[Cite as *State v. Cooper*, 2010-Ohio-1120.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellant : C.A. CASE NO. 23719

v. : T.C. NO. 09 CR 1965

CURTIS A. COOPER : (Criminal appeal from Common Pleas Court)

Defendant-Appellee :

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OPINION

Rendered on the 19th day of March, 2010.

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R. LYNN NOTHSTINE, Atty. Reg. No. 0061560, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellant

GLEN H. DEWAR, Atty. Reg. No. 0042077, Law Office of the Public Defender, 117 S. Main Street, Suite 400, Dayton, Ohio 45422
Attorney for Defendant-Appellee

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DONOVAN, P.J.

{¶ 1} Plaintiff-appellant State of Ohio appeals a decision of the Montgomery County Court of Common Pleas, General Division, in which the trial court sustained defendant-appellee's motion to suppress filed on July 7, 2009. A hearing was held on said motion on August 17, 2009, and September 3, 2009. On October 30, 2009, the trial court

issued a written decision sustaining Cooper's motion to suppress. For the following reasons, the judgment of the trial court will be affirmed.

I

{¶ 2} At approximately 5:00 p.m. on June 18, 2009, Trooper Rachel Ankeney of the Ohio State Patrol was on routine patrol in the Needmore Road and North Dixie Drive area of Harrison Township in Montgomery County, Ohio. As she was traveling southbound on North Dixie Drive, Trooper Ankeney observed a white Ford Festiva with a "hairline crack" in the windshield. The Festiva turned left onto Needmore Road and proceeded eastbound. Trooper Ankeney followed the Festiva for a short distance before she activated her cruiser's lights and initiated a stop of the vehicle. Once he became aware of Trooper Ankeney's lights, he pulled over into the parking lot of an insurance company located on Needmore Road. Trooper Ankeney pulled in behind the Festiva, exited her cruiser, and approached the vehicle on the driver's side.

{¶ 3} Upon approaching the vehicle, Trooper Ankeney testified that she asked the driver of the Festiva, who was later identified as Cooper, for his driver's license. Cooper stated that he did not have a driver's license because it had been suspended on an earlier date. Cooper supplied Trooper Ankeney with his social security number so that she could identify him. Trooper Ankeney testified that Cooper stated that his license had been previously suspended for driving under suspension. Trooper Ankeney confirmed the information Cooper had given her once she was able to enter his social security number into the LEADS/NCIC database. Trooper Ankeney ordered Cooper to exit the vehicle, and after patting him down for weapons, she placed him in the back of her cruiser and questioned him

regarding the ownership of the vehicle. Cooper stated that the Festiva belonged to his mother, who suffered from various health problems.

{¶ 4} Trooper Ankeney informed Cooper that she did not intend to take him into custody or impound his vehicle if he could contact someone to pick him up and retrieve the vehicle. Cooper was able to reach someone who could pick him up, but he could not reach his mother. At that point, Trooper Ankeney stated that she would secure the vehicle pursuant to State Highway Patrol internal policy, and someone could come pick it up later. While she was in the process of rolling up the windows and locking the doors, she discovered a white chunky substance in a plastic bag partially covered by a baseball cap located between the front seats of the vehicle. Trooper Ankeney testified that she recognized the substance to be crack cocaine.

{¶ 5} Trooper Ankeney immediately arrested Cooper for possession of crack cocaine and informed of his *Miranda* rights. After being advised of his rights, Cooper voluntarily explained the substance Trooper Ankeney found was crack cocaine and that he had paid $500.00 for it. Trooper Ankeney requested a tow for the Festiva. While she waited for the tow truck to arrive, Trooper Ankeney performed an inventory search of the vehicle during which she found a box of cartridges for a .22 caliber rifle. Trooper Ankeney also found approximately $1500.00 during a search of Cooper's pockets.

{¶ 6} In its written decision sustaining Cooper's motion to suppress, the trial court held that the evidence adduced at the hearing was insufficient to establish that Trooper Ankeney possessed a reasonable suspicion that Cooper was violating the law when she initially decided to pull him over. Specifically, the court found that the State failed to

establish that the state of the windshield in Cooper's vehicle was such that it amounted to an unsafe condition which would warrant a traffic stop. Thus, the trial court held that the stop was impermissible under the Fourth Amendment and suppressed all the physical evidence, as well as Cooper's incriminating statements, obtained as a result of the unlawful stop. The State filed a timely notice of appeal with this Court on November 2, 2009.

