IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

CHARLES HENRY TARVER, JR.,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2018-542**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

ROWLAND, JUDGE:

Appellant, Charles Henry Tarver, Jr., was tried by jury in the District Court of Pottawatomie County, Case No. CF-2016-446, and convicted of Possession of Controlled Dangerous Substance with Intent to Distribute, After Former Conviction of Two or More Felonies (Count 1), in violation of 63 O.S.Supp.2012, § 2-401(A)(1), and Unlawful Possession of Drug Paraphernalia (Count 2), in violation of 63 O.S.2011, § 2-405. The jury assessed punishment at forty years imprisonment on Count 1, and imposed a $1,000.00 fine on Count 2. The Honorable Dawson Engle, who presided at trial, sentenced accordingly. Tarver appeals raising the following issue:

(1) whether the evidence should have been suppressed.

We find relief is required and remand the case to the district court with instructions to dismiss.

BACKGROUND

On May 23, 2016, Deputy William Wheeler with the Pottawatomie County Sheriff's Office responded to a call at a trailer park in Shawnee. Upon leaving the trailer park, Wheeler noticed a pickup with an inoperable tag light leaving the trailer park at approximately 10:27 p.m. Wheeler stopped the pickup for this traffic violation and advised the driver and sole occupant, Charles Henry Tarver, Jr., of the reason he had pulled him over. Wheeler noted that Tarver was very nervous and very fidgety; he wouldn't stop moving around. After Deputy Wheeler returned to his patrol car with Tarver's driver's license, he did not immediately start writing the citation but watched Tarver until requested backup, including a K-9 officer, arrived. Tarver was removed from his pickup, patted down for officer safety, and placed in a patrol car. The pat down search revealed a small clear bag with a crystal-like substance that tested positive for methamphetamine. The drug dog alerted on the pickup, and the

subsequent search revealed 51 grams of methamphetamine in a zip-up satchel on the passenger's side of the truck. Tarver was arrested.

1.

Tarver complains that because the State relied upon evidence gained in violation of his Fourth Amendment rights to prove the charged crimes, his conviction should be reversed and remanded to the district court with instructions to dismiss. Prior to trial, Tarver filed a Motion to Suppress in which he argued that evidence found during the stop was discovered in violation of his constitutional right to be free from illegal searches and seizures. In a hearing held on January 16, 2018, the court denied this motion. Tarver filed a motion to reconsider which was denied on May 11, 2018. At trial defense counsel objected to the evidence discovered as a result of the traffic stop but the objection was overruled.

Tarver's objections below preserved this issue, and on appeal we review the trial court's ruling on the motion to suppress for abuse of discretion. *Mason v. State*, 2018 OK CR 37, ¶ 17, 433 P.3d 1264, 1270. An abuse of discretion is "any unreasonable or arbitrary action made without proper consideration of the relevant facts and law, also

described as a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts." *Bosse v. State*, 2017 OK CR 10, ¶ 24, 400 P.3d 834, 845 (citing *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170). "When reviewing a trial court's ruling on a motion to suppress evidence based on a complaint of an illegal search and seizure, this Court defers to the trial court's findings of fact unless they are not supported by competent evidence and are therefore clearly erroneous. We review the trial court's legal conclusions based on those facts de novo." *State v. Alba*, 2015 OK CR 2, ¶ 4, 341 P.3d 91, 92 (internal citations omitted). *See also Seabolt v. State*, 2006 OK CR 50, ¶ 4, 152 P.3d 235, 237.

Tarver complained in his motion to suppress that: (1) the initial stop was illegal, (2) the stop was unlawfully extended past the duration necessary to conduct the traffic stop, and (3) the search was conducted without probable cause. The trial court addressed only the first claim at the suppression hearing and found that the initial stop was legal because Deputy Wheeler testified that he stopped Tarver because his license light was inoperable. Tarver does not challenge this ruling on appeal. Rather, he complains that the search of his

vehicle was illegal because Deputy Wheeler intentionally extended the duration of the stop past that necessary to effectuate the purpose of the stop without reasonable suspicion that there was criminal activity afoot.

