[Cite as *State v. Batcho*, 2019-Ohio-2511.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2018-P-0107**
- vs -	:	
KENNETH L. BATCHO,	:	
Defendant-Appellee.	:	

Criminal Appeal from the Portage County Municipal Court, Ravenna Division.
Case No. 2018 TRC 00891 R.

Judgment: Reversed and remanded.

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

D. Timothy Huey and *Blaise Katter*, The Huey Defense Firm, 3240 Henderson Road, Suite B, Columbus, OH 43220 (For Defendant-Appellee).

TIMOTHY P. CANNON, J.

{¶1} Appellant, the state of Ohio, appeals from a judgment of the Portage County Municipal Court, Ravenna Division, granting appellee, Kenneth L. Batcho's, motion to suppress evidence upon reconsideration. We reverse the trial court's judgment.

{¶2} On January 21, 2018, at 4:02 a.m., Trooper Chester Engle effectuated a traffic stop of twenty-year-old Batcho near Kent State University in Kent, Ohio. Trooper Engle initially observed Batcho make an allegedly improper turn at an intersection; he

then observed a strong odor of an alcoholic beverage and that Batcho had glassy and bloodshot eyes. Trooper Engle administered field sobriety tests. Batcho was arrested, and his blood alcohol concentration was tested.

{¶3} Batcho was charged with operating a vehicle under the influence of alcohol ("OVI"), with a prohibited blood alcohol concentration of 0.110%, in violation of R.C. 4511.19(A)(1)(a) and (d) (first-degree misdemeanor); and making an improper turn at an intersection, in violation of R.C. 4511.36 (minor misdemeanor). Batcho pleaded not guilty.

{¶4} On March 26, 2018, Batcho filed a motion to suppress evidence regarding the field sobriety tests, chemical tests, observations and opinions of law enforcement, and statements taken from or made by him. As grounds, Batcho asserted (1) there was no probable cause to arrest him without a warrant; (2) law enforcement lacked a sufficient basis to request he submit to field sobriety tests and failed to administer them in substantial compliance with applicable standards; (3) statements were obtained in violation of his Fifth and Sixth Amendment rights to counsel and against self-incrimination; (4) the tests were taken without a warrant or consent, in violation of his Fourth Amendment right against unlawful searches and seizures; and (5) the blood alcohol level test was not conducted in accordance with R.C. 4511.19(D) and the Ohio Department of Health regulations.

{¶5} The state did not file a response in opposition.

{¶6} On July 24, 2018, Batcho filed a supplemental brief to his motion to suppress, which addressed an argument that the traffic stop was predicated upon Trooper Engle's mistake of law and, therefore, violated the Fourth Amendment and Article I, Section 14, of the Ohio Constitution. Specifically, Batcho alleged Trooper Engle

mistakenly relied upon R.C. 4511.36(A)(1) as justification for the traffic stop. R.C. 4511.36(A)(1) provides: "Approach for a right turn and a right turn shall be made as close as practicable to the right-hand curb or edge of the roadway." In the supplemental brief, Batcho explained:

> At the time of the stop, defendant was driving southbound on University Drive. After coming to a complete stop at the intersection, he turned right, heading west, onto State Route 59. Upon making his right turn, Defendant entered the middle lane. There was no traffic in the lane of entry. Since the Kent State University Campus is immediately to the south of this intersection, there is never any traffic entering the road from a northbound direction. Just a few yards beyond the right turn from University onto State Route 59, the road splits into three lanes: the far right, the middle and a distinct left turn lane. Any driver wishing to turn left onto South Lincoln Street, (as was the case here), must enter a separate left turn lane. It was not practicable for the driver to enter the curb lane, and then within such a short distance, move over not one, but two lanes to make his left turn. Under these circumstances, any reasonable person would conclude that the better and safer choice is to enter the middle lane on Route 59 immediately upon making the right turn in order to then enter the left turn lane to turn onto South Lincoln. The Trooper's application of the traffic law in this instance is clearly mistaken. The plain and unambiguous language of the statute does not require that a driver always make a right hand turn into the curb lane, but rather, only when *practicable*. No reasonable officer could conclude that under the particular circumstance of this turn, a driver is required to enter the far right lane. Thus, the officer's application of the law was mistaken. [Emphasis sic.]

