

**IN THE SUPREME COURT OF OHIO**

**STATE OF OHIO,**

**Plaintiff-Appellee,**

**Vs.**

**CASE NO. 2007-1302**

**On appeal from the Licking County  
Court of Appeals, Fifth Appellant District**

**Court of Appeals Case No. 2006CA00097**

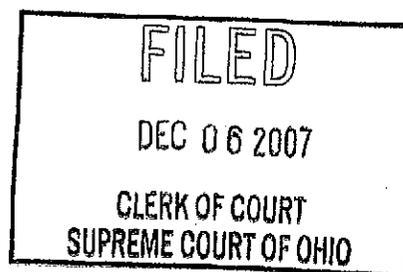
**CHRISTOPHER MAYS,**

**Defendant-Appellant.**

.....  
**MERIT BRIEF OF PLAINTIFF-APPELLEE**  
.....

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## STATEMENT OF THE CASE

Appellee agrees with the statement of the case as recited by the Appellant.

## STATEMENT OF THE FACTS

On March 26, 2007, Tpr. Milligan of the State Highway Patrol was traveling westbound on State Route 16 in the Township of Granville, Licking County, Ohio. Tr. at 8. Tpr. Milligan came upon Appellant's vehicle and observed the vehicle cross over the right fog line of the roadway by approximately a tire's width. Id. The Appellant drifted back onto the roadway and then immediately drifted once again across the white fog line on the right side of the roadway. Tr. at 9,43,44. At this time, Tpr. Milligan activated his in car camera. Id. As he continued to follow the vehicle, he observed the Appellant weaving within his marked lane of travel from the fog line to the centerline. Id. Tpr. Milligan did not observe any obstructions in the roadway to cause the Appellant to weave within his lane of travel or leave the roadway and operate the vehicle outside his marked lane of travel. Tr. at 9. After observing the lane violations and the weaving, Tpr. Milligan initiated a traffic stop. Tr. at 10. The Appellant was later cited for operating a motor vehicle while under the influence of alcohol under R.C. 4511.19(A)(1)(a) and marked lanes under R.C. 4511.33.

## PROPOSITION OF LAW

**May a police officer who witnesses a motorist cross a right white edge line and without further evidence of erratic driving or that the crossing was done in an unsafe manner make a constitutional stop of a motorist.**

### STANDARD OF REVIEW

The standard of review for challenging on appeal a trial court's ruling on a motion to suppress where the appellant alleges that the trial court has incorrectly decided the ultimate or final issue raised in the motion is *de novo*. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion whether the facts meet the appropriate legal standard. *State v. Curry* (1994), 95 Ohio App.3d 93, 96, *State v. Claytor* (1993), 85 Ohio App.3d 623, 627, and *State v. Guysinger* (1993), 86 Ohio App.3d 592. This standard of review is further elaborated in *State v. Searls* (1997), 118 Ohio App.3d 739, 693 N.E.2d 1184 in the following passage:

In the recent case of *Ornelas v. United States* (1996), 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911, the United States Supreme Court held that in reviewing a motion to suppress, the ultimate questions of whether an officer has reasonable suspicion to make an investigatory stop and whether an officer had probable cause to make a warrantless search are reviewed by an appellate court *de novo*. In conducting the appellate review, the court reviews the trial court's findings of the facts of the case only for clear error and with due weight given the inferences the trial judge drew from the facts. This comports with the mandate in *State v. Mills* (1992), 62 Ohio St.3d 357, 582 N.E.2d 972, wherein the Ohio Supreme Court noted that the evaluation of evidence and the credibility of the witnesses are issues for the trier of fact in the hearing on the motion to suppress *Id.* at 366, 582 N.E.2d at 981-982. The court of appeals is bound to accept factual determinations of the trial court made during the suppression hearing so long as they are supported by competent and credible evidence. Then, however we proceed to review the trial court's application of law to those facts *de novo*. See, e.g., *State v. Beard* (Mar.26,1996), Athens App. No. 95CA1685, unreported, 1996 WL 139663.

## STANDARD TO APPLY

The standard for judging the constitutional validity of an investigative stop is well established under both federal and state case law. *Berkemar v. McCarthy* (1984), 468 U.S. 420, declared that in order for a traffic stop to be constitutionally valid, the officer must have: 1) a reasonable suspicion to believe based on specific and articulable facts, that a law has been violated or criminal activities have taken place; or 2) probable cause to believe the motorists has committed a specific traffic violation. The trial court further found it must view the stop in light of the totality of circumstances, citing *State v. Freeman* (1980), 64 Ohio St.2d 291.