Because warrantless searches and seizures are presumptively unreasonable under the state and federal constitutions, the burden, at a suppression hearing, lies with the State to establish that the search or seizure was lawful. *State v. Iven*, 2014 OK CR 8, ¶ 8, 335 P.3d 264, 267 (citing *Delgarza-Alzaga v. State*, 2001 OK CR 30, ¶ 4, 36 P.3d 454, 455). Here, the trial court applied the burden of proof incorrectly at the suppression hearing, holding that as the moving party it was defendant's burden to show the stop was unreasonable. At the beginning of the hearing, defense counsel stated that the defense had filed a motion to suppress evidence gained through a warrantless search and seizure of Tarver's vehicle and the burden was on the State to prove that the search and seizure was constitutional. The prosecutor disagreed, arguing that burden of proof was on the moving party but agreeing that it would "present [its] evidence anyway." The trial court did not address which party had the burden

of proof but instructed the State to call its witness. The prosecutor complied, calling two deputies to testify at the hearing. At the end of the hearing the district court denied the motion to suppress, concluding, "I have to resolve any dispute in favor of the party that this suppression motion is being argued against at this particular time." This erroneous application of the burden of proof at the motion hearing was an abuse of discretion. However, the prosecutor proceeded to present his evidence supporting the stop and detention, and thus we have before us all necessary facts to determine the reasonableness of the stop and detention.

A traffic stop is a seizure under the Fourth Amendment. *State v. Strawn*, 2018 OK CR 2, ¶ 21, 419 P.3d 249, 254 (citing *McGaughey v. State*, 2001 OK CR 33, ¶ 24, 37 P.3d 130, 136). The scope and duration of a traffic stop must be related to the stop and must last no longer than is necessary to effectuate the purpose of the stop (i.e., investigate the potential traffic infraction). *Seabolt*, 2006 OK CR 50, ¶ 6, 152 P.3d at 237 (citing *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 229 (1983); *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968)). "If the length of the

investigative detention goes beyond the time necessary to reasonably effectuate the reason for the stop, the Fourth Amendment requires reasonable suspicion that the person stopped has committed, is committing or is about to commit a crime." *Seabolt*, 2006 OK CR 50, ¶ 6, 152 P.3d at 237-38.

The United States Supreme Court has held that "the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission' - to address the traffic violation that warranted the stop and attend to related safety concerns." *Rodriguez v. United States*, 575 U.S. ___, 135 S.Ct. 1609, 1614, 191 L.Ed.2d 492 (2015) (internal citation omitted). "Authority for the seizure thus ends when tasks tied to the traffic infraction are - or reasonably should have been - completed." *Id.* Given the many variable circumstances associated with traffic stops, this Court has been unwilling to impose rigid time limitations on the duration of traffic stops. We have acknowledged, however, that during a routine traffic stop an officer may "request a driver's license, vehicle registration and other required papers, run necessary computer checks, and then issue any warning

or citation." *Seabolt*, 2006 OK CR 50, ¶ 9, n. 5, 152 P.3d at 238, n. 5 (citing *U.S. v. Gregoire*, 425 F.3d 872, 879 (10th Cir. 2005)).

In the present case we must first determine whether the scope and duration of the traffic stop was related to the stop and lasted no longer than was necessary to investigate the traffic violation. Deputy Wheeler testified that he observed the inoperable tag light on Tarver's pickup and pulled him over at 10:27 p.m. Wheeler made contact with Tarver, spent about one minute at his pickup window explaining why he had stopped him, and retrieving his driver's license and information. Then Wheeler went back to his patrol car and requested backup and a K-9 officer. While waiting, Wheeler ran Tarver's driver's license to make sure it was valid and checked for warrants. He did not immediately write a citation but rather watched Tarver because he was acting "nervous and fidgety." The K-9 officer arrived on the scene at 10:41 p.m. – approximately fourteen minutes after Wheeler first observed the traffic violation.

