[Cite as *State v. Raubenolt,* 2019-Ohio-3112.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellant	:	Hon. Craig R. Baldwin, J.
	:	Hon. Earle E. Wise, Jr., J.
-vs-	:	
	:	
RYAN A. RAUBENOLT	:	Case No. 19-CAC-01-0002
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Municpal Court, Case. No. 18TRC11291
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	July 29, 2019

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
CHRISTOPHER E. BALLARD 70 North Union Street Delaware, OH 43015	JAMES MAYER, III 34 South Park Street Mansfield, OH 44902

Wise, Earle, J.

{¶ 1} Plaintiff-Appellant, state of Ohio, appeals the December 29, 2018 judgment entry of the Municipal Court of Delaware County, Ohio, granting the motion to suppress filed by Defendant-Appellee, Ryan A. Raubenolt.

FACTS AND PROCEDURAL HISTORY

{¶ 2} On July 27, 2018, Ohio State Highway Patrol Troopers W. Bogantz and Ravonne Lawrence stopped appellee for an improper lane change. Upon speaking with appellee, Trooper Lawrence performed field sobriety testing and arrested him for driving under the influence in violation of R.C. 4511.19 and improper lane change in violation of R.C. 4511.39.

{¶ 3} On September 13, 2018, appellee filed a motion to suppress, challenging the stop, the field sobriety tests, and the arrest. A hearing was held on December 28, 2018. By judgment entry filed December 29, 2018, the trial court granted the motion, "finding no reasonable suspicion, nor a violation, to stop the car; no reasonable suspicion to expand to OVI; no probable cause to arrest; and that the FSTs were performed in substantial compliance regarding the numerical results, but that the results did not sufficiently raise the suspicion level to probable cause."

{¶ 4} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶ 5} "THE TRIAL COURT ERRED IN RULING THAT THERE WAS NOT REASONABLE AND ARTICULABLE SUSPICION OF A TRAFFIC VIOLATION TO STOP APPELLEE'S VEHICLE."

II

{¶ 6} "THE TRIAL COURT ERRED IN RULING THAT THERE WAS NOT REASONABLE SUSPICION THAT APPELLEE WAS OPERATING A VEHICLE WHILE UNDER THE INFLUENCE TO EXPAND THE INQUIRY OF THE TRAFFIC STOP TO FIELD SOBRIETY TESTS."

III

{¶ 7} "THE TRIAL COURT ERRED IN FINDING THAT THERE WAS INSUFFICIENT PROBABLE CAUSE TO ARREST APPELLEE FOR OPERATING A VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL OR DRUGS."

{¶ 8} All three assignments of error challenge the trial court's granting of appellee's motion to suppress. As recently stated by the Supreme Court of Ohio in *State v. Leak,* 145 Ohio St.3d 165, 2016-Ohio-154, 47 N.E.3d 821, ¶ 12:

> "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Burnside,* 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. In ruling on 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." *Id.,* citing *State v. Mills,* 62 Ohio St.3d 357, 366, 582 N.E.2d 972 (1992). On appeal, we "must accept the trial court's findings of fact if they are supported by competent, credible evidence." *Id.,* citing *State v. Fanning,* 1 Ohio St.3d 19, 20, 437 N.E.2d 583 (1982). Accepting those facts as true, we must then

"independently determine as a matter of law, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Id.*

{¶ 9} As the United States Supreme Court held in *Ornelas v. U.S.,* 517 U.S. 690, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 94 (1996), "…as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal."

I

{¶ 10} In its first assignment of error, appellant claims the trial court erred in finding there was not a reasonable and articulable suspicion of a traffic violation to stop appellee. We disagree.

{¶ 11} The Fourth Amendment to the United States Constitution protects individuals against unreasonable governmental searches and seizures. A traffic stop by law enforcement implicates the Fourth Amendment. *Whren v. United States,* 517 U.S. 806, 809-810, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). "Therefore, if an officer's decision to stop a motorist for a criminal violation, including a traffic violation, is prompted by a reasonable and articulable suspicion considering all the circumstances, then the stop is constitutionally valid." *State v. Mays,* 119 Ohio St.3d 406, 2008-Ohio-4539, 894 N.E.2d 1204. ¶ 8. "When police stop a vehicle without probable cause or reasonable suspicion, the seizure is unconstitutional and evidence derived from such a stop must be suppressed." *State v. Gray,* 6th Dist. Wood No. WD-18-067, 2019-Ohio-2662, ¶ 22, citing *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

{¶ 12} Appellant was pulled over for improper lane change in violation of R.C. 4511.39 which states the following in pertinent part:

> No person shall turn a vehicle or trackless trolley 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 or trackless trolley before turning, except that in the case of a person operating a bicycle or electric bicycle, the signal shall be made not less than one time but is not required to be continuous.

