[Cite as *State v. Baker*, 2014-Ohio-2564.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Appellant

v.

Kenneth Baker

Appellee

Court of Appeals No. WD-13-074

Trial Court No. 13-TRC-05999

DECISION AND JUDGMENT

Decided: June 13, 2014

* * * * *

Matthew L. Reger, Bowling Green Prosecutor, for appellant.

Scott T. Coon and Elizabeth B. Bostdorff, for appellee.

* * * * *

JENSEN, J.

{¶ 1} Appellant, the state of Ohio, appeals the October 30, 2013 judgment of the Bowling Green Municipal Court suppressing evidence obtained by a Wood County sheriff's deputy after stopping defendant-appellee, Kenneth Baker, for a violation of R.C. 4511.33, driving outside marked lanes. For the reasons that follow, we affirm the trial court's judgment.

I. Background

{¶ 2} On August 13, 2013, at approximately 1:02 a.m., Deputy Micah Kindle initiated a stop of Baker's truck after he observed multiple instances where the vehicle rode atop the centerline dividing the lanes of traffic, then drifted toward the fog line. As Deputy Kindle interacted with Baker during the stop, he detected a strong odor of alcohol inside the vehicle and observed an open container of beer. Baker was ultimately arrested and charged with violating R.C. 4511.19(A)(1)(a), operating a motor vehicle while under the influence of alcohol, and R.C. 4511.19(A)(1)(h), operating with a prohibited alcohol content. Baker moved to suppress the evidence obtained during the traffic stop, arguing that the stop was unconstitutional because the deputy lacked reasonable, articulable suspicion that Baker was engaged in criminal activity.

{¶ 3} At the hearing on Baker's motion to suppress, Deputy Kindle explained his reason for stopping Baker's vehicle:

> The vehicle was drifting back and forth in between the centerline and the fog line and several times it drove on and appeared to be over the centerline as well as the fog line * * *. It appeared that his tire was over the centerline and as well as the fog line * * *. Part of his tire travelled over the line.

On cross-examination, Deputy Kindle clarified that while Baker's vehicle drove on top of the centerline, it did not actually enter the opposite lane of travel.

{¶ 4} Baker argued that under our decision in *State v. Parker,* 6th Dist. Ottawa No. OT-12-034, 2013-Ohio-3470, a driver does not violate the marked lanes provisions of R.C. 4511.33 unless the tire completely crosses either the yellow lane line or the white fog lane markers. Accordingly, Baker claimed, Deputy Kindle lacked reasonable, articulable suspicion to initiate the stop.

{¶ 5} After reviewing Deputy Kindle's testimony and watching footage from the patrol camera which recorded Baker's vehicle's movements, the trial court concluded that Baker's tires never crossed completely over any lane marking. Relying on *Parker*, the court determined that Deputy Kindle lacked reasonable, articulable suspicion to stop Baker and granted Baker's motion to suppress. The state appeals that ruling, assigning the following error for our review:

> THE TRIAL COURT COMMITTED REVERSABLE [SIC] ERROR WHEN IT FOUND THAT THE REASONS ARTICULATED BY AN OFFICER FOR STOPPING A VEHICLE DID NOT ESTABLISH REASONABLE SUSPICION FOR A STOP UNDER THE FOURTH AMENDMENT[.]

II. Standard of Review

{¶ 6} Our review of a decision granting or denying 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. The trial court assumes the role of trier of fact and is in the best position to resolve factual discrepancies and to evaluate the credibility of witnesses. *Id.*,

citing *State v. Mills*, 62 Ohio St.3d 357, 366, 582 N.E.2d 972 (1992). We will 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, 437 N.E.2d 583 (1982). We must then determine, without deference to the trial court's conclusion, whether the facts satisfy the applicable legal standard. *Id.*, citing *State v. McNamara*, 124 Ohio App.3d 706, 707 N.E.2d 539 (4th Dist.1997).

III. Analysis

{¶ 7} The trial court held that Deputy Kindle lacked reasonable, articulable suspicion that Baker violated R.C. 4511.33, thus it suppressed the evidence obtained as a result of the investigatory stop. The state argues that in *State v. Devault,* 6th Dist. Ottawa No. OT-12-027, 2013-Ohio-2942*,* we held that reasonable, articulable suspicion exists to initiate a traffic stop where an officer observes a vehicle "weaving back and forth as well as riding on top of the center line" and that under this authority, the trial court's judgment should be reversed. It also claims that *Devault* is inconsistent with our decision in *State v. Parker,* 6th Dist. Ottawa No. OT-12-034, 2013-Ohio-3470*,* where we held that merely traveling on the marked lanes is not a violation of the statute.

