IN THE COURT OF APPEALS 10/17/95

OF THE

STATE OF MISSISSIPPI

NO. 92-KA-00119 COA

PATRICK ANTHONY REYNOLDS AND RONALD KEVIN LUCAS

APPELLANTS

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. KOSTA VLAHOS

COURT FROM WHICH APPEALED: CIRCUIT COURT OF HARRISON COUNTY

ATTORNEY FOR APPELLANT: F. HOLT MONTGOMERY, JR.; HERMAN COX

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: JOLENE M. LOWRY; DEIRDRE McCRORY

DISTRICT ATTORNEY: CONO A. CARANNA, II

NATURE OF THE CASE: CRIMINAL - ILLEGAL DRUGS

TRIAL COURT DISPOSITION: LUCAS WAS SENTENCED TO 15 YEARS IN THE MDOC, WITH 5 YEARS SUSPENDED AND FINED $15,000. REYNOLDS WAS SENTENCED TO 20 YEARS IN THE MDOC, WITH 5 YEARS SUSPENDED, AND FINED $25,000.

BEFORE BRIDGES, P.J., BARBER, AND PAYNE, JJ.

BRIDGES, P.J., FOR THE COURT:

Patrick Anthony Reynolds and Ronald Kevin Lucas were convicted on various narcotics charges arising out of a traffic stop on Interstate 10 in Harrison County. Each defendant raises different issues on appeal, but both allege that the convictions should be reversed because there was lack of probable cause to make the traffic stop which resulted in their arrest on the drug charges. After reviewing the record, we are of the opinion that the only issue which needs to be addressed is that pertaining to probable cause in stopping the defendants in order to make the arrest in connection with the drug charges. Finding that the lower court failed to find that reasonable suspicion existed as to why the officer stopped the appellants, we reverse and remand for a hearing on that issue.

FACTS

On April 1, 1990, Reynolds and Lucas were traveling eastward from Houston, Texas to Jacksonville, Florida on Interstate 10 in a 1986 model Ford pickup truck displaying a Texas tag. At approximately 8:00 a.m., they were stopped and pulled over by Officer Billy Collins of the Harrison County Sheriff's Department. Officer Collins was stopped and parked in the median of the highway, looking south, between the eastbound and westbound lanes, when the defendants passed him. Officer Collins noticed that the truck had a cracked windshield and proceeded to pull the truck over in order to issue a traffic citation. Lucas was driving the vehicle.

While Officer Collins was walking from his patrol car to the pickup truck, he smelled "burnt" marijuana. When he approached the window of the truck he saw in open view on the cab floor some cigarettes which had been smoked or partially smoked, and which turned out to be marijuana. Officer Collins found other drugs in a subsequent search of the vehicle.

The defendants requested a suppression hearing to challenge the introduction of any evidence on the grounds that the stop was improper and therefore, all evidence seized was done so unlawfully. At that hearing, Officer Collins testified that the windshield was cracked in such a manner that it was easily visible from his patrol car and a danger to the occupants of the vehicle. The crack began on the passenger's side and continued across the middle of the truck's windshield. He did not advise Lucas that he was issuing him a ticket for the cracked windshield, nor has any citation been found to date. Defendants' motion to suppress was denied by the trial court.

Trial of the defendants began July 23, 1991. No evidence or testimony was introduced to show that the crack in the windshield extended to the driver's side or into the windshield wiper arch on the driver's side. There is no evidence in the record that the condition of the windshield hindered the driver's vision because it was so shattered, clouded or pitted, or that the crack had any rough or sharp edges exposed. However, both Reynolds and Lucas were found guilty on drug charges.

DISCUSSION OF THE LAW

1. DID THE TRIAL COURT ERR IN FAILING TO GRANT THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE BASED ON A LACK OF PROBABLE CAUSE TO MEET THE TRAFFIC STOP WHICH RESULTED IN THE APPELLANTS ARREST?

Both Reynolds and Lucas argue that Officer Collins did not have probable cause to stop them. They argue that at the suppression hearing, no proof was put on as to how such a "tiny crack" could have been a danger or impaired the driver's vision.

Mississippi law provides:

> No person shall drive or move on any highway any motor vehicle, . . . unless the equipment upon any and every said vehicle is in good working order and adjustment as required in this chapter, and said vehicle is in such safe mechanical condition as not to endanger the driver or other occupant or any person upon the highway.