While there may be circumstances where fourteen minutes would reasonably be required to effectuate the purposes of a traffic stop, there may also be circumstances where this length of time

would not be reasonable. Wheeler did not remember writing Tarver a citation but Court minutes indicate that a citation was written and was ultimately dismissed. Wheeler testified that the time it takes him to write a ticket varies; it could take two minutes or ten minutes. It is not clear, however, whether the warning citation was written while the deputy was waiting for the K-9 officer, during the sniff, or after the fact. Thus, it is impossible to discern from this record how much of the fourteen minutes was spent on duties legitimately related to the purpose of the traffic stop. The district court did not specifically rule on this issue and the record before us fails to show that the State met its burden of proving that the stop lasted only as long as was necessary to write the warning citation. Accordingly, we move to the next step in the analysis, which is whether the detention was supported by independent reasonable suspicion.

A traffic stop which extends beyond the time necessary to effectuate the purpose of the stop may nonetheless be reasonable under the Fourth Amendment where the detention is supported by reasonable suspicion to believe that the person stopped committed, was committing, or was about to commit a crime. *Seabolt*, 2006 OK

CR 50, ¶ 6, 152 P.3d at 237-38. It is the prosecution's burden to prove the reasonableness of an officer's suspicion. *United States v. Lopez*, 849 F.3d 921, 925 (10th Cir. 2017) (citing *United States v. Pettit*, 785 F.3d 1374, 1379 (10th Cir. 2015). "[R]easonable suspicion is not, and is not meant to be, an onerous standard." *Pettit*, 785 F.3d at 1379 (10th Cir. 2015) (quoting *United States v. Kitchell*, 653 F.3d 1206, 1219 (10th Cir. 2011)). Individual acts that are susceptible to an innocent explanation can collectively amount to reasonable suspicion. *See United States v. Arvizu*, 534 U.S. 266, 274, 122 S.Ct. 744, 751, 151 L.Ed.2d 740 (2002). However, continued detention must be based on observed facts, not conclusions. *United States v. Fernandez*, 18 F.3d 874, 878, (10th Cir. 1994) ("continued detention . . . can only be justified if specific and articulable facts and rational inferences drawn from those facts [give] rise to a reasonable suspicion of criminal activity") (internal citation and quotation marks omitted). Furthermore, "inchoate and unparticularized suspicion or 'hunch' is insufficient to give rise to reasonable suspicion." *Id. See also United States v. Simpson*, 609 F.3d 1140, 1147-53 (10th Cir. 2010) (finding

reasonable suspicion is determined by the totality of the circumstances).

In the present case, the State argues that Deputy Wheeler had reasonable suspicion that criminal activity was afoot based upon three factors: (1) Tarver's nervous behavior during the stop, (2) Tarver's prior criminal history, and (3) that prior to the stop Tarver was leaving a home associated with drug activity. While an officer may consider nervousness along with other circumstances in forming reasonable suspicion, it is not, generally, given significant weight in the reasonable suspicion analysis. *See Seabolt*, 2006 OK CR 50, ¶ 10, 152 P.3d at 238; *Fernandez*, 18 F.3d at 879 ("nervousness is of limited significance in determining reasonable suspicion"). *See also United States v. Moore*, 795 F.3d 1224, 1230 (10th Cir. 2015)("nervousness is not entitled to significant weight when determining whether reasonable suspicion exists") (quoting *Courtney v. Okla. ex rel. Dep't of Public Safety*, 722 F.3d 1216, 1224 (10th Cir. 2013)). "It is certainly not uncommon for most citizens –whether innocent or guilty—to exhibit signs of nervousness when confronted by a law enforcement officer." *United States v. Wood*, 106 F.3d 942,

948 (10th Cir. 1997). However, more weight is given to "extreme and persistent nervousness." *Simpson*, 609 F.3d at 1148; *Paul v. State*, 2003 OK CR 1, 3 n. 4, 62 P.3d 389, 390 n. 4.

Here, Deputy Wheeler testified at the suppression hearing that when he made contact with Tarver he was "very nervous, very fidgety." Wheeler testified that Tarver was "very nervous, fidgeting around a lot, moving around, enough to make [Wheeler] feel a little uncomfortable as far as his movements." When asked, Wheeler agreed that he viewed Tarver's nervousness to be at a higher level than that of a normal person. After Wheeler returned to his car, he observed Tarver looking back over his shoulder. These factors do not rise to the level of extreme nervousness necessary for this factor to weigh significantly in the assessment of reasonable suspicion.[1]

