[Cite as *State v. Serafin*, 2012-Ohio-1456.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-P-0036**
- vs -	:	
STEVEN A. SERAFIN,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Municipal Court, Ravenna Division, Case No. 2010 TRC 16576.

Judgment: Affirmed.

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

Matthew R. Hunt and *John A. Burnworth*, Krugliak, Wilkins, Griffiths & Dougherty Co., LPA, 4775 Munson Street, N.W., P.O. Box 36963, Canton, OH 44735 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Steven A. Serafin, appeals the Judgment Entry of the Portage County Municipal Court, Ravenna Division, denying his Motion to Suppress. The issues before this court are whether the state highway patrolman, who stopped Serafin for speeding, possessed a reasonable suspicion of further wrongdoing, so as to justify his removal from his vehicle; and whether the patrolman's questioning of Serafin

in his police cruiser constituted custodial interrogation, so as to require the Miranda warnings. For the following reasons, we affirm the decision of the court below.

{¶2} On December 23, 2010, Trooper Jonathan A. Ganley of the Ohio State Highway Patrol issued Serafin a Complaint, charging him with two violations of Operation of a Vehicle while Intoxicated, misdemeanors of the first degree in violation of R.C. 4511.19(A)(1)(a) ("under the influence of alcohol") and (A)(1)(d) (having "a concentration of eight-hundredths of one gram or more but less than seventeen-hundredths of one gram by weight of alcohol per two hundred ten liters of the person's breath"), and Speeding, a minor misdemeanor in violation of R.C. 4511.21(D)(2) ("operat[ing] a motor vehicle * * * [a]t a speed exceeding sixty-five miles per hour upon a freeway").

{¶3} On the same date, Serafin was arraigned in municipal court and entered a plea of "not guilty."

{¶4} On February 18, 2011, Serafin filed a Motion to Suppress, alleging that Trooper Ganley did not have a reasonable suspicion to remove him from his vehicle during a traffic stop and failed to administer Miranda warnings prior to custodial interrogation.

{¶5} On April 28, 2011, a suppression hearing was held. Trooper Ganley testified on behalf of the State.

{¶6} Trooper Ganley testified that at 12:59 a.m., on December 23, 2010, he was operating radar on Interstate 76, in Brimfield Township. Trooper Ganley clocked a westbound 2003 Mitsubishi Outlander, operated by Serafin, at 82 miles per hour. Trooper Ganley stopped the vehicle on the off-ramp to Route 43.

{¶7} Trooper Ganley testified that Serafin was the sole occupant of the vehicle. Serafin told Trooper Ganley, through the window of the vehicle, that he lived in Texas and was visiting Ohio. Serafin told him that he was returning to his mother's house in Richmond Heights, and was driving her vehicle.

{¶8} Trooper Ganley testified that Serafin's eyes were glassy and that there was a distinct odor of alcohol coming from the car. Serafin produced an Ohio driver license but could not produce the vehicle's registration.

{¶9} Trooper Ganley ordered Serafin out of the vehicle and to accompany him to the patrol car. Serafin was allowed to leave the car running.

{¶10} Trooper Ganley provided several explanations for doing so. He testified that it was his "regular practice * * * to have drivers exit the vehicle for no other reason than * * * that way I can do several things at once instead of making possibly two or three trips back to the vehicle for more information." Trooper Ganley also testified that he wanted to separate Serafin from the vehicle to determine the source of the odor. Finally, Trooper Ganley testified that the weather, cold with light flurries, made it more convenient to continue the stop in the patrol car.

{¶11} After Serafin exited the vehicle, Trooper Ganley asked his permission to conduct a pat down search, which Serafin allowed. Trooper Ganley described this search as a consensual search, rather than a Terry-style pat down, as he did not have any particular suspicion that Serafin was armed.

{¶12} Trooper Ganley noted that Serafin showed "some signs of unbalance" and "serpentine walking" as they went toward the patrol car.

{¶13} Trooper Ganley and Serafin sat in the front seat of the patrol car. Trooper Ganley testified that the odor of alcohol was coming from Serafin's person. Trooper Ganley asked Serafin how much he had had to drink, and Serafin replied that he had had a couple of beers over dinner. At this point, Trooper Ganley began to conduct field sobriety tests.

