[Cite as *State v. Brown*, 2007-Ohio-4626.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2006-T-0077**
- vs -	:	
JODIRAE B. BROWN,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Girard Municipal Court, Case No. 2004 TRC 00740.

Judgment: Reversed and remanded.

Robert L. Johnson, Girard City Prosecutor, 100 North Market Street, Girard, OH 44420 (For Plaintiff-Appellee).

Jodirae B. Brown, pro se, 107 Diamond Way, Cortland, OH 44410 (Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Jodirae B. Brown appeals from the Girard Municipal Court's denial of her motion to suppress, in a case resulting in her conviction for operating a vehicle under the influence of alcohol, in violation of R.C. 4511.19(A)(3). We reverse and remand.

{¶2} March 7, 2004, about 2:00 a.m., Officer George Bednar of the Liberty Township Police Department was cruising south on Belmont Avenue, in Liberty Township, Trumbull County, Ohio. At Motor Inn Drive, a Pontiac pulled out in front of him. At this point, Belmont Avenue is a four lane road, with two lanes heading each direction, with a concrete divider in between. The Pontiac was in the left hand, southbound lane. Officer Bednar followed the Pontiac for about a quarter mile, until it turned left onto Liberty Street, where Officer Bednar made a stop. The driver of the Pontiac was Mrs. Brown. At the suppression hearing, Officer Bednar testified the Pontiac was driven "erratically," bouncing between the lines of the left hand lane on Belmont. Officer Bednar admitted on cross-examination that the weaving occurred entirely in the one lane of traffic.

{¶3} As a result of the stop, Officer Bednar arrested Mrs. Brown. She was charged with driving under the influence of alcohol, in violation of R.C. 4511.19(A)(1); driving with a prohibited breath-alcohol content, in violation of R.C. 4511.19(A)(3); and for violation of the marked lanes statute, in violation of R.C. 4511.33. *State v. Brown*, 166 Ohio App.3d 90, 2006-Ohio-1792, at ¶2 ("*Brown* I"). March 9, 2004, Mrs. Brown pleaded not guilty. Id. at ¶3. May 19, 2004, she entered a "Rule 11 Agreement"; withdrew her previous pleas; and pled guilty to each charge. Id. at ¶4. The trial court took her sentence "under advisement," and diverted Mrs. Brown to treatment in lieu of conviction, under supervision of the probation department, pursuant to the common law. Id. at ¶4-5.

{¶4} Thereafter, Mrs. Brown was found in violation of her probation. The trial court dismissed the R.C. 4511.19(A) charge against her, but sentenced her to various

sanctions, including fines, jail time, and license suspension. *Brown* I at ¶6-8. Mrs. Brown appealed. Id. at ¶9. We reversed and remanded, finding the trial court's procedure of diversion to treatment, in lieu of conviction, to be improper, since unauthorized by statute. Id. at ¶12-17, 27-30.

{¶5} On remand, the matter was set for trial, all the original charges being reinstalled. June 7, 2006, the trial court entertained, and overruled, Mrs. Brown's motion to suppress. Mrs. Brown then entered another "Rule 11 Agreement." The trial court dismissed the counts under R.C. 4511.19(A)(1) and R.C. 4511.33, and filed a judgment entry of conviction for violation of R.C. 4511.19(A)(3). While indicating that Mrs. Brown had pleaded "no contest," this judgment entry did not indicate whether she had been found guilty on the remaining charge.

{¶6} Mrs. Brown timely noticed this appeal. July 28, 2006, we sua sponte remanded the matter to the trial court, so a judgment formally compliant with the requirements of *State v. Ginocchio* (1987), 38 Ohio App.3d 105, and Crim.R. 32(C) could be entered. The trial court did this August 2, 2006; and we deemed the matter filed as of that date, pursuant to App.R. 4(C). However, the August 2, 2006 judgment entry of the trial court stated that Mrs. Brown had pleaded "guilty," rather than "no contest," to the remaining charge against her. Consequently, June 27, 2007, we remanded to the trial court for clarification of her plea. June 29, 2007, the trial court filed a judgment entry specifying that Mrs. Brown pleaded "no contest" to violating R.C. 4511.19(A)(3).

