[Cite as *State v. Bui*, 2021-Ohio-362.]

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

State of Ohio — Court of Appeals No. L-19-1028

Appellee — Trial Court No. CR0201703170

v.

Vuong Bui — **DECISION AND JUDGMENT**

Appellant — Decided: January 29, 2021

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Lauren Carpenter, Assistant Prosecuting Attorney, for appellee.

Laurel A. Kendall, for appellant.

* * * * *

SINGER, J.

{¶ 1} This case is before the court on appeal by appellant, Vuong Bui, from the January 16, 2019 judgment of the Lucas County Court of Common Pleas. For the reasons that follow, we reverse.

{¶ 2} Appellant sets forth four assignments of error:

1. The trial court abused its discretion when it denied appellant's motion to suppress evidence obtained from illegal traffic stop.

2. The trial court abused its discretion when it admitted statements made by appellant without Miranda warnings.

3. The trial court abused its discretion when it denied appellant's motion for acquittal pursuant to Crim.R. 29, because the evidence presented was insufficient to support convictions in this matter.

4. Appellant's convictions for possession of controlled substances and trafficking in drugs were against the manifest weight on the evidence.

Background

{¶ 3} On October 11, 2017, at approximately 1:30 in the afternoon, appellant was driving a vehicle on the Ohio Turnpike in Monclova Township, Lucas County, Ohio, when he was stopped by Trooper Jason Archer of the Ohio State Highway Patrol, for following too closely to a tractor trailer truck. The vehicle appellant was driving was a 2018 Chevrolet Suburban with Utah license plates, which had been rented by appellant's passenger, Nhan Nguyen. After the traffic stop, Trooper Archer used a drug-sniffing dog for an exterior sniff of the vehicle. The trooper declared that the dog alerted to the odor of drugs. Ultimately, about 104 pounds of marijuana were seized from the vehicle.

{¶ 4} On December 15, 2017, appellant was indicted for trafficking in marijuana in violation of R.C. 2925.03(A)(2) and (C)(3)(g), and possession of in marijuana in violation of R.C. 2925.11(A) and (C)(3)(g), both second-degree felonies. Appellant was not charged with a traffic violation.

{¶ 5} On January 3, 2018, appellant was arraigned and entered a plea of not guilty.

{¶ 6} On May 7, 2018, appellant filed a motion to suppress, objecting to both the traffic stop and the detention, and claiming the contraband was illegally seized. A suppression hearing was held on May 29, 2018. Post-hearing memoranda were filed.

{¶ 7} On September 19, 2018, the trial court issued an opinion and journal entry denying the motion to suppress.

{¶ 8} On January 15, 2019, a jury trial commenced, and on January 16, 2019, appellant was found guilty. The trial court immediately proceeded to sentencing. The court found the possession and trafficking offenses were allied offenses, and the state elected to proceed on the trafficking count. The court sentenced appellant to eight years in prison. Appellant timely appealed.

First Assignment of Error

{¶ 9} Appellant argues the trial court abused its discretion when it denied his motion to suppress as the traffic stop was pretextual and was not based on reasonable suspicion of a traffic violation. Appellant observes no traffic citation was issued. Appellant also asserts R.C. 4511.34, the following too closely statute, should be found to be void for vagueness, or in the alternative, R.C. 4511.34 and 4511.21 (the assured clear distance statute) should be found to have similar intent. Appellant contends we "should find that [his] vehicle was travelling in a reasonable and prudent manner * * * [and was] travelling at a distance which was arguably reasonable and prudent relative to the semi."

{¶ 10} Appellant further contends the trooper did not have reasonable articulable suspicion to detain him. Appellant maintains no matter how de minimis the length of

time that he was detained after the traffic stop, the search was unconstitutional and the contraband seized must be excluded as evidence. Appellant relies on *Rodriguez v. United States*, 575 U.S. 348, 135 S.Ct. 1609, 191 L.Ed.2d 492 (2015), in support of his position.

{¶ 11} We will address the validity of the traffic stop first.

Traffic Stop

Search and Seizure Law

{¶ 12} The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution, guarantee a person's right to be free from unreasonable searches and seizures. *State v. Orr*, 91 Ohio St.3d 389, 391, 745 N.E.2d 1036 (2001). The temporary detention of a motorist during a traffic stop is a seizure. *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).