The next factor to consider is Tarver's prior criminal history. As with nervousness, prior criminal history alone is insufficient to create reasonable suspicion. *Moore*, 795 F.3d at 1230 (quoting *United States*

[1] *See Moore*, 795 F.3d at 1230 (shaking hands, failure to make eye contact, fidgeting, heart beating rapidly, request to smoke, and persistent anxiousness indicative of extreme nervousness); *United States v. Williams*, 271 F.3d 1262, 1268 (10th Cir. 2001)(trembling hands, shaky voice, and twitching lip displayed "uncommon and extreme" nervousness); *United States v. Davis*, 636 F.3d 1281, 1292 (10th Cir. 2011)(There must be more than broad, generalized statements about nervousness to characterize the nervousness as extreme and persistent.).

v. Santos, 403 F.3d 1120, 1132 (10th Cir. 2005)). Criminal history can, however, be a part of the totality of the circumstances considered. *See United States v. Santos*, 403 F.3d 1120, 1132 (10th Cir. 2005) ("[I]n conjunction with other factors, criminal history contributes powerfully to the reasonable suspicion calculus."); *See also United States v. White*, 584 F.3d 935, 951 (10th Cir. 2009). Although a criminal record is not justification in itself, it "may cast a suspicious light on other seemingly innocent behavior." *Simpson*, 609 F.3d at 1147.

Here, Wheeler testified that he knew Tarver had a record and was known for possessing and dealing methamphetamine although he did not expound upon this or indicate that he had asked Tarver about his prior criminal record. Wheeler could not recall if he had ever had contact with Tarver prior to the stop. He stated, however, that he had "been on some other calls or traffic stops that have had him, but I'm not going to sit here and say for the record for sure or not." Wheeler did acknowledge that he ran Tarver's driver's license and confirmed that Tarver's driver's license was valid and he had no active warrants. Thus, while the record contains general conclusory statements

indicating that Tarver had a criminal record, it provides no details, *i.e.*, specific and articulable facts, which the trial court could independently evaluate for its contribution to reasonable suspicion. The sparse evidence of Tarver's criminal history did little to contribute to the finding of reasonable suspicion.

Finally, we address the State's argument that there was reasonable suspicion to believe that criminal activity was afoot based upon Deputy Wheeler's assertion that he saw Tarver leave a home known for drug activity. Informant information may certainly contribute to reasonable suspicion of criminal activity, and in such cases the quality of the information contributing to reasonable suspicion is a factor for consideration. *See United States v. Tucker*, 305 F.3d 1193, 1200 (10th Cir. 2002). "When the officers' information comes from an informant, reliability may be assessed by viewing 'the credibility or veracity of the informant, the basis of the informant's knowledge, and the extent to which the police are able independently to verify the reliability of the tip.'" *Id.* 305 F.3d at 1200-01 (quoting *United States v. Leos-Quijada*, 107 F.3d 786, 792 (10th Cir. 1997). *See also United States v. Mabry*, 728 F.3d 1163 (10th Cir. 2013).

In the present case, Deputy Wheeler testified at the hearing on the motion to suppress that he suspected Tarver was engaged in criminal activity, in part, because he had seen Tarver leaving a certain trailer in the trailer park. Wheeler testified, "We had gotten some tips prior to that night, a few tips that there was a certain trailer there that had been - - may or may not have been manufacturing methamphetamine and that was a place people were going to get it." Deputy Wheeler acknowledged on cross examination that he did not know who lived in the trailer, he had not conducted surveillance on the trailer, and was not aware that any drugs had been seized from that trailer in the past. He did not indicate that he knew the person or people who had provided the tip(s) and thus was unable to assess the reliability of the informant(s). As is the case with Tarver's prior criminal record, there is simply a dearth of specific facts which the trial court could independently evaluate in determining the existence reasonable suspicion. Given the lack of specific information regarding the tip, Tarver's presence at that residence contributes very little to the finding of reasonable suspicion of criminal activity. *See* Se*abolt*, 2006 OK CR 50, ¶ 11, 152 P.3d at 238 (officer's observation of

Seabolt's car at a suspected drug house without more did not contribute to reasonable suspicion).