### Reasonable Suspicion

In *Terry v. Ohio* (1968), 392 U.S. 1, 22, 88 S.Ct. 1868, 20 L.E.2d 889, the United States Supreme Court stated that “a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest.” Reasonable suspicion constitutes something less than probable cause. *State v. Carlson* (1995), 102 Ohio App.3d 585, 590. “However, for the propriety of a brief investigatory stop pursuant to *Terry*, the police officer involved must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry v. Ohio* at 21, Id at 2. “Specific and articulable facts’ that will justify an investigatory stop by way of reasonable suspicion include: (1) location; (2) the officer’s experience, training or knowledge; (3) the suspect’s conduct or appearance; and (4) the surrounding circumstances.” *State v. Gaylord*, 9<sup>th</sup> Dist. No. 22406, 2005-Ohio-2138 at paragraph 9, citing *State v. Bobo* (1988), 37 Ohio St.3d 177,178-79. In *State v. Norman*,

136 Ohio App.3d 46, 53-54, 735 N.E.2d 453, 1999-Ohio-961 the court held that reasonable articulable suspicion need not be a suspicion of criminal activity. The court stated:

“Police officers without reasonable suspicion of criminal activity are allowed to intrude on a person’s privacy to carry out ‘community caretaking functions’ to enhance public safety. The key to such permissible police action is the reasonableness required by the Fourth Amendment. When approaching a vehicle for safety reasons, the police officer must be able to point to reasonable, articulable, facts upon which to base her safety concerns. Such a requirement allows a reviewing court to answer Terry’s fundamental question in the affirmative: ‘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.

#### Probable Cause

In *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 665 N.E.2d 1091, this Court held, “where a police officer stops a vehicle based on probable cause that a traffic violation occurred, the stop is not unreasonable under the Fourth Amendment to the United States Constitution even if the officer has some ulterior motive for making the stop, such as a suspicion that the violator was engaging in more nefarious criminal activity.” Probable cause is “whether at the moment of the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner has committed the offense.” *Beck v. State of Ohio* (1964) 379 U.S. 89,91,85 S.Ct. 223,13 L.Ed.. 2d 142. The United States Supreme Court and the Ohio Supreme Court in *Whren v. United States* (1996), 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89, and *Erickson*, both held that a stop by an officer based on a traffic violation occurring is reasonable. The severity of the violation has no bearing on whether or not an officer had probable cause to stop a vehicle. The Fifth District Court of Appeals echoed this decision in *State v. McCormick* (February 2, 2001), Stark App. No.

2000CA00204, unreported which held “any traffic violation, even a de minimis violation, would form a sufficient basis upon which to stop a vehicle. The severity of the violation is not the determining factor as to whether probable cause existed for the stop. Rather, where an officer has an articulable reasonable suspicion or probable cause to stop a motorist for any criminal violation, including a minor traffic violation, the stop is constitutionally valid.” Id. at 3.

### THE STATUTE

In the case at bar, the appeal centers on whether the officer had cause to stop the motor vehicle for a violation of R.C. 4511.33. The interpretation of this statute is paramount to the resolution of the issue. The standard when interpreting a statute according to R.C. 2901.04, is that the statute shall be strictly construed against the State and liberally construed in favor of the accused.

R.C. 4511.33 provides as follows:

Whenever a roadway has been divided into two or more clearly marked lanes for traffic, or wherever within a municipal corporations traffic is lawfully moving in two or more substantially continuous lines in the same direction

- (A) A vehicle shall be driven, as nearly as 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 safely made.

The Appellant’s argument is that the white fog line (lane marking) is merely a suggestion, rather than an instruction to guide travel. The appellant argues that even though he operated his motor vehicle across the edge line in the roadway he did not violate R.C. 4511.33 because there was no traffic or pedestrians in danger due to such movement and therefore the movement was made safely. This reasoning is contradictory to common sense. The more logical reading of R.C. 4511.33 is that movement outside the

white marked lane of travel is a violation of the statute unless maintaining a vehicle within one's lane of travel is impracticable. It does not give the operator, as the appellant would have it, free reign to move outside his lane of travel at anytime.

The Seventh District Court of Appeals in *State v. Hodge* (2002), 147 Ohio App.3d 550, 2002-Ohio-3053 reviewed this very issue and performed an in-depth analysis of the statute and its prior case law in this matter. Prior to the decisions issued in *Whren* and *Erickson*, the Seventh District court had repeatedly declared beginning with *State v. Drogi* (1994), 96 Ohio App.3d 466, 645 N.E.2d 153, that insubstantial drifts across lane lines did not give rise to reasonable and articulable suspicion sufficient to make a traffic stop. However, with the decisions issued in *Whren* and *Erickson* (which both held any stop based upon an officer's reasonable belief that a traffic violation has occurred or is occurring, no matter how minor the violation, is lawful), *Drogi* was essentially overruled and no longer held precedential value. *Id.* at ¶18, 22. The change in precedent brought a realization to the court that under *Drogi* it had buried itself in a case-by-case analysis to determine whether a violation rose to the level of being enough of a violation for reasonable suspicion to make a stop. *Id.* at ¶ 27. However, pursuant to *Whren* and *Erickson*, the court now only had to recognize that a violation of the law is exactly that, a violation. The trial court must determine only if a violation occurred and not the extent of the violation. *Id.*