Miss. Code Ann. § 63-13-3 (1972). Additionally, section 63-13-21 of the Mississippi Code of 1972 provides rules to be followed by a patrolman in stopping a motor vehicle on the roads and highways. Specifically, that section states:

> (1) Members of the Mississippi Safety Patrol may at any time, *upon reasonable cause* to believe that a vehicle is unsafe or not equipped as required by law, or that its equipment is not in proper adjustment or repair, require the driver of such vehicle to stop and submit such vehicle to an inspection and such test with reference thereto as may be reasonably appropriate. . . .
>
> Such authority, however, shall be limited to the inspection of said vehicle for mechanical defects and shall not authorize the search of the vehicle or the occupants thereof for any other purpose without due process of law.
>
> (2) In the event such vehicle is found to be in unsafe condition, or any required part or equipment is not present or is not in proper repair and adjustment, the officer shall give a written notice to the driver and shall send a copy to the department.

Id. § 63-13-21 (emphasis added).

The Mississippi Highway Patrol inspection regulation sets out safety standards for windshields. The current regulation dated November 1994, page 23, provides as follows:

> Windshields shall have no cracks or breaks which shall interfere with the driver's vision; if cracked or broken in line with driver's vision, it must be replaced. Normally, this would mean a crack or break in the windshield wiper arch on the driver's side. No non-transparent material upon windshield. If the windshield or other glass is so shattered, clouded or pitted as to interfere with vision, replacement is required. If cracks have rough edges or glass is broken so that any rough or sharp edges are exposed in windshield, side or back glass, replacement is necessary.

Mississippi Highway Safety Patrol Inspection Regulations, 23 (1994).

The above rules and regulations of the Motor Vehicle Inspection Department are printed in the police handout which all patrolman are required to study. Thus, the issue in this case is not whether upon investigation the pickup truck actually had a cracked windshield. Rather, we must ascertain whether the officer reasonably believed that the windshield was cracked in a manner which would have impaired the driver's vision.

The United States Supreme Court has stated:

> [E]xcept in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.

Delaware v. Prouse, 440 U.S. 648, 663 (1979). In other words, *unless* there is an articulable and reasonable suspicion, a stop *is not* justified. Other courts have specifically found that when such suspicions exist, the stop *is* justified.

Further, the Mississippi Supreme Court has stated that it "is elementary that probable cause is not a prerequisite to a brief investigatory stop, where the officer has reasonable suspicion based on articulable facts that criminal activity is afoot." *Neely v. State*, 628 So. 2d 1376, 1379 (Miss. 1993). Nowhere in the standard is there a requirement that reasonable suspicion justifies a stop *unless the suspicions are later proved incorrect.*

To determine if a suspicion is reasonable, the totality of the circumstances must be taken into account. *United States v. Cortez*, 449 U.S. 411, 418 (1981). It must also be considered that from circumstances, "a trained officer draws inferences and makes deductions -- inferences and deductions that might well elude an untrained person. . . . The process does not deal with hard certainties, but with probabilities." *Id.* The "whole picture" must "raise a suspicion that the particular individual being stopped is engaged in wrongdoing." *Id.* (citations omitted). The wrongdoing that justifies a stop can be egregious and dangerous, or it can be a relatively minor traffic or related offense. Indeed, the United States Supreme Court has recognized that a cracked windshield that constitutes a traffic violation does justify a stop of an automobile. *New York v. Class*, 475 U.S. 106, 111 (1986).

A significant law enforcement function is to investigate to determine if that which originally raised suspicion signals the occurrence of a crime. One court held that stopping a truck for a traffic violation constitutes a "permissible intrusion based on a reasonable suspicion . . . *whether or not a traffic court does or would find the person guilty of the alleged infraction*." *United States v. Lewis*, 910 F.2d 1367, 1370 (7th Cir. 1990) (a reasonable suspicion existed that defendant ran a stop sign, thus justifying a *Terry* stop). "Because many situations which confront officers in the course of executing their duties are ambiguous, room must be allowed for some mistakes on their part. But the

mistakes must be those of "reasonable men, acting on facts leading sensibly to their conclusions of probability." *United States v. Gonzalez,* 969 F.2d 999, 1005 (11th Cir. 1992) (error of fact which formed basis of reasonable suspicion did not make stop illegal) (citations omitted). Accordingly, even if mistaken in the severity of the damage to the windshield, the patrolman here may have had sufficient facts to raise reasonable suspicion to make the stop.

