IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RYAN LEE GILLE,	)	
	)	
Appellant,	)	
	)	
-vs-	)	Case No. M-2004-802
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

A. JOHNSON, J.:

On July 20, 2004, Appellant was found guilty by Special Judge Glenn M. Jones in Oklahoma County District Court Case No. CM-2003-2401 of Driving Under the Influence of Alcohol, Count I, and Possession of a Controlled Dangerous Substance (Marijuana), Count II. Judge Jones deferred sentencing Appellant until July 6, 2006. Appellant posted an appeal bond and perfected this appeal.

Prior to the beginning of his non-jury trial, Appellant stipulated to all facts, but challenged the legality of the investigatory stop and his subsequent arrest. Judge Jones denied Appellant's Motion to Suppress and found Appellant guilty of both counts.

In the early morning hours of May 17, 2003, City of Edmond Police Officer Bervis Littles was on patrol when he observed a car with its inside lights on, parked in the parking lot of the Kentucky Fried Chicken restaurant in Edmond,

Oklahoma. Officer Littles became suspicious of the car because of the hour, the store was closed and there had been a "rash of burglaries" in the area.

Officer Littles believed the car would leave the area when the driver saw his patrol car. When the car did not move, however, Officer Littles drove back around the restaurant and pulled up behind it. At that point, the car began to move off. Officer Littles activated his emergency lights, detained the vehicle and conducted an investigatory stop of the driver, Appellant herein.[1]

In the only assignment of error on appeal, Appellant contends the trial court committed reversible error in refusing to suppress evidence which he argues was the product of an illegal stop, illegal search and seizure and illegal arrest. The facts are not in dispute. We review de novo the district court's legal conclusion regarding the legality of the investigatory stop. *Haynes v. State*, 1998 OK CR 74, 973 P.2d 330. *See also, e.g., United States v. Simpson*, 152 F.3d 1241, 1246 (10th Cir. 1998).

We **FIND** the arresting officer did not have the requisite reasonable suspicion of criminal activity to justify the investigatory stop of Appellant. *See Brown v. State*, 1998 OK CR 77, 989 P.2d 913, and *Delgarza-Alzaga v. State*, 2001 OK CR 30, 36 P.3d 454.[2] The record reveals the officer had no reasonable

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[1] Officer Littles testified Appellant "didn't pull away at a high rate of speed or anything like he was trying to run from me. He just started to pull away." Littles stopped the car "to inquire what was going on and why – [Appellant's] reason why he was there in the parking lot" at 4:30 a.m. (Tr. 34 – 35).

[2] In *Brown v. State*, 1998 OK CR 77, 989 P.2d 913, this Court observed that reasonable suspicion has been described as a particularized and objective basis for suspecting a person is involved in criminal activity. In *Delgarza-Alzaga v. State*, 2001 OK CR 30, 36 P.3d 454, this

suspicion Appellant was engaged in *criminal* activity.[3] In that regard, Officer Littles admitted he had no idea whether Appellant was burglarizing the business, and would not know until he made the stop.[4] The officer further admitted having no evidence a burglary was in progress at the time he instituted the stop of Appellant. Finally, the officer admitted he "did not have any idea" what Appellant was doing.[5]

We find Appellant's conduct was at least as consistent with innocent activity as with criminal activity. *See Revels v. State*, 1983 OK CR 105, 666 P.2d 1298.[6] The officer admitted he had seen similar activity numerous times on his patrol, and Appellant made no attempt to run or avoid him.[7] Likewise, the record evidence does not support the officer's contention the area was a high crime area. We find the officer intended to stop and detain Appellant without any specific basis or objective criteria for believing Appellant was or had been

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Court reiterated that police may stop and question citizens if they have reasonable suspicion that criminal activity is afoot.

[3] The officer testified, "If you want me to tell you if [Appellant] was burglarizing the business, I wouldn't know until I made contact with him to conduct an investigation." (Tr. 24)

[4] (Tr. 24).

[5] (Tr. 41).

[6] In *Revels*, this Court found similar behavior was at least as consistent with innocent activity as with criminal activity. The defendant's conduct was not unusual; the officer had seen people at the car lot late at night before. The defendant made no attempt to hide, run or avoid the police. The defendant's actions were not furtive.

