From:	Robert Gallimore
To:	J. Russell Jennings
Cc:	Linda Kentch; Natalie Scott; Jenna Moyer; Jordan Milholland
Subject:	Requested information from hearing on HB 2534 (exhibition of speed)
Date:	Monday, February 5, 2018 3:01:42 PM
Attachments:	State v. Sharp 305 Kan. 1076.pdf State v Sharp Court of Appeals.pdf City of Altamont v Finkle 224 Kan 221 (1978).pdf

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Rep. Jennings:

During today's hearing on HB 2534, defining exhibition of speed or acceleration offense, you and other members of the committee requested additional information.

You asked conferees about the location of the offense in *State v. Sharp* and whether it occurred in a jurisdiction that had a more detailed ordinance. Another member asked for a copy of the opinion from *Sharp*. Attached is a copy of the Supreme Court's opinion, courtesy of the Revisors. Also attached is a copy of the Court of Appeals opinion, which provides additional detail regarding the location of the offense (Olathe), the Olathe ordinance (which is more detailed), and why the state statute and not the municipal ordinance was applied in the case.

You also requested we find an older opinion dealing with the definition of exhibition of acceleration. It appears the opinion you may have in mind is *City of Altamont v. Finkle*, 224 Kan. 221 (1978), a copy of which is attached.

I hope this information is helpful. Please let me know if you need additional information.

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340 P.3d 1235 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Travis SHARP, Appellant.

No. 110,845.
|
Dec. 19, 2014.
|
Review Granted June 29, 2015.

Appeal from Johnson District Court; Kevin P. Moriarty, Judge.

Attorneys and Law Firms

Rachelle Worrall Smith, and Darrell Smith, of Law Office of Darrell Smith, of Olathe, for appellant.

Jacob M. Gontesky, assistant district attorney, Steven J. Obermeier, senior deputy district attorney, Stephen M. Howe, district attorney, and Derek Schmidt, attorney general, for appellee.

Before STANDRIDGE, P.J., ATCHESON, J. and BURGESS, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** Travis Sharp appeals his conviction for driving under the influence. First, he argues that K.S.A. 8–1565, the alleged violation of which was the basis for Sharp's initial traffic stop, is unconstitutionally vague. Next, he argues that the police lacked reasonable suspicion to stop his vehicle and therefore all evidence obtained after he was stopped should have been suppressed. For the reasons stated below, we reverse the court's decision to deny Sharp's motion to suppress, we reverse both of his convictions, we vacate any sentences or fines imposed, and we remand the case with directions.

FACTS

On January 25, 2013, Lieutenant Donald Bowers of the Johnson County Sheriffs Office was traveling eastbound on Santa Fe Street in Olathe, Kansas, when he stopped at a red light. He was in the left-turn lane at the intersection of Santa Fe Street and K–7 Highway, and there was at least one vehicle in front of him. There were two lanes of eastbound traffic to his right. While stopped, Bowers heard what sounded like an engine revving. When he looked to his right, he saw heavy smoke coming from underneath the rear end of a dark-colored sport utility vehicle (SUV). The SUV was stopped

at the light two lanes over and slightly in front of Bowers' vehicle. Bowers was not sure whether the SUV was the first vehicle in line at the stoplight; he could barely see the left half of the SUV. In light of the engine revving and the smoke, Bowers rolled down the passenger side window. When he did so, Bowers detected the smell of rubber. Looking to the rear end of the SUV, Bowers observed the right rear tire spinning while the SUV stayed in place. Bowers identified this tire spinning of a stationary vehicle as power braking, a technique, in his opinion, used by a driver to demonstrate a vehicle's endurance and to warm up a vehicle's tires for better traction.

Although the traffic light was still red and both the patrol car and the SUV were stationary, Bowers testified it was at this point that he decided he was going to conduct a traffic stop of the SUV. When the light turned green, the SUV proceeded east through the intersection. Bowers testified that the SUV "didn't tear out from the intersection" and did not accelerate in a manner that would have provided him with any reason other than the power braking to conduct a stop of the SUV. Although Bowers did not activate the emergency lights on his patrol car until the light turned green and the SUV proceeded forward, Bowers reiterated that he made the decision to stop the SUV before it moved from its stationary position at the red light and the sole reason for stopping the SUV was because the driver was spinning the tires.

The driver of the SUV was identified as Sharp. When Bowers asked him why he thought he had been stopped, Sharp responded, " 'for burning my tires.' " Because he believed Sharp responded strangely and slowly to some of his questions, Bowers asked whether Sharp had anything to drink that day. Sharp said, "[N]ot much, no," and then said he only had "one Buzz Ball." After getting Sharp's identification and insurance information, Bowers returned to his patrol car to run a routine check and to request backup based on his concern that Sharp may be an impaired driver. Sharp ultimately was arrested for driving under the influence.

***2** Prior to trial, Sharp filed a motion to suppress any evidence of him driving under the influence of alcohol. In support of his motion, Sharp argued Bowers lacked reasonable suspicion to conduct a traffic stop in the first instance and therefore any evidence obtained as a result of the stop must be suppressed. As we have noted above, Bowers testified at the suppression hearing that although he did not initiate his front emergency lights to stop Sharp's vehicle until after the stoplight changed to green and Sharp had cleared the intersection, the sole reason Bowers stopped Sharp was the spinning of tires and he did not see Sharp accelerate in a way that would justify a traffic stop while Sharp's vehicle was moving.

The district court denied Sharp's motion to suppress. Sharp filed a motion to reconsider the motion to suppress. In addition to his previous argument that Bowers lacked reasonable suspicion to stop him, he also argued that the portion of K.S.A. 8–1565 prohibiting exhibitions of speed or acceleration was unconstitutionally vague and indefinite. Although there is no transcript of a hearing on the motion to reconsider in the record on appeal, a journal entry was filed stating that the motion was considered and denied by the district court. This journal entry was signed by both parties and the district court judge.

The parties agreed to proceed to a bench trial on stipulated facts. Sharp was convicted of driving under the influence and exhibition of speed or acceleration.

ANALYSIS

On appeal, Sharp claims the district court erred in failing to suppress any evidence of him driving under the influence of alcohol. In support of this claim, Sharp argues the portion of K.S.A. 8–1565 prohibiting exhibitions of speed or acceleration is unconstitutionally vague and indefinite. Sharp also argues that Bowers lacked the necessary reasonable suspicion to conduct a traffic stop based on a violation of K.S.A. 8–1565. We address each of Sharp's arguments in turn.