{¶7} Mrs. Brown assigns one error:

{¶8} "The trial court erred in overruling [d]efendant-[a]ppellant's [m]otion to [s]uppress [e]vidence."

{¶9} At a hearing on a motion to suppress, the trial court functions as the trier of fact. Accordingly, the trial court is in the best position to weigh the evidence by resolving factual questions and evaluating the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366; *State v. Smith* (1991), 61 Ohio St.3d 284, 288.

{¶10} On review, an appellate court must accept the trial court's findings of fact if they are supported by some competent and credible evidence. *State v. Retherford* (1994), 93 Ohio App.3d 586, 592. After accepting the factual findings as true, the reviewing court must then independently determine, as a matter of law, whether the applicable legal standard has been met. Id. See, also, *State v. Swank*, 11th Dist. No. 2001-L-054, 2002-Ohio-1337, at ¶11.

{¶11} It is well-established that any violation of the traffic laws justifies the police in making a traffic stop. Cf. *State v. Williams*, 11th Dist. No. 2005-T-0123, 2006-Ohio-6689, at ¶18. In this case, Officer Bednar justified stopping Mrs. Brown, ultimately resulting in her arrest and conviction for driving under the influence, for a marked lanes violation, R.C. 4511.33(A)(1). That statute provides, in pertinent part:

{¶12} "(A) Whenever any roadway has been divided into two or more clearly marked lanes for traffic, *** the following rules apply:

{¶13} "(1) A vehicle *** shall be driven, as nearly as is practicable, entirely within a single lane *** of traffic and shall not be moved from such lane *** until the driver has first ascertained that such movement can be made with safety."

{¶14} As noted above, Officer Bednar testified at the suppression hearing that Mrs. Brown's driving, during the quarter-mile he followed her down Belmont Avenue, was somewhat erratic: that her car moved from side to side of the left hand lane in which she was driving. He testified she touched the lines. However, he admitted on cross-examination she stayed entirely in one lane.

{¶15} By its plain language, R.C. 4511.33(A)(1) allows a driver to move between lanes, as long as the movement can be made safely. This court has held that, "police officers may lawfully stop a motor vehicle solely on the basis that the vehicle is weaving, but only when the extent of the weaving was what can be described as substantial." *Willoughby v. Mazura* (Sep. 30, 1999), 11th Dist. No. 98-L-012, 1999 Ohio App. LEXIS 4642, at 8. That is, "there must be some indicia of erratic driving to warrant an investigative stop beyond some incident of modest or minimal weaving in one's lane alone." *State v. Spikes* (June 9, 1995), 11th Dist. No. 94-L-187, 1995 Ohio App. LEXIS 2649, at 10.

{¶16} In this case, the record does not reveal any indicia of erratic driving beyond some modest weaving by Mrs. Brown in her own lane of traffic. Even ignoring the plain language of R.C. 4511.33(A)(1), which appears to require lane crossing to constitute a violation, such modest weaving is insufficient to justify an investigative stop. The motion to suppress should have been granted.

{¶17} The assignment of error is with merit.

{¶18} The judgment of the Girard Municipal Court is reversed, and the matter remanded for further proceedings consistent with this opinion.

CYNTHIA WESTCOTT RICE, P.J., concurs in judgment only,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

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{¶19} I respectfully dissent.

{¶20} The issue here is whether Officer Bednar had probable cause to stop Brown's vehicle. The Ohio Supreme Court has held that "where a police officer stops a vehicle based on probable cause that a traffic violation has occurred or was occurring, the stop is not unreasonable under the Fourth Amendment ***." *Dayton v. Erickson*, 76 Ohio St.3d 3, 11, 1996-Ohio-431.

