[Cite as *Kirtland Hills v. Rinkes*, 2011-Ohio-2713.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

VILLAGE OF KIRTLAND HILLS,	:	**O P I N I O N**
Plaintiff-Appellant,	:	
- vs -	:	**CASE NOS. 2010-L-078 and 2010-L-079**
HOWARD J. RINKES,	:	
Defendant-Appellee.	:	

Criminal Appeals from the Willoughby Municipal Court, Case Nos. 10 TRC 03623 and 10 CRB 01303.

Judgment: Affirmed.

Joseph P. Szeman, Village of Kirtland Hills Prosecutor, 100 Society National Bank Building, 77 North St. Clair Street, Painesville, OH 44077 (For Plaintiff-Appellant).

Jerri Mitchell-Tharp and *Ralph C. Buss*, Law Offices of Ralph C. Buss, 168 East High Street, P.O. Box 705, Painesville, OH 44077 (For Defendant-Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, the village of Kirtland Hills, appeals from the judgment entered by the Willoughby Municipal Court granting the motion to suppress evidence filed by appellee, Howard J. Rinkes. At issue is whether the arresting officer possessed probable cause, or at least reasonable suspicion, to initiate the traffic stop which led to appellee's ultimate arrest for operating a vehicle while intoxicated ("OVI"). For the reasons discussed below, we affirm the trial court's judgment.

{¶2} On May 9, 2010, Village of Kirtland Hills Police Officer Jeff Meyerhoffer was performing routine patrol work on Interstate 90. According to the officer, the area where he was patrolling consists of two eastbound lanes and two westbound lanes, each marked with center lines to divide the respective lanes. At approximately 1:50 a.m., the officer stopped a motorist for an unspecified traffic violation. Both the officer's cruiser, with emergency lights activated, and the stopped vehicle were stationary, situated on the paved berm of the interstate.

{¶3} After issuing a warning to the motorist, the dash camera on the officer's cruiser recorded appellee's vehicle passing the officer in the right lane of traffic. Officer Meyerhoffer estimated appellee's speed at 40 miles per hour. The dash camera also recorded a second vehicle behind appellee in the left lane of traffic.

{¶4} Officer Meyerhoffer returned to his vehicle and pursued appellee "[t]o conduct a traffic stop to advise the operator of not merging for a stationary emergency vehicle." The officer followed appellee for approximately "30 seconds of driving." During this time, although appellee's vehicle was "weaving within its lane," the officer did not witness any traffic violations. On the basis of his initial belief that appellee had failed to merge, the officer initiated a traffic stop; the officer approached the vehicle and noticed an odor of alcoholic beverage coming from the car. The officer further observed an open beer can in the passenger seat. After conducting field sobriety tests, the officer concluded appellee was under the influence of alcohol and arrested appellee for OVI.

{¶5} The village filed two separate complaints in the Willoughby Municipal Court. In Case No. 10 TRC 03623, appellee was charged with OVI, in violation of R.C. 4511.19(A)(1)(a); OVI, in violation of R.C. 4511.19(A)(2); and failing to yield to a

stationary public safety vehicle, in violation of Kirtland Hills Codified Ordinances ("KHO") Section 333.031(a). In Case No. 10 CRB 01303, appellee was charged with possession of drug paraphernalia, in violation of KHO Section 513.12(c)(1); and possession of an open container of an alcoholic beverage, in violation of KHO 529.07.

{¶6} Appellee entered a plea of "not guilty" to the charges and filed a motion to suppress evidence. At the hearing on the motion, Officer Meyerhoffer testified that, on the night of the arrest, he had stopped a separate motorist around 2:00 a.m. While stopped on the shoulder of Interstate 90, his cruiser's emergency lights were activated and the visibility was "[p]retty good." While in the process of clearing the initial traffic stop, the officer testified he witnessed appellee pass his location, traveling at a "slow rate of speed," without merging into the left lane. When asked whether he recalled any other traffic in the other lane, the officer stated: "I only saw his one vehicle at the time [sic]."