The Seventh District then engaged in an analysis of the statute of R.C. 4511.33. The court focused the analysis of the statute on the word "practical" which is not defined in the Revised Code. In interpreting a statute, R.C. 1.42 states that "Words and phrases shall be read in context and construed according to the rules of grammar and common

usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.” R.C.1.49 states “that if a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters: (a) the object sought to be attained; (b) the circumstances under which the statute was enacted; (c) the legislative history; (d) the common law or former statutory provisions, including laws upon the same or similar subjects; (e) the consequences of a particular construction; and (f) the administrative construction of the statute.”

The court began with the definition of “practical” as found in Black’s Law Dictionary (5 Ed. 1979) which is that “which may be done, practiced, or accomplished; that which is performable, feasible, possible.” *Hodges* at ¶ 42. Inserting this definition into the statute, the court concluded that the statute should read as follows:

“(A) a vehicle or trackless trolley shall be driven, as nearly as is performable, feasible, possible, entirely within a single lane.” *Id* at ¶ 40.

The court determined, to which the Fifth District relied on in its decision in this matter issued on May 31, 2007, that:

“The legislature did not intend for a motorists to be punished when road debris or a parked vehicle makes it necessary to travel outside the lane. Nor, we are quite certain, did the legislature intend the statute to punish motorists for traveling outside their lane to avoid striking a child or animal. We are equally certain the legislature did not intend the statute to give motorists the option of staying within the lane of their choosing. Common sense dictates that the statute is designed to keep travelers, both in vehicles and pedestrians safe. The logical conclusion is that the legislature intended only special circumstances to be valid reasons to leave a lane, not mere inattentiveness or carelessness, To believe that the statute was intended to allow motorists the option of when they will or will not abide by the lane requirement is simply not reasonable.” *State v. Mays* (May 31, 2007) Licking App. No. 2006CA00097 citing *Hodge* at 558, 2002-Ohio-3053 at paragraph 43, 771 N.E.2d at 338.

The court in *Hodge* further recognized “we do not intend our decision to stand for the proposition that movement within one lane is a per se violation giving rise to reasonable suspicion, nor does inconsequential movement within a lane give law enforcement carte blanche opportunity to make an investigatory stop.” Id at ¶45. The appellant argues that should the court find that crossing a white edge line is sufficient to provide probable cause to stop a vehicle for violation of R.C. 4511.33 then any motorists whose vehicle became disabled would be violating the statute by pulling off into the berm of the roadway. The State agrees with the Appellant when he declared in his merit brief that this argument defies logic and common sense. The appellant falsely believes that the State is submitting that any vehicle operating across the edge line, no matter the circumstances or obstacles in the roadway is a violation of R.C. 4511.33. This is an incorrect assumption and contrary to the statute. R.C. 4511.33, based on the above analysis, only criminalizes travel made outside one’s lane of travel, when the operation is performed without reason or issue of impracticality.

Another error in the appellant’s argument is that the wording of 4511.33(A) which reads, “until the driver has first ascertained that such movement can be safely made” means that as long as the driver ascertains that movement outside his lane of travel can be safely made, then the driver has free reign to travel outside his lane of travel, whether the operator faces an obstacle or not. This defies common sense. *State v. Phillips*, Logan App. No. 8-04-25, 2006-Ohio-6338, even acknowledged that the explicit language of R.C. 4511.01 (QQ) makes it clear that the right white edge line falls within the statutory definition of a traffic control device intended to guide and warn motorists. Common sense would dictate that should an obstacle appear in the roadway to where the

operator of a motor vehicle found it impracticable to maintain their lane of travel, travel may occur outside the marked lane only after it has been ascertained that the movement can be made safely. This reasoning is supported by the Third District in *State v. Lamb*, 2003-Ohio-6997 in which the defendant was stopped by an officer after he observed the defendant operate his vehicle over the centerline of the roadway and over the white edge line of the roadway. The court held that although the defendant only committed a minor violation of R.C. 4511.33, "he nonetheless committed a violation when he left the lane in which he was traveling when it was practicable to stay within his own lane of travel, as there was no evidence that something or someone was blocking the roadway in any fashion. Moreover, the fact that he was eating does not excuse this violation nor does the windy weather in light of the fact that no evidence was provided that the wind velocity was so substantial that it made driving within one's own lane impracticable." *Id* at ¶ 11.