Constitutionality of KS.A. 8–1565

We note, as a preliminary matter, that the State argued in its brief that Sharp did not properly preserve the right to raise a constitutional challenge to K.S.A. 8–1565 on appeal because he failed to raise the argument before the district court. Although the State acknowledges that Sharp did challenge the constitutionality of K.S.A. 8–1565 in his motion to reconsider the district court's decision to deny his original motion to suppress, it contends Sharp's motion to reconsider was insufficient for purposes of preservation because it was untimely filed. In support of this contention, the State argues that motions to reconsider generally are treated as motions to alter or amend a judgment and therefore must be filed no later than 28 days after entry of judgment under K.S.A.2013 Supp. 60–259(f), which Sharp did not do here. But the State misinterprets K.S.A.2013 Supp. 60–259. Not every order entered by the court is an entry of judgment. A criminal judgment is defined as a pronouncement of guilt and the determination of punishment. *State v. Thompson,* 45 Kan.App.2d 515, 519, 250 P.3d 282 (2011). In this case, the district court did not enter a judgment until sentencing was completed on October 30, 2013. Because Sharp's motion to reconsider his initial motion to suppress was filed in June 2013, his challenge to the constitutionality of K.S.A. 8–1565 was properly preserved.

***3** Whether a statute is unconstitutional is also a question of law over which appellate courts exercise unlimited review. *Kempke v. Kansas Dept. of Revenue,* 281 Kan. 770, 775, 133 P.3d 104 (2006). A criminal statute is unconstitutionally vague and indefinite if its language fails to convey a sufficiently definite warning as to the conduct proscribed when measured by common understanding and practice. Enforcement of a statute violates due process if it either requires or forbids an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. *State v. Watson,* 273 Kan. 426, 429, 44 P .3d 357 (2002).

In *City of Altamont v. Finkle,* 224 Kan. 221, 224, 579 P.2d 712 (1978), the Kansas Supreme Court determined that part of a city ordinance substantially similar to K.S.A. 8–1565 was unconstitutionally vague. In that case, the defendant was convicted of violating a city ordinance that read:

> ‘ “Sec. 37. Racing on Highways; “Drag Race” and “Racing” Defined. (a) No person shall drive any vehicle in any race, speed competition or contest, drag race or acceleration contest, test of physical endurance, exhibition of speed or acceleration, or for the purpose of making a record, and no person shall in any manner participate in any such race, competition, contest, test or exhibition.
>
> “ ‘(b) For the purpose of this section, the term drag race means the operation of two (2) or more vehicles from a point side by side at accelerating speeds in a competitive attempt to out-distance each other, or the operation of one (1) or more vehicles over a common selected course from the same point to the same point, for the purpose of comparing the relative speeds or power of acceleration of such vehicle or vehicles within a certain distance or time limit.
>
> “ ‘(c) For the purpose of this section, the term racing means the use of one (1) or more vehicles in an attempt to outgain, out-distance or prevent another vehicle from passing, to arrive at a given destination ahead of another vehicle or vehicles, or to test the physical stamina or endurance of drivers over long distance driving routes.’ “ 224 Kan. at 221–22.

After being charged and convicted of unlawful “exhibition of speed” under K.S.A. 8–1565, Finkle argued on appeal that the charge of exhibition of speed lodged against him failed to state a crime and was so vague that a person charged in such terms could not be expected to understand the nature of the alleged crime. Our Supreme Court agreed: “The ordinance when considered in its entirety appears to speak primarily to racing, speed and acceleration tests, contests or competition. The mere charge of an ‘exhibition of speed’ against a driver not engaged in any such test, contest or competition fails to charge any violation of the ordinance.” 224 Kan. at 223–24.

In its analysis, the court found significant that “[n]owhere in the ordinance is there an attempt to define the words ‘exhibition of speed or acceleration’ or to delineate the proscribed conduct.” 224 Kan. at 224. The court concluded that “[a]ny interpretation of that portion of the ordinance, without additional allegations, is such that men [or women] of common intelligence must guess at its meaning and may differ as to its application and therefore the language standing alone does not meet the minimum standards required .” 224 Kan. at 224. Finding that the statutory language used in

the charging document was so vague and indefinite that one charged in such terms could not be expected to understand the nature and elements of the alleged crime, the court reversed Finkle's conviction with directions to discharge him. 224 Kan. at 224.

***4** Here, Sharp was charged with an unlawful "exhibition of speed" under K.S.A. 8–1565. K.S.A. 8–1565 reads as follows:

> "(a) No person shall drive any vehicle in any race, speed competition or contest, drag race or acceleration contest, test of physical endurance, exhibition of speed or acceleration, or for the purpose of making a speed record, and no person shall in any manner participate in any such race, competition, contest, test or exhibition.
>
> "(b) As used in this section, 'drag race' means the operation of two or more vehicles from a point side by side at accelerating speeds in a competitive attempt to outdistance each other, or the operation of one or more vehicles over a common selected course, from the same point to the same point, for the purpose of comparing the relative speeds or power of acceleration of such vehicle or vehicles within a certain distance or time limit.
>
> "(c) As used in this section, 'racing' means the use of one or more vehicles in an attempt to out-gain, out-distance or prevent another vehicle from passing, to arrive at a given destination ahead of another vehicle or vehicles, or to test the physical stamina or endurance of drivers over long distance driving routes.
>
> "(d) Violation of this section is a misdemeanor."

K.S.A. 8–1565 is identical to the ordinance at issue in *Finkle* in all relevant respects. This court is duty bound to follow Kansas Supreme Court precedent absent some indication the court is departing from its previous position. *State v. Acevedo,* 49 Kan.App.2d 655, 670, 315 P.3d 261 (2013). Therefore, in accordance with the court's holding in *Finkle,* we conclude the provision in K.S.A. 8–1565 making it unlawful to exhibit speed or acceleration uses language that is so vague and indefinite that one charged in such terms could not be expected to understand the nature and elements of prohibited conduct.

In so concluding, we do not find persuasive the State's argument that the vague and indefinite language in K.S.A. 8–1565 is rendered constitutional because Sharp was arrested in Olathe, which has adopted a more detailed definition in its ordinance prohibiting exhibitions of speed and acceleration. See Olathe Municipal Code § 10.01.001 (2001) (defining exhibitions of speed or acceleration, in part, as acts which cause "unnecessary tire squeal, skid, smoke, or slide upon acceleration or stopping" or "acts that cause the vehicle to unnecessarily ... lose traction with the road surface"). In deciding a motion to suppress, a district court may only consider the evidence in light of the statute the State claims was violated. This is true even if more than one statute could have applied to the defendant. *State v. Garza,* 295 Kan. 326, 334, 286 P.3d 554 (2012). In this case, there is no evidence in the record to support a conclusion that Bowers relied on Sharp's violation of the Olathe ordinance—as opposed to K.S.A. 8–1565—to support his suspicion that Sharp was committing, had committed, or was about to commit a crime. The Uniform Notice to Appear and Complaint, which was handwritten by Bowers, charged Sharp with violating K.S.A. 8–1565. The prosecutor specifically argued at the suppression hearing that power braking at a red light "certainly constitutes exhibition driving and speed—of speed in violation of 8–1565(a)." And finally, K.S.A. 8–1565 is the statute Sharp ultimately was convicted of violating. Thus, although the Olathe Municipal Code provides a more precise definition of what it means to engage in an exhibition of speed or acceleration, this ordinance is not relevant to the issue presented on appeal.