{¶ 13} There has been continuing confusion over what standard applies to a traffic stop: probable cause or reasonable articulable suspicion. *See State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, 894 N.E.2d 1204, ¶ 23 ("[W]e have not held that probable cause is required [for a traffic stop]. * * * A traffic stop is constitutionally valid if the police officer has a reasonable and articulable suspicion that a motorist has violated the law."). *But see State v. Turner*, 2020-Ohio-6773, ¶ 2 ("[W]hen an officer believes a traffic law has been violated, the focus of the inquiry is whether the officer had 'probable cause to believe that a traffic violation has occurred.'"). Yet, there is no confusion that "[w]hen police stop a vehicle without either probable cause or a reasonable articulable suspicion of criminal activity, the seizure is violative of constitutional rights and evidence

derived from such a stop must be suppressed." *State v. Clark*, 6th Dist. No. WD-17-025, 2018-Ohio-2029, 101 N.E.3d 758, ¶ 22 (6th Dist.), citing *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

{¶ 14} Probable cause has been defined as "[a] reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offence with which he is charged." *Ash v. Marlow*, 20 Ohio 119, 1851 WL 16 (1851), paragraph one of the syllabus.

{¶ 15} Reasonable, articulable suspicion has been described as "something more substantial than inarticulate hunches." *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21. When a judge evaluates the reasonableness of a particular search or seizure in light of the particular circumstances, "the facts [must] be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Id.* at 21-22. The determination of whether reasonable suspicion exists to justify a stop is based on the totality of the circumstances. *United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981).

{¶ 16} The reasonable suspicion standard is less demanding than probable cause. *Alabama v. White*, 496 U.S. 325, 330, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990). "[A]n

officer who has probable cause necessarily has a reasonable and articulable suspicion * * * [as] [t]he former subsumes the latter." *Mays* at ¶ 23.

{¶ 17} With respect to pretextual stops, the Supreme Court of Ohio has held such a stop is not unreasonable under the Fourth Amendment, so long as a police officer has probable cause to believe a traffic violation has occurred, even if the officer's motivation is based on suspicion that the motorist is engaging in other criminal activity. *Dayton v. Erickson*, 76 Ohio St.3d 3, 665 N.E.2d 1091 (1996), syllabus.

Appellant's Motion to Suppress

{¶ 18} In appellant's motion, he sought to have the trial court suppress the evidence obtained by the state from the illegal traffic stop and detention. Appellant argued the trooper's contention that appellant was following the vehicle in front of him too closely was dubious, as the stop was a pretext and not justified by what was captured on video. Appellant submitted the trooper offered "contradictory, flimsy, and at times silly" reasons "to justify his decision to rifle through [appellant's] vehicle." Appellant asserted the trooper then brought out the drug-sniffing dog, who had to be "'reset'" before finally providing "a signal from which the Trooper derive[d] his claimed right to fully rifle through [appellant's] vehicle."

Suppression Hearing

{¶ 19} Trooper Archer was the only witness called to testify at the hearing on the motion to suppress. In addition, the trooper's patrol car video ("dash cam") was played, which depicted: the trooper pursuing appellant's vehicle prior to initiating the traffic

stop; the stop; the trooper's questioning of appellant; appellant being placed in the patrol car; the canine sniff of the outside of appellant's vehicle; and the search of the vehicle.

{¶ 20} Trooper Archer testified to the following. He recounted his training and work as a law enforcement officer as well as his certification as a canine handler. On October 11, 2017, he was in a marked patrol car, in his uniform, and was conducting a joint operation with the United States Border Patrol, with Agent Thurston Mullen, trying to intercept criminal elements on the roadway. The trooper was stationary in the patrol car at mile marker 51, when he "observed a white Chevrolet Tahoe with Utah registration travel past * * * in the left lane," then move into the right lane in front of a commercial vehicle. The trooper observed "what looked - - appeared to be a single male occupant in a large rented Suburban. I believed it to be rented because it didn't have a license plate bracket, didn't have any decals, didn't have anything indicating it was privately owned." He also stated "the seats appeared to be folded down," which "peaked [his] interest" and was a criminal indicator because "if I rented a vehicle, I would probably rent a larger vehicle if I needed to haul something of a large amount of people." In addition, the driver "appeared very rigid in posture, almost leaning back trying to conceal his face from my view with what we call the B pillar. * * * It appeared he was leaning back and hiding his face from my view." The trooper pulled out and followed the vehicle.

{¶ 21} At about mile marker 57, the trooper's dash cam activated. As the dash cam was played, the trooper offered comments. He stated he saw appellant's vehicle

"traveling in the right lane approximately 65 mile an hour. There is a commercial vehicle in the right lane in front of that Suburban."