Here, Officer Collins stated that he could see a cracked windshield as the appellants' truck passed him on Interstate 10. He testified that the only way he could have seen a crack in the windshield would have been if it was "busted real bad," i.e., only if the crack were large. Arguably fulfilling his duty to ensure that the truck did not pose a threat to the safety of its occupants or others, the officer pulled it over.

Since the crack in this case did not extend past the passenger side of the windshield, there was no requirement that the windshield be replaced and therefore no reason to stop the truck. However, this standard assumes infallibility on the part of the police in observing the extent to which a windshield is cracked on a car passing at over sixty-five miles per hour in the early morning sun. That the driver was heading easterly into the sun might mean the crack was more observable to the officer; it might also mean a good view of the crack was obscured by glare. We should not be deciding fact questions on appeal. Our analysis should start with whether a policeman upon seeing a car with a cracked windshield can stop it only if he knows for certain the full extent of the defect. Since that is not the law, and reasonable suspicion is a sufficient basis for a stop, we should then determine whether the trial court's ruling regarding suspicion can be sustained.

At the suppression hearing, the arresting officer testified as to what he saw. He was cross-examined extensively on the issue of pretext -- was the real reason for the stop the Texas license plates and the race of the driver? The defense attorney attempted to elicit from the officer that he had a practice of stopping vehicles because of unparticularized suspicions that Hispanic or black drivers in vehicles with Texas license plates were transporting illegal drugs. The officer denied the allegations. The officer stated he issued a citation for the cracked windshield, but he never appeared in court regarding it and did not know its disposition. He also testified he had issued ten or twelve other citations for cracked windshields.

Regardless of the varying inferences that could be made from the events leading up to the search, initially these are fact questions for the trial court to resolve. The court made no findings of fact, nor even explained on the record the basis for his ruling, but merely denied the suppression motion. He necessarily found the stop to be constitutional. When "findings of fact are fairly implicit in a trial court's ruling, we will credit those and grant them deference." *Riddle v. State,* 580 So. 2d 1195, 1200 (Miss. 1991). The contrary is also true -- if the findings are "not fairly inferable from the trial court's action," we will not assume findings that would uphold the ruling. *Riddle,* 580 So. 2d at 1200. As the court stated, we "do not make up findings just to save a conviction." *Id.*

Inferences can be drawn from comments made by the trial court during the hearing. *Stokes v. State,* 548 So. 2d 118, 121 (Miss. 1989). The trial court engaged in fairly extensive questioning of two witnesses. At one point he stated that "the issue before the Court is whether or not in this particular case this officer had probable cause for the arrest and the subsequent search." He ruled that evidence regarding a practice of stopping certain kinds of vehicles was inadmissible -- suppression would be

granted or denied based only on evidence regarding this single event.

What is reasonably inferable from the court's ruling is that he found the stop justified because of the cracked windshield, and that the officer observed the potential violation and it was not a pretext. What is not clear is whether the court found the crack was such as to constitute an offense, or whether he determined that even if it were not, there was a reasonable suspicion of a safety violation that made the stop proper. The initial decision regarding the existence of a reasonable suspicion that there was a safety violation is the trial judge's.

Since the trial court made no findings, and since the standard just enunciated above was not ever mentioned by the trial court, we remand for the trial court to make findings and conclusions on this point. Because of the passage of time (the suppression hearing was held in June 1991), it may well be necessary to conduct a new hearing and again present evidence. Depending upon the result of the remand, a reversal or an affirmance would then need to be determined.

THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY OF CONVICTION OF POSSESSION OF MARIJUANA IS HEREBY REMANDED TO DETERMINE WHETHER OFFICER COLLINS POSSESSED A REASONABLE SUSPICION THAT THE WINDSHIELD OF THE APPELLANTS' TRUCK IMPAIRED THE DRIVER'S VISION.

BARBER, COLEMAN, DIAZ, KING, MCMILLIN, AND SOUTHWICK, JJ., CONCUR. FRAISER, C.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY PAYNE, J. THOMAS, P.J., NOT PARTICIPATING.

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FRAISER, C.J., DISSENTING:

I respectfully dissent. It is implicit in the trial court's ruling that the court found a reasonable suspicion of a safety violation by the officer who made the investigatory stop and therefore, we should affirm instead of remanding the cause for additional findings and conclusions on this point. *See Riddle v. State*, 580 So. 2d 1195, 1199 (Miss. 1991).

PAYNE, J., JOINS THIS DISSENT.