***5** Because the provision within K.S.A. 8–1565 making it unlawful to exhibit speed or acceleration is unconstitutionally vague and indefinite, we conclude Officer Bowers lacked reasonable suspicion to conduct a traffic stop based on what he perceived was a violation of that statute. But this does not end the inquiry. Typically, evidence obtained in violation of a person's rights under the Fourth Amendment to the United States Constitution may not be used against a defendant in a criminal proceeding. However, the Kansas Supreme Court has recognized a good-faith exception to the exclusionary

rule in certain situations. Under this exception, if an officer acts in objectively reasonable reliance upon a statute that was subsequently found to be unconstitutional, the exclusionary rule does not apply and evidence obtained as a result of the reasonable reliance will not be suppressed. *State v. Daniel,* 291 Kan. 490, 496, 498–500, 242 P.3d 1186 (2010), *cert. denied* 131 S.Ct. 2114 (2011). Accordingly, we must decide whether it was objectively reasonable for Bowers to believe that spinning tires while stopped at a traffic light was conduct that violated K.S.A. 8–1565. On this issue, we again are bound by the legal precedent set by our Supreme Court in *Finkle,* where the court specifically held that the question of an "exhibition of speed or acceleration" is a matter for subjective determination lacking any objective standards. 224 Kan. at 224. Given that there are no objective standards by which a court could evaluate an officer's reliance on this statutory language, we find it improper to apply the good-faith exception to the exclusionary rule in this case.

Our finding in this regard is supported by the analysis conducted by our Supreme Court in *Daniel,* 291 Kan. at 501–05. Unlike the conclusion we reach here, the *Daniel* court held it was proper to apply the good-faith exception to the exclusionary rule. In so holding, the Supreme Court found persuasive the fact that appellate courts in Kansas repeatedly had relied on the statute the *Daniel* subsequently found to be unconstitutional. 291 Kan. at 505. But the exact opposite is true in this case. As noted above, there is no meaningful difference between the ordinance found to be unconstitutional in *Finkle* back in 1978 and the current version of K.S.A. 8–1565. Thus, Bowers relied on language found unconstitutional decades ago by our Supreme Court to justify Sharp's initial stop, a fact which weighs heavily against application of the good-faith exception.

Because the provision within K.S.A. 8–1565 making it unlawful to exhibit speed or acceleration is unconstitutionally vague and the good-faith exception is not applicable, the district court erred in denying Sharp's motion to suppress.

Reasonable suspicion

Although this court's analysis need go no further based on our conclusion that the relevant portion of K.S.A. 8–1565 is unconstitutionally vague, we also will address Sharp's alternative argument that Bowers lacked the necessary reasonable suspicion to conduct a traffic stop based on a violation of that statute.

***6** The Fourth Amendment protects against unreasonable searches and seizures. *State v. Spagnola,* 295 Kan. 1098, 1105, 289 P.3d 68 (2012). A traffic stop always constitutes a seizure under the Fourth Amendment. *State v. Thompson,* 284 Kan. 763, 773, 166 P.3d 1015 (2007). In order for a traffic stop to be constitutionally reasonable, a police officer must have reasonable suspicion based on articulable facts that a crime has been, is being, or is about to be committed. *State v. Jones,* 300 Kan. ——, 333 P.3d 886, 893 (2014); see K.S.A. 22–2402(1). " 'Reasonable suspicion means a particularized and objective basis for suspecting the person stopped is involved in criminal activity.' " *State v. Pollman,* 286 Kan. 881, 890, 190 P.3d 234 (2008).

An appellate court analyzes the denial of a motion to suppress under a bifurcated standard. The appellate court reviews the district court's findings to determine whether they are supported by substantial competent evidence. The ultimate legal conclusion is then reviewed de novo. If the material facts are not in dispute, the question of whether to suppress is a question of law over which an appellate court has unlimited review. *State v. Martinez,* 296 Kan. 482, 485, 293 P.3d 718 (2013).

Assuming K.S.A. 8–1565 is constitutional, Sharp argues that Bowers lacked reasonable suspicion to stop Sharp because spinning tires while stationary is not a violation of that statute. The State disagrees, arguing in its brief that by spinning his tires and generating smoke, Sharp "was committing, had committed or was about to commit a violation of K.S.A. 8–1565." The statute at issue prohibits exhibitions of speed or acceleration. Criminal statutes must be strictly construed in favor of the accused. *State v. Coman,* 294 Kan. 84, 96, 273 P.3d 701 (2012). Strictly construed, speed and acceleration are both words that denote movement of some kind. Yet, all of the actions Bowers identified as justification for his decision to stop Sharp occurred while Sharp was stationary. In order to show a violation of this statute, the State would need to prove, at a minimum, that Sharp was moving or accelerating. There are no such facts in the record.

There also are no facts in the record to support reasonable suspicion that Sharp was about to participate in a race in violation of K.S.A. 8–1565. Officer Bowers testified that he believed Sharp was power braking in order to warm Sharp's tires in preparation of a drag race. But Sharp did not actually initiate the traffic stop until after both he and Sharp had cleared the intersection. Bowers did not observe Sharp accelerating in a way that would justify a traffic stop for drag racing. A determination of reasonable suspicion is based on the totality of the circumstances from the viewpoint of those versed in the field of law enforcement. *Pollman,* 286 Kan. at 890. While Bowers did believe Sharp was preparing for a drag race, he also observed Sharp accelerate appropriately when the traffic light turned green and observed no other unlawful behavior prior to activating his front lights to pull Sharp over. Sharp's actions after the light turned green directly contradict Bowers' belief that Sharp was preparing for a race. Since Bowers did not initiate a stop until after he cleared the intersection, we are required to consider that fact when determining whether reasonable suspicion existed for the stop. When considering the totality of the circumstances, Sharp's actions simply do not rise to the level of a particularized and objective basis for suspecting prior, current or future criminal activity. As a result, even if the language of the statute at issue was constitutional, the district court erred by denying Sharp motion to suppress.

***7** We reverse the district court's decision to deny Sharp's suppression motion; we reverse both of Sharp's convictions; we vacate any sentences or fines imposed; and we remand the case with directions to grant Sharp's motion to suppress.

All Citations

340 P.3d 1235 (Table), 2014 WL 7566576

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305 Kan. 1076
Supreme Court of Kansas.

STATE of Kansas, Appellee,
v.
Travis SHARP, Appellant.

No. 110,845
Opinion filed March 17, 2017

Synopsis

Background: Following denial of motion to suppress, defendant was convicted on stipulated facts in the Johnson District Court, Kevin P. Moriarty, J., of driving under influence (DUI) and unlawful exhibition of speed. Defendant appealed. The Court of Appeals, 2014 WL 7566576, reversed denial of motion to suppress but upheld District Court's ruling on defendant's challenge to constitutionality of statute criminalizing exhibition of speed. State petitioned for review.

[Holding:] The Supreme Court, Malone, J., held that police officer lacked reasonable suspicion that defendant was going to violate "exhibition of speed" statute, as justification for traffic stop.

Judgment of Court of Appeals affirmed in part and vacated in part; convictions reversed; sentence vacated; remanded to District Court with instructions.

Stegall, J., filed dissenting opinion.