{¶7} The officer testified he then returned to his vehicle with the intention of stopping appellee for failing to merge. To this end, the officer paced appellee at approximately 40 miles per hour. Although he testified he did not witness any additional traffic violations, he initiated the traffic stop. In his report, the officer wrote there were no other vehicles present preventing appellee from merging.

{¶8} The officer's dash-cam video was admitted into evidence. Although Officer Meyerhoffer testified he did not recall any other vehicles passing his location at the time he witnessed appellee pass (and memorialized this in his incident report), the video demonstrated his independent recollection was erroneous. The video shows appellee's vehicle, but also shows a second vehicle passing the officer's stationary

cruiser immediately behind appellee, in the left lane. Upon reviewing the video, the officer conceded that, despite his earlier testimony and his statement in the written report, he may have seen the second vehicle prior to stopping appellee. Based on the video, the officer estimated the second vehicle was traveling faster than appellee's vehicle and was closing in on appellee's position. Moreover, he estimated the second vehicle was approximately "two, three car lengths" behind appellee's vehicle. Given these points, the officer stated he was unable to testify whether appellee could have safely merged into the left lane prior to passing his initial location.

{¶9} Based on the above evidence, the trial court granted appellee's motion to suppress. The court found "[t]he Officer stated the stop was initiated for the Defendant's failure to yield [pursuant to] ORD 333.031. The Defendant passed the Officer at a rate of 40 MPH in a 65 MPH zone and it was not clear whether a maneuver into the left lane could be performed safely." The court therefore ruled the prosecution failed to offer sufficient evidence that the officer had probable cause to initiate a traffic stop for failing to merge under the relevant ordinance.

{¶10} The village of Kirtland Hills now appeals, and assigns the following error for our review:

{¶11} "The trial court erred in granting the defendant's motion to suppress evidence for lack of probable cause to perform a traffic stop."

{¶12} Under its sole assignment of error, the village asserts Officer Meyerhoffer possessed probable cause to stop appellee for violating KHO 333.031(a) because the facts available to him at the time of the stop show appellee had sufficient time to safely merge into the left lane prior to passing the location of the officer's stationary cruiser.

{¶13} Appellate review of a trial court's decision regarding a motion to suppress evidence involves mixed questions of law and fact. *State v. Urso*, 11th Dist. No. 2010-T-0042, 2010-Ohio-2151, at ¶46. Thus, an appellate court's standard of review of the trial court's decision granting the motion to suppress is two-fold. See *State v. Lloyd* (1998), 126 Ohio App.3d 95, 100-101. Because the trial court is in the best position to weigh the credibility of the witnesses, we shall uphold the trial court's factual findings if competent, credible evidence supports them. *State v. Mills* (1992), 62 Ohio St.3d 357, 366. We nonetheless must independently determine, as a matter of law, whether the facts meet the applicable legal standard. See, e.g., *Urso*, supra. At a hearing on a motion to suppress, the state bears the burden of establishing the validity of a traffic stop. See, e.g., *State v. Foster*, 11th Dist. No. 2003-L-039, 2004-Ohio-1438, at ¶6.

{¶14} KHO 333.01(a) provides:

{¶15} "(a) The driver of a motor vehicle, upon approaching a stationary public safety vehicle, an emergency vehicle, or a road service vehicle that is displaying the appropriate visual signs by means of flashing, oscillating, or rotating lights as prescribed in Section 337.16 shall do either of the following:

{¶16} "(1) If the driver of the motor vehicle is traveling on a street or highway that consists of at least two lanes that carry traffic in the same direction of travel as that of the driver's motor vehicle, the driver shall proceed with due caution and, if possible with due regard to the road, weather, and traffic conditions, shall change lanes into a lane that is not adjacent to that of the stationary public safety vehicle, an emergency vehicle, or a road service vehicle.

{¶17} "(2) If the driver is not traveling on a street or highway of a type described in subsection (a)(1) of this section, or if the driver is traveling on a highway of that type but it is not possible to change lanes or if to do so would be unsafe, the driver shall proceed with due caution, reduce the speed of the motor vehicle, and maintain a safe speed for the road, weather, and traffic conditions."