{¶7} A suppression hearing was held July 24, 2018. The motion was limited, by agreement, to the issue of whether Trooper Engle had sufficient grounds to effectuate the traffic stop, i.e. a reasonable, articulable suspicion or probable cause. The prosecuting attorney asked Trooper Engle if, in his opinion, it is "impracticable or difficult to go into the right lane, then the left lane, then the left turn lane as required by law." He responded, "it is not," and explained: "Because it's the law and you're supposed to turn in the right lane. If there's no other traffic around and the traffic flow at 4 o'clock [in] the morning, which

clearly shows in the [dashcam] video that there was [sic] no other vehicles around, there was no reason for him not to turn into that correct lane and then safely move over if he was going to travel south on Lincoln Street." From his rearview mirror, Trooper Engle witnessed Batcho turn onto State Route 59 into the left lane, rather than the right curb lane. He testified that Batcho travelled in the left lane "one or two seconds" before he was able to get in the left-turn lane. A "Google Maps" printout of the intersection was admitted into evidence, which indicated it was approximately 190 feet between where Batcho had turned onto State Route 59 and where the left-turn lane onto Lincoln Street began. The parties agreed the judge could independently review the trooper's dashcam video at a later time.

{¶8} On August 21, 2018, the trial court overruled Batcho's motion to suppress. The court concluded as follows:

> The Court took an oath to follow and uphold the law. It does not matter whether the Court agrees with the law or not. Therefore, the Court finds, on the evidence, that on January 21, 2018, at approximately 4:00 a.m., *the Defendant violated Ohio Revised Code Section 4511.36*. The Court finds the Defendant had plenty of roadway space and time to turn right into the curb lane, put on his signal to switch lanes to the southernmost lane headed westbound on State Route 59, and then again move into the left-hand turn lane to turn south on to Lincoln Street. [Emphasis added.]

{¶9} On October 2, 2018, Batcho filed a motion for reconsideration. As grounds, he asserted that "it was not only impracticable to execute the turn in the manner the Court suggested, but actually legally impossible." In support of this assertion, Batcho stated that R.C. 4511.36(A)(1), the "turning at intersections" statute, conflicts with R.C. 4511.39, the "turn signal" statute. R.C. 4511.39(A) reads, in pertinent part, as follows:

> No person shall turn a vehicle * * * or move right or left upon a highway unless and until such person has exercised due care to

> ascertain that the movement can be made with reasonable safety nor without giving an appropriate signal in the manner hereinafter provided.
>
> When required, a signal of intention to turn or move right or left shall be given continuously during *not less than the last one hundred feet* traveled by the vehicle * * * before turning * * *. [Emphasis added.]

{¶10} Accordingly, Batcho maintained, it was legally impossible for him to make the two lane changes within a distance of approximately 184 feet and still comply with R.C. 4511.39(A). "Assuming for the sake of argument," he stated, "that the driver was required to first turn into the curb lane and he immediately signaled his lane change, he would be left with only a distance of 84 feet to signal the second lane change."

{¶11} A status hearing was held on November 6, 2018. The parties did not dispute that the "Google Map" indicates the distance between University Drive and Lincoln Street, on State Route 59, is 184 feet. The trial court ordered the parties to brief the issue raised in Batcho's motion for reconsideration.

{¶12} The state filed a response to the motion for reconsideration on December 6, 2018. First, the state asserted Batcho's legal remedy to the denial of his motion to suppress was an appeal, not a motion for reconsideration—an argument the state has correctly abandoned on appeal. *See*, *e.g.*, *State v. Dubose*, 164 Ohio App.3d 698, 2005-Ohio-6602, ¶9 (7th Dist.) ("The overruling of a motion to suppress is an interlocutory order until the judgment of conviction and the judgment of sentence are filed."). Second, the state asserted Batcho was inappropriately asking the trial court to "reconsider" an issue that was not addressed at the suppression hearing and was therefore waived. Third, the state asserted Batcho's argument raises an "impossibility" defense to the underlying

charge, not a challenge to whether the stop was reasonable for Fourth Amendment purposes.

{¶13} Batcho filed a "bench memo re: probable cause to stop vehicle" on December 7, 2018. He argued Trooper Engle did not have probable cause for the traffic stop: "Because the rules for turning at intersections statutorily give the driver some flexibility when turning, and because of the specific layout of this intersection, Mr. Batcho lawfully turned right in a safe and reasonable manner."

{¶14} On December 13, 2018, the trial court found that "justice requires" Batcho be permitted to proceed on his motion for reconsideration because the court was "troubled" when it issued its initial decision as it related to the grounds for the traffic stop. The court stated that prior to overruling the initial motion to suppress, it had read and considered R.C. 4511.36, the "turning at intersections" statute, but had failed to consider the conflict with R.C. 4511.39, the "turn signal" statute, as it related to signaling when changing lanes.