****543** Review of the judgment of the Court of Appeals in an unpublished opinion filed December 19, 2014. Appeal from Johnson District Court; KEVIN P. MORIARTY, judge.

Attorneys and Law Firms

Richard P. Klein, of Olathe, Darrell Smith, of Law Office of Darrell Smith, of Olathe, and Rachelle Worrall Smith, of the same firm, were on the briefs for appellant.

Steven J. Obermeier, senior deputy district attorney, Stephen M. Howe, district attorney, and Derek Schmidt, attorney general, were on the briefs for appellee.

Syllabus by the Court

1. Appellate courts generally avoid making unnecessary constitutional decisions. Where there is a valid alternative ground for relief, an appellate court need not decide a constitutional challenge.

2. Issues not presented to the trial court generally will not be considered for the first time on appeal.

****544** 3. The Fourth Amendment to the United States Constitution guarantees the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, and a traffic stop is considered a seizure of the driver. Compliance with the Fourth Amendment requires the officer conducting the stop to have a reasonable and articulable suspicion, based on fact, that the person stopped has committed, is committing, or is about to commit a crime.

4. Reasonable suspicion is a lower standard than probable cause, and what is reasonable depends on the totality of circumstances in the view of a trained law enforcement officer. In determining whether reasonable suspicion exists, the court must judge the officer's conduct in light of common sense and ordinary human experience under the totality of the circumstances. This determination is made with deference to a trained officer's ability to distinguish between innocent and suspicious circumstances, while recognizing that it represents a minimum level of objective justification and is considerably less than proof of wrongdoing by a preponderance of the evidence.

5. The reviewing court does not pigeonhole each factor as to innocent or suspicious appearances but instead determines whether the totality of the circumstances justifies the detention. The relevant inquiry is not whether particular conduct is innocent or guilty, but whether a sufficient degree of suspicion attaches to particular types of noncriminal acts. The totality of the circumstances standard precludes a divide-and-conquer analysis under which factors that are readily susceptible to an innocent explanation are entitled to no weight.

6. The essence of the totality of circumstances standard does not allow law enforcement officers or the courts to selectively choose the facts that would establish reasonable suspicion to justify police action. Rather, a totality of circumstances standard recognizes that events and conditions giving rise to reasonable suspicion are fluid rather than fixed and the existence of reasonable suspicion may change once new facts are observed by or become known to law enforcement.

Opinion

The opinion of the court was delivered by Malone, J.:

***1077** Travis Sharp was convicted of driving under the influence and unlawful exhibition of speed. In an unpublished opinion, the Court of Appeals reversed these convictions and the district court's denial of Sharp's motion to suppress evidence of his driving under the influence. *State v. Sharp*, No. 110845, 2014 WL 7566576, at *7 (Kan. App. 2014) (unpublished opinion). The panel held K.S.A. 8-1565, which prohibits an unlawful

"exhibition of speed or acceleration," was unconstitutionally vague and indefinite, the good faith exception was inapplicable, and the officer lacked reasonable suspicion to conduct a traffic stop based on a violation of K.S.A. 8-1565. 2014 WL 7566576, at *4–5.

[1]The State petitioned for review arguing the panel misapplied the good faith exception, substantial competent evidence supports the denial of the motion to suppress, and K.S.A. 8-1565 is not unconstitutionally vague as applied to Sharp. The case was placed on summary calendar pursuant to Kansas Supreme Court Rule 7.01(c)(2) (2015 Kan. Ct. R. Annot. 59). We affirm the Court of Appeals decision holding the officer lacked reasonable suspicion to conduct ***1078** the traffic stop but vacate its holding regarding the constitutionality of the statute. See *State ex rel. Schmidt v. City of Wichita*, 303 Kan. 650, Syl. ¶ 3, 367 P.3d 282 (2016) ("Appellate courts generally avoid making unnecessary constitutional decisions. ... [W]here there is a valid alternative ground for relief, an appellate ****545** court need not reach a constitutional challenge.").

On January 25, 2013, at approximately 5:30 p.m., Officer Donald Bowers was in a marked police car sitting at a traffic light, in a left turn lane, next to two lanes of eastbound traffic. Bowers' attention was drawn to a dark-colored SUV two lanes to his right and slightly ahead of his car when he heard an engine revving and saw a heavy cloud of smoke coming from underneath the vehicle. Bowers smelled rubber and saw the right rear tire spinning and smoking while the vehicle was stationary. Bowers explained this was called "power braking" and is accomplished by applying the brake and the gas at the same time. Bowers described it as a show of "physical endurance of a vehicle" and was to him "a preparation of a drag race warming the tires."

Bowers decided to stop the vehicle after the light changed. Because he was surrounded by stationary traffic, Bowers turned on his *rear* flashing lights to alert the drivers in *back of* him of his intention to change lanes so he could move behind the SUV. When the light turned green, the SUV did not "tear out from the intersection" nor accelerate in any manner that would provide another justification for stopping him. Bowers followed the vehicle through the intersection, and once Bowers had cleared the intersection, he activated "lights that [the driver of the SUV, Travis Sharp] was able to see" and conducted a traffic stop.

When Bowers asked Sharp if he knew why he had been stopped, Sharp responded "for burning my tires." Sharp responded strangely and slowly to Bowers' initial questions, admitted to drinking "one Buzz Ball," and proceeded to exhibit multiple indications of impairment on field sobriety testing. His preliminary breath test and breath test indicated the presence of alcohol over the legal limit.

Sharp was charged with exhibition of speed under K.S.A. 8-1565 and misdemeanor driving under the influence under K.S.A. 8-1567. Sharp moved to suppress all evidence, reasoning the officer lacked ***1079** reasonable suspicion to conduct the traffic stop. At the suppression hearing, Bowers testified the sole reason he made the traffic stop was because Sharp was spinning his tires at the stoplight. Defense counsel argued the evidence did not establish an exhibition of speed or acceleration under a strict construction of K.S.A. 8-1565(a). The State countered that burning tires at a red light is an exhibition of the power, endurance, and capabilities of the vehicle, such as the ability to accelerate off the stop or to speed.

The district court denied the motion, reasoning the officer had reasonable suspicion to stop the vehicle which was showing it *could* drag race based on the racing engine, the smell of the tires, and the back tires squealing. In so doing, the district court stated: "Even if the officer only saw what he saw, and I think it meets the statute, there is some room for interpretation as both attorneys have done as to what the—what the exact words mean. But clearly, I think that the intent of the legislature was to prohibit this type of behavior."

Sharp filed a motion to reconsider additionally arguing K.S.A. 8-1565 is unconstitutional because exhibition of speed or acceleration is not adequately defined and requires a person of common intelligence to guess at its meaning. The district court summarily denied the motion to reconsider. The parties agreed to a bench trial based on stipulated facts in order to preserve Sharp's motion to suppress. Sharp was convicted of second offense driving under the influence under K.S.A. 8-1567 and exhibition of speed under K.S.A. 8-1565.