{¶ 22} "At some point, [appellant's] vehicle was following too closely to the commercial vehicle * * * [and] the roads are damp from previous rains." The trooper stated "[t]he recommended following distance that I was trained was through NHTSA, National Highway Transportation Safety Administration, recommends one car length for every ten miles an hour." The trooper testified "[a]s we get near mile post 58 I believe [appellant's] vehicle is at one-and-a-half to two car lengths at the 65 mile per hour * * * and it is traveling * * * behind the commercial vehicle in the right lane. The left lane is open, [appellant] could move to the left lane and go around the commercial vehicle. However, he did not." The trooper continued "[a]nd [appellant's] vehicle is following that commercial vehicle at less than two car lengths at this point. Still traveling 65 mile per hour roughly. The left lane is still open, [appellant] could pass the commercial vehicle. * * * He got to one-and-a-half car lengths behind the commercial vehicle in front of him, still maintaining that 65 mile per hour speed. And then once I moved to the right lane to attempt to traffic stop, [appellant] tried to move to the left lane at that point." The trooper activated his lights and stopped appellant's vehicle at the exit 59 ramp.

{¶ 23} When asked about R.C. 4511.34, the following too closely statute, the trooper shared "I think it states, no person shall follow another vehicle more closely than is reasonably prudent for the road or speed of that vehicle." He appreciated there was no bright line rule, the reasonably prudent standard depended on weather and road

conditions, posted speed limit and the weight and load of the vehicles." He opined "the Suburban was traveling too closely * * * we use what the National Highway Traffic Safety Administration recommends of one car length for every ten miles an hour. So if he were traveling 65 mile an hour on a dry roadway, it would be prudent to be five to six, seven car lengths behind the commercial vehicle * * * [but] he was traveling at less than two car lengths at several times and the road was wet and the left lane was wide open."

{¶ 24} On cross-examination, when asked about the "factors that might enter into whether a vehicle is traveling at a safe speed in terms of what's [a]head of it," the trooper further explained about the gross weight of the vehicle being driven "roughly, the size of the vehicle, the weight of it is going to cause that vehicle, depending on its components, to have a longer braking distance if it were to have to brake." He was also asked about the character of the vehicle being followed and the way it is being driven, as well as road conditions. The trooper was questioned about why he determined appellant's vehicle was following too closely and he replied "[t]he National Highway Transportation Safety Administration's recommendation is one car length per ten miles an hour." The trooper was asked "[b]ut that, in and of itself, does indicate a violation of the assured clear distance statute, does it?" The trooper stated "[t]he Ohio Revised Code doesn't specify specifically what that distance is. It allows interpretation based on the road conditions and the speed of the other vehicle." The question was posed "[b]ut your interpretation was strictly about the number of car lengths, correct?" The trooper answered, "Yes, sir."

{¶ 25} The trooper was asked about appellant's "rigid posture" and "hiding behind the pillar of the vehicle." He acknowledged neither circumstance was a criminal indicator in and of itself, but they were criminal indicators "in totality of the circumstances."

Trial Court's Opinion and Journal Entry

{¶ 26} On September 19, 2018, the trial court, "[u]pon consideration of the evidence presented * * * arguments * * * and the applicable law," denied the motion to suppress. Under the section entitled "Hearing on the Motion," the court noted it admitted several exhibits into evidence including the "DVD of the trooper's in-car video." The court observed Trooper Archer testified about his employment with the Ohio Highway Patrol, his work with K-9 partners, and the joint operation between the border patrol and the highway patrol. The court noted the trooper testified that on October 11, 2017, he noticed a white Chevrolet Suburban with Utah plates drive by in the left lane, with "what appeared to be a single male in the vehicle" and the trooper "believed the vehicle to be rented" * * * [and] "the seats appeared to be folded down." And, "[w]hat piqued Trooper Archer's interest was the fact that it was a large, rented vehicle that could be used to haul a lot of people or goods" plus, appellant's "behavior did not appear normal because his posture appeared very rigid * * * [and he] was leaning back as if he were trying to conceal his face from view."

{¶ 27} The court set forth the trooper testified he followed appellant's "vehicle for eight miles, noting that the driver was continually following a commercial vehicle too

closely, at times less than three car lengths, at times at one-and-a-half to two car lengths, at a speed of 65 miles per hour, despite the wet road conditions." The court recognized "[t]he recommended distance is one car length for every ten miles per hour."

