[Cite as *Wickliffe v. Petway*, 2012-Ohio-2439.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

CITY OF WICKLIFFE,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
- vs -	:	**CASE NOS. 2011-L-101 and 2011-L-102**
DERRICK J. PETWAY,	:	
Defendant-Appellant.	:	

Criminal Appeals from the Willoughby Municipal Court, Case Nos. 10 TRC 04046 and 10 CRB 01490.

Judgment: Reversed and remanded.

Almis J. Stempuzis, City of Wickliffe Prosecutor, 880 East 185th Street, Cleveland, OH 44119 (For Plaintiff-Appellee).

R. Paul LaPlante, Lake County Public Defender, and *Vanessa R. Clapp,* Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Derrick J. Petway, appeals from the judgment of the Willoughby Municipal Court denying his motion to suppress evidence. At issue is whether the arresting officer possessed probable cause or, in the alternative, reasonable suspicion to stop appellant's vehicle. As we answer these questions in the negative, we reverse the trial court's judgment and remand the matter for further proceedings.

{¶2} On May 24, 2010, at approximately 11:00 p.m., Officer Brett Peeples of the Wickliffe Police Department was on routine patrol, driving eastbound on Route 2. The record indicates traffic was light and weather conditions were fair. The officer was in the center lane of the three-lane highway when a minivan in front of his cruiser veered slightly left onto the line dividing the lanes. The vehicle, however, did not cross over the line. Shortly thereafter, the van again weaved slightly left prompting the officer to activate his overhead lights and initiate a traffic stop.

{¶3} Upon approaching the van, Officer Peeples asked the driver, appellant, for his license. Appellant stated he did not have his license and, instead, provided the officer with his social security number. Because the officer detected the odor of alcoholic beverage coming from the vehicle, he asked if anyone in the van had been drinking. The officer then noticed appellant's passenger was sitting with an open container between his legs. He confiscated the can.

{¶4} Appellant, who appeared dazed, subsequently asked the officer whether he could get out of the vehicle so his passenger could drive. In light of the odor and appellant's strange demeanor and statement, the officer proceeded to initiate several field sobriety tests. As appellant exited the van, the officer saw a second open container in the vehicle's cup holder. After administering the tests, the officer concluded appellant was operating the vehicle while intoxicated, and he was placed under arrest. When the van was inventoried, a small baggie of marijuana was also discovered in the vehicle.

{¶5} As a result of the sequence of events, appellant was charged in two separate cases. In Case No. 10-TRC-4046, appellant was charged with operating a

vehicle under the influence ("OVI"), a misdemeanor of the first degree, in violation of R.C. 4511.19(A)(1)(a); failure to reinstate, a misdemeanor of the first degree, in violation of R.C. 4510.21(A); expired operator's license, a minor misdemeanor, in violation of R.C. 4510.12(A)(1); and driving in marked lanes, a minor misdemeanor, in violation of R.C. 4511.33. The same day, in Case No. 10-CRB-1490, appellant was charged with possession of marijuana, a minor misdemeanor, in violation of R.C. 2925.11; and open container, a minor misdemeanor, in violation of R.C. 4301.62.

{¶6} Appellant filed a motion to suppress evidence, arguing the officer lacked a constitutional basis to stop his vehicle. Following a hearing, the trial court reviewed the dash-camera video depicting appellant veering to the left and considered the evidence in light of the officer's testimony. The trial court found the video evidence corroborated Officer Peeples' testimony. The court also found there was no evidence indicating appellant's ability to remain in the center lane was impaired by existing road or traffic conditions. The court further found that "the perspective and resolution of the video are not ideal to determine the exact action of the driver, but bolstered with the officer's on scene observations, the prosecutor met his burden of proof."

{¶7} In light of the above findings, the trial court concluded the officer possessed probable cause to stop appellant for a marked lane violation and, therefore, denied appellant's motion to suppress. Appellant pleaded no contest to the OVI charge and the possession charge. The remaining charges were dismissed. For the OVI conviction, appellant was sentenced to one-year probation, 180 days in jail, with 165 suspended, and a $675 fine with a one-year license suspension. With respect to the

possession charge, the trial court imposed a $100 fine. Both sentences were stayed by the trial court pending appeal.

{¶8} On appeal, appellant assigns the following error for our review:

{¶9} "The trial court erred when it overruled the defendant-appellant's motion to suppress where the officer had no specific and articulable suspicion upon which to base his stop of the defendant-appellant's vehicle, in violation of the defendant-appellant's right to be free from unreasonable search and seizure as guaranteed by the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 10 and 14 of the Ohio Constitution."