{¶15} The trial court proceeded, on reconsideration, to grant Batcho's motion to suppress. The court found that, "in this particular situation where the defendant turns right onto State Route 59 from University Drive and then makes a left hand turn onto Lincoln Street, heading south, law enforcement should not be enforcing [R.C. 4511.36] due to the fact that it is not practicable to make that right hand turn into the curb lane and then proceed to a left hand turn onto South Lincoln Street without violating the turn signal statute [R.C. 4511.39]." The court concluded, therefore, that "in this instance, based on the particular facts of this case," Trooper Engle did not have grounds to stop Batcho for a violation of R.C. 4511.36(A)(1).

{¶16} The state noticed an appeal from this decision, certifying that it was not taken for the purpose of delay and that granting the motion to suppress destroyed any reasonable possibility of effective prosecution of the pending charges against Batcho. *See* Crim.R. 12(K) and R.C. 2945.67(A).

{¶17} The state raises two assignments of error for our review:

> [1.] The trial court erred in granting Mr. Batcho's motion for reconsideration which raised a new legal theory to challenge the stop of the vehicle that he was driving.
>
> [2.] The trial court erred in granting Mr. Batcho's motion to suppress based on a potential defense to the charge underlying the stop.

{¶18} Under its first assignment of error, the state argues the trial court erred in granting Batcho's motion for reconsideration, which raised a conflict-of-law theory that had not been mentioned in the original motion, in the supplemental brief, or at the suppression hearing. Batcho responds that, although styled as a motion for reconsideration, it was in content a motion to suppress, and no rule prohibits the trial court from hearing multiple motions to suppress filed prior to trial. We need not resolve this dispute, however, as the state withdrew this assignment of error at oral argument.

{¶19} Under its second assignment of error, the state argues the trial court erred in granting Batcho's motion to suppress based on a claimed "impossibility" defense to the underlying charge rather than determining whether the traffic stop was constitutionally valid.

{¶20} "Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8,

citing *State v. Mills*, 62 Ohio St.3d 357, 366 (1992). "Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Id.*, citing *State v. Fanning*, 1 Ohio St.3d 19 (1982) and *State v. McNamara*, 124 Ohio App.3d 706 (4th Dist.1997).

{¶21} The Fourth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, guarantees an individual's right to be free from unreasonable searches and seizures. *Accord* Ohio Constitution, Article I, Section 14. Police action of stopping an automobile and detaining its occupant is a "seizure" under the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648 (1979), paragraph two of the syllabus. Thus, an automobile stop is "subject to the constitutional imperative that it not be 'unreasonable' under the circumstances." *Whren v. United States*, 517 U.S. 806, 810 (1996).

{¶22} A traffic stop is not "unreasonable" when it is premised upon either an articulable reasonable suspicion of criminal activity or probable cause to believe a crime was committed. *State v. Calori*, 11th Dist. Portage No. 2006-P-0007, 2007-Ohio-214, ¶19, citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968), *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, ¶35, and *Dayton v. Erickson*, 76 Ohio St.3d 3 (1996), syllabus. *See also State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, ¶23 ("an officer who has probable cause necessarily has a reasonable and articulable suspicion, which is all the officer needs to justify a stop"). This determination "requires an objective assessment of a police officer's

actions in light of the facts and circumstances then known to the officer." *Erickson*, *supra*, at 6 (citation omitted).

{¶23} An officer's observation of a traffic violation provides probable cause to stop a vehicle. *See Mays*, *supra*, at ¶24, and *State v. Eggleston*, 11th Dist. Trumbull No. 2014-T-0068, 2015-Ohio-958, ¶20. "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 to the United States Constitution even if the officer had some ulterior motive for making the stop, such as a suspicion that the violator was engaging in more nefarious criminal activity." *Erickson*, *supra*, at syllabus, applying and following *United States v. Ferguson*, 8 F.3d 385, 388 (6th Cir.1993).

{¶24} Turning to the facts at hand, there is no dispute that Batcho turned right from University Drive onto State Route 59, immediately entering into the left lane, and then entered the left-turn lane and turned left onto Lincoln Street. It is also not disputed that the distance between the intersection of University Drive/State Route 59 and the beginning of the left-turn lane is 184 feet.