[7] When asked if he had previously seen a vehicle under similar circumstances late at night and made a stop to see what was going on, Littles responded, "I've done it numerous times. I stopped - - it's been the paper guy." (Tr. 39) When asked if Appellant could just have easily been on his cell phone, Littles replied, "He could have been. Exactly. I didn't have any idea what he was doing there until I made contact with him." (Tr. 41)

involved in criminal activity. That failure makes the stop improper.[8] *See also Sowell v. State*, 1980 OK CR 98, 620 P.2d 429.[9]

We therefore hold Appellant's Judgment and Sentence must be **REVERSED** and **REMANDED** with **INSTRUCTIONS TO DISMISS**. Pursuant to Rule 3.15, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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OPINION BY: A. JOHNSON, J.
CHAPEL, P.J.: Concur
LUMPKIN, V.P.J.: Dissent
C. JOHNSON, J.: Concur

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[8] *See Brown v. Texas*, 443 U.S. 47, 99 S.Ct 2637, 61 L.Ed.2d 357, wherein the Supreme Court stated generalized suspicion of criminal activity in a high crime neighborhood was insufficient in and of itself, to constitute reasonable suspicion.

[9] In *Sowell*, this Court found similar facts did not constitute reasonable suspicion justifying a stop. In that case, the Court found the officer intended to stop and detain the defendant because he looked suspicious, without any specific basis or objective criteria for believing the defendant was involved in criminal activity.

LUMPKIN, VICE PRESIDING JUDGE: DISSENTS

John Adams in his argument in the defense of the British soldiers charged in the Boston Massacre Trials, December 1770, stated "Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence". The facts in this case require that I dissent to the Court's decision to reverse and dismiss the conviction lawfully rendered against this Appellant.

As this Court recognized in *Leaper v. State*, 753 P.2d 914, 915 (Okl.Cr. 1988) "It is well established that the police have a right and duty to investigate all unusual or suspicious circumstances". The facts of this case reveal excellent and proper law enforcement work on behalf of the Edmond police officer. He was on patrol and at approximately 4:00 **A.M.** he noticed a vehicle sitting directly **behind** the Kentucky Fried Chicken store on Broadway. The knowledge he possessed at that time was there had been a string of break-ins in the area recently. Thus, he was on a higher sense of alert than he otherwise might have been. As he passed by the store the car did not move so he turned around and pulled into the parking lot behind the vehicle to check on the suspicious circumstance. As he pulled behind the vehicle, it started to leave, which further heightened the officer's suspicions. Only then did the officer stop the vehicle to inquire of the individuals right to be in that place on

private property, at that early hour of the morning, and in an area which had been plagued with a series of break-ins. It was at that time the officer went to check the curious behavior of the driver, and standing at the window of Appellant's vehicle he smelled alcohol thus giving further factors within his knowledge to warrant further action on his part at that time.

The opinion cites *Revels v. State*, 666 P.2d 1298 (Okl.Cr. 1983); *Brown v. State,* 989 P.2d 913 (Okl.Cr. 1998); and *Delgarza v. State,* 36 P.3d 454 (Okl.Cr. 2001) as its authority for the reversal of this case. However, a review of the facts in each of these cases reveal distinct differences from the facts before the Court at this time. The standard that applies to each of these cases is that set forth in *Brown* which requires that the officer have a reasonable suspicion that the Appellant was involved in criminal activity, and that any seizure did not become unreasonably intrusive.

In *Revels* there was no indication that the area around the car lot had been burglarized recently, but only that the time was 11:30 p.m. and Revels was not the owner of the car lot. Here, Gille was in an area with recent crime activity and it was 4:00 a.m. He was definitely out of place at a very suspicious hour of the day. The duty and obligation of law enforcement is to protect from crime, not just solve it once it is committed. Any reasonable person would have thought it prudent to inquire when seeing a vehicle parked behind a business at that hour of

the morning, even without the extra knowledge of the recent crime. Those facts were not present in the *Revels* case.

In *Brown* the facts show that Brown was a passenger in a vehicle legally stopped by the officer. Nothing connecting Brown to a crime was discovered until he was taken into the police station for questioning. The facts in the present case are very dissimilar, and the comparison is too distant to attempt any connection.

In *Delgarza* a confidential informant tipped off officers that drugs and cash were in Delgarza's vehicle, and the stop was based solely on the informant's tip, without any additional indication of criminal activity. Again, the facts are distinctly different.

Thus, the only similar case cited is *Revels* but the facts in that case lack the specificity of facts which articulate a reasonable basis for the action the officer took. Here, we have those facts. Several crimes had occurred in the area, the Appellant was parked behind a business that was not open at 4:00 **A.M.**, and the officer only stopped to determine the reason the Appellant was there at that time of day. There was a reasonable basis to make the stop and the smell of alcohol gave the officer the probable cause for the further action he took at the time. The officer performed his duties in a very professional manner. Had he not acted, and the business had been burglarized, the community would have rightfully questioned not only the professionalism of its police force, but more importantly its competence.

There is no basis in law or fact to invalidate the judgment and sentence in this case. Therefore, I must dissent.