{¶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, 2003-Ohio-5372, ¶8. 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*, 62 Ohio St.3d 357, 366 (1992). 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*, 86 Ohio App.3d 592, 594 (4th Dist.1993). 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, ¶19.

{¶11} Under his assignment of error, appellant argues the video evidence introduced at the suppression hearing fails to demonstrate he crossed the marked lane. Consequently, appellant contends, the trial court erred in denying his motion to

suppress because the officer had neither reasonable suspicion nor probable cause to stop his vehicle. We agree with appellant's argument.

{¶12} An officer may constitutionally stop a motorist if the seizure is premised upon either a reasonable suspicion or probable cause. *See e.g. Ravenna v. Nethken*, 11th Dist. No. 2001-P-0040, 2002-Ohio-3129, ¶28. Probable cause is defined in terms of those facts and circumstances sufficient to warrant a prudent law enforcement officer in believing that a suspect committed or was committing an offense. *See Beck v. Ohio*, 379 U.S. 89, 91 (1964). It is well-settled that an officer's observance of a traffic violation furnishes probable cause to stop a vehicle. *See e.g. State v. Korman*, 11th Dist. No. 2004-L-064, 2006-Ohio-1795.

{¶13} R.C. 4511.33 sets forth the "Rules for Driving in Marked Lanes." The statute provides, in relevant part:

> **{¶14}** (A) Whenever any roadway has been divided into two or more clearly marked lanes for traffic, or wherever within municipal corporations traffic is lawfully moving in two or more substantially continuous lines in the same direction, the following rules apply:
>
> **{¶15}** (1) A vehicle or trackless trolley 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.

{¶16} In this case, the dash-cam video shows appellant's minivan weaving from the center lane to the left on two occasions. Given the video's lack of clarity, it is not obvious whether the van's tires cross the marked roadway lines. With respect to the

purported violation, Officer Peeples testified appellant's vehicle did not leave its lane entirely; rather, he asserted appellant's vehicle "went to the left, the entire tire hadn't crossed over the white line, just a majority of it had; then he moved back to the center."

{¶17} The trial court, in finding the officer had probable cause to stop appellant for a marked lanes violation, premised its decision on its determination that the officer's on-scene, first-hand observations of the minivan's movements were consistent with the video evidence. While the officer's statements were consistent with the video evidence, we hold the officer's testimony was insufficient to rise to the level of a violation of R.C. 4511.33.

{¶18} In *Mentor v. Phillips*, 11th Dist. No. 99-L-119, 2000 Ohio App. LEXIS 6207 (Dec. 29, 2000), an officer observed, at 12:50 a.m., a vehicle's left tires travel onto the line dividing two eastbound lanes and quickly returned to the original lane. The driver did so twice within several seconds. In reversing the trial court's judgment denying the appellant's motion to suppress, this court concluded the officer did not have probable cause to believe the appellant had committed a marked lanes violation because the driver only momentarily touched the dividing line of the lanes of the road. *Id.* at *4-*5.

{¶19} In this case, the video fails to clearly demonstrate appellant left his lane of travel; and, pursuant to Officer Peeples' testimony, the minivan did not cross the marked lane. Rather, like the vehicle in *Phillips*, appellant's minivan's left tires briefly went onto the line dividing the lanes without passing into the neighboring lane. As there was no other testimony regarding the van's purportedly illicit movement, we hold, pursuant to *Phillips*, there was no marked lane violation in this case as a matter of law. The officer therefore lacked probable cause to stop appellant on this basis.

{¶20} Even though the officer did not possess probable cause to stop appellant, we must next determine whether he possessed a reasonable suspicion to believe appellant was impaired such that he was justified in initiating an investigative stop. This court has concluded that "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*, 11th Dist. No. 94-L-187, 1995 Ohio App. LEXIS 2649, *10 (June 9, 1995); *see also State v. Kesler*, 11th Dist. No. 2007-P-0107, 2008-Ohio-4668, ¶22. An officer may permissibly stop a vehicle solely on the basis that it is weaving in its lane so long as the weaving observed is "substantial." *Phillips*, *supra*, at *7, citing *Willoughby v. Mazura*, 11th Dist. No. 98-L-012, 1999 Ohio App. LEXIS 4642 (Sept. 30, 1999); *see also Kesler*, *supra.*

{¶21} Here, a review of the dash-cam video demonstrates that the minivan weaved slightly to the left of the lane and then back to the center twice within the span of ten to 15 seconds. In *Mazura*, *supra*, this court concluded there was insufficient evidence to find a motorist's driving was erratic and therefore the officer's stop was not supported by reasonable suspicion. The record in that case included the following evidence:

> **{¶22}** [The officer] followed appellant's vehicle for one-quarter of a mile and observed it weave in its lane of travel while traveling approximately twenty feet behind another vehicle. * * * [At the] hearing on appellant's motion to suppress, [the officer] testified that appellant, "was driving on the center double yellow line and

touching that line going to the other -- the divider, the white divider line several times."