Sharp appealed claiming the district court erred in denying his motion to suppress because the portion of K.S.A. 8-1565 prohibiting exhibitions of speed or acceleration is unconstitutionally vague and indefinite, and Bowers lacked the necessary reasonable suspicion to conduct a traffic stop based on a violation of the statute.

The *Sharp* panel held K.S.A. 8-1565 was substantially similar to a city ordinance prohibiting an unlawful "exhibition of speed" which this court held was unconstitutionally vague in *City of Altamont v. Finkle*, 224 Kan. 221, 224, 579 P.2d 712 (1978). Applying *Finkle*, the *Sharp* panel held the provision in ****546** K.S.A. 8-1565 "making it unlawful to exhibit speed or acceleration uses language that is so vague and indefinite that one charged in such terms could not be ***1080** expected to understand the nature and elements of the prohibited conduct." 2014 WL 7566576, at *4. The panel also rejected the State's reliance on both an Olathe ordinance to provide a more precise definition of what it

means to engage in "exhibition of speed or acceleration" and the good faith exception to the exclusionary rule. 2014 WL 7566576, at *4–5.

Alternatively, the panel held that even if the statute was constitutional, Bowers lacked reasonable suspicion to conduct a traffic stop. The panel reasoned that under a strict construction of the statute in favor of the accused, "speed and acceleration are both words that denote movement of some kind," and all of the actions identified by Bowers as justification to stop Sharp happened while the vehicle was stationary. 2014 WL 7566576, at *6. Additionally, it found no facts in the record to support a reasonable suspicion that Sharp was about to participate in a drag race. Although Bowers believed Sharp was warming his tires to participate in a race, Sharp did not accelerate in a manner that would justify a stop for drag racing. Under the totality of the circumstances, the panel concluded Sharp's actions did not rise to the level of a particularized and objective basis for suspecting prior, current, or future criminal activity. 2014 WL 7566576, at *6.

The panel reversed the district court's denial of the motion to suppress and both of Sharp's convictions, vacated the sentences and fines imposed, and remanded with directions to grant the motion to suppress. *Sharp*, 2014 WL 7566576, at *7. This court granted the State's petition for review which argued the panel misapplied the good faith exception, substantial competent evidence supports the denial of the motion to suppress, and K.S.A. 8-1565 is not unconstitutionally vague as applied to Sharp.

[2] [3]We first address the State's reasonable suspicion argument as it is dispositive of the case. The State argues the panel erred by reversing the district court's decision denying the motion to suppress because reasonable suspicion did not exist to support the traffic stop. "The district court's factual findings on a motion to suppress evidence are reviewed for substantial competent evidence. The legal conclusions drawn from that evidence are reviewed de novo." *State v. Pettay*, 299 Kan. 763, 768, 326 P.3d 1039 (2014).

[4] ***1081** Similarly, "[w]hether reasonable suspicion exists is a question of law, and appellate courts review this question with a mixed standard of review, determining whether substantial competent evidence supports the district court's factual findings, while the legal conclusion is reviewed de novo." *City of Wichita v. Molitor*, 301 Kan. 251, 264–65, 341 P.3d 1275 (2015).

[5] [6]The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and a traffic stop is considered a seizure of the driver. *City of Atwood v. Pianalto*, 301 Kan. 1008, 1011, 350 P.3d 1048 (2015). Compliance with the Fourth Amendment requires the officer conducting the stop to "have a reasonable and articulable suspicion, based on fact, that the person stopped has committed, is committing, or is about to commit a crime." 301 Kan. at 1011, 350 P.3d 1048.

[7] [8] [9] [10]Reasonable suspicion is a lower standard than probable cause, and "[w]hat is reasonable depends on the totality of circumstances in the view of a trained law enforcement officer." *State v. Martinez*, 296 Kan. 482, 487, 293 P.3d 718 (2013). In determining whether reasonable suspicion exists, the court must judge the officer's conduct in light of common sense and ordinary human experience under the totality of the circumstances. This determination is made with deference to a trained officer's "ability to distinguish between innocent and suspicious circumstances," while recognizing that it represents a "minimum level of objective justification" and is "considerably less than proof of wrongdoing by a preponderance of the evidence." *Pianalto*, 301 Kan. at 1011, 350 P.3d 1048 (quoting *Martinez*, 296 Kan. at 487, 293 P.3d 718). On appeal,

> "[t]he reviewing court does not 'pigeonhole' each factor as to innocent or suspicious ****547** appearances, but instead determines whether the totality of the circumstances justifies the detention. *State v. DeMarco*, 263 Kan. 727, 734–35, 952 P.2d 1276 (1998). The relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but whether a sufficient degree of suspicion attaches to particular types of noncriminal acts. *United States v. Sokolow,* 490 U.S. 1, 10, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989). The totality of the circumstances standard precludes a 'divide-and-conquer analysis' under which factors that are 'readily susceptible to an innocent explanation [are] entitled to "no weight." ' ***1082** *United States v. Arvizu,* 534 U.S. 266, 274, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002)." *State v. Coleman*, 292 Kan. 813, 817–18, 257 P.3d 320 (2011).

See also *State v. Chapman*, 305 Kan. 365, 371, 381 P.3d 458 (2016).

In denying the motion to suppress, the district court reasoned Bowers had reasonable suspicion to approach the vehicle after he heard the engine racing, smelled the tires, and "saw" the back tires squealing. The court held K.S.A. 8-1565 was "clear enough to show that there was a showing that this vehicle could race," and also noted the possibility that Sharp's actions amounted to an attempted crime as well.

The *Sharp* panel disagreed, holding the officer lacked reasonable suspicion to conduct the traffic stop in this case:

> "Assuming K.S.A. 8-1565 is constitutional, Sharp argues that Bowers lacked reasonable suspicion to stop Sharp because spinning tires while stationary is not a

violation of that statute. The State disagrees, arguing in its brief that by spinning his tires and generating smoke, Sharp 'was committing, had committed or was about to commit a violation of K.S.A. 8-1565.' The statute at issue prohibits exhibitions of speed or acceleration. Criminal statutes must be strictly construed in favor of the accused. *State v. Coman*, 294 Kan. 84, 96, 273 P.3d 701 (2012). Strictly construed, speed and acceleration are both words that denote movement of some kind. Yet, all of the actions Bowers identified as justification for his decision to stop Sharp occurred while Sharp was stationary. In order to show a violation of this statute, the State would need to prove, at a minimum, that Sharp was moving or accelerating. There are no such facts in the record.