{¶ 28} In its analysis and decision section, under the heading "Trooper Archer had probable cause to believe a traffic violation had occurred when he stopped [appellant's] vehicle," the trial court set forth "[t]he United States Supreme Court has ruled that a traffic stop is reasonable and not violative of the Fourth Amendment of the * * * Constitution where the police have probable cause to believe a traffic violation has occurred." In support, the court cited to *Whren v. United States*, 517 U.S. 806, 809, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), *Dayton v. Erickson*, 76 Ohio St.3d 9-10, 665 N.E.2d 1091 (1996), and *State v. Ruffer*, 6th Dist. Fulton No. F-11-007, 2012-Ohio-4491, ¶ 17. The court noted the trooper stopped appellant's vehicle "after observing that it was following the vehicle in front of it too closely." The court cited R.C. 4511.34, then stated "[t]hus, the stop did not violate [appellant's] constitutional rights."

Standard on Appeal

{¶ 29} Appellate review of a Crim.R. 12(C)(3) motion to suppress presents mixed questions of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. When the trial court decides a motion to suppress, it assumes the role of trier of fact and is in the best position to resolve questions of fact and to assess witness credibility. *Id.* At a motion to suppress, the state bears the burden of demonstrating the validity of a traffic stop. *State v. Foster*, 11th Dist. Lake No.

2003-L-039, 2004-Ohio-1438, ¶ 6. However, "the rules of evidence normally applicable in criminal trials do not operate with full force and effect in hearings before the judge to determine the admissibility of evidence." *U.S. v. Matlock*, 415 U.S. 164, 172-173, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). Therefore, when ruling on a motion to suppress, the trial court may rely on hearsay and other evidence which would not be admissible at trial. *Id.*

{¶ 30} A reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *Burnside* at ¶ 8. An appellate court must then independently decide as a matter of law whether the trial court's conclusions satisfy the appropriate legal standard. *Id.*

R.C. 4511.34

{¶ 31} The Space Between Moving Vehicles statute reads in relevant part:

> A) The operator of a motor vehicle * * * shall not follow another vehicle * * * more closely than is reasonable and prudent, having due regard for the speed of such vehicle * * * and the traffic upon and the condition of the highway.

{¶ 32} In *State v. Gonzalez*, 43 Ohio App.3d 59, 61, 539 N.E.2d 641 (6th Dist.1987), we acknowledged R.C. 4511.34 is a traffic regulation with a "rule of reason" standard. We found the "reasonable and prudent" standard of the statute was constitutionally definite and certain. *Id.* at 60. We observed "[t]he purpose of the stated portion of the statute is to prevent rear-end collisions. Whether a person could stop in

time to avoid a rear-end collision is thus the important issue." *Id.* at 61. We recognized the one car length per ten miles an hour measurement is not a standard but is one means of estimating what is reasonable and prudent under the circumstances, and this "means of measurement is thus sufficient to determine in general terms whether a driver is operating his vehicle reasonably and prudently to be able to stop in time." *Id.* at 61.

Analysis

{¶ 33} In addition to opposing the traffic stop and the detention, appellant also challenged the validity of R.C. 4511.34, and whether it had the same intent as R.C. 4511.21. We note appellant did not raise these arguments in the trial court. We find appellant waived these arguments, and we decline to consider them for the first time on appeal. *See In re M.D.*, 38 Ohio St.3d 149, 527 N.E.2d 286 (1988), syllabus.

{¶ 34} In its decision, the trial court found the trooper had probable cause to believe a traffic violation occurred, and the traffic stop did not violate appellant's constitutional rights. The court mentioned that Trooper Archer testified he followed appellant's vehicle for eight miles, and at times appellant followed the commercial vehicle at less than three car lengths and one-and-a-half to two car lengths "at a speed of 65 miles per hour, despite the wet road conditions * * * [and] [t]he recommended distance [of] one car length for every ten miles per hour."

{¶ 35} A review of the record shows that at the suppression hearing, Trooper Archer agreed he only based his opinion that appellant was following too closely due to car length. Yet, he was aware of other factors, as he stated several times in his testimony

that the road was wet or damp and the left lane was open, "wide open," and appellant could pass the truck. The trooper also acknowledged there was no bright line rule and the reasonably prudent standard depended on weather and road conditions, posted speed limit, and the weight and load of the vehicles. However, the trooper offered contradictory testimony about the road conditions and no testimony as to the current weather conditions or the weight and load of appellant's vehicle or the slower truck. In addition, the prosecutor, not the trooper, stated the posted speed limit. With respect to the speed of appellant's vehicle, the trooper estimated the speed at roughly or approximately 65 m.p.h., but provided no explanation as to how he arrived at that speed. Finally, no testimony was presented as to a driver's reaction time or how the factors, of which the trooper was aware, impacted appellant's ability to brake.

{¶ 36} We note the trial court, in its decision, did not refer to the trooper's testimony that the left lane was wide open and appellant could pass the truck, nor did the court mention the dash cam video or what it depicted in relation to the traffic stop.