Therefore, the State submits that the Court should adopt the most logical interpretation of the statute which best reflects the intent of the legislature. R.C. 4511.33 does not give the operator of a vehicle free reign to drive outside their marked lane of travel whenever they desire, but rather that the operator of a motor vehicle must maintain his vehicle entirely within his lane of travel as nearly as practicable, unless an obstruction or other circumstance diminishes that practicality and then movement outside the lane of travel is permitted if it can be safely accomplished.

## THE ARGUMENT

The Appellant argues that Tpr. Milligan did not have sufficient probable cause or reasonable suspicion to stop the appellant for violation of R.C. 4511.33. However, the State and the Fifth District Court of Appeals disagree.

In the case at bar, Tpr. Milligan observed the defendant's vehicle, in the early hours of the morning, traveling on State Route 16. Tpr. Milligan observed the appellant's vehicle cross over the white edge line of the roadway by approximately a tire width. The Appellant then drifted back onto the roadway and then immediately drifted once again outside his marked lane of travel. As the trooper continued to follow the defendant, he observed the defendant's vehicle drifting from the centerline to the fog line. The trooper did not observe any obstructions in the roadway to cause the Appellant to leave his marked lane of travel and no testimony was given by the defendant to explain his departure from his marked lane. After these observations, Tpr. Milligan initiated a traffic stop on the defendant. The defendant was cited for a marked lanes violation and operating a vehicle while under the influence of alcohol.

It is clear from the above testimony elicited at the suppression hearing, that Tpr. Milligan possessed probable cause to initiate a traffic stop on the appellant based on his personal observations. Deferring to the analysis of R.C. 4511.33 as stated above, Tpr. Milligan's testimony, which stood uncontradicted, that the Appellant operated his vehicle outside his marked lane of travel on two occasions, when there were no obstructions in his lane making his ability to maintain his vehicle entirely within his lane of travel impracticable, is sufficient to establish probable cause to stop the vehicle. This rationale is supported the United States Supreme Court and the Supreme Court of Ohio in *Whren*

and *Erickson* which provide that observation of even a de minimis lane violation provides an officer with probable cause to initiate a traffic stop to issue a citation.

The appellant in support of his argument cites case law that no longer holds precedential value in light of the decisions in *Whren* and *Erickson*. The appellant relies on *State v. Gullet* (1992), 78 Ohio App.3d 138 which held that where a driver commits only a de minimis marked lanes violation, some other evidence of impairment is needed before an officer is justified in stopping the vehicle. However, as specified in *State v. Hodge*, this case was rejected along with *State v. Drogi*, following the decisions issued in *Whren* and *Erickson*. *Hodge* at ¶ 21 and 22.

However, should the court find that officer did not have probable cause to initiate a traffic stop on the appellant, than the State submits that the officer had at least a reasonable suspicion to believe a traffic violation had occurred and that the driver was possibly impaired. Reasonable suspicion exists when the officer has a reasonable and articulable suspicion to believe that a law has been violated or criminal activity is afoot. Reasonable suspicion is to be viewed in light of the totality of the circumstances. When determining whether or not the officer possessed a reasonable, articulable suspicion in cases such as this, the nature of the weaving and the time of day at which the observations are made can provide support for a determination that the arresting officer reasonable suspected that a driver was intoxicated. See *Mays* at ¶ 17, citing *State v. Hiler* (1994), 96 Ohio App.3d 271 at 274, 644 N.E.2d 1096. Clearly, when a trooper observes an operator of a motor vehicle in the early hours of the morning, driving outside his marked lane of travel for no practical reason and weaving within his lane, the trooper has a reasonable, articulable suspicion not only that a traffic law is being violated but that the

operator may be impaired. Even if it is later found by the trier of fact that a traffic violation did not occur, it still does not render the officer's reasonable suspicion moot as probable cause and reasonable suspicion are not synonymous with proof beyond a reasonable doubt. In *State v. Hilleary* (May 24, 1989) Miami App. No. 88-CA-5, unreported, 1989 WL 55637, as cited in *Mays* at ¶ 17, the officer may have a duty to investigate the cause of the weaving, in order to protect the public, and even the driver against such possible causes as the driver being under the influence, the driver being unduly mentally fatigued, or sleepy, or even some mechanical defect of the automobile. This reasoning is supported in *Norman* which stated that reasonable suspicion can be based on the officer's duty as a community caretaker. Obviously, when observing such erratic driving, there is a great interest in keeping individuals who are intoxicated, fatigued, or ill off the roadway. It is clear that this concern was in the mind of Tpr. Milligan when on his approach to the vehicle he engaged the defendant in a conversation concerning his alcohol consumption.

Therefore based on the above argument, Tpr. Milligan did have probable cause and at the very least a reasonable suspicion to stop the appellant's vehicle based on his observations.

