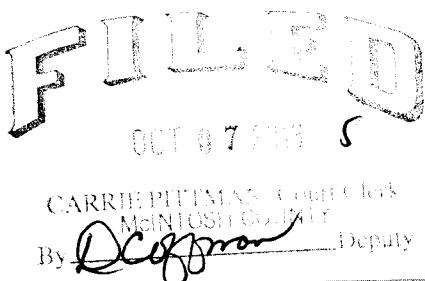


IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA,
Appellant,

v.
Uriel Alejandro Lopez,
Appellee,

Maria De Lourdes Magana,
Appellant,



Case Number: S-2013-103

TCC Number(s): CF-2011-300

MANDATE

To the Honorable Judge of the District Court in and for the County of MCINTOSH,
State of Oklahoma, Greetings:

Whereas, the Court of Criminal Appeals of the State of Oklahoma has rendered its
decision in the above styled and numbered case on the 2nd day of October, 2013, resolving
the appeal from the District Court in Case Number CF-2011-300.

AFFIRMED

Now, therefore, you are hereby commanded to cause such Decision to be filed and
spread of record in your court and to issue such process (see 22 O.S. 2001, §§ 978 & 979,
and 22 O.S. 2004 §980) and to take such other action as may be required by said Summary
Opinion (see 22 O.S. 2001 §§ 1066 and 1072). You shall then make due and prompt return
to this court showing ultimate disposition of the above case.

Witness, the Honorable David B. Lewis, Presiding Judge of the Court of Criminal
Appeals of the State of Oklahoma, State Capitol Building, Oklahoma City, this 2nd day of
October, 2013 .

MICHAEL S. RICHIE
Clerk

(seal)

By: Susan Hampton
Deputy

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THE STATE OF OKLAHOMA,) NOT FOR PUBLICATION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

S U M M A R Y O P I N I O N

MICHAEL S. RICHIE
CLERK

C. JOHNSON, JUDGE:

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.

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**

**APPEARANCES AT MOTION
HEARING**

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DEFENDANT MAGANA

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MCINTOSH COUNTY COURTHOUSE
EUFAULA, OK 74432
ATTORNEY FOR THE STATE

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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ATTORNEY FOR THE STATE

I, Michael S. Richie, Clerk of the Appellate Courts of the State of Oklahoma do hereby certify that the above and foregoing is a full, true and complete copy of the Summary Opinions in the above entitled cause, as

the same remains on file in my office.

In Witness Whereof, I have signed my name and affix the Seal of
said Court at Oklahoma City, the 2nd day of October
2013.

By _____

Clerk
Susan Hampton
First DEPUTY