Dash Cam

{¶ 37} An examination of the dash cam video footage, which starts at approximately 1:40 p.m., portrays the following regarding the events surrounding the traffic stop. The day was overcast with no precipitation and the eastbound two-lane roadway had light traffic and no obstructions. The right lane of the roadway was barely damp in the middle, and the tire travel paths appeared dry. There were three vehicles in front of the trooper traveling eastbound, a slower moving truck in the right lane followed

by appellant's vehicle and a faster moving truck in the left lane. The faster truck remained in the left lane for a significant duration of time as it gradually overtook the slower truck. After the faster truck completely passed the slower truck, the faster truck moved into the right lane directly in front of the slower truck. Appellant's vehicle stayed behind the slower truck in the right lane.

{¶ 38} Meanwhile, the trooper was traveling eastbound in the left lane of the roadway, initially at quite a distance from appellant's vehicle and the trucks, but over time, the trooper gradually moved closer to those vehicles. The faster truck, slower truck and appellant's vehicle traveled in the right lane while the trooper stayed in the left lane, at one point nearly passing appellant. Then, the trooper moved to the right lane, behind appellant's vehicle, at a distance of one to two car lengths. The left lane was now open for the first time since the video began. Appellant appeared to brake and shortly thereafter, signaled and started to move toward the left lane. Appellant does not complete the lane change, and shortly thereafter is pulled over by the trooper.

Further Analysis

{¶ 39} Based on our review of the entire record, there are certain inconsistencies in Trooper Archer's testimony, including that appellant was driving a Tahoe or a Suburban. The record establishes appellant was driving a Suburban. The trooper also said "[he] was trained * * * through NHTSA, National Highway Transportation Safety Administration," and "we use what the National Highway Traffic Safety Administration recommends" and "[t]he National Highway Transportation Safety Administration's

recommendation is one car length per ten miles an hour." The federal agency is the National Highway Traffic Safety Administration. *See* www.NHTSA.gov.

{¶ 40} In addition, we observed several contradictions between the trooper's testimony and what is portrayed on the dash cam video. The trooper testified the condition of the road was wet or damp from previous rains, while the dash cam revealed the middle of the right lane was barely damp and the tire travel paths appeared dry. The trooper also testified repeatedly that the left lane was wide open and appellant could pass the truck, but the dash cam showed the trooper and/or the faster truck in the left lane for virtually the entire video. This contradiction does not support Trooper Archer's numerous assertions that appellant could have passed the truck he was following.

{¶ 41} In our view, the video shows a traffic pattern created, in part, by the trooper, which effectively required appellant to continue to follow the slower truck in the right lane as the trooper approached in the left lane. When the trooper moved to the right lane, appellant signaled his intention to move into the left lane, but was then stopped for following too closely to the truck. Nowhere in the video does it show appellant's vehicle proceeding on the roadway in an unreasonable or unsafe manner, despite following the slower truck, on occasion, at less than the suggested one car length per 10 m.p.h.

{¶ 42} After thoroughly reviewing the entire record, we conclude the trial court erred in finding that Trooper Archer had probable cause to believe a traffic violation occurred, as the court did not apply the correct standard in analyzing the validity of the traffic stop, and the court's findings are not based on the totality of the circumstances or

supported by competent, credible evidence. We conclude the evidence failed to establish that appellant was following the truck more closely than was reasonable and prudent, having due regard for the speed of such vehicle, the traffic and the condition of the highway. Moreover, we conclude Trooper Archer lacked reasonable and articulable suspicion or probable cause to believe a violation of R.C. 4511.34 occurred, as to justify the traffic stop.

{¶ 43} We therefore conclude the trial court erred in finding the traffic stop did not violate appellant's constitutional rights, and further erred in denying appellant's motion to suppress with respect to the validity of the traffic stop. Accordingly, appellant's first assignment of error is found well-taken.

{¶ 44} In light of our conclusions, any evidence seized as a result of the illegal stop must be excluded as "fruits of the poisonous tree." *See Wong Sun v. United States*, 371 U.S. 471, 487-488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Furthermore, appellant's remaining assignments of error are moot. *See* App.R. 12(A)(1)(c). Accordingly, appellant's second, third and fourth assignments of error are not well-taken.

{¶ 45} The judgment of the Lucas County Court of Common Pleas denying appellant's motion to suppress is reversed, and this matter is remanded to the trial court for proceedings consistent with this decision. Pursuant to App.R. 24, appellee is hereby ordered to pay the costs incurred on appeal.

Judgment reversed
and remanded.

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

Arlene Singer, J. _____
JUDGE

Christine E. Mayle, J.
CONCUR. _____
JUDGE