

**THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	<b>OPINION</b>
Plaintiff-Appellee,	:	<b>CASE NO. 2009-P-0054</b>
- vs -	:	
TRAVIS S. LARRICK,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Municipal Court, Ravenna Division, Case No. 08 TRC 14789.

Judgment: Reversed and remanded.

*Victor V. Vigluicci*, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

*J. Chris Sestak*, Student Legal Services, Inc., Kent State University, P.O. Box 5190, Kent, OH 44242 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Travis S. Larrick appeals from the judgment of the Portage County Municipal Court, Ravenna Division, overruling his motion to suppress regarding a traffic stop, which led to his conviction for operating a vehicle under the influence of alcohol. We reverse and remand.

{¶2} About 4:00 a.m. on the morning of October 19, 2008, Trooper Jonathan A. Ganley of the State Highway Patrol was stopped at a light on Route 59, westbound, in

the city of Kent, Portage County, Ohio. Two to three blocks away, he noticed a car pull out of a private drive or road on the north side of Route 59. At this point, Route 59 is two lanes in either direction. At certain instances, there are concrete planters dividing the roadway in the center; in between the planters, there appears to be a turning lane, marked, in part, by double yellow or orange lines. Trooper Ganley testified that the car he noticed turned right – i.e., westbound – on Route 59, and pulled into the left-hand lane. In so doing, the trooper claimed the car touched one of the double lines marking the center lane.

{¶3} Trooper Ganley followed the car, without noticing any erratic driving. The car reached the intersection of Route 59 with Lincoln Street, where it signaled, and made, a proper left turn to head south on Lincoln. Trooper Ganley followed. At this point, Lincoln Street is two lanes, separated by a double yellow line. Trooper Ganley testified that, as soon as he turned, he saw the car make a full marked lanes violation on Lincoln, with both of its driver's side wheels going approximately a foot over the center double yellow lane. Evidently the trooper turned on his lights at this time, thus activating the audio portion of his cruiser's camera system. Trooper Ganley testified that, while he had been too distant from the first violation for his camera to capture it, the second violation should be fully visible on the resulting DVD. Trooper Ganley followed the car several blocks, until it pulled into a private driveway, where the trooper initiated a traffic stop.

{¶4} The driver of the car was Mr. Larrick; ultimately, Trooper Ganley arrested him for operating his vehicle under the influence of alcohol. Mr. Larrick was eventually charged with operating a vehicle under the influence, in violation of R.C.

4511.19(A)(1)(a); having a breath alcohol concentration in excess of .17, in violation of R.C. 4511.19(A)(1)(h); marked lanes violations, R.C. 4511.33; and, failure to wear a seatbelt, in violation of R.C. 4513.263. He pleaded not guilty. December 2, 2008, Mr. Larrick moved to suppress, on the basis that Trooper Ganley had no basis for the initial traffic stop. Hearing went forward March 17, 2009, and April 23, 2009. By a judgment entry filed June 9, 2009, the trial court denied the motion to suppress. Eventually, Mr. Larrick changed his plea to no contest; and, the trial court found him guilty of violating R.C. 4511.19(A)(1)(h) and 4511.33. The trial court stayed Mr. Larrick's sentence pending this timely appeal.

{¶5} Mr. Larrick assigns a single error on appeal:

{¶6} "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS [.]"

{¶7} Under this assignment of error, he advances two issues:

{¶8} "[1.] The trial courts (sic) findings of fact were not supported by competent credible evidence.

{¶9} "[2.] Trooper Ganley did not have probable cause or reasonable suspicion that a marked lanes violation occurred and therefore violated Appellant's Fourth Amendment right against unreasonable seizures."

{¶10} "Appellate review of a trial court's ruling on a motion to suppress evidence presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 154, 2003-Ohio-5372, \*\*\*. During a hearing on a motion to suppress evidence, the trial judge acts as the trier of fact and, as such, is in the best position to resolve factual questions and assess the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366,

\*\*\*. An appellate court reviewing a motion to suppress is bound to accept the trial court's findings of fact where they are supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594, \*\*\*. Accepting these facts as true, the appellate court independently reviews the trial court's legal determinations de novo. *State v. Djisheff*, 11th Dist. No. 2005-T-0001, 2006-Ohio-6201, at ¶19." *Geneva v. Fende*, 11th Dist. No. 2009-A-0023, 2009-Ohio-6380, at ¶11. (Parallel citations omitted.)

{¶11} We deal with the issues in reverse order, finding the second dispositive of this appeal. By it, Mr. Larrick contends the evidence, in the form of Trooper Ganley's testimony, and the DVD of the events, does not show he committed either of the marked lanes violations, and, consequently, that Trooper Ganley had no reason to conduct a traffic stop.