"There also are no facts in the record to support reasonable suspicion that Sharp was about to participate in a race in violation of K.S.A. 8-1565. Officer Bowers testified that he believed Sharp was power braking in order to warm Sharp's tires in preparation of a drag race. But Sharp did not actually initiate the traffic stop until after both he and Sharp had cleared the intersection. Bowers did not observe Sharp accelerating in a way that would justify a traffic stop for drag racing. A determination of reasonable suspicion is based on the totality of the circumstances from the viewpoint of those versed in the field of law enforcement. [*State v.*] *Pollman*, 286 Kan. [881,] 890[, 190 P.3d 234 (2008)]. While Bowers did believe Sharp was preparing for a drag race, he also observed Sharp accelerate appropriately when the traffic light turned green and observed no other unlawful behavior prior to activating his front lights to pull Sharp over. Sharp's actions after the light turned green directly contradict Bowers' belief that Sharp was preparing for a race. Since Bowers did not initiate a stop until after he cleared the intersection, we are required to consider that fact when determining whether reasonable suspicion existed for the stop. When considering the totality of the circumstances, Sharp's actions simply do not rise to the level of a particularized and objective ***1083** basis for suspecting prior, current or future criminal activity. As a result, even if the language of the statute at issue was constitutional, the district court erred by denying Sharp['s] motion to suppress." *Sharp*, 2014 WL 7566576, at *6.

We agree with this sound analysis. A strict construction of the statutory language an "exhibition of speed or acceleration" would necessarily "denote movement of some kind." 2014 WL 7566576, at *6; see *Coman*, 294 Kan. at 96, 273 P.3d 701. In this case, no evidence was presented that Sharp accelerated or moved his vehicle at all when the officer decided to stop the vehicle. Although ****548** Bowers testified he thought Sharp was preparing his tires to drag race, a trained law enforcement officer would realize this concern was unwarranted once Sharp was observed proceeding lawfully after the light turned green. According to Bower's testimony, Sharp did not "tear out" from the intersection nor accelerate in any manner that would provide a reason to stop the vehicle. Compare *State v. Giger*, No. 94854, 2006 WL 619327, at *2–3 (Kan. App. 2006) (unpublished opinion) (mere acceleration and squealing of tires as a vehicle enters a turn was insufficient to establish the defendant's commission of a violation of K.S.A. 8-1565[a]).

The State tries to avoid these facts by arguing that reasonable suspicion arose because Sharp was attempting to violate or was about to violate K.S.A. 8-1565 by spinning his tires. See K.S.A. 2015 Supp. 21-5301(a) ("An attempt is any overt act toward the perpetration of a crime done by a person who intends to commit such crime but fails in the perpetration thereof or is prevented or intercepted in executing such crime."); K.S.A. 22-2402(1) ("a law enforcement officer may stop any person in a public place whom such officer reasonably suspects is committing, has committed or is about to commit a crime").

The State's argument is unpersuasive because, like the dissent today, it fails to evaluate the facts under the totality of the circumstances by concluding its analysis at the officer's initial observations. While Bowers testified he thought Sharp was spinning his tires in preparation to race, Sharp's normal, lawful acceleration through the intersection objectively dispels Bower's suspicion that he was preparing to drag race. The dissent suggests that our analysis establishes that "reasonable suspicion, once obtained, can be lost if, ***1084** as law enforcement closes in (perhaps drawing the attention of the suspect), the suspect breaks off his or her suspicious behavior before law enforcement initiates the stop." Op. at 550.

However, this notion assumes facts and inferences that are not supported by the record, and ignores our mandate to consider the *totality* of the circumstances without "pigeonholing" each factor as innocent or suspicious or individually considering each factor in a "divide and conquer" analysis. See *Coleman*, 292 Kan. at 817–18, 257 P.3d 320. Although Bowers testified he decided to stop the vehicle before the light had changed to green, he was two lanes over and slightly behind Sharp's vehicle when he turned on his *rear* flashing lights. Bowers did not turn on the overhead lights that Sharp could see until *after* they had cleared the intersection. No evidence was presented, as the dissent presumes, that Sharp saw the officer's vehicle and changed his course of action. Rather, because of his location with respect to Sharp's vehicle, *i.e.,* surrounded by stationary traffic, Bowers had the benefit of knowing his suspicion that Sharp was preparing to drag race was incorrect by observing Sharp's normal, lawful acceleration when the light turned green. Under the totality of the circumstances, a trained officer would not have reasonably suspected that Sharp had committed, was committing, or was about to commit a crime when

Bowers conducted the traffic stop.

[11]The dissent suggests our decision "defenestrate[s] law enforcement and create[s] a public safety risk" and "defies common sense." Op. at 550. We disagree. Our decision follows the long recognized legal standard that law enforcement officers must consider all of the facts known to them to justify their actions. Thus, in evaluating whether reasonable suspicion of past, present, or future criminal activity exists to validate a traffic stop, officers can neither ignore certain facts nor stop considering ongoing circumstances.

[12]In other words, the essence of the "totality of circumstances" standard does not allow law enforcement officers or the courts to selectively choose the facts that would establish reasonable suspicion to justify police action. Compare *Arvizu*, 534 U.S. at 274, 122 S.Ct. 744 (reasonable suspicion analysis considering each factor in isolation "does not take into account the 'totality of the circumstances,' as our cases have understood that phrase"). Rather, a "totality of circumstances" ***1085** standard recognizes that events and conditions giving rise to reasonable suspicion are fluid rather than fixed, and the existence ****549** of reasonable suspicion may change once new facts are observed by or become known to law enforcement. Indeed, if law enforcement officers were allowed to cherry-pick certain facts, they would be able to operate with unbridled discretion to conduct traffic stops with impunity.

[13]We decline to reach the State's alternative argument that reasonable suspicion arose based on a violation of Olathe Municipal Code 10.01.037 (2001) under *Devenpeck v. Alford*, 543 U.S. 146, 153, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004), because it was not addressed below. See *State v. Holt*, 298 Kan. 469, Syl. ¶ 9, 313 P.3d 826 (2013) ("Issues not presented to the trial court generally will not be considered for the first time on appeal.").

The district court's conclusion that the officer had reasonable suspicion to conduct a traffic stop was not based on substantial competent evidence. As the officer lacked reasonable suspicion to conduct the traffic stop, the district court erroneously denied the motion to suppress evidence of driving under the influence obtained thereafter. See K.S.A. 22-2402(1); *State v. Jones*, 300 Kan. 630, 637, 333 P.3d 886 (2014) (for a traffic stop to be constitutionally reasonable, officer must have reasonable suspicion based on articulable facts that a crime has been, is being, or is about to be committed).

[14]As our analysis provides an alternative ground for relief, we need not decide the constitutional challenges raised in this case. See *Wilson v. Sebelius*, 276 Kan. 87, 91, 72 P.3d 553 (2003). We thus summarily vacate the panel's determination that K.S.A. 8-1565 is unconstitutionally vague as applied to Sharp. In addition, the application of the good faith exception will not be considered because the facts and argument were not presented to the trial court.

The Court of Appeals decision is affirmed in part and vacated in part. We reverse Sharp's convictions, vacate his sentences and fines, and remand the case to the district court with directions to grant the motion to suppress for the reasons stated herein.