II

{¶ 7} The State of Ohio's sole assignment of error is as follows:

{¶ 8} "THE TRIAL COURT ERRED IN ITS FINDING THAT TROOPER ANKENEY DID NOT HAVE REASONABLE SUSPICION TO CONDUCT A TRAFFIC STOP WHERE THE VEHICLE CURTIS COOPER WAS DRIVING HAD A CRACK IN THE DRIVER'S SIDE OF THE WINDSHIELD THAT RAN FROM THE TOP TO THE BOTTOM OF THE WINDSHIELD."

{¶ 9} In its sole assignment, the State argues that the trial court erred when it sustained Cooper's motion to suppress. Specifically, the State contends that the totality of the circumstances surrounding the initial stop and investigation establish that Trooper Ankeney "had a reasonable, articulable suspicion that Cooper's cracked windshield amounted to a violation" of R.C. § 4513.02(A) and rendered the vehicle unsafe.

{¶ 10} With respect to a motion to suppress, "the trial court assumes the role of trier of facts and is in the best position to resolve questions of fact and evaluate the credibility of witnesses." *State v. Hopfer* (1996), 112 Ohio App.3d 521, 548, quoting *State v. Venham* (1994), 96 Ohio App.3d 649, 653. The court of appeals must accept the trial court's findings of fact if they are supported by competent, credible

evidence in the record. *State v. Isaac* (July 15, 2005), Montgomery App. No. 20662, 2005-Ohio-3733, citing *State v. Retherford* (1994), 93 Ohio App.3d 586. Accepting those facts as true, the appellate court must then determine, as a matter of law and without deference to the trial court's legal conclusion, whether the applicable legal standard is satisfied. *Id*.

{¶ 11} We have addressed a similar situation to the one in the instant case in *State v. Latham*, Montgomery App. No. 20302, 2004-Ohio-2314, wherein we stated the following:

{¶ 12} "R.C. 4513.02(A) states, 'No person shall drive or move, or cause or knowingly permit to be driven or moved, on any highway any vehicle or combination of vehicles which is in such unsafe condition as to endanger any person.' R.C. 4513.02(B) further provides that, '[w]hen directed by any state highway patrol trooper, the operator of any motor vehicle shall stop and submit such motor vehicle to an inspection under division (B)(1) or (2) of this section, as appropriate, and such tests as are necessary.'

{¶ 13} "Ohio Administrative Code 4501:2-1-11, which is under the section for inspection by Ohio state highway patrol officers, reads:

{¶ 14} " 'Every motor vehicle shall be equipped with safety glass as required in Section 4513.26 of the Revised Code: Such glass shall be free of discoloration or diffusion, cracks, and unauthorized obstructions * * *' "

{¶ 15} We also noted the following in *Latham*:

{¶ 16} "Ohio state courts have disagreed as to whether a crack in the windshield of a vehicle justifies a stop pursuant to R.C. 4513.02(A). *State v.*

Wilhelmy (May 17, 2000), Hamilton App. No. C-990730 (holding that a police officer, who was not a state highway patrolman, did not have a reasonable suspicion to stop a vehicle whose windshield was cracked absent any evidence that the crack posed a threat to personal safety); *State v. Glinsey* (Aug. 20, 1999) Williams App. No. WM-98026 (holding that a state highway patrolman did not have reasonable suspicion to stop a vehicle as unsafe when it had a crack in the windshield that extended four inches below the shaded portion of the windshield); *State v. Repp*, Knox App. No. 01-CA-11, 2001-Ohio-7034 (finding that a one to two foot long crack across the middle of the driver's side windshield of a vehicle was sufficient to create a reasonable suspicion to stop a vehicle as unsafe pursuant to R.C. 4513.02(A) in a local police officer); *State v. Heiney*, Portage App. No. 2000-P-0081, 2001-Ohio-4287 (finding that a one foot long spider crack in the middle of a vehicle's windshield was 'substantial' and gave a state highway patrolman reasonable suspicion that the crack rendered the vehicle unsafe and a violation of R.C. 4513.02); *State v. Goins* (May 24, 1996), Ross App. No. 95CA2106 (finding that a state highway patrolman had reasonable suspicion to stop a vehicle with a large linear crack in the front windshield for an equipment violation pursuant to R.C. 4513.02(A) and (B)); *State v. Imboden* (Nov. 16, 1993), Ross App. No. 92CA1901 (stating that a state highway patrolman did not have reasonable suspicion to stop a vehicle whose windshield was cracked on the passenger side of the vehicle, did not impair the driver's vision, and no evidence was presented that the cracked windshield affected the safeness of the vehicle). We note that in these opinions a crack in the windshield is generally found to

