

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR09-817

JAMES MICHAEL McKIM
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered December 9, 2009

APPEAL FROM THE SALINE
COUNTY CIRCUIT COURT
[CR2008-71T]

HONORABLE GRISHAM A.
PHILLIPS, JR., JUDGE

REVERSED

DAVID M. GLOVER, Judge

Appellant, James McKim, was convicted in a bench trial in Saline County Circuit Court of misdemeanor DWI, first offense, and speeding in excess of the posted speed limit; he was sentenced to one day in the county jail, fined \$800, and assessed court costs and fees. The sole issue on appeal is whether the trial court erred in denying McKim’s motion to suppress evidence. We reverse the convictions.

On the day of trial, McKim filed a motion in limine to suppress the traffic stop and all evidence seized as the result of the traffic stop, arguing that he was the target of selective traffic enforcement when he was stopped on Interstate 30 by Corporal Lee Ledbetter, a City of Bryant police officer, in violation of Arkansas Code Annotated section 12-8-106(h)(1) (Repl. 2003). This code section provides, “Municipal police are prohibited from patrolling limited

access highways except as may be authorized by the director [of the Arkansas State Police].” Municipal police are, however, allowed to patrol any service roads in their jurisdiction situated adjacent to limited access highways. Ark. Code Ann. § 12-8-106(h)(2). At the time of the traffic stop on February 11, 2007, there was a letter dated September 9, 2004, from the Arkansas State Police director to the Bryant police chief, which stated in pertinent part:

Pursuant to the authority granted this office by virtue of A.C.A. § 12-8-106(h)(1), you are hereby authorized to patrol those limited access roads that exist within your jurisdiction, or that may be annexed in the future. This authority is for general patrol purposes only and **does not** authorize selective traffic enforcement or interdiction.

(Emphasis in original.) By contrast, a letter dated September 6, 2002, from the previous Arkansas State Police director to the Bryant Police Department, stated that the Bryant Police Department was authorized to patrol those limited access roads that exist within Bryant’s jurisdiction or that may be annexed in the future; however, the earlier letter did not contain the express limitation found in the later letter (in force at the time of the traffic stop) that such authority did not authorize selective traffic enforcement.

Corporal Ledbetter testified that on February 11, 2007, at approximately 1:00 a.m., he was set up on the service road just west of the Raymar overpass to check for speeders on I-30 when he noticed a black Chevrolet pickup truck traveling westbound at a high rate of speed. Ledbetter was using Lidar, a specific type of radaring, which requires the operator to be stationary and to point it at the vehicle; he determined the truck’s speed to be eighty-four miles per hour in a seventy-mile-per-hour zone. Ledbetter followed the truck parallel on the service road until he could enter onto Interstate 30 and get behind the truck. Ledbetter then

observed the truck go from the far left lane across the other lanes of traffic, onto the shoulder of the road, and return to the right lane of traffic. Ledbetter pulled the truck over and made contact with the driver, McKim, who smelled of intoxicants. McKim failed one field-sobriety test and was unable to complete another; his BAC test result was .146.

When questioned on *voir dire*, Ledbetter testified that he had worked in conjunction with the state police to stop speeders on I-30, positioning himself on an overpass with Lidar to identify speeders, with troopers stopping the cars on the interstate. He acknowledged that Bryant officers had also done this on their own. Ledbetter testified that he had patrolled I-30 since he began working for Bryant; that no one had “fussed” at him about doing that; that he was not aware of any complaints about the Bryant police patrolling I-30; that the state police were aware that Bryant officers were making stops on I-30 because the state police had backed them up on stops and they had backed the state police up on stops. He testified that he had made DWI stops on the interstate and then called the state police to ask if they would like to come take the stop.

During the hearing, the trial court commented that it could derive the intent of the letter from the practice of the two law-enforcement agencies and that it appeared that the practice had been to allow that type of patrol and stop. After the hearing, the trial court found McKim guilty of DWI, first offense, and speeding in excess of the posted speed limit. McKim timely filed a motion for new trial, which was denied, and he then timely filed his notice of appeal to this court.

When reviewing the denial of a motion to suppress evidence, the appellate courts conduct a *de novo* review based on the totality of the circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court. *Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003).

Arkansas law is silent on the definition of selective traffic enforcement.¹ In support of affirming the conviction, the State argues that at the time Ledbetter pulled McKim over, he was engaged in “general patrol,” rather than “selective-traffic enforcement or interdiction.” The State contends that the circuit court found the term “selective-traffic enforcement” ambiguous, and relied upon Ledbetter’s testimony about the long-standing practice of the Arkansas State Police to allow the Bryant Police Department to conduct the types of traffic stops made in this case to infer that the intent of the Arkansas State Police director’s letter was to allow such stops.

We cannot agree with the State’s interpretation. By statute, municipal police are prohibited from patrolling limited access highways except as authorized by the director of the Arkansas State Police. At the time this stop was effected, the Bryant police were authorized to patrol the limited-access roads in its jurisdiction; that authority was specifically limited to

¹Selective-traffic enforcement and general patrol are terms of civil urban control used to reduce traffic accidents. Selective enforcement units should be assigned to areas reflecting the greatest concentration of accidents. The areas experiencing fewer accidents would then become the responsibility of general patrol units. HIGHWAY SAFETY DIV., INT’L ASS’N OF CHIEFS OF POLICE, SELECTIVE TRAFFIC LAW ENFORCEMENT MANUAL 12 (1972).

general patrol purposes only and clearly did not authorize selective traffic enforcement. In this case, Ledbetter testified that on the date in question, he was set up to check speeders on the interstate. While it was his testimony that this type of stop had been occurring on the interstate by Bryant police officers, this is in direct contravention of the limitations set forth in the Arkansas State Police director's letter. Here, Ledbetter was stationary on the service road. He testified that he was set up to check for speeders on the interstate. He found McKim, who was speeding on I-30, and he chose to pull him over in a traffic stop. On these facts, we hold this was selective-traffic enforcement, not simply general patrol, which was the only authorization given by the Arkansas State Police director to the Bryant Police Department at that time with regard to limited-access highways, of which I-30 is one. Because the Bryant Police Department did not have the authority to make this type of traffic stop on I-30, we agree with McKim that the evidence obtained in the stop should have been suppressed.

Reversed.

GLADWIN and BROWN, JJ., agree.