Beier, J., not participating.
***1086** Michael J. Malone, Senior Judge, assigned.[1]

Stegall, J., dissenting:

I cannot agree with our decision to reverse the district court's finding of a lawful stop based on reasonable suspicion. To establish the lawfulness of the stop in this case, the State need only show that the officer had a "particularized and objective basis" for suspecting that Sharp was "involved in criminal activity." *State v. Pollman*, 286 Kan. 881, Syl. ¶ 4, 190 P.3d 234 (2008). In other words, the reasonable suspicion standard does not require facts establishing a violation of the law. It is enough simply to show facts sufficient to establish a particularized and objective suspicion that "criminal activity may be afoot." *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Though a mere hunch "does not create reasonable suspicion," the evidentiary threshold is " 'considerably less than proof of wrongdoing by a preponderance of the evidence.' " *Navarette v. California*, 572 U.S. ——, 134 S.Ct. 1683, 1687, 188 L.Ed.2d 680 (2014). Furthermore, a "determination that reasonable suspicion exists ... need not rule out the possibility of innocent conduct." *United States v. Arvizu*, 534 U.S. 266, 277, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002).

> "Our cases have recognized that the concept of reasonable suspicion is somewhat abstract. [Citations omitted.] But we have deliberately avoided reducing it to ' "a neat set of legal rules," ' *Ornelas* [*v. United States*, 517 U.S. 690, 695–96, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996)] (quoting *Illinois v. Gates*, 462 U.S. 213, 232, 103 S.Ct. 2317, 76 L.Ed.2d 527 [1983])." *Arvizu*, 534 U.S. at 274, 122 S.Ct. 744.

Moreover, the "totality of the circumstances" standard "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them." *Arvizu*, 534 U.S. at 273, 122 S.Ct. 744. Finally, a reviewing court is required to give ****550** "due weight" to the factual inferences drawn by both the district court and law enforcement officers. *Ornelas,* 517 U.S. at 699, 116 S.Ct. 1657.

With this framework in mind, the facts before

us—adequately ***1087** set forth in the majority opinion—may be summarized as follows:

While stopped in traffic at a crowded intersection, Officer Bowers observed Sharp spinning his tires using a technique referred to as power braking. From his patrol car positioned slightly behind Sharp in a different lane, Officer Bowers observed Sharp's spinning wheels, a heavy cloud of smoke emanating from under Sharp's vehicle, and the smell of burning rubber. Officer Bowers believed Sharp was "warming" his tires in preparation of a drag race once the light turned green. Based on his observations and knowledge that drag racing is illegal, Officer Bowers believed he had a particularized and objective suspicion that criminal activity was afoot—*i.e.*, was about to occur—and he decided to make a stop.

In preparation for making the stop, and possibly preventing the illegal conduct from occurring (thus guarding public safety), Officer Bowers initiated his rear emergency lights. He was surrounded by vehicles, so he did not immediately attempt a stop because, as he testified, "it wasn't the appropriate time for safety to stop somebody in traffic like that." The light then turned green and Sharp proceeded through the intersection in a normal manner. Officer Bowers activated his front emergency lights and stopped Sharp. After Officer Bowers asked Sharp if he knew why he pulled him over, Sharp immediately acknowledged that it was because he had been "burning tires." One reasonable inference that can be drawn from these facts—one apparently given little weight by the majority—is that Sharp changed his behavior due to the presence of Officer Bowers.

The district court ruled that the question of whether reasonable suspicion existed under these circumstances was not "a particularly close call"—and I agree. But the Court of Appeals found no reasonable suspicion based exclusively on the fact that Sharp proceeded normally through the intersection after the signal turned green. *State v. Sharp*, No. 110845, 2014 WL 7566576, at *6 (Kan. App. 2014) (unpublished opinion) (holding that there are "no facts in the record to support reasonable suspicion that Sharp was about to participate in a race in violation of K.S.A. 8-1565 ... [because] Sharp's actions after the light turned green directly contradict Bowers' belief that Sharp was preparing for a race"). Likewise, today's ***1088** majority concludes that "a trained law enforcement officer would realize this concern"—the concern that Sharp was about to drag race—"was unwarranted once Sharp was observed proceeding lawfully after the light turned green." Op. at 548.

The rule of this case, then, appears to be that reasonable suspicion, once obtained, can be lost if, as law enforcement closes in (perhaps drawing the attention of the suspect), the suspect breaks off his or her suspicious behavior before law enforcement initiates the stop. Not only does this rule defenestrate law enforcement and create a public safety risk, it defies common sense. In the world imagined by today's majority, a driver who spins his or her tires while stopped at an intersection, creating a large black cloud of burning rubber, is nothing more than an innocent out-and-about motorist once he or she proceeds normally through the intersection. I suggest experienced law enforcement officers know better, and we ought to give due weight to that knowledge and experience here.

In my judgment, Officer Bowers acted appropriately given the circumstances, and the fact that Sharp did not consummate the crime of drag racing immediately at that intersection did not deprive Officer Bowers of the particularized and objective suspicion that criminal activity may have been afoot—perhaps even at the next intersection—had Officer Bowers declined to effect a stop.

Finally, notwithstanding Officer Bowers' subjectively reasonable rationale for the stop premised Sharp's preparation for drag racing, the observed behavior was *objectively* suspicious in other respects. See *Whren v. United States*, 517 U.S. 806, 812–13, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) ("[W]e [have] never held ... that an officer's motive ****551** invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary."). Sustained power braking at a traffic intersection is not ordinary behavior and has no innocent explanation. It is conduct that lies outside the common sense norms expected by law abiding motorists. It is inherently unsafe and disturbs the ordinary and orderly flow of traffic on our roadways. All of which can and should cause a reasonable law enforcement officer exercising the appropriate discretion and judgment borne of experience in the field to ***1089** conclude that the operator of such a vehicle may be driving recklessly or impaired—a condition caused either by a conscious decision to disregard traffic laws, or (as turned out to be the case here) by a lack of inhibition brought on by intoxication.

For these reasons, I dissent.

All Citations

305 Kan. 1076, 390 P.3d 542

224 Kan. 221
Supreme Court of Kansas.

CITY OF ALTAMONT, Kansas, Appellee,
v.
Kenneth L. FINKLE, Appellant.

No. 48627.
|
June 10, 1978.

Synopsis
Driver was convicted before the Labette District Court, Charles J. Sell, J., of violating city automobile ordinance, and he appealed. The Supreme Court, Holmes, J., held that citation charging driver, who allegedly drove his automobile from parked position at curb, spun his tires, threw some gravel and turned corner at speed of ten to 15 miles per hour, with driving his automobile in unlawful "exhibition of speed" in violation of ordinance prohibiting racing, speed and acceleration tests, contests or competitions, failed to charge any violation of such ordinance, in that charge was so vague and indefinite that one charged in such terms could not be expected to understand nature and elements of alleged violation.

Reversed with directions.

****712 *221** *Syllabus by the Court*

1. A complaint or information under which a defendant is charged with a criminal offense must charge an offense under the statute with enough clarity and detail to inform the defendant of the criminal act with which he is charged.

2. A complaint, even though phrased in the words of the statute and not attacked on a constitutional basis, may still be void if it does not advise the defendant of the nature of the accusation against him.

3. A complaint, in the form of a citation issued for an alleged violation of a city ****713** traffic ordinance, which charged the defendant with an unlawful "exhibition of speed" and nothing more is void as it fails to adequately inform the defendant of the charges against him.

