[Cite as *State v. Zervos*, 2010-Ohio-1998.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-09-1249

Appellee — Trial Court No. TRC 08-6783

v.

Jacqueline Zervos — **DECISION AND JUDGMENT**

Appellant — Decided: May 7, 2010

* * * * *

Robert A. Pyzik, City of Sylvania Chief Prosecutor, for appellee.

Jerome Phillips, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Sylvania Municipal Court, Lucas County, Ohio, which denied appellant's motion to suppress in an operating a motor vehicle under the influence of alcohol case. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, Jacqueline Zervos, sets forth the following sole assignment of error:

{¶ 3} "THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS EVIDENCE."

{¶ 4} The following undisputed facts are relevant to the issues raised on appeal. On the evening of November 2, 2008, appellant and her cousin visited several establishments throughout the Toledo Metropolitan area. While patronizing these establishments, the parties consumed alcohol. At approximately 3:00 a.m., an on-duty Ohio State Highway Patrol officer was traveling southbound on McCord Road near its intersection with Bancroft Street at the boundary point between Springfield and Sylvania townships. Conditions were clear and dry, with minimal traffic present on the roadway.

{¶ 5} The officer observed appellant's vehicle traveling in the opposite direction. The officer observed appellant execute what he believed to be an illegal U-turn across double yellow lines and which was impermissibly close to a change in road elevation so as to preclude adequate visibility by oncoming traffic.

{¶ 6} Based upon these observations, the officer initiated a traffic stop of appellant. The officer indicated to appellant that she had made an unsafe and improper U-turn. Appellant apologized and indicated that she had missed a turn into an apartment complex. This was collaborated by the testimony of appellant's cousin, who was a front seat passenger in appellant's vehicle.

{¶ 7} Appellant testified that she did not make a U-turn, but rather missed the entrance to the apartment complex where her cousin lived and that she lawfully pulled into the driveway of a Montessori school in order to turn around.

{¶ 8} On November 5, 2008, appellant was charged with two counts of operating a motor vehicle under the influence of alcohol, in violation of R.C. 4511.19 and one count of making an improper U-turn, in violation of R.C. 4511.37. On April 3, 2009, appellant filed a motion to suppress. On May 15, 2009, the trial court held an evidentiary hearing on appellant's motion to suppress. The trial court concluded that although there was insufficient evidence to establish a U-turn violation, the testimony of the officer established the requisite reasonable suspicion to initiate the stop itself. Thus, the motion to suppress was denied.

{¶ 9} Given the failure of the motion to suppress, on May 15, 2009, appellant voluntarily pled no contest to one count of operating a motor vehicle under the influence of alcohol. In exchange, all remaining charges were dismissed. On August 21, 2009, appellant was sentenced to probation, an alcohol treatment program, and electronic monitoring in lieu of incarceration. Timely notice of appeal was filed.

{¶ 10} In her sole assignment of error, appellant contends that the trial court erred in denying the motion to suppress. It is well-established that when considering a motion to suppress, the trial court assumes the role of the trier of fact and is, therefore, in the best position to resolve factual questions and evaluate witness credibility. *State v. Mills* (1992), 62 Ohio St.3d 357, 366. It is similarly well-established that an appellate court

will not disturb a trial court's motion to suppress judgment so long as it is supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594. See, also, *State v. Jobe,* 6th Dist. No. L-07-1413, 2009-Ohio-4066.

{¶ 11} In denying the motion to suppress, the trial court noted in pertinent part, "On the other hand, there was testimony of the officer that there was a U-turn and in the process the defendant's vehicle did go off the right side of the roadway. The Court does find that, that both those acts as testified to by the officer both constitute probable cause--I'm sorry, reasonable suspicion to stop the defendant based on the driving alone."

{¶ 12} In support of her contention that the trial court erred in denying her motion to suppress, appellant construes the determinative issue regarding the propriety of the trial court judgment as, "whether R.C. 4511.33 prohibits a driver from crossing over a white line while executing a U-turn." Appellee agrees that this question as posed is one of first impression.

{¶ 13} Nevertheless, given the facts of this case, we find it unnecessary to interpret the U-turn statute. Confining the issue in this case so narrowly would abandon the established principle that an officer's reasonable suspicion in support of a traffic stop is not negated by the failure to ultimately establish that a traffic offense occurred and attain a conviction on the perceived offense.