{¶12} "A stop is constitutional if it is supported by either a reasonable suspicion or probable cause. *City of Ravenna v. Nethken*, 11th Dist. No. 2001-P-0040, 2002-Ohio-3129, at ¶30-31. '(\*\*\* (T)he concept of an investigative stop allows a police officer to stop an individual for a short period if the officer has a reasonable suspicion that criminal activity has occurred or is about to occur.' *State v. McDonald* (Aug. 27, 1993), 11th Dist. No. 91-T-4640, 1993 Ohio App. LEXIS 4152, \*10. "In justifying the particular intrusion, the police officer must be able to point to specific and articulable facts which would warrant a man of reasonable caution in the belief that the action taken was appropriate." *Id.*, quoting *State v. Klein* (1991), 73 Ohio App.3d 486, 488, \*\*\*." *Fende*, supra, at ¶13. (Parallel citation omitted.)

{¶13} Regarding the first alleged marked lanes violation, Trooper Ganley testified initially:

{¶14} “\*\*\* my initial observation was after he had established himself in that center or in that left-hand lane of the westbound traffic [on Route 59], his left tires had crossed over. There’s an orange fog line to the left. He just crossed over that, did not strike or even get relatively close to the barrier but just went over and then recorrected his error back into the left-hand lane of westbound Route 59.”

{¶15} Later in the hearing, the following took place:

{¶16} “THE COURT: I would sustain his objection to the issue of leading. I do – let me ask one question just for clarification in case I forget when we take this up.

{¶17} “You talked about going over the fog line that was orange, and you said it was next to the barriers –

{¶18} “[Trooper Ganley]: Yes.

{¶19} “THE COURT: – on 59. I haven’t looked lately. There are orange fog lines next to the barriers, is that correct?

{¶20} “[Trooper Ganley]: Yes, Judge, to clearly mark the lanes.

{¶21} “THE COURT: Okay, as opposed to a white fog line.

{¶22} “[Trooper Ganley]: Generally, yes, there’s left on the left side of the road and right on the right side of the road.”

{¶23} Photographs introduced by Mr. Larrick of Route 59 at the point in question, and used by his counsel in cross examining Trooper Ganley, clearly show that the only double yellow or orange lines on Route 59 are in between the planters or barriers separating the east and west bound lanes – not next to the planters. Mr.

Larrick contends the discrepancy between Trooper Ganley's response to the trial court's question, that the double line he saw Mr. Larrick's car touch is "next to" the barrier, as opposed to the fact that it is in between the barriers, renders his testimony regarding the first marked lanes violation incredible.

{¶24} We respectfully disagree. While acknowledging the point that the double yellow lines are between the planters, not "next to" them, Trooper Ganley maintained that Mr. Larrick's car touched the lines on Route 59. The notion that the line was "next to" the planter was introduced into the testimony when the trial court, admittedly unfamiliar with the roadway in question, tried to visualize more closely the situation described.

{¶25} However, we note that Trooper Ganley testified that Mr. Larrick "just crossed over" the fog lines during his initial alleged violation. In its judgment entry, the trial court found that during the initial alleged violation, "both of Defendant's driver's side tires traveled over the double yellow line for approximately 20 feet \*\*\* [.]". Our own review of the DVD of the incident made by Trooper Ganley comports with his testimony on the subject: the alleged violation is not perceptible on the DVD.

{¶26} Mr. Larrick further contends that the DVD from Trooper Ganley's cruiser fails to show the second alleged marked lanes violation, purportedly occurring just after he turned onto Lincoln Street from Route 59. Trooper Ganley maintained, repeatedly, that this violation would be depicted clearly on the DVD, and that it consisted of both of Mr. Larrick's driver's side wheels about one foot over the line. In its judgment entry, the trial court found that one tire on Mr. Larrick's car was one foot over the center line.

{¶27} We have reviewed this portion of the DVD several times. While there appears to be a moment when Mr. Larrick's car lurches slightly, no marked lanes violation is visible.

{¶28} We respectfully disagree with the dissent's conclusion that this court is substituting its own reading of the evidence for that of the trial court. Rather, the problem is that the trial court's findings of fact do not seem to comport with either Trooper Ganley's testimony regarding the alleged marked lanes violations, nor the DVD. Consequently, the trial court's factual findings are not supported by competent, credible evidence, which is the standard we must apply when considering the grant or denial of a motion to suppress.

{¶29} The assignment of error has merit.

{¶30} The judgment of the Portage County Municipal Court, Ravenna Division, is reversed, and this matter is remanded for further proceedings consistent with this opinion.

{¶31} It is the further order of this court that appellee is assessed costs herein taxed.