As noted above, the State's evidence fails to show that the scope and duration of the traffic stop lasted no longer than was necessary to effectuate the original purpose of the stop. Nor did the evidence show sufficient facts that the stop was extended upon reasonable suspicion that Tarver had committed, was committing, or was about to commit a crime. The deputy's knowledge that Tarver was more nervous and fidgety than he normally sees during a traffic contact, that he was aware Tarver had some criminal past and had heard from someone at some point about possible drug activity associated with the trailer simply fall short of the specific and articulable facts necessary to justify a detention under the Fourth Amendment. The trial court's decision overruling the motion to suppress and allowing the admission of the unlawfully seized evidence was an abuse of discretion. This case must be reversed and remanded to the district court with instructions to dismiss.

DECISION

The Judgment and Sentence of the district court is **REVERSED** with instructions to **DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF POTTAWATOMIE COUNTY, THE HONORABLE DAWSON ENGLE, ASSOCIATE DISTRICT JUDGE

APPEARANCES AT TRIAL

SHELLEY LEVISAY
ATTORNEY AT LAW
320 N. BROADWAY
SHAWNEE, OK 74801
COUNSEL FOR DEFENDANT

DAVID HAMMER
CATHY ADAMS
ASSISTANT DISTRICT ATTORNEYS
331 N. BROADWAY
SHAWNEE, OK 74801
COUNSEL FOR STATE

APPEARANCES ON APPEAL

ROBERT W. JACKSON
APPELLATE DEFENSE COUNSEL
P.O. BOX 926
NORMAN, OK 73070
COUNSEL FOR APPELLANT

MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA
ASHLEY L. WILLIS
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105
COUNSEL FOR APPELLEE

OPINION BY: ROWLAND, J.
LEWIS, P.J.: Concur
KUEHN, V.P.J.: Concur
LUMPKIN, J.: Concur in Part and Dissent in Part
HUDSON, J.: Concur

LUMPKIN, JUDGE: CONCUR IN PART/DISSENT IN PART:

I agree with the Court that the trial judge used the wrong standard in ruling on the Appellant's Motion to Suppress and due to the use of the wrong standard, the judge's ruling constituted an abuse of discretion. However, I continue to adhere to my analysis in *Seabolt v. State,* 2006 OK CR 50, ¶¶ 1-19, 152 P.3d 235, 239-44 (Lumpkin, V.P.J., dissenting), and dissent to this Court putting a stopwatch on the traffic stop rather than reviewing the reasonableness of the officer's actions.

In *Seabolt*, the Court found that the passage of twenty-five minutes from stop to arrest was unreasonable and now in this case, the Court finds that the passage of fourteen minutes is too long. The Court dissects the officer's actions in minute fashion without determining the reasonableness of the officer's overall action. All agree the stop was legal. It seems where the Court finds fault is in the officer's observations taking too long without adjusting for the fact that those observations laid the groundwork for the officer's formation of probable cause to proceed further with the arrest.

The Court seems to dismiss or give faint weight to the officer's knowledge, based upon previous information, that the Appellant was coming from a dwelling that police believed to be a drug house. While no police action had occurred based upon that information, it was still properly a part of the officer's knowledge and experience that helped form the basis for his actions in this case. Using that knowledge, he called for a drug dog and in this case, from stop to arrest it only took fourteen minutes. Traffic stops should be viewed based on the reasonableness of the officer's actions and not on a stopwatch. It appears the Court actually is engaging in a *de novo* review of the facts in this case. My objection to this appellate determination of the facts, rather than remanding and allowing the trial court to determine the facts, formed the basis of my dissent in *Seabolt*. Applying the facts as developed in the trial court, I find the officer's actions reasonable and would determine the error by the trial judge be harmless beyond a reasonable doubt.

By analogy, that is exactly what we do in evaluating the failure to conduct a hearing prior to trial under 12 O.S.Supp.2013, § 2803.1 as to the testimony of a child witness. We recognize the error due to the failure to hold a pre-trial hearing and then we determine if the

provision of Section 2803.1 were met by the testimony in the record. See *Simpson v. State*, 1994 OK CR 40, ¶ 37, 876 P.2d 690, 702; *J.J.J. v. State*, 1989 OK CR 77, ¶ 5, 782 P.2d 944, 945-46. It should be no different here.