{¶18} Distilled to its essence, the ordinance requires a motorist, upon approaching an emergency vehicle with its lights appropriately displayed, to proceed with due caution and, with due regard to the road, weather, and traffic conditions, change lanes if possible and not unsafe; if merging is not possible or otherwise unsafe, the motorist shall proceed in the same lane with due caution, maintaining a safe speed for the conditions.

{¶19} As previously indicated, Officer Meyerhoffer testified he initiated the traffic stop based upon his belief appellee had violated the above provision. 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. Further, even if no actual violation is observed, an officer may initiate a constitutionally valid traffic stop where he possesses reasonable suspicion, based on specific and articulable facts, that a traffic law is being or has been violated. *State v. Melone*, 11th Dist. No. 2009-L-047, 2009-Ohio-6710, at ¶26, citing *Berkemer v. McCarty* (1984), 468 U.S. 420, 439. Thus, if the officer can point to a particularized and an objective basis for suspecting a motorist of a violation, the stop will be upheld even in the absence of a true infraction. *State v. Andrews* (1991), 57 Ohio St.3d 86, 87.

{¶20} With this in mind, the state argues the officer possessed probable cause to stop appellee based upon certain inductive inferences that can be drawn from the circumstances of the case. To wit, building upon the officer's testimony that a motorist can see a cruiser's overhead lights in conditions similar to the night in question "for three-quarter's [sic] of a mile or better," the state claims appellee would have had sufficient time and opportunity to take the necessary measures to merge into the left lane prior to passing the officer's location. The state maintains this point, in conjunction with the lack of any evidence that the second car somehow prevented appellee from merging, demonstrates the officer had reasonable grounds to believe that appellee failed to meet the requirements of the ordinance. The village's argument is without merit.

{¶21} Initially, the village apparently fails to appreciate *it*, not appellee, had the burden of production in the proceedings below. In *Xenia v. Wallace* (1988), 37 Ohio St.3d 216, the Supreme Court of Ohio held:

{¶22} "Once a defendant has demonstrated a warrantless search or seizure and adequately clarified that the ground upon which he challenges its legality is lack of probable cause, the prosecutor bears the burden of proof, including the burden of going forward with evidence, on the issue of whether probable cause existed for the search or seizure." Id. at paragraph two of the syllabus.

{¶23} Thus, the village was required to demonstrate the stop was valid by *producing* evidence sufficient to meet the legal standard for probable cause or, at least, reasonable suspicion.

{¶24} Here, the record is devoid of any evidence indicating appellee, at any point prior to passing the officer, could have safely merged into the left lane. Accepting the veracity of the officer's testimony regarding the distance that emergency lights are visible, one might reasonably assume a motorist *should* be able to merge when he or she has three-quarters of a mile to do so. The record, however, contained nothing that would have allowed the court to conclude appellee in this case *could* have merged. The village's argument is based upon hypothetical assumptions regarding what may or may not have occurred prior to the vehicles passing Officer Meyerhoffer's location. And, given the video evidence, the trial court declined to assume, for the village's benefit, that the traffic conditions were such that appellee could safely merge prior to passing the officer's location.

{¶25} Similarly, the village cannot rely upon the absence of evidence relating to the second vehicle's actions prior to passing the officer's location. A lack of evidence, by itself, is no evidence. Again, simply because there was no evidence introduced indicating the second vehicle prevented appellee from merging does not imply appellee could have merged. The village's conclusion is premised upon speculation and possibility, not upon evidence adduced at the hearing. Without more, the officer failed to establish probable cause or reasonable suspicion to reasonably warrant the stop. The village's argument is therefore without merit.

{¶26} With this in mind, the officer testified, at the time of the stop, he believed appellee's vehicle was the only vehicle on the road. It was consequently his belief that appellee blatantly failed to meet the requirements of the ordinance. The dash-cam video demonstrates that the officer's subjective beliefs regarding both the traffic volume

and the supposed violation of the ordinance were false. The video shows appellee passing the officer at approximately 40 miles per hour with a second vehicle following in the left lane a mere two or three car lengths behind. The officer testified the second vehicle was closing in on appellee's vehicle and, as a result, he could not testify appellee could have safely merged prior to passing his location.