Attorneys and Law Firms

Charles F. Forsyth, Erie, argued the cause and was on the brief for appellant.

John F. Amos, Oswego, was on the brief for appellee.

Opinion

HOLMES, Justice:

This is an appeal by defendant-appellant, Kenneth L. Finkle, from a conviction by the court of a violation of Section 37 of Ordinance No. 248, of the City of Altamont. Ordinance No. 248 is the Standard Traffic Ordinance for Kansas Cities prepared by The League of Kansas Municipalities.

Section 37 reads:
"Sec. 37. Racing on Highways; 'Drag Race' and 'Racing' Defined. (a) No person shall drive any vehicle in any race, speed competition or contest, drag race or acceleration contest, test of physical endurance, exhibition of speed or acceleration, or for the purpose of making a record, and no person shall in any manner participate in any such race, competition, contest, test or exhibition.

"(b) For the purpose of this section, the term drag race means the operation of two (2) or more vehicles from a point side by side at accelerating speeds in a competitive attempt to out-distance each other, or the operation of one (1) or more vehicles over a common selected course from the same point to the same point, for the purpose of comparing the relative speeds or power of acceleration of such vehicle or vehicles within a certain distance or time limit.

"(c) For the purpose of this section, the term racing means the use of one (1) or more vehicles in an attempt to outgain, out-distance or prevent another vehicle ***222** from passing, to arrive at a given destination ahead of another vehicle or vehicles, or to test the physical stamina or endurance of drivers over long distance driving routes."

This section of the ordinance is similar to K.S.A. 8-1565(a), (b) and (c).

Defendant was charged, by citation, on a Uniform Traffic Ticket and Complaint with driving his automobile in an unlawful "exhibition of speed." Defendant, at all stages of the proceedings in both the Municipal Court and District Court, contended the citation failed to charge a crime under the ordinance. While defendant does not question the constitutionality of the ordinance itself, he does contend that an allegation of "exhibition of speed" fails to state a crime and is so vague and indefinite that a person charged in such terms could not be expected to understand the nature and elements of the alleged violation.

We agree.

In the instant case there was no evidence of racing or drag racing as defined in the statute. There was no evidence of any race, competition, contest or test. The only evidence was the testimony of a city police officer. The officer testified that while off-duty he observed the defendant drive his automobile from a parked position at the curb, spin his tires, throw some gravel and turn the corner at a speed of 10 to 15 miles per hour. The officer described this activity as a "jackrabbit start." During cross-examination the officer answered questions as follows:
"Q. All right. Now, do you of your own knowledge know what comprises exhibition of speed? What does that mean?

"A. Squealing your tires, fishtailing the rear end of your car, jackrabbit starts.

"Q. Is there some provision in the City of Altamont against that?

"A. Well, under the Ordinance 248 which the City adopted of the State Statute.

"Q. That ordinance defines drag racing; is that correct?

"A. Defines drag racing, racing, racing on highways; drag racing, racing defined. But it also covers exhibition of speed or acceleration.

****714** "Q. Does that involve two cars?

"A. No, sir.

"Q. Or long distance endurance driving?

"A. It don't state this not in here.

"Q. That's in your opinion?

"A. In my opinion, yes.

"Q. So in your opinion, if someone squeals his tires, he can be charged with exhibition of acceleration?

"A. Yes, sir. I would think it would be highly possible to take off from a corner, curb or from a stop sign without having to spin your tires."

***223** The question of the sufficiency of the allegations of a complaint or information has been before this court numerous times in a variety of situations.

[1] In State v. Williams, 196 Kan. 274, 411 P.2d 591 (1966), the court said:

"It is elementary that an information under which a defendant is charged with a criminal offense must be legally sufficient, in that it must charge an offense under the statute with enough clarity and detail to inform the defendant of the criminal act with which he is charged. . . ." (at page 285, 411 P.2d at page 600.)

[2] The test to be applied to a criminal statute or ordinance when attacked as being vague and indefinite was recently repeated in State v. Kirby, 222 Kan. 1, 563 P.2d 408 (1977):

". . . The test to determine whether a criminal statute is unconstitutionally void by reason of being vague and indefinite is whether its language conveys a sufficiently definite warning as to the conduct proscribed when measured by common understanding and practice. If a statute conveys this warning it is not void for vagueness. Conversely, a statute which either requires or forbids the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application is violative of due process. . . ." (at page 4, 563 P.2d at page 410.)

See also Kansas City Millwright Co., Inc. v. Kalb, 221 Kan. 658, 562 P.2d 65 (1977); State v. Gunzelman, 210 Kan. 481, 502 P.2d 705 (1972); State v. Hill, 189 Kan. 403, 369 P.2d 365 (1962).

[3] **[4]** We have held that a complaint, even though phrased in the words of the statute and even though not attacked on a constitutional basis is still void if it does not advise the defendant of the nature of the accusation against him.

". . . The defendant argues a number of propositions but does not contest the validity of the provision of the statute under which he was prosecuted, although his motion to quash the complaint was sufficient to raise that question. The court is not disposed to hold that a complaint is good when drawn under a statute that is unconstitutional, although the validity of the statute is not specifically questioned. The statute prescribes punishment for anyone who carelessly or negligently handles or exposes nitroglycerin, but does not say what acts constitute carelessness or negligence, thus necessarily leaving the jury to determine what is carelessness or negligence in any particular case. The statute does not name the acts which are prohibited, and a complaint following the statute, containing nothing but statutory allegations no other would be necessary if the statute were good does not inform the defendant of the nature and cause of the accusation against him. . . ." State v. Satterlee, 110 Kan. 84, 85, 202 P. 636, 637 (1921).

The ordinance when considered in its entirety appears to speak ***224** primarily to racing, speed and acceleration tests, contests or competition. The mere charge of an "exhibition of speed" against a driver not engaged in any such test, contest or competition fails to charge any violation of the ordinance.

[5] Nowhere in the ordinance is there any attempt to define the words " exhibition of speed or acceleration" or to delineate the proscribed conduct. Any interpretation of ****715** that portion of the ordinance, without additional allegations, is such that men of common intelligence must guess at its meaning and may differ as to its application and therefore the language standing alone does not meet the minimum standards required. Every attempt by a driver to proceed from a stopped position or to increase speed from a moving position could be considered by some persons as an "exhibition of speed or acceleration." How is the driver to know when he is committing an offense, and when he is not, where the question of an "exhibition of speed or acceleration" is a matter for subjective determination lacking any objective standards?

Although appellee has submitted no case authority supporting the validity of the charge in this case our research indicates that similar language has been considered sufficient in two states. See People v. Grier, 226 Cal.App.2d 360, 38 Cal.Rptr. 11 (1964) and People v. Heckard, 164 Colo. 19, 431 P.2d 1014 (1967). We have carefully considered both cases and, in view of what we have said above, do not consider them persuasive.

The judgment of the district court is reversed with directions to discharge the defendant.

PRAGER, MILLER and McFARLAND, JJ., concur in result.

All Citations

224 Kan. 221, 579 P.2d 712