{¶ 14} The Supreme Court of Ohio has ruled that the failure to convict on a perceived traffic offense does not negate the propriety of the stop. *Bowling Green v. Godwin*, 110 Ohio St.3d 58, 2006-Ohio-3563. As succinctly held in *Godwin*, "probable

cause does not require the officer to correctly predict that a conviction will result." We agree with the sentiment expressed in a federal case involving an officer who had stopped a vehicle based on the mistaken belief that the windows were tinted darker than the law permitted. The court observed that the officer "'was not taking the bar exam. The issue is not how well [the officer] understood California's window tinting laws, but whether he had objective, probable cause to believe that these windows were, in fact, in violation.' *United States v. Wallace* (C.A.9, 2000), 213 F.3d 1216, 1220." Id. at ¶ 15.

{¶ 15} Given these guiding legal principles, the inability of the officer to establish a U-turn or marked lanes violation is moot. The record shows that the arresting officer testified that he observed appellant at approximately 3:00 a.m. make a U-turn on McCord Road near Bancroft Street in a fashion that the officer believed caused appellant to impermissibly cross over double yellow lines and which was impermissibly close in proximity to a nearby change in road elevation.

{¶ 16} Based upon the foregoing, we find that the record of evidence clearly shows that the trial court's motion to suppress judgment was supported by competent, credible evidence. Subsequent conjecture pertaining to potential nuances of U-turn or marked lane statutes is moot. It has no bearing on the officer's reasonable suspicion prior to the stop, clearly articulated in his testimony. We find appellant's assignment of error not well-taken.

{¶ 17} On consideration whereof, the judgment of the Sylvania Municipal Court, Lucas County, Ohio, is affirmed. Appellant is ordered to pay the cost of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____

_____
JUDGE

Thomas J. Osowik, P.J.
CONCUR (WITH SINGER, J., WRITING SEPARATELY). _____

JUDGE

Keila D. Cosme, J.,
DISSENTS AND WRITES
SEPARATELY.

SINGER, J., concurring.

{¶ 18} I concur with the holding of the majority but write separately to emphasize the fact that the issue in the present case is whether the highway patrol officer reasonably believed that the law had been violated, not whether he was correct in his assessment.

{¶ 19} A reviewing court must examine the totality of the circumstances surrounding the stop as "viewed through the eyes of the reasonable and prudent police

officer on the scene who must react to events as they unfold." *State v. Andrews* (1991), 57 Ohio St.3d 86, 87-88. "The court reviewing the officer's actions must give due deference to the officer's experience and training, and view the evidence as it would be understood by those in law enforcement." *State v. Teter* (Oct. 6, 2000), 11th Dist. No. 99-A-0073.

{¶ 20} The highway patrol officer, a four-year veteran of the force, testified that he witnessed appellant make an illegal U-turn and in doing so, he witnessed her illegally cross marked lanes.[1] It is clear the trial court found the officer's testimony on direct-examination convincing. It is a long-standing principle that factual findings of the trial court are to be given deference because it is in the best position "to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶ 21} In reviewing the totality of the circumstances, including the trial court's finding that the officer's testimony was credible, I find that the officer's actions were not unreasonable and that he possessed a reasonable articulable suspicion, if not actual probable cause, that appellant committed a traffic violation.

{¶ 22} Accordingly, I find appellant's single assignment of error not well-taken and affirm the judgment below.

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[1]I note that the transcript of the proceedings below was transcribed from an audiotape recording. Several "inaudibles" appeared in the transcript. This time, however, I was able to determine what transpired below.

COSME, J., dissenting.

{¶ 23} The Fourth Amendment guarantees our right to be secure in our person by prohibiting searches and seizures except upon probable cause. R.C. 4511.33 requires maintenance of one's lane only "as nearly as practicable." Crossing over the fog line in the course of executing a legal U-turn does not violate the statute if executed safely. Accordingly, there was no cause to stop appellant, and I respectfully dissent.

I. STANDARD OF REVIEW

{¶ 24} When presented with a motion to suppress, the trial court assumes the role of trier of fact. See *State v. Mills* (1992), 62 Ohio St.3d 357, 366. As such, the trial court is in the best position to resolve questions of fact and evaluate witness credibility. *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, ¶ 41, see *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. On review, we must accept the trial court's factual findings if they are supported by competent, credible evidence. Accepting those facts as true, we must then independently determine whether, as a matter of law and without deference to the trial court's conclusion, those facts meet the applicable legal standard. *Mayl*, 2005-Ohio-4629, ¶ 41; *State v. Klein* (1991), 73 Ohio App.3d 486, 488.