{¶ 13} During the suppression hearing, Trooper Lawrence testified to the following (T. at 26-27):

> We were driving and we were in the far right lane, and there was a white truck that was in the left lane right next to us. The white truck put his right turn signal on and started to get over. As he was starting to get over, Trooper Bogantz honked to grab the driver of the white truck's attention. After Trooper Bogantz honked, the white truck corrected himself. Bogantz then pulled behind him and we activated our lights to make a traffic stop.

{¶ 14} Appellee was the driver of the white truck. T. at 27. Trooper Lawrence acknowledged during the entire incident, appellee never left his lane of travel. T. at 62. He surmised, "If we hadn't honked, he would have struck us." T. at 40. A video of the stop was played for the trial court (State's Exhibit 3). At the conclusion of the hearing, the trial court entered its findings based on the videotape and what the trial court deemed the credible testimony of Trooper Lawrence. T. at 100-101. The trial court found, "Turning, however, to the final part, first of all, with regard to reasonable suspicion to pull the vehicle over, I do find that there was not reasonable suspicion to pull the vehicle over." T. at 108. The trial court explained the following (T. at 109-112):

> And the defendant never came over. The defendant turned on his turn signal, the trooper honked, and the defendant went back to his own lane. He never left his lane. He didn't even really move very far to the right in his lane.
>
> But, further, there's no way of knowing, as far as I can tell, and I didn't hear any testimony from it, and of course we didn't hear anything from the defendant, but it's not necessarily true that the defendant even reacted to the horn. It's conceivable that the defendant could have looked over, ascertained that the movement could not be made with safety, and changed his mind about it whether or not he heard the horn. Of course, I can't tell that.
>
> But one could say it probably was in response to the horn, but one could also say that all those things are going to happen pretty

simultaneously. As soon as a trooper or any driver sees somebody starting to come over, they're going to hit their horn, simultaneously the driver's going to make the final check and check to make sure it can be made with safety, and so it's conceivable the defendant could have gone back in his own lane complying with the law and making sure the movement could be made with safety and making it with safety.

I was looking at the street to see if there were any hundred-foot issues. I did not see any. It's hard to tell, and there was no testimony on it, but just judging from the apparent speed of the vehicles and the fact that, you know, cars are a certain length and that sort of thing, it didn't look to me like the defendant did not - - well, first of all, he never left his lane or made the turn so there is no hundred-foot rule on that.

* * *

So based on that, since that particular violation in the way it was done itself, I would not - - I don't think that that's a violation of the law, and I don't think that that violation alone would provide - - that event alone would provide a trooper reasonable suspicion that some other crime was being committed.

So I'm finding that there's not reasonable suspicion apart from that violation, nor reasonable suspicion that that was a violation, nor reasonable suspicion to pull the vehicle over.

{¶ 15} In its judgment entry filed December 29, 2018, the trial court granted appellee's motion to suppress, finding, among other things, "no reasonable suspicion, nor a violation, to stop the car." Based upon our review of the videotape and the testimony presented at the hearing, we concur with the trial court's analysis. Appellee signaled to move over as required by R.C. 4511.39, started to move to the right, and then moved back to the center of his lane of travel. What prompted appellee to not complete the lane change, whether it was because of the horn warning or because he looked over his shoulder exercising "due care to ascertain that the movement can be made with reasonable safety" and realized the cruiser was there, is irrelevant. Appellee signaled to move over, and as acknowledged by Trooper Lawrence, *never left his lane of travel*.

{¶ 16} In its appellate brief at 10-11, appellant argues if we find R.C. 4511.39 inapplicable, another potential violation could be a marked lanes violation pursuant to R.C. 4511.33(A)(1) which states the following:

> (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:
>
> (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.

{¶ 17} Appellee was not charged with a marked lanes violation, presumably because he *never left his lane of travel*. There is no evidence that appellee committed a traffic violation to justify the stop.

{¶ 18} Upon review, we find the trial court did not err in granting appellee's motion to suppress. As a consequence, any evidence obtained as a result of the illegal stop is excluded as "fruits of the poisonous tree" and therefore, the remaining assignments of error challenging the trial court's decision on the expanded stop and the arrest are moot. *Wong Sun v. United States,* 371 U.S. 471, 487-488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

{¶ 19} Assignment of Error I is denied. Assignments of Error II and III are moot.

{¶ 20} The judgment of the Municipal Court of Delaware County, Ohio is hereby affirmed.

By Wise, Earle, J.

Hoffman, P.J. and

Baldwin, J. concur.

EEW/db 75