### **CONCLUSION**

WHEREFORE, the State respectfully requests this Court affirm the appellate court's ruling reversing the trial court's ruling suppressing the traffic stop in this matter

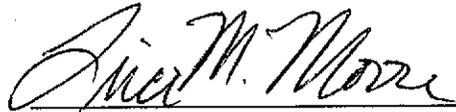
Respectfully Submitted,



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing was duly served according to Rule upon Robert E. Calesaric, attorney for the defendant, by regular U.S. Mail, postage pre-paid, or by hand-delivery into the designated mailbox in the Office of the Clerk of this Court this 6<sup>th</sup> day of December, 2007.



Tricia M. Moore (0077414)  
Assistant Director of Law

## APPENDIX

The STATE of Ohio, Appellee, v. HODGE, Appellant.

[Cite as State v. Hodge, 147 Ohio App.3d 550, 2002-Ohio-3053]

2002-Ohio-3053

Court of Appeals of Ohio, Seventh District, Mahoning County.

No. 01 CA 76.

Decided June 7, 2002.

Paul J. Gains, Mahoning County Prosecuting Attorney, for appellee.

Mark A. DeVicchio, for appellant.

DEGENARO, Judge.

{¶1} This matter presents a timely appeal from a judgment entry rendered by the Mahoning County Court for Austintown, Ohio, finding appellant Jesse F. Hodge III ("Hodge") guilty of driving under the influence in violation of R.C. 4511.19(A). Upon consideration of the record and the parties' briefs, for the reasons herein the decision of the trial court is affirmed.

{¶2} On July 21, 2000, at approximately 1:01 a.m., Hodge was traveling west in his pickup truck on a five-lane-wide section of Mahoning Avenue when Ohio State Highway Patrol Trooper Joel Hughes pulled behind Hodge's truck. Trooper Hughes remained behind Hodge's truck and paced his car to determine Hodge's speed, following Hodge a distance of approximately one-half mile for approximately thirty seconds.

{¶3} Trooper Hughes estimated that Hodge's car was traveling at forty to forty-five miles per hour in a thirty-five-mile-per-hour zone, but he did not stop him or ultimately cite him for exceeding the posted speed limit. Trooper Hughes next observed Hodge "weaving out of his [curbside] lane." Trooper Hughes explained that by "weaving" he meant "[c]rossing-he was in the left-hand lane, crossing from the right-hand partially into the left-hand." At trial, Trooper Hughes could not say exactly how far Hodge drifted into the adjacent lane but estimated several feet. Trooper Hughes further testified that Hodge's partial crossing into the parallel lane of traffic posed little danger because there was no

other traffic on the road at this time. Trooper Hughes also testified that Hodge failed to signal before drifting partially into the left lane. At trial, Trooper Hughes explained that he did not cite Hodge for failure to signal because it is the Highway Patrol's policy not to cite a driver for more than one "rules of the road" violation, and he cited Hodge for the lane violation.

{¶4} Trooper Hughes stopped Hodge for three reasons: (1) Hodge's speed in excess of the posted limit, (2) Hodge's failure to signal before partially drifting into the adjacent lane, and (3) Hodge's

weaving out of his lane. Before being asked for his license, Hodge attempted to hand his license to Trooper Hughes through the truck window while the window was still up. After Hodge rolled down his window and handed over his license, Trooper Hughes smelled alcohol on and about Hodge. Although admittedly Hodge's speech appeared to be normal, the officer further testified that Hodge's eyes were glassy and bloodshot. Trooper Hughes performed the horizontal nystagmus gaze test and completed an impaired driver report. Last, Trooper Hughes performed a breathalyzer test, in which Hodge registered 0.139 percent. Hodge was cited for DUI in violation of R.C. 4511.19(A)(3) and failure to operate within marked lanes of the road in violation of R.C. 4511.33.

{¶5} Hodge filed a motion to suppress on January 11, 2001, which was denied on February 26, 2001. In overruling Hodge's motion the trial court relied upon *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 6, 665 N.E.2d 1091. On April 9, 2001, and after pleading no contest, Hodge was convicted for a first offense DUI under R.C. 4511.19(A) and the lane charge was dismissed. Hodge was fined \$400, sentenced to thirty days in jail with twenty-seven days suspended, ordered to attend the Driving Intervention Program ("D.I.P."), and his driver's license was suspended for 180 days. Hodge timely filed his notice of appeal with this court on April 9, 2001, and the sentence is suspended pending this appeal.

{¶6} Hodge's sole assignment of error alleges:

{¶7} "The trial court erred as a matter of law in denying the defendant/appellant's motion to suppress, since there is insufficient evidence in the record to support a finding that the state trooper had a reasonable and articulable suspicion or probable cause that defendant was violating any traffic laws."