{¶14} Serafin failed the field sobriety tests. At this time, Serafin was handcuffed and placed in the rear of the patrol car.

{¶15} A video recording of the stop was played before the court and admitted into evidence. In the video, Trooper Ganley is heard asking Serafin, while seated in the front of the patrol car: "how much have you had to drink tonight, I smell a pretty strong odor [of alcohol]?" The video revealed that approximately six minutes elapsed from the time of the initial stop until Trooper Ganley began conducting the field sobriety tests.

{¶16} Also on April 28, 2011, the municipal court denied the Motion to Suppress. The court entered the following (hand-written) Judgment Entry: "Hrg [hearing] on motion to suppress evidence. [Defendant] stipulates to results of FST [field sobriety tests] and chemical breath test. CT [the court] finds PC [probable cause] to request [defendant] to take FST. CT finds Miranda given prior to all post-arrest questioning. CT finds statements made prior to arrest are admissible. * * * CT further finds that even without [the defendant's] response to officer's questions, officer had PC to make arrest."

{¶17} Also on April 28, 2011, Serafin entered a plea of "no contest" to the charge of Operation of a Vehicle while Intoxicated (R.C. 4511.19(A)(1)(a)). The remaining charges were dismissed on motion of the prosecutor. The municipal court imposed a fine of $375; a sentence of 180 days in the Portage County Jail, with 177 days

conditionally suspended; and a six-month license suspension. The court stayed execution of the sentence pending appeal.

{¶18} On May 24, 2011, Serafin filed his Notice of Appeal. On appeal, Serafin raises the following assignments of error:

{¶19} "[1.] Trooper Ganley did not have the reasonable suspicion required to remove the defendant from his vehicle."

{¶20} "[2.] Statements by the defendant during Trooper Ganley's custodial interrogation, as well as evidence obtained therefrom, should be suppressed."

{¶21} At a suppression hearing, "the trial court is best able to decide facts and evaluate the credibility of witnesses." *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, 833 N.E.2d 1216, ¶ 41. "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." *Id.*, citing *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8; *State v. Morgan*, 11th Dist. No. 2008-P-0098, 2009-Ohio-2795, ¶ 13 ("[o]nce the appellate court accepts the trial court's factual determinations, the appellate court conducts a de novo review of the trial court's application of the law to these facts") (citation omitted).

{¶22} Under the first assignment of error, Serafin objects that several actions taken by Trooper Ganley violated his Fourth Amendment right "to be secure * * * against unreasonable searches and seizures." Specifically, Serafin contends that Trooper Ganley "did not have sufficient justification [1.] to remove [him] from his vehicle, [2.] pat him down and [3.] place him in a police cruiser." Reply Brief of Appellant, 8.

{¶23} With respect to ordering Serafin out of his vehicle, the Ohio Supreme Court has held that "a police officer may order a motorist to get out of a car, which has been properly stopped for a traffic violation, even without suspicion of criminal activity." *State v. Evans*, 67 Ohio St.3d 405, 407, 618 N.E.2d 162 (1993), citing *Pennsylvania v. Mimms*, 434 U.S. 106, 111, fn. 6, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977); *State v. Wiesenbach*, 11th Dist. No. 2010-P-0029, 2011-Ohio-402, ¶ 20 ("a *Mimms* order does not have to be justified by any constitutional quantum of suspicion") (citations omitted). Accordingly, there was nothing constitutionally impermissible about Trooper Ganley ordering Serafin out of the vehicle.

{¶24} With respect to conducting a "pat down" or Terry search, the Ohio Supreme Court has held that "[t]he driver of a motor vehicle may be subjected to a brief pat-down search for weapons where the detaining officer has a lawful reason to detain said driver in a patrol car." *Id.* at paragraph one of the syllabus. However, "[d]uring a routine traffic stop, it is unreasonable for an officer to search the driver for weapons before placing him or her in a patrol car, if the sole reason for placing the driver in a patrol car during the investigation is for the convenience of the officer." *State v. Lozada*, 92 Ohio St.3d 74, 748 N.E.2d 520 (2001), paragraph two of the syllabus.