II. THE ALLEGED VIOLATIONS

{¶ 25} The intersection near McCord Road and Bancroft Street in Toledo is a two-lane road, marked by double yellow lines in the center and a white fog line at each edge of the roadway. The shoulder extends about five feet past the white fog lines.

{¶ 26} Trooper Steven Powell of the Ohio Highway Patrol stopped and cited appellant for an alleged improper U-turn. R.C. 4511.37 prescribes "no vehicle shall be turned so as to proceed in the opposite direction upon any curve, or upon the approach to or near the crest of a grade, if the vehicle cannot be seen within five hundred feet by the driver of any other vehicle approaching from either direction." Trooper Powell claimed that the U-turn was illegal because appellant crossed the center lines and attempted the U-turn too close to a change in the road elevation which prevented oncoming traffic from easily seeing appellant's vehicle.

{¶ 27} At the suppression hearing, Trooper Powell also testified that appellant's vehicle went over the white fog line on the right side of the road while appellant was executing the U-turn, and characterized this movement as a marked-lanes violation under R.C. 4511.33. But appellant was not cited for this alleged violation at the time of the stop.

{¶ 28} The trial court concluded that there was insufficient evidence to establish the cited U-turn violation, but determined that the Trooper's testimony established a marked-lanes violation, thereby justifying the stop. I disagree. The alleged violation (crossing the white fog line) was a part of a single, continuous, legal turn. R.C. 4511.33 requires only that a vehicle be driven "as nearly as practicable, entirely within a single lane" of traffic.

{¶ 29} In *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, syllabus, the Ohio Supreme Court held, "a traffic stop is constitutionally valid when a law-enforcement

officer witnesses a motorist drift over the lane markings in violation of R.C. 4511.33, even without further evidence of erratic or unsafe driving." While observing a vehicle *drifting* across an edge line may suffice, that is not the case here. See *State v. Stokes*, 10th Dist. No. 07AP-960, 2008-Ohio-5222. To drift is defined as "an aimless course," or "a foregoing of any attempt at direction or control." Here, appellant did not drift across the white fog line. She intentionally crossed it while making a legal turn. Both appellant and Trooper Powell testified there was no other traffic on the road when she executed the turn. And there was no evidence that the maneuver was performed in an unsafe manner. Therefore, there was no violation of R.C. 4511.33.

{¶ 30} The circumstances of the stop in this case demonstrate that appellant crossed the white fog line as part of her turn. Instead of viewing the alleged lane violation as part of the totality of circumstances, Trooper Powell chose to view it as an isolated incident - which it was not.

{¶ 31} Absent an offense, there is no reason to stop a vehicle. Absent an offense, the exclusionary rule should be invoked. In *State v. Downs*, 6th Dist. No. WD-03-030, 2004-Ohio-3003, this court held that the police officer did not possess reasonable and articulable suspicion to justify a traffic stop. In that case, the fact that defendant's vehicle briefly crossed the divider line between two southbound lanes was not a traffic violation in the absence of any other traffic on the street, and the officer did not interpret defendant's minimal, momentary, and likely unintended lane incursion as a signaling violation.

{¶ 32} But now, according to the majority, anytime a police officer observes a singular minimal incursion of R.C. 4511.33, he has probable cause to stop the vehicle. The detailed nature of traffic codes enables any officer to stop virtually any motorist at almost any time by using the traffic infraction as a pretext. I disagree. The most troubling aspects lie in the implications of this rule, the incredible amount of discretionary power it hands law enforcement without any check on the potential abuse of power.

{¶ 33} The state suggests that because the issue of whether a marked-lanes violation can be committed while making a legal U-turn is a case of first impression, the trooper's mistaken belief that a violation had occurred was reasonable. I disagree. The statute is clear, and common sense requires that we find a vehicle may leave its lane when necessary to effectuate a turn, so long as it can do so safely.

III. CONCLUSION

{¶ 34} Because there was no offense and there was no set of facts to prompt a reasonable suspicion that an offense had occurred, there was no reason to stop appellant's vehicle. As a result, the trial court erred in denying appellant's motion to suppress. I therefore respectfully dissent.