[Cite as *Lebanon v. Evans*, 2010-Ohio-4402.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO/CITY OF LEBANON,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-08-116
	:	O P I N I O N
- vs -		9/20/2010
	:	
THOMAS G. EVANS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM LEBANON MUNICIPAL COURT
Case No. TRC 0803568 A

Matthew J. Graber, 423 Reading Road, Mason, Ohio 45040, for plaintiff-appellee

Fred S. Miller, Baden & Jones Building, 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

POWELL, J.

{¶1} Thomas Evans asks this court to overturn his conviction for driving under the influence (OVI). The judgment of the Lebanon Municipal Court is affirmed because the stop of Evans' vehicle was lawful, there was sufficient evidence for the jury to find guilt, and the trial court did not abuse its discretion in admitting the officer's opinion that Evans' driving was impaired.

{¶2} Ohio State Highway Patrol Trooper Sydney Michael Steele first noticed Evans' car at 2:30 a.m. when it accelerated down the ramp onto I-75 at what he described as a "high rate of speed," merged onto the highway, and moved over to the next lane. Steele was out of his vehicle at the time. He returned to his vehicle and tried to catch up to the car. Trooper Steele said he observed the car make several lane changes and at least two of the lane changes were made without a signal. The trooper also saw the car drive out of its marked lane when the tires "hit the dotted lines."

{¶3} Trooper Steele stopped the vehicle. Evans' eyes were bloodshot. The trooper smelled what he described alternatively as a "strong" or "moderate" odor of alcoholic beverage. Evans initially admitted to drinking two beers and agreed to submit to field sobriety tests. Trooper Steele arrested Evans after he did not perform well on the tests. Evans refused to take a chemical test to measure his alcohol levels. He eventually told the trooper he drank five beers.

{¶4} Evans was charged with driving under the influence under R.C. 4511.19(A)(1). Evans moved to suppress evidence. The state presented a videotape from the trooper's vehicle. The municipal court overruled the motion based on testimony, while noting that the videotape was not helpful because it was so far away from Evans' vehicle. A jury trial was held and the jury found Evans guilty. On appeal, Evans first challenges the trial court's decision to deny his motion to suppress evidence.

{¶5} The Ohio Supreme Court said in *State v. Burnside* that appellate review

of a motion to suppress presents a mixed question of law and fact.[1] The supreme court explained that 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.[2] An appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence.[3] But, an appellate court must independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard.[4]

{¶6} Evans argues that the trial court erred in overruling his motion because the trooper lacked a reasonable and articulable suspicion that a marked lane violation had occurred.

{¶7} The United States Supreme Court in *Berkemer v. McCarty* explained that a traffic stop is constitutionally valid if an officer has a reasonable and articulable suspicion that a motorist has committed, is committing, or is about to commit a crime.[5]

{¶8} The Ohio Supreme Court in *Dayton v. Erickson* found that a minor violation of a traffic regulation witnessed by a police officer is sufficient justification to stop a vehicle.[6]

{¶9} The same court said later in *State v. Mays* that if an officer's decision to stop a motorist for a criminal violation, including a traffic violation, is prompted by a

1. *State v. Burnside,* 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8.

2. Id.
3. Id.

4. Id.

5. *Berkemer v. McCarty* (1984), 468 U.S. 420, 439, 104 S.Ct. 3138.

6. *Dayton v. Erickson*, 76 Ohio St.3d 3, 11, 1996-Ohio-431.

reasonable and articulable suspicion considering all of the circumstances, the stop is constitutionally valid.[7]

{¶10} According to R.C. 4511.33(A)(1), when a road has been divided into two or more clearly marked lanes for traffic, a vehicle 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. Trooper Steele stated that he observed Evans "hit the dotted lines" in his lane of travel.

{¶11} The *Mays* court held that a traffic stop is constitutionally valid when a law enforcement officer witnesses a motorist drift over the lane markings in violation of the marked lane statute even without further evidence of erratic or unsafe driving.[8]

{¶12} In *Mays*, the defendant argued that the stop for marked lanes was not justified.[9] According to the defendant, there was no showing he failed to determine whether he could leave his lane safely or that he had not stayed within his lane as nearly as practicable.[10] The court stated that a possible defense to a traffic violation was not relevant to the analysis of whether the officer had a reasonable and articulable suspicion to initiate a traffic stop.[11] And further, the "as practicable" language of the statute requires the driver to remain within the lane markings unless

7. *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, ¶8.
8. Id. at syllabus.
9. Id. at ¶17.
10. Id.
11. Id.

the driver cannot reasonably avoid straying.[12] The *Mays* court said the purpose of the statute was not to punish a driver who strayed from the marked lane to avoid, for example, striking a person or animal, a parked vehicle, or debris in the road.[13]

{¶13} The trooper testified that he saw Evans "go out of his marked lanes a couple of times, and that's when I knew I was going to stop him." When asked to describe how far into the other lane Evans' vehicle strayed, the trooper indicated the tires hit the dotted lines.

{¶14} The municipal court did not err in finding the trooper had a reasonable and articulable suspicion that a marked lane violation occurred. In addition, the court did not err in deciding the suppression motion because Trooper Steele also had reasonable and articulable suspicion to stop Evans for an improper lane change.