{¶25} The issue of the constitutionality of the pat down search in the present case need not be decided. Assuming, arguendo, a constitutional violation, the search produced no evidence that could be suppressed.

{¶26} With respect to having Serafin sit in the patrol car, the Ohio Supreme Court has held that "[p]lacing a driver in a patrol car during a routine traffic stop increases the intrusive nature of the detention." *Id.* at 78. However, "[t]he placement of

a driver in a patrol car during a routine traffic stop may be constitutionally *permissible*," and "[n]umerous courts have held that an officer may ask a driver to sit in his or her patrol car to *facilitate* the traffic stop." (Emphasis sic.) *Id.* at 76. In considering the constitutionality of a practice, "[t]he touchstone of [the] analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'" *Mimms*, 434 U.S. 106, 108-109, 98 S.Ct. 330, 54 L.Ed.2d 331, quoting *Terry v. Ohio*, 392 U.S. 1, 19, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). "[F]ailure to produce a driver's license during a traffic stop is a 'lawful' reason for detaining a driver in a patrol car." (Citation omitted.) *Lozada* at 77.

{¶27} In the present case, Trooper Ganley identified several reasons for detaining Serafin in his patrol car. Some of these reasons were investigative, such as the need to verify the vehicle's registration and to determine the source of the odor of alcohol. Other reasons were for the sake of convenience, such as reducing the length of time of the traffic stop. Considering all the circumstances, Trooper Ganley's detention of Serafin in his patrol car for five minutes, until he decided to conduct field sobriety tests, was reasonable and did not violate Serafin's Fourth Amendment rights. *Lozada* at 78.

{¶28} We note that the Ohio Supreme Court has affirmed the reasonableness of detaining a motorist for the purpose of "run[ning] a computer check on the driver's license, registration, and vehicle plates." *State v. Batchili*, 113 Ohio St.3d 403, 2007-Ohio-2204, 865 N.E.2d 1282, ¶ 12. Moreover, other Ohio appellate districts have affirmed the permissibility of in-car detentions under similar circumstances. *See State v. Mendoza*, 6th Dist. No. WD-05-094, 2006-Ohio-6462, ¶ 29 (the driver was made to sit

in the front seat of the patrol car after he produced his license but not his registration, smelled of alcohol and had glassy eyes); *Bay Village v. Lewis*, 8th Dist. No. 87416, 2006-Ohio-5933, ¶ 5 (the driver was made to sit in the patrol car where he smelled of alcohol, masked by cologne and had bloodshot eyes); *State v. Carlson*, 102 Ohio App.3d 585, 596, 657 N.E.2d 591 (9th Dist.1995) (driver was made to sit in the patrol car while the officer wrote up a written warning and verified the out-of-state driver's license).

{¶29} The case of *State v. Townsend*, 77 Ohio App.3d 651, 603 N.E.2d 261 (11th Dist. 1991), relied upon by Serafin, is factually distinguishable in that it involved the pat down search of a passenger in a vehicle which resulted in the discovery of a weapon and a subsequent search of the vehicle. *Id.* at 654. Moreover, *Townsend* was decided before the significant Ohio Supreme Court decisions in *Evans* and *Lozada*.

{¶30} The first assignment of error is without merit.

{¶31} In the second assignment of error, Serafin argues that the statements made to Trooper Ganley while seated in the patrol car, i.e., that he had had a couple of beers over dinner, should have been suppressed as they were made during a custodial interrogation without the benefit of the Miranda warnings.

{¶32} Statements obtained during the custodial interrogation of a defendant are not admissible at trial unless the police have used procedural safeguards to secure the defendant's Fifth Amendment right against self-incrimination and Sixth Amendment right to representation. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). "Only *custodial* interrogation triggers the need for *Miranda* warnings." (Emphasis sic.) *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, 787 N.E.2d 1185,

¶ 47; *State v. Biros*, 78 Ohio St.3d 426, 440, 678 N.E.2d 891 (1997). "Custodial interrogation" means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda* at 444.