{¶ 8} "In order to conduct an investigative stop of a motor vehicle, a police officer must have an articulable and reasonable suspicion that the motorist is engaged in criminal activity or is operating his vehicle in violation of the law." *City of Sylvania v. Comeau*, 6th Dist. Lucas No. L-01-1232, 2002-Ohio-529, ¶ 7, citing *Delaware v. Prouse* (1979), 440 U.S. 648, 663, 99 S.Ct. 1391, 59 L.Ed.2d 660. A driver violates R.C. 4511.33 where

he or she fails to operate his or her vehicle "as nearly as is practicable" within a single lane of traffic until he or she ascertains that it is safe to exit the lane. More specifically, that statute provides as follows:

> (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.
>
> * * *

R.C. 4511.33 does not explicitly prohibit weaving within one's own lane, nor does it specifically mention whether driving on the demarcating lines constitutes a violation. But various appellate courts have interpreted the statute as it applies to those situations.

{¶ 9} Like other courts, we recognized in *Parker* that a driver violates R.C. 4511.33 when he or she travels completely *across* the centerline or fog line. *Parker* at ¶ 8. *See also State v. Marcum,* 5th Dist. Licking No. 12-CA-2013-2652; *State v. Grigoryan,* 8th Dist. Cuyahoga No. 93030, 2010-Ohio-2883, ¶ 25. In *Parker,* the defendant traveled *on* but did not cross over the line, therefore, we concluded that the

officer lacked reasonable, articulable suspicion of a marked lanes violation and determined that defendant's motion to suppress evidence should have been granted.

{¶ 10} In *Devault,* relied upon by the state, the officer observed the defendant's vehicle "*weaving off the right side of the road,*" "*across the white line.*" (Emphasis added.) *Devault,* 6th Dist. Ottawa No. OT-12-027, 2013-Ohio-2942 at ¶ 2, 12. We affirmed the trial court's denial of defendant's motion to suppress because the defendant did not merely weave *within* the lane. In this important respect, *Devault* is distinguishable from *Parker* and from the facts of this case.

{¶ 11} The state contends that the Ohio Supreme Court's decision in *State v. Mays,* 119 Ohio St.3d 406, 2008-Ohio-4539, 894 N.E.2d 1204, provides authority for us to establish a reliable, bright-line rule that when a driver operates his or vehicle on the centerline or fog line, he or she violates R.C. 4511.33. In *Mays,* the Ohio Supreme Court was presented with the issue of whether a motorist violates R.C. 4511.33 by drifting across the edge line where there exists no other evidence of erratic or unsafe driving. The court determined that "when an officer observes a vehicle drifting back-and-forth across an edge line, the officer has a reasonable and articulable suspicion that the driver has violated R.C. 4511.33," sufficient to initiate a constitutionally valid traffic stop. *Mays* at ¶ 16, 25. It rejected the notion that an officer must first determine whether the driver has a possible defense to the charge before initiating the traffic stop. *Id.* at ¶ 17. *Mays* sheds no light on the question of whether driving *on* the line, as opposed to driving *across* it, violates R.C. 4511.33.

{¶ 12} Based on Deputy Kindle's concession that Baker drove his car *on* the marked line and not across it, and based on our review of the recording obtained from the dashboard camera of the patrol car which followed Baker's vehicle's movements, we agree with the trial court that Deputy Kindle lacked reasonable, articulable suspicion that Baker had violated R. C. 4511.33. We find that the trial court properly granted Baker's motion to suppress and we find the state's assignment of error not well-taken.

IV. Conclusion

{¶ 13} We find the state's assignment of error not well-taken and affirm the October 30, 2013 judgment of the Bowling Green Municipal Court granting Baker's motion to suppress. The costs of this appeal are assessed to the state pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _______________________________
JUDGE

Stephen A. Yarbrough, P.J.

James D. Jensen, J. _______________________________
CONCUR. JUDGE

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JUDGE

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