{¶27} The dissent properly points out that an officer's mistake of fact will not necessitate the suppression of evidence where the mistake is "'understandable' and a reasonable response to the situation facing the officer." We cannot conclude, under the circumstances of this case, however, that the arresting officer's admitted mistake of fact was either understandable or a reasonable response to the situation. The evidence before the court demonstrated that, as appellee passed the officer's location, another vehicle was immediately behind appellee's vehicle in the passing lane. The other vehicle was plainly observable from the officer's cruiser while the officer followed appellee; in fact, the officer passed the second vehicle while approaching appellee's vehicle. And prior to initiating the stop of appellee's vehicle, the second vehicle passed the officer. Given this uncontroverted evidence, the officer's mistaken belief regarding the circumstances of the stop was neither understandable nor does it represent a reasonable response to the situation facing the officer.

{¶28} In *State v. Loza-Gonzalez*, 6th Dist. No. L-05-1046, 2005-Ohio-5735, the Sixth District affirmed the trial court's suppression of evidence arising from a traffic stop. In that case, the arresting officer testified he stopped the defendant for traveling within one and one-half car lengths of a semi-tractor trailer, in violation of R.C. 4511.34. The trial court, relying on a video recording of the pursuit and stop, determined that the

trooper's testimony was not credible when assessed against the video evidence. In the court's view, the video revealed the defendant was traveling at a much greater distance from the truck and thus the trooper's rendition of events failed to establish a violation sufficient to justify the stop. On appeal, the court affirmed, holding that competent, credible evidence supported the trial court's findings. In particular, the appellate court observed: "As the evidence shows that appellee did not operate his vehicle more closely to the semitractor trailer than was reasonable and prudent, we conclude that [the trooper] lacked a reasonable and articulable suspicion to stop appellee's vehicle." Id. at ¶16.

{¶29} In this case, similar to *Loza-Gonzalez*, the trial court possessed video evidence to compare with the officer's construction of the facts and circumstances of the arrest. In reviewing and weighing the evidence before it, the court concluded the facts were insufficient to support a finding of probable cause. The court was able to review the video at the hearing and, moreover, consider the officer's ultimate equivocation relating to his recollection of events: namely, his testimony that, regardless of his original version of events and his statement in his report, the officer conceded he may have actually seen the second vehicle prior to stopping. Given its legal conclusion and the evidence before the court, it is reasonable to infer the court found the trooper's testimony regarding his perceptions of traffic at the time of the stop simply not credible.

{¶30} As indicated above, the trial court, as the trier of fact, is charged with the role of resolving factual questions and evaluating witness credibility. See *Mills*, supra. And an appellate court is compelled to accept these findings if they are supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594. A

review of the record demonstrates the facts and circumstances within Officer Meyerhoffer's knowledge would not permit an individual of reasonable caution to suspect or believe appellee had violated the ordinance. To the contrary, the video evidence and the officer's testimony indicate that, at the time appellee passed the officer, he was actually *in compliance* with the requirements of KHO 333.031(a). We therefore hold the trial court's factual findings are supported by competent, credible evidence. We further hold that, in light of these findings, the officer had neither probable cause, nor reasonable suspicion to believe the ordinance was violated.

{¶31} The village of Kirtland Hills' sole assignment of error is without merit.

{¶32} For the reasons discussed in this opinion, the judgment of the Willoughby Municipal Court is affirmed.

THOMAS R. WRIGHT, J., concurs,

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

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{¶33} I respectfully dissent from the majority's conclusion that there was a lack of evidence supporting Officer Meyerhoffer's determination that Rinkes was in violation of KHO 333.01(a), and, therefore, a lack of probable cause to conduct a stop of his vehicle. The record shows that, based on the facts known to Officer Meyerhoffer at the time of the stop, he had probable cause to believe that Rinkes was able to merge into the left lane and was in violation of KHO 333.01(a).