{¶8} In *State v. Brown* (June 1, 1999), 7th Dist. No. 97-CO-27, 1999 WL 343418, this court decided:

{¶9} "Our standard of review in an appeal of a suppression issue is two-fold. *State v. Lloyd* (Apr. 15, 1998), Belmont App. No. 96 BA 31, unreported, 2 [126 Ohio App.3d 95, 100, 709 N.E.2d 913]. As the trial court is in the best position to evaluate witness credibility, we must uphold the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Dunlap*

(1995), 73 Ohio St.3d 308, 314, 652 N.E.2d 988; *State v. Fanning* (1982), 1 Ohio St.3d 19, 20 [1 OBR 57], 437 N.E.2d 583; *State v. Winand* (1996), 116 Ohio App.3d 286, 688 N.E.2d 9. However, we must then conduct a de novo review of the trial court's application of the law to the facts. *State v. Anderson* (1995), 100 Ohio App.3d 688, 691, 654 N.E.2d 1034; *State v. Strassman* (Nov. 20, 1998), Athens App. No. 98 CA 10, unreported, at 2 [1998 WL 833592]; *Lloyd*, supra at 2 [126 Ohio App.3d at 100, 709 N.E.2d 913]. Thus, whether the trial court met the applicable legal standard is a question of law answered without deference to the trial court's conclusion. *Id.*" *Brown* at 1.

{¶10} Although the Fourth Amendment of the United States Constitution does not explicitly provide that violations of its provisions against unlawful search and seizure will result in suppression of evidence obtained as a result of a violation, the United States Supreme Court held that the exclusion of evidence is an essential part of the Fourth Amendment. *Weeks v. United States* (1914), 232 U.S. 383, 394, 34 S.Ct. 341, 58 L.Ed. 652; *Mapp v. Ohio* (1961), 367 U.S. 643, 649, 81 S.Ct. 1684, 6 L.Ed.2d 1081. The primary purpose of this exclusionary rule is to remove incentive to violate the Fourth Amendment and thereby deter police from unlawful conduct. *State v. Jones* (2000), 88 Ohio St.3d 430, 435, 727 N.E.2d 886. Thus, for the evidence against Hodge to serve as the basis for his conviction, the investigative stop must have been lawful.

{¶11} In order to make an investigatory stop of a vehicle, a law enforcement officer must merely

have reasonable suspicion, not probable cause. *State v. Bobo* (1988), 37 Ohio St.3d 177, 524 N.E.2d 489, paragraph two of the syllabus. Reasonable suspicion means the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion [or stop]." *Bobo* at 178, 524 N.E.2d 489, citing *Terry v. Ohio* (1968), 392 U.S. 1, 20-21, 88 S.Ct. 1868, 20 L.Ed.2d 889.

{¶12} The traffic law for which Hodge was stopped and cited is R.C. 4511.33, which provides:

{¶13} "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:

{¶14} "(A) 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." (Emphasis added.)

{¶15} Hodge was also stopped, although not cited, for speed and lane-change violations.

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{¶16} Beginning with *State v. Drogi* (1994), 96 Ohio App.3d 466, 645 N.E.2d 153, this court has repeatedly decided that insubstantial drifts across lane lines did not give rise to reasonable and articulable suspicion sufficient to make a traffic stop. *Id.* *State v. Perko* (July 9, 1999), 7th Dist. No. 97-CO-32, 1999 WL 528731; *State v. Crites* (June 18, 1998), 7th Dist. No. 96 CA 67, 1998 WL 336938; *E. Palestine v. Adrian* (June 12, 1997), 7th Dist. No. 96-CO-41, 1997 WL 321623.

{¶17} Subsequent to our decision in *Drogi*, the United States Supreme Court and Ohio Supreme Court have both held that any violation of a traffic law gives rise to a reasonable suspicion to make an investigatory stop of a vehicle. *Whren v. United States* (1996), 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89; *State v. Wilhelm* (1998), 81 Ohio St.3d 444, 692 N.E.2d 181; *Erickson*, supra (holding that when an officer has an articulable and reasonable suspicion or probable cause to stop a driver for any criminal violation, including a minor traffic violation, the stop is constitutionally valid regardless of the officer's subjective motivation for stopping the driver). Additionally, more than one appellate district has rejected any further reliance upon *Drogi*. In *State v. Spillers* (Mar. 24, 2000), 2d Dist. No. 1504, 2000 WL 299550, the Second District ruled:

{¶18} "The State contends, and we agree, *Drogi*, upon which the trial court relied, is of limited precedential value in view of the subsequently-decided *Whren v. United States* (1996), 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89, and *Dayton v. Erickson* (1996), 76 Ohio St.3d [3], 665 N.E.2d 1091. As we understand the holdings in both of those cases, a police officer in a marked cruiser may stop a vehicle for any traffic violation no matter how slight, for the purpose of issuing a citation for the violation. See, *State v. Stephens* (May 22, 1998), Montgomery App. [No.] 16727, unreported [1998 WL 257868]." *Id.*