{¶21} "Regarding 'weaving' and marked lane violations, there are two legitimate bases for an officer to initiate a traffic stop. The first is that, pursuant to *Terry v. Ohio* [(1968), 392 U.S. 1, 21,] the officer has a reasonable suspicion that a crime is occurring. The second is that the officer has probable cause to believe that a traffic violation has occurred." *State v. Korman*, 11th Dist. No. 2004-L-064, 2006-Ohio-1795, at ¶13 (citation omitted). "In many instances when a vehicle crosses [a lane marker], the officer could stop the vehicle based upon probable cause that a traffic violation has occurred *** *and* based upon reasonable suspicion that the driver is operating the vehicle under the influence of alcohol. However, the stop does not violate the Fourth Amendment so long as the circumstances meet *one* of the above standards." Id. (emphasis sic).

{¶22} In the instant matter, Officer Bednar testified that, at approximately 2:00 a.m., on March 7, 2000, he observed a Pontiac, driven by Brown, turn from Motor Inn Drive and head southbound on Belmont Avenue. Bednar testified that Belmont Avenue is a four lane roadway with a concrete divider in the center. After Brown made the turn, Bednar observed her "driving in an erratic manner," and "bouncing back and forth" within the left hand lane, and followed behind her for a distance of approximately one-quarter of a mile. Officer Bednar stated that at first, he thought that Brown might have been lost, because several times "[i]t appeared like [she] was going to switch lanes, and then she didn't." He described this movement as both "straddling the line instead of driving straight," and "bouncing between lanes as if she was going to switch."

{¶23} R.C. 4511.33 (A)(1) provides:

{¶24} "Whenever any roadway has been divided into two or more clearly marked lanes for traffic, or wherever *** traffic is lawfully moving in two or more substantially continuous lines in the same direction, *** a vehicle *** shall be driven, as nearly as is practicable, entirely within a single lane or line of traffic and shall not be moved from such lane or line until the driver has first ascertained that such movement can be made with safety."

{¶25} "This court has repeatedly held that a minor violation of a traffic regulation *** that is witnessed by a police officer is, standing alone, sufficient justification to warrant a limited stop for the issuance of a citation." *State v. Yemma* (Aug. 9, 1996), 11th Dist. No. 95-P-0156, 1996 Ohio App. LEXIS 3361, at *6-*7 (citations omitted); *Warren v. Smith*, 11th Dist. No. 2002-T-0063, 2003-Ohio-2113, at ¶7; *State v. Livengood*, 11th Dist. No. 2002-L-044, 2003-Ohio-1208, at ¶17; *State v. Jones*, 11th

Dist. No. 2001-A-0041, 2002-Ohio-6569, at ¶17; *State v. Molk*, 11th Dist. No. 2001-L-146, 2002-Ohio-6926, at ¶15.

{¶26} There was competent, credible evidence to support the trial court's finding, on the basis of Bednar's testimony, that Brown repeatedly "straddled the line."

{¶27} Furthermore, this court has stated that "[s]ignificant weaving within one's lane can give rise to the level of erratic driving and reasonable suspicion that the driver of the vehicle is impaired to justify a stop, even if there are no other traffic violations." *Korman*, 2006-Ohio-1795, at ¶15 (citation omitted).

{¶28} Once the aforementioned violations and erratic driving were observed, Officer Bednar had reasonable grounds to stop the vehicle. Absent some evidence from Brown that further detention was unreasonable, the motion to suppress should not be granted. See *State v. Hale*, 11th Dist. No. 2004-L-105, 2006-Ohio-133, at ¶40, quoting *State v. Myers* (1990), 63 Ohio App.3d 765, 771 ("[i]f circumstances attending an otherwise proper stop should give rise to a reasonable suspicion of some other illegal activity, different from the suspected illegal activity that triggered the stop, then the vehicle and the driver may be detained for as long as that new articulable and reasonable suspicion continues").

{¶29} The judgment of the Trumbull County Court of Common Pleas should be affirmed.