{¶23} In the instant matter, appellant's weaving was less substantial than the weaving described in *Mazura* and could not be reasonably characterized as jerky or unsafe. Moreover, there was no testimony that appellant was speeding or driving in an otherwise suspicious manner. As a result, we cannot conclude appellant's driving was erratic. We therefore hold, as a matter of law, the officer lacked reasonable suspicion to initiate an investigative stop to determine if appellant was impaired. The trial court erred by denying appellant's motion to suppress.

{¶24} Appellant's assignment of error is well-taken.

{¶25} For the reasons discussed in this opinion, the judgment of the Willoughby Municipal Court is reversed and remanded to the trial court for further proceedings.

TIMOTHY P. CANNON, P.J., concurs,

MARY JANE TRAPP, J., dissents with a Dissenting Opinion.

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{¶26} I must respectfully dissent, as I find that the majority's reliance on the holding in *Mentor v. Phillips*, and its determination that there were no marked lane violations, because "there was no other testimony regarding the van's purportedly illicit movement," besides the van momentarily moving left in its lane of travel and touching, but not crossing, the broken white line twice, to be both factually and legally incorrect.

{¶27} An earlier decision from our court formed the foundation for the decision in *Phillips – State v. Spikes*, 11th Dist. No. 94-L-187, 1995 Ohio App. Lexis 2649 (Jun. 9, 1995). In *Spikes* we held that "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." *Id.* at *10. No evidence of erratic driving or unsafe driving was present in the *Spikes* case.

{¶28} What Mr. Petway's case does have, that both *Phillips* and *Spikes* did not, is testimony from the officer that the lane movements were made in an "unsafe manner."

{¶29} As we observed in *State v. Slider*, 11th Dist. No. 2007-P-0096, 2008-Ohio-2318: "[t]here are two interpretations available for R.C. 4511.33(A)(1). The first interpretation, adopted at some point by the Fifth, Sixth, Ninth, and Tenth Districts, finds a violation of the statute *only* when a driver fails to drive 'as nearly as is practicable, entirely within a lane or line of traffic' *and* fails to first ascertain safety before moving from such lane or line of traffic. See *State v. Philips*, 3rd Dist. No. 8-04-25, 2006 Ohio 6338, at P41-42, for a survey of these cases. Under this interpretation, failing to drive within the lane or line of traffic is insufficient to establish a violation of R.C. 4511.33(A)(1), and there must also be evidence that the driver's movement is not made with safety.

{¶30} "The second interpretation views the statute as imposing two *separate* requirements: first, a driver must drive within a lane or line of traffic as nearly as practicable; second, a driver may not move from his lane or line of traffic until the driver ascertains such movement can be made safely. Under this interpretation, failing to

comply with *either* prong of the statute is a violation of the statute. See *Philips*, at P43-48, for a survey of cases adopting this interpretation." *Id*. at ¶26-27.

{¶31} Mr. Petway, like Mr. Slider, violated both requirements of the marked lane statute. He failed to drive entirely within his lane, or line of travel, as nearly as practicable, actually hitting the broken white line on three occasions for no apparent reason. Mr. Petway also violated the safety prong of the statute because there was evidence that his movement was not made safely on two occasions. So, as in *Slider*, under either interpretation of the statute, probable cause existed for the stop.

{¶32} Officer Peeples testified that Mr. Petway moved his van to the left and touched the broken white line *"in an unsafe manner without signaling."* Mr. Petway then moved back to the right within the center lane, and "later again also left [his] lane one more time," before the emergency lights were activated. Officer Peeples then observed Mr. Petway "move to the right, *again without signaling*, outside of the lane into the right lane and *abruptly moved* [sic] back to the center lane," before finally signaling to the right and pulling off to the right to the berm. (Emphasis added.)

{¶33} This testimony was corroborated by the dash cam video.

{¶34} Because of this precedent, I would affirm the judgment of the trial court.