{¶34} The facts before this court indicate that although Officer Meyerhoffer may have ultimately been mistaken in his belief that no other cars were on the road near Rinkes, he had no knowledge of this fact at the time of the stop. Instead, Officer Meyerhoffer testified that he did not see a second car and was unaware that such a car was on the roadway.

{¶35} "Determination of probable cause that a traffic offense has been committed, 'like all probable cause determinations, is fact-dependent and will turn on what the officer knew *at the time he made the stop*.'" *Bowling Green v. Godwin*, 110 Ohio St.3d 58, 2006-Ohio-3563, at ¶14, citing *Dayton v. Erickson,* 76 Ohio St.3d 3, 10, 1996-Ohio-431 (citation omitted) (emphasis sic).

{¶36} In this case, at the time of the stop, Officer Meyerhoffer knew that he had his overhead lights activated and that these lights could typically be seen, based on the conditions at the time, from approximately three-quarters of a mile away. In his testimony, Officer Meyerhoffer also indicated that he saw only one vehicle, Rinkes' vehicle, on the road at the time Rinkes passed his police cruiser. Officer Meyerhoffer testified that at the time of the stop, he had not observed any vehicles that would have prevented Rinkes from merging into the left-hand lane of travel. Based on these observations, Officer Meyerhoffer believed that Rinkes had the ability to merge into the left-hand lane.

{¶37} Therefore, based on what Officer Meyerhoffer knew at the time of the stop, he believed that Rinkes was able to merge to the left. KHO 333.01(a)(1) states that "the driver shall proceed with due caution and, if possible with due regard to the road, weather, and traffic conditions, shall change lanes." The question is not whether it

was actually possible for Rinkes to merge, but instead whether, based on what Officer Meyerhoffer knew, he had probable cause to believe that Rinkes could change lanes. Although the dash camera video may support Rinkes' claim that he did not commit a violation of KHO 333.01(a)(1), it does not eliminate the existence of probable cause to conduct the stop. See *State v. Hernandez*, 10th Dist. No. 09AP-765, 2010-Ohio-2066, at ¶15 ("the question of whether or not officer had reasonable suspicion to stop someone is not concerned with whether defendant actually violated [the] statute") (citation omitted). While a jury could ultimately find that it was not possible for Rinkes to merge into the left lane, Officer Meyerhoffer had probable cause to believe that it was possible, based on his knowledge at the time of the stop.

{¶38} Although the majority emphasizes that the dash-cam video shows a second car on the road, to the left of Rinkes' car, Officer Meyerhoffer testified that he was unaware of that second car at the time of the stop. The fact that Officer Meyerhoffer later testified that it was "possible" that the second car was on the roadway at the time of the stop does not negate his testimony that he personally had no knowledge of that car's existence at the time he conducted the stop.

{¶39} Moreover, Officer Meyerhoffer's mistake about the existence of a second car does not render his stop of Rinkes invalid. A police officer's mistake of fact will not lead to the suppression of evidence where the mistake was "understandable" and a reasonable response to the situation facing the officer. *Hill v. California* (1971), 401 U.S. 797, 804; *State v. Kinzy*, 7th Dist. No. 09 MO 7, 2010-Ohio-6499, at ¶23 (citation omitted); *State v. Mathis*, 9th Dist. Nos. 22039 and 22040, 2004-Ohio-6749, at ¶15 (where an officer is unaware or mistaken as to a fact, this mistake will not affect the

validity of the stop or the admissibility of evidence obtained as a result of that stop). Courts have held that even clear mistakes by officers do not prevent the initial stop from being lawful and that evidence resulting from such a stop cannot be suppressed. See *State v. Keilback*, 12th Dist. No. CA2001-01-002, 2001-Ohio-8691, 2001 Ohio App. LEXIS 4724, at *5-*6 (a stop of a vehicle that was the result of a mistake in reporting the vehicle's license number was a justified stop and the trial court erred in granting the motion to suppress); *Kinzy*, 2010-Ohio-6499, at ¶29 (where, in the dark, an officer mistook a private driveway for a business' driveway, such a mistake was reasonable and the stop leading to an arrest for OVI was valid); *State v. Fain*, 9th Dist. No. 18306, 1998 Ohio App. LEXIS 144, at *5-*6 (misreading a defendant's license is an understandable and reasonable mistake).