{¶32} The court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, P.J., concurs,

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

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

{¶33} In reversing the trial court's Judgment Entry and granting appellant, Travis S. Larrick's, Motion to Suppress, the majority has substituted its own evaluation of the

evidence for that of the court below. As the lower court's factual findings are to be accorded "great deference," I respectfully dissent. Cf. *State v. Scrivens*, 11th Dist. No. 2009-T-0072, 2010-Ohio-712, at ¶29 ("acknowledg[ing] that great deference is to be given to the trial court's findings of fact," where the motion to suppress has been **granted**); *Kirtland Hills v. Hall*, 11th Dist. No. 2008-L-005, 2008-Ohio-3391, at ¶30 ("[a]n appellate court is to give great deference to the judgment of the trier of fact," where the motion to suppress has been **denied**).

{¶34} The Ohio Supreme Court has clearly and consistently held that "the trial court is best able to decide facts and evaluate the credibility of witnesses. Its findings of fact are to be accepted if they are supported by competent, credible evidence, and we are to independently determine whether they satisfy the applicable legal standard." *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, at ¶41.

{¶35} In the present case, the trial court found, based on the testimony of Trooper Jonathan Ganley, "that the Defendant committed two marked lanes violations." At the suppression hearing, Trooper Ganley testified that he observed two marked lanes violations. The trial court believed Trooper Ganley's testimony and his testimony is competent, credible evidence of the violations. Since the court's factual finding is supported by competent, credible evidence, we must defer and affirm the lower court's Judgment. That is all the analysis that is necessary on this issue. Cf. *State v. Ewing*, 10th Dist. No. 09AP-776, 2010-Ohio-1385, at ¶20 ("the officers testified they could not read the license plate, the trial court believed their testimony, and the testimony is competent, credible evidence to support probable cause").



{¶36} Instead, the majority improperly considers the strength of the State's evidence. The majority notes that it has reviewed Trooper Ganley's dashboard video "several times" and decides, while acknowledging that Larrick's car "lurches slightly," that "no marked lanes violation is visible." The majority then holds the trial court's judgment must be reversed, "as there was insufficient evidence to support the traffic stop."<sup>1</sup>

{¶37} The majority's construal of the video evidence is misleading. The quality of the video at the critical moments is too poor to permit any conclusion regarding a marked lanes violation. That is, the video cannot be used to prove or disprove the Trooper's testimony. Even defense counsel acknowledged the essentially neutral value of the video evidence: "I've looked at it a dozen times and I can't see it to be honest with you. I mean, is he close to the center of the road? I think that's fair to say, but you can't tell if he is over some double yellow line \*\*\*." "[T]he video isn't for us or for them[;] [i]t just shows what it shows." Since the video evidence is inconclusive, it cannot be used to negate or cancel out Trooper Ganley's testimony.

{¶38} The determinative issue for the court below was whether Trooper Ganley had probable cause to initiate the traffic stop, i.e., whether he observed a marked lanes violation. The fact that the trial court's Judgment fails to accurately reflect Trooper Ganley's testimony with respect to the details of the violation is not a sufficient reason to reverse that Judgment.

{¶39} It is a fundamental and well-established principle of appellate review that

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1. Under a sufficiency of the evidence analysis, Trooper Ganley's testimony, on direct examination, is sufficient to support the trial court's Judgment. The majority apparently feels that conclusion is against the manifest weight of the evidence, although that is not the proper standard to be applied here.

“a reviewing court is not authorized to reverse a correct judgment merely because erroneous reasons were assigned as a basis thereof.” *Joyce v. Gen. Motors Corp.* (1990), 49 Ohio St.3d 93, 96, citing *Agricultural Ins. Co. v. Constantine* (1944), 155 Ohio St. 275, 284 (“it is the definitely established law of this state that where the judgment is correct, a reviewing court is not authorized to reverse such judgment merely because erroneous reasons were assigned as the basis thereof”); *State ex rel. Fleming*, 68 Ohio St.3d 509, 514, 1994-Ohio-172 (citation omitted).

{¶40} This principle applies, and has been applied, to judgments ruling on motions to suppress. It is not at all remarkable to affirm a judgment in this context for reasons “other than” those relied upon by the trial court. See, e.g., *State v. Moore*, 9th Dist. Nos. 22146 and 22216, 2005-Ohio-3304, at ¶23; *State v. Walker*, 10th Dist. No. 97APA09-1219, 1998 Ohio App. LEXIS 3466, at \*26; *Dept. of Liquor Control v. Fraternal Order of Orioles Nest 274*, 10th Dist. No. 95APE08-973, 1996 Ohio App. LEXIS 5651, at \*5.

{¶41} In the present case, the only real evidence in the record, Trooper Ganley’s testimony, supports the trial court’s conclusion that there was probable cause to initiate a traffic stop. The trial court was free to accept as well as to reject that testimony. We, however, must accept the lower court’s decision if there is some evidence to support it. In this case, the evidence is there.