

The Defendant acknowledges that an officer can perform a warrantless search of a defendant's person as a search incident to arrest so long as there was probable cause for an arrest before the search and the arrest occurs shortly after the search. There is no question here the arrest occurred immediately after the search. The Defendant, however, argues there was not sufficient probable cause for the arrest at the time of the search for a variety of reasons. First, the Defendant attacks the fact the drug dog alerted on the passenger's side of the vehicle and not the side where the Defendant was. She cites *State v. Anderson*, 281 Kan. 896, 136 P.3d 406 (2006), to argue that if the dog alerts, but no incriminating evidence is found inside, then there is no probable cause to search the vehicle. However, as the Defendant admits, *Anderson* is not on point; there were items of drug paraphernalia in the car to include an item that contained amphetamine and later

tested positive by the KBI for methamphetamine. The dog's alert, coupled with the finding of drug paraphernalia and a narcotic, was an important pillar of the probable cause for the arrest in this case.

Second, the Defendant argues the fact the people inside the vehicle were seen moving around can be probative but unless the movements can be coupled with some sort of illegal act, the value is limited. The State agrees with that argument, however, it is does support a finding of probable cause for an arrest, when coupled with other facts, when evaluating the totality of circumstances.

Next, the Defendant points out the officer, although he testified that he was aware that each of the passengers had a drug history, testified he did not work any of their cases personally. The Defendant argues that the fact other officers had relayed this information to him made it presumptively unreliable. She cites *State v. Ibarra*, 282 Kan. 530, 147, P.3d 842 (2006), and *State v. Brewer*, 49 Kan.App.2d 102, 305 P.3d 676 (2013), for the proposition that this type of information needs to be verified. However, in *Ibarra*, the issue was information from a variety of informants, some unnamed, coming to the officer through yet another officer. 282 Kan. at 546-47. In *Brewer*, the officer could not name his source and could not speak as to whether the information was reliable. 49 Kan.App.2d at 112.

Both of these cases are easily distinguishable from the instant case in which the officer testified that he knew all three of the occupants of the vehicle had "been at least charged with drug crimes." (Vol. VI, p. 33) This is much different than information coming from an informant, through another officer, and then eventually to the officer making the stop. It is also different in that in *Brewer* and *Ibarra*, the information was

that the people in the vehicle were "involved in drugs," much different than an officer who knows the people have been "at least charged with drug crimes." Still, the State would not argue this alone would have constituted probable cause, but that it cannot be disregarded in a totality of circumstances argument.

Last, the Defendant attacks the finding of drug paraphernalia and correctly identifies that it is the "main evidence" the officer relied upon in making his probable cause determination. The Defendant argues that amphetamines can be prescribed and there are valid reasons why a person might have a cut down straw in their vehicle. The deputy testified that he had been a law enforcement officer for more than eight years and in that time, he participated in "hundreds" of drug investigations. (Vol. VI, p. 13) He further testified that, in that time, he has never encountered a cut down straw that was not associated with narcotics or other paraphernalia. (Vol. VI, p. 14) He also told the court that he has never seen prescribed amphetamines in a cut down "snort" straw. (Vol. VI, p. 14, 32)

The Defendant argues the object found in the glove compartment that the officer described as a "mirror-type" object is also something that could be a common object. The Defendant seems to miss in her argument that this was not a mirror, it was a piece of black plastic that was mirror-like. (Vol. VI, p. 12) This object contained a white residue similar to the amphetamine residue in the straw, but this residue was not tested at the scene. (Vol. VI, p. 14, 15) This piece of plastic would not be an item as commonly found as a mirror. Once again, based on his training and experience, the officer believed both items to be drug paraphernalia. The Defendant argues that because these items

could have a common use, they did not provide probable cause for the arrest. She cites *State v. Knight*, 33 Kan.App.2d 325, 104 P.3d 403 (2004), as support for this proposition.

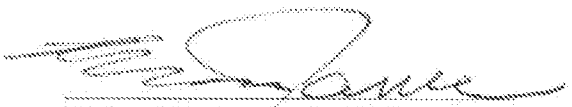
In *Knight*, the items were indeed things that could be commonly found – salt, bottled water, and two boxes of cold pills. 33 Kan.App.2d at 327-28. The items found here were much different, and there was no residue of a Schedule 1 controlled substance on any of the items in *Knight*. Again, the standard here is probable cause, not beyond a reasonable doubt. When totaling up what the officer knew, the totality of the evidence provided sufficient probable cause for the arrest and search. Deputy Browne stopped a vehicle in which the three occupants were moving around in a suspicious manner upon his approach, after making contact, he recognized all three as individuals that had "at least been charged with drug crimes," a drug dog alerted on the vehicle, during the subsequent search he located two items of drug paraphernalia, one of which contained a residue that tested positive for a Schedule 1 controlled narcotic. As a result, the driver and owner of the vehicle was searched and arrested. The officer had sufficient probable cause for the search incident to arrest.

CONCLUSION

The district court properly denied the Defendant's Motion to Suppress. The taillight was clearly broken and the fact it was emitting white light to the rear was sufficient reasonable suspicion that a traffic infraction was being committed to justify the stop of the car. Once the car was stopped, the drug dog's subsequent alert on the car gave probable cause for the search of the car. In the car, items of drug paraphernalia were found, one of which contained a residue of a controlled narcotic. These things alone would have provided sufficient probable cause for an arrest of the Defendant before the

search incident to arrest of the Defendant's person and her subsequent arrest. The district court did not err in denying the Defendant's Motion to Suppress; the Defendant's appeal should be denied and the convictions upheld.

Respectfully submitted,



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Certificate of Service

The undersigned hereby certifies that service of the above and forgoing brief was made by electronic service, to Heather Cessna, Attorney for Appellant, 700 Jackson, Suite 900, Topeka, Kansas, 66603 and one copy to Derek Schmidt, Attorney General, Kansas Judicial Center, Topeka, Kansas, 66612, on the 3rd day of January, 2017.

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