amount to a reasonable suspicion of a violation of R.C. 4315.02(A) only when the crack is 'substantial' or impairs the driver's vision. Id. Some courts have stated that the combination of R.C. 4513.02 (A) and O.A.C. 4501:2-1-11 make it a violation to operate a vehicle with any cracks in the windshield because administrative agencies' rules have the full force and effect of law when issued pursuant to statutory authority. *Repp*, supra citing *Doyle v. Ohio Bureau of Motor Vehicles* (1990), 51 Ohio St.3d 46; *Goins*, supra. Although the *Repp* court stated that a crack in a windshield violates R.C. 4513.02(A), the court continued on to state that the size and placement of the crack is what created the reasonable suspicion that R.C. 4513.02(A) was being violated. *Repp*, supra."

{¶ 17} Ultimately, in *Latham* we held that the mere appearance of a crack in a vehicle's windshield does not give rise to a reasonable suspicion of a violation of R.C. § 4513.02. Rather, we concluded that the size and placement of the crack must be sufficient to create a reasonable suspicion that R.C. § 4513.02 was being violated. *State v. Repp*, Knox App. No. 01-CA-11, 2001-Ohio-7034.

{¶ 18} While Trooper Ankeney testified that she noticed the "hairline crack" in Cooper's windshield when she drove up next to him on North Dixie Drive, she did not testify that she believed that the crack in any way obscured Cooper's vision. In fact, the trial court specifically noted the following in its written decision in regards to Trooper Ankeney's observation of the crack in Cooper's windshield:

{¶ 19} "Trooper Ankeney did not testify that she felt the state of the windshield was such that it amounted to an unsafe condition that would endanger a person. The photographs admitted herein reveal that the crack was not such that

the vehicle was in any unsafe condition so as to endanger a person.

{¶ 20} "The court has thoroughly reviewed the photographs. In some of the pictures, the crack cannot even be detected. On others, the hairline crack is observable. It is difficult to imagine how Trooper Ankeney saw this crack from her vantage point to the west of Mr. Cooper at the intersection. If she did, it would not have been reasonable for her to then find that the negligible crack amounted to an unsafe condition such as to endanger a person."

{¶ 21} After having reviewed the entire record in this matter, including the photographs of the apparently "negligible" crack in Cooper's windshield, we agree with the trial court that Trooper Ankeney did not have a reasonable suspicion that that R.C. § 4513.02 was being violated. The size and placement of the crack in the Festiva's windshield was clearly not such that it would have impaired the vision of the driver of the vehicle. Under the facts presented in the instant case, it was unreasonable for Trooper Ankeney to base her decision to stop Cooper on the presence of the barely visible hairline crack in the windshield of the Festiva.

{¶ 22} Because the stop was a product of a violation of the Fourth Amendment, the evidence and statements obtained as a result of the subsequent search of Cooper's vehicle must be suppressed as "fruit of the poisonous tree" pursuant to the U.S. Supreme Court's holding in *Wong Sun v. United States* (1963), 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441.

{¶ 23} The State of Ohio's sole assignment of error is overruled.

III

{¶ 24} The State of Ohio's sole assignment of error having been overruled,

the judgment of the trial court is affirmed.

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BROGAN, J. and FROELICH, J., concur.

Copies mailed to:

R. Lynn Nothstine
Glen H. Dewar
Hon. Timothy N. O'Connell