{¶19} Similarly, in *State v. Young* (Dec. 31, 2001), 12th Dist. No. CA2001-03- 019, 2002 WL 4526, the Twelfth District ruled:

{¶20} "Even assuming that [the] traffic violations were de minimis traffic violations, her argument fails. This court has held that even a de minimis traffic violation provides probable cause for a traffic stop, and that any cases to the contrary were effectively overruled by the Ohio Supreme Court in *State v. Wilhelm* (1998), 81 Ohio St.3d 444, 692 N.E.2d 181 and [*Dayton v.*] *Erickson* [1996], 76 Ohio St.3d 3,

665 N.E.2d 1091. State v. Mehta (Sept. 4, 2001), Butler App. No. CA2000-11-232, unreported [2001 WL 1001075]; State v. Williams (June 19, 2001), Clinton App. No. CA2000-11-029, unreported [2001 WL 672850]; State v. Sandlin (Oct. 23, 2000), Warren App. No. CA2000-01-010, unreported [2000 WL 1591152]." Id.

{¶21} Also in rejecting the argument that all surrounding circumstances must be looked at to determine the propriety of stopping a vehicle for a "mere" crossing of a marked right edge line, the Second District rejected the appellant's

use of State v. Gullett (1992), 78 Ohio App.3d 138, 604 N.E.2d 176, and State v. Johnson (1995), 105 Ohio App.3d 37, 663 N.E.2d 675, the cases upon which Drogi was premised, holding:

{¶22} "The Appellant, however, is citing old law which has been overruled by the United States Supreme Court in Whren v. United States (1996), 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89, and by the Ohio Supreme Court in Dayton v. Erickson (1996), 76 Ohio St.3d 3, 665 N.E.2d 1091, which promulgated the rule that a stop by a police officer based upon probable cause that a traffic violation has occurred, or was occurring, is reasonable per se. In other words, any stop based upon an officer's reasonable belief that a traffic violation has occurred, or is occurring, no matter how minor the violation, is lawful and beyond questioning." State v. Stephens (May 22, 1998), Montgomery App. No. 16727, at 1, 1998 WL 257868.

{¶23} The Fourth District has also analyzed the progeny of cases dealing with such traffic violations and observed:

{¶24} "As Erickson and Whren clearly state \* \* \* the observance of traffic violations, even minor violations, justifies a traffic stop and fulfills the Fourth Amendment's reasonableness requirement." State v. Stevens (Aug. 30, 2000), Hocking App. No. 00 CA 05, at 6, 2000 WL 1253526.

{¶25} Before today, this court has undertaken an analysis on a case-by-case basis of whether each instance of crossing a lane was a violation of the law, and consequently reasonable suspicion to justify a stop. In the following instances, this court continued to distinguish Drogi from the case being decided, and held the stop was constitutionally valid. State v. Saeger (Nov. 21, 2000), 7th Dist. No. 99-CO-51, 2000 WL 1741985; State v. Carter (June 14, 2000), 7th Dist. No. 99 BA 7; State v. Raley (Sept. 13, 1999), 7th Dist. No. 97-CO-65, 1999 WL 760228; State v. Brown (June 1, 1999), 7th Dist. No. 97-CO-27, 1999 WL 343418; State v. Levkulich (Nov. 30, 1998), 7th Dist. Nos. 97-CO-51 and 97-CO52, 1998 WL 841004; State v. Leonard (Aug. 7, 1998), 7th Dist. No. 96-BA-72, 1998 WL 473343; State v. Lloyd (1998), 126 Ohio App.3d 95, 709 N.E.2d 913; State v. Meade (May 13, 1997), 7th Dist. No. 95 CA 76, 1997 WL 257517; State v. Winand (1996), 116 Ohio App.3d 286, 688 N.E.2d 9.

{¶26} In determining whether law enforcement has had the requisite reasonable suspicion to make an investigatory stop, this court has been mired down in deciding factual scenarios such as "insubstantial drifts" across the right-edge line, Perko, supra; the distance traveled by the driver and how far the vehicle traveled over the edge line, State v. Gibson (Apr. 4, 1995), 7th Dist. No. 92-C-21, 1995 WL 152978; and whether nine seconds was enough time for an officer to have observed a vehicle swaying between lanes before stopping the motorist. State v. Mitchell (June 29, 1999), 7th Dist. No. 98-CA-5, 1999 WL 476041. Further, in

Drogi, the opinion specifically noted that the driver " \* \* \* was driving his vehicle, for the most part,

within a single lane of traffic on a four lane divided highway." Drogi at 469, 645 N.E.2d 153.

{¶27} In each instance we are in effect second-guessing whether a violation rose to the level of being "enough" of a violation for reasonable suspicion to make the stop. Pursuant to Whren and Erickson, we must recognize that a violation of the law is exactly that—a violation. Trial courts determine whether any violation occurred, not the extent of the violation. Based upon the foregoing analysis, we explicitly overrule Drogi, as it is contrary to the subsequent decisions of Whren and Erickson.