{¶25} In its initial entry denying the motion to suppress, the trial court found that Batcho "had plenty of roadway space and time to turn right into the curb lane, put on his signal to switch lanes to the southernmost lane headed westbound on State Route 59, and then again move into the left-hand turn lane to turn south on to Lincoln Street." This finding is supported by competent, credible evidence. Notably, this finding was not negated in the trial court's subsequent entry on reconsideration. Rather, the trial court found that "it is not practicable to make that right hand turn into the curb lane and then proceed to a left hand turn onto South Lincoln Street *without violating the turn signal*

statute [R.C. 4511.39]." (Emphasis added.) Thus, the trial court concluded that Trooper Engle "did not have grounds" to stop Batcho because law enforcement should not be enforcing R.C. 4511.36(A)(1), the "turning at intersections" statute, in this situation.

{¶26} However, Batcho was not charged with a violation of R.C. 4511.39, the "turn signal" statute. The trooper may *not* have had probable cause to effectuate a traffic stop solely based on that offense. Batcho, instead, was charged with a violation of R.C. 4511.36, the "turning at intersections" statute. The trial court's initial entry concluded "that on January 21, 2018, at approximately 4:00 a.m., the Defendant violated Ohio Revised Code Section 4511.36." The subsequent entry concluded, however, that "Trooper Engle did not have grounds to stop the Defendant for violation of Ohio Revised Code Section 4511.36" because complying with R.C. 4511.36 would cause Batcho to violate R.C. 4511.39.

{¶27} In other words, the trial court "reconsidered" its decision—not because it determined Batcho had actually made the right-hand turn onto State Route 59 "as close as practicable to the right-hand curb"—but because it determined Batcho could not have done so while also giving a continuous left-turn signal for not less than 100 feet, twice, before turning left onto Lincoln Street.

{¶28} In both entries, the trial court applied the wrong legal standard. Rather than limiting its suppression inquiry to whether the trooper had probable cause to effectuate the traffic stop, it more broadly considered whether the defendant had a defense to the observed traffic violation.

{¶29} In *State v. Mays*, the Supreme Court of Ohio considered whether an officer had reasonable suspicion to stop a motorist for a perceived violation of R.C. 4511.33(A),

which also includes “as practicable” language (“a vehicle or trackless trolley shall be driven, as nearly as is practicable, entirely within a single lane or line of traffic”). The motorist argued the officer did not have reasonable suspicion because there was no evidence that “he had not stayed within his lane, ‘as nearly as [was] practicable,’ within the meaning of [the statute].” *Mays*, *supra*, at ¶17. The Supreme Court rejected this argument and held that the question of whether a motorist has a possible defense to a charge of a traffic offense is irrelevant in analyzing whether an officer had an articulable reasonable suspicion or probable cause to initiate a traffic stop. *Id.* “An officer is not required to determine whether someone who has been observed committing a crime might have a legal defense to the charge.” *Id. See also Calori*, *supra*, at ¶32 (“essentially, the ‘as nearly as is practicable’ language is a defense to the [marked lane] statute”).

{¶30} In *State v. Graham*, similar to the case sub judice, a motorist was pulled over for violating R.C. 4511.36(A)(1) by not turning into the right curb lane when making a right turn. The trial court determined the trooper lacked reasonable suspicion for the stop because, similar to here, the left lane quickly became a left turning lane, and thus the right turn was proper under the circumstances. The state appealed and, applying the holding in *Mays*, the Ninth District reversed. The Court explained that the question raised in the motion to suppress was not whether the motorist had actually violated the statute, but whether the trooper had reasonable suspicion (or probable cause) to believe that a violation had occurred. *State v. Graham*, 9th Dist. Lorain No. 13CA010489, 2014-Ohio-3283, ¶24. The trooper was not required to consider whether the motorist had a possible defense to the statute before stopping the car. *Id. See also State v. Acord*, 4th Dist. Ross No. 05CA2858, 2006-Ohio-1616, ¶13-15 (regardless of whether the impossibility defense

would have prevailed at trial for a violation of a traffic ordinance, the question is whether the stop was reasonable for Fourth Amendment purposes).

{¶31} Here, Trooper Engle observed Batcho pull into the left inside lane of State Route 59, rather than the right curb lane, when he turned right from University Drive. Batcho does not dispute this observation. Therefore, Trooper Engle had probable cause to believe Batcho had violated R.C. 4511.36(A)(1). Trooper Engle was not required to consider whether Batcho had a possible defense to the statute before stopping his car. The trial court erred in determining Trooper Engle "did not have grounds" for the stop. Batcho's motion to suppress should not have been granted on that basis.

{¶32} The state's second assignment of error has merit.

{¶33} The judgment of the Portage County Municipal Court, Ravenna Division, is reversed. This matter is remanded to the trial court for further proceedings consistent with this opinion.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.