{¶15} The applicable lane change statute says that no driver may move right or left on a highway unless the driver has exercised due care to determine that the movement can be made with reasonable safety and has given an appropriate signal.[14] Trooper Steele indicated that Evans made several lane changes and two of them were made without signaling.

{¶16} The Third Appellate District recently said in *State v. Burwell*, that even if the trial court's reliance on a particular traffic violation was in error, the error would be harmless where the officer had an independent reason to initiate a traffic stop based upon another traffic violation for which the defendant was not cited.[15]

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12. Id. at ¶18.

13. Id. at ¶19.
14. R.C. 4511.39.

15. *State v. Burwell*, Putnam App. No. 12-09-06, 2010-Ohio-1087, ¶14.

{¶17} The trooper could have initiated a lawful traffic stop based upon the lane changes without a signal. Evans' first assignment of error is overruled.

{¶18} Evans argues under his second assignment of error that there was insufficient evidence that he was driving under the influence. Specifically, Evans claims he committed no traffic violations, he drove appropriately, and had no "bad behavior," that would indicate he was driving under the influence.

{¶19} When reviewing a challenge to the sufficiency of the evidence to support a criminal conviction, the Ohio Supreme Court in *State v. Hancock* explained that the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[16]

{¶20} R.C. 4511.19 states, in pertinent part, that no person shall operate any vehicle if, at the time of the operation, the person is under the influence of alcohol, a drug of abuse, or a combination of them.

{¶21} The Sixth Appellate District explained in *State v. Dorf* that a defendant's driving need not be erratic or in violation of a traffic law to be found guilty of driving under the influence.[17] The effect of the alcohol must adversely affect a defendant's actions, reactions, conduct, movements or mental process, or impair his reactions, under the circumstances, "to deprive him of that clearness of the intellect and control of himself which he would otherwise possess."[18]

{¶22} The Eleventh district in *State v. Wargo* stated that the state may show

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16. *State v. Hancock,* 108 Ohio St.3d 57, 2006-Ohio-160, ¶34.

17. *State v. Dorf*, (June 30, 1993), Wood App. No. 92-WD-059, *2.

18. Id.; see, also, *State v. Peters*, Wayne App. No. 08CA0009, 2008-Ohio-6940, ¶5-6.

impaired driving ability by relying on physiological factors such as slurred speech, bloodshot eyes, odor of alcohol, and coordination tests to demonstrate that physical and mental ability to drive is impaired.[19]

{¶23} In this case, Trooper Steele indicated that Evans committed a marked lane violation and failed to signal lane changes two times while making multiple lane changes. Upon stopping Evans, the trooper observed that Evans had bloodshot eyes and a strong or moderate odor of alcoholic beverage. Evans admitted to drinking two beers and later indicated he drank five beers. Evans exhibited four out of six clues on the horizontal gaze nystagmus test, did not pass the one-leg stand test, and exhibited three of eight clues on the walk and turn field sobriety test. Further, evidence of a refusal to submit to a chemical test is a factor that may be used against a defendant at trial.[20]

{¶24} When this evidence is viewed in the light most favorable to the prosecution, a rational trier of fact could conclude that Evans consumed alcohol and it impaired his driving ability. The second assignment of error is overruled.

{¶25} Evans next argues that the trial court should not have permitted the trooper to offer his opinion that Evans was driving under the influence when it was the ultimate issue for the jury to decide.

{¶26} The Ohio Supreme Court has explained that a determination as to the admissibility of evidence is a matter generally within the sound discretion of the trial

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19. *State v. Wargo* (Oct. 31, 1997), Trumbull App. No. 96-T-5528, *3.

20. *Westerville v. Cunningham* (1968), 15 Ohio St.2d 121; *State v. Wise*, Guernsey App. No. 2008-CA-9, 2008-Ohio-7003, ¶82-83.

court.[21]

{¶27} Evidentiary rule 704 states that testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact. Comments to the rule from 1980 explain that the rule provides that opinion evidence on an ultimate issue is not excludable per se, but must be read in conjunction with evidence rules 701 and 702, each of which requires that opinion testimony be helpful to, or assist, the trier of the fact in the determination of a factual issue.[22]

{¶28} The prosecutor asked the trooper whether, given the trooper's law enforcement experience, he had any doubt that Evans was driving under the influence. Evans' trial counsel objected, but the trial court overruled the objection. Trooper Steele replied that Evans was impaired.

{¶29} After having reviewed the trooper's testimony and the applicable law, we find that the trooper's testimony was rationally based on the trooper's perception and helpful to a clear understanding of the testimony or determination of a fact in issue.[23] The trial court did not abuse its discretion in permitting the trooper's testimony. Evans' third assignment of error is overruled.

{¶30} Judgment affirmed.

YOUNG, P.J., and HENDRICKSON, J., concur.

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21. *Schaffter v. Ward* (1985), 17 Ohio St.3d 79, 80.

22. Evid.R. 704, Evid.R. 701, Evid.R. 702.
23. Evid.R. 701.