{¶33} "Although a motorist who is temporarily detained as the subject of an ordinary traffic stop is not 'in custody' for the purposes of *Miranda*, * * * if that person 'thereafter is subjected to treatment that renders him "in custody" for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*.'" *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985, ¶ 13, quoting *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).

{¶34} In *Farris*, the Ohio Supreme Court held that the officer's treatment of the motorist following the traffic stop rendered him "in custody" for practical purposes, thus requiring the giving of the Miranda warnings prior to questioning. The Court noted the following: "Officer Menges patted down Farris, took his car keys, instructed him to enter the cruiser, and told Farris that he was going to search Farris's car because of the scent of marijuana." *Id.* at ¶ 14.

{¶35} Apart from the fact that Serafin consented to a pat down search for weapons, the facts of the present case are distinguishable from *Farris*. Serafin was allowed to keep his keys and to keep his vehicle running and Trooper Ganley gave no indication that the detention would extend beyond the purposes of the initial stop for Speeding. In these circumstances, Ohio appellate courts have regularly held that routine questioning of a detained motorist, including whether the motorist has been drinking, does not require the administration of the Miranda warnings. *State v.*

Coleman, 7th Dist. No. 06 MA 41, 2007-Ohio-1573, ¶ 24 (noting that several Ohio "appellate districts have concluded that simply requiring the defendant to sit in a police car for a short period of time to answer a few questions does not elevate the situation beyond the realm of the ordinary traffic stop approved in *McCarty* and into the realm of a formal arrest or its equivalent").

{¶36} In *State v. Leonard*, 2nd Dist. No. C-060595, 2007-Ohio-3312, an officer stopped a motorist for a window-tinting violation and noticed an odor of alcohol and glassy eyes. The officer had the motorist sit in the front passenger seat of the police cruiser where he admitted that he had been drinking. *Id.* at ¶ 6. The court of appeals concluded the intrusion was minimal and held that these circumstances did not render a motorist in custody for practical purposes. *Id.* at ¶ 23. Apart from the fact that Serafin was subject to a pat down search, the facts of the present case are the same as those in *Leonard* with respect to the issue of whether the suspect was in custody.

{¶37} Similarly in *Coleman*, the officer stopped a motorist for Speeding and had him return to the patrol car to verify his information. *Coleman* at ¶ 6. While in the patrol car, the motorist eventually admitted to having "a couple of beers at work." *Id.* at ¶ 7. The court of appeals concluded that Miranda warnings were not necessary prior to questioning, noting the following factors: the stop occurred late at night; the motorist failed to produce the required documents; the motorist's keys were not confiscated; the motorist was not handcuffed; the motorist was placed in the front seat; there was no extended detention; the vehicle was not searched; and there was only one officer on the scene. *Id.* at ¶ 37. *See also State v. Mullins*, 5th Dist. No. 2006-CA-00019, 2006-Ohio-4674, ¶ 2-4, 29 (Miranda warnings were not required where a motorist was stopped for

failing to dim the high beam headlights and made to sit in the front seat of the patrol car while the officer completed paperwork to issue a citation).

{¶38} The only significant difference between the present situation and the authorities cited above is that Serafin was subjected to a pat down search upon exiting his vehicle. In light of the other circumstances, this search did not convert this routine traffic stop into a custodial situation requiring the administration of the Miranda warnings. We note that the search was nominally consensual. Trooper Ganley asked Serafin if he could conduct a pat down search for weapons for his own protection. Serafin quickly answered, "sure," and the search was concluded in a few seconds. Nothing was found during the search and, so, the search did not alter the nature of the stop. In *Farris*, by contrast, the initial stop for speeding had already been extended into a search for marijuana. The brief and inconsequential nature of the pat down search in the present case is further demonstrated by the video of the traffic stop, which was introduced into evidence. For these reasons, Serafin was not in custody at the time of Trooper Ganley's questioning.

{¶39} The second assignment of error is without merit.

{¶40} For the foregoing reasons, the Judgment Entry of the Portage County Municipal Court, Ravenna Division, denying Serafin's Motion to Suppress, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.