{¶40} As courts have determined that even clear mistakes are reasonable, it follows that a mistake in observation that occurs while involved in a complicated series of events, such as the ones that occurred in the present case, is reasonable and understandable. Officer Meyerhoffer observed Rinkes' car pass by while he was standing at the side of the road, to the left of the car stopped during the initial traffic stop. This car was parallel to Rinkes' car. From this angle, it would be difficult to see a second car on the roadway. Officer Meyerhoffer had to then quickly enter his cruiser and catch up to Rinkes' vehicle. Although the video does show a second car, this does not mean that Officer Meyerhoffer was aware of, or should have been aware of, a second car. He was pursuing Rinkes and presumably concentrating on Rinkes' vehicle.

{¶41} Although the majority contends that Officer Meyerhoffer should have seen the second car after he entered the roadway, it does not automatically follow that Officer

Meyerhoffer should have then changed his initial belief that Rinkes could have merged into the left lane. Even if Officer Meyerhoffer's mistake about the other car was not understandable and even if he had seen the second car on the road, he still may have reasonably believed that Rinkes should have been able to merge in approximately three-quarters of a mile. The second car could have been following behind Rinkes, not impeding his ability to merge.

{¶42} That the video shows a second car should not automatically disprove Officer Meyerhoffer's testimony that he believed Rinkes was able to merge. To do so would eliminate the mistake exception altogether. Proving that an officer was mistaken after a stop does not invalidate the stop altogether. See *Keilback*, 2001 Ohio App. LEXIS 4724, at *6 (a stop continues to be valid if the officer does not discover his mistake until after the stop has ended). That the dash-cam video shows Officer Meyerhoffer was mistaken does not eliminate the probable cause he had at the time of the stop.

{¶43} Moreover, this case is distinguishable from *State v. Loza-Gonzalez*, 6th Dist. No. L-05-1046, 2005-Ohio-5735. In *Loza-Gonzalez*, the officer was following a car from behind and made an improper observation about the distance between the two cars, which was clearly disproved by the video. In the present case, Officer Meyerhoffer made his initial observation from the side of the road, at a distance, and while involved in another stop. In addition, in *Loza-Gonzalez*, the camera showed the pertinent activity that occurred prior to the traffic stop. The dash-cam video in the present case does not show the most relevant activity, whether Rinkes was able to merge into the left lane *before* passing Officer Meyerhoffer's cruiser. To show whether Rinkes had sufficient

time to merge, the video would have to show the vehicles *prior to* passing Officer Meyerhoffer's cruiser.

{¶44} Finally, this case is similar to *State v. Lewis*, 4th Dist. No. 08CA3226, 2008-Ohio-6691, where the appellant failed to remain in the left hand lane while making a left turn. The Revised Code required the appellant to remain in the left lane "as nearly as practicable." R.C. 4511.36(A)(3). The court found that whether the appellant may have a defense that her turn was made "as nearly as practicable" to the left lane, this was "irrelevant" to whether the officer had probable cause to conduct a stop of the car based on the violation. *Lewis*, 2008-Ohio-6691, at ¶¶22-23 (an officer is not required to determine whether someone who has been observed committing a crime might have a defense to the charge, such as that it was not practicable to stay in the left lane). Similarly, in this case, KHO 333.01(a)(1) states that the driver "shall" merge into the left lane "if possible." Although it may be in dispute whether it was actually possible for Rinkes to merge into the left lane, the officer still had probable cause to conduct a stop based on Rinkes' failure to merge into the left lane. As noted above, although Rinkes may not ultimately be found guilty of violating KHO 333.01(a)(1), there was still probable cause to conduct a stop.

{¶45} Based on the facts known to the officer at the time of the stop, that Rinkes' car was the only one on the road and that Rinkes had approximately three-quarters of a mile to merge into the adjacent lane, Officer Meyerhoffer had both probable cause and reasonable suspicion to conduct the stop. Therefore, I would reverse the trial court's decision granting Rinkes' Motion to Suppress and remand to the trial court for further proceedings.