{¶28} In the case at bar, however, the necessary analysis really focuses upon the meaning of "practicable" in reference to maintaining a vehicle within a lane pursuant to R.C. 4511.33. The statute does not define "practicable." Therefore, we must interpret what the statute means.

{¶29} "Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." R.C. 1.42.

{¶30} "If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

{¶31} "(A) The object sought to be attained;

{¶32} "(B) The circumstances under which the statute was enacted;

{¶33} "(C) The legislative history;

{¶34} "(D) The common law or former statutory provisions, including laws upon the same or similar subjects;

{¶35} "(E) The consequences of a particular construction;

{¶36} "(F) The administrative construction of the statute." R.C. 1.49.

{¶37} This court has held in cases involving statutory construction that legislative intent is the paramount concern. *Kane v. Youngstown City Council* (Dec. 2, 1999), 7th Dist. Nos. 98 CA 43, 98 CA 59 and 98 CA 65, at 5, 1999 WL 1124755, citing *Boardman Twp. Trustees v. Fleming* (1996), 110 Ohio App.3d 539, 674 N.E.2d 1204. In his dissenting opinion in *Kane*, Judge Vukovich, a former legislator in the Ohio House and Senate, discussed statutory interpretation:

{¶38} "[A]s this court has previously held in *State ex rel. Phelps v. Columbiana Cty. Commrs.* (1998), 125 Ohio App.3d 414 [708 N.E.2d 784], the paramount consideration in construing statutory language is legislative intent. *Id.* at 419 [708 N.E.2d 784], citing *State ex rel. Zonders v. Delaware Cty. Bd. of Elections*

(1994), 69 Ohio St.3d 5, 8 [630 N.E.2d 313]. In determining the intent of the legislature, a reviewing court must look both to the language of the statute as well as the purpose to be accomplished. *Id.* In the event that a statute is found to be subject to various interpretations, a reviewing court may implement the rules of statutory construction and interpretation to arrive at the intent of the legislature. *Cline v. Ohio Bur. of Motor Vehicles* (1991), 61 Ohio St.3d 93, 96 [573 N.E.2d 77]." *Kane* at 9 (Vukovich, J., dissenting).

{¶39} In deciding exactly what the legislature intended by the use of the word "practicable," we will use the ordinary definition and common sense. In fact, if we were to insert the definition into the statute in place of the word "practicable," the statute would read:

{¶40} "(A) A vehicle or trackless trolley shall be driven, as nearly as is performable, feasible, possible, entirely within a single lane \* \* \*."

{¶41} When read in this context, the statute without question mandates drivers to maintain their vehicle within a lane without some kind of exigent circumstance forcing the vehicle operator to do otherwise.

{¶42} "Black's Law Dictionary (5 Ed.1979) defines 'practicable' as: ' \* \* \* that which may be done, practiced or accomplished; that which is performable, feasible, possible \* \* \*.' Our review of the law of other jurisdictions indicates that other state \* \* \* courts generally agree with this definition. See, e.g., Miller v. State (1968), 73 Wash.2d 790, 793-794, 440 P.2d 840; Unverzagt v. Prester (1940), 339 Pa. 141, 144, 13 A.2d 46; Beech Fork Coal Co. v. Pocahontas Corp. (1930), 109 W.Va. 39, 46-47, 152 S.E. 785; People, ex rel. Williams v. Errant (1907), 229 Ill. 56, 66, 82 N.E. 271. \* \* \* The Ohio Supreme Court has also defined 'practicable' as 'capable of being put into practice or accomplished,' or something that is 'reasonably possible.' State ex rel. Fast & Co. v. Indus. Comm. (1964), 176 Ohio St. 199, 201 [198 N.E.2d 666, 27 O.O.2d 86]." Columbus v. Truax (1983), 7 Ohio App.3d 49, 50-51, 7 OBR 60, 454 N.E.2d 184.

{¶43} The legislature did not intend for a motorist to be punished when road debris or a parked vehicle makes it necessary to travel outside the lane. Nor, we are quite certain, did the legislature intend this statute to punish motorists for traveling outside their lane to avoid striking a child or animal. We are equally certain the legislature did not intend the statute to give motorists the option of staying within the lane at their choosing. Common sense dictates that the statute is designed to keep travelers, both in vehicles and pedestrians, safe. The logical conclusion is that the legislature intended only special circumstances to be valid reasons to leave a lane, not mere inattentiveness or carelessness. To believe that the statute was intended to allow motorists the option of when they will or will not abide by the lane requirement is simply not reasonable.

{¶44} In fact, several decisions have come to the conclusion, and we agree, that there are instances when weaving entirely within a lane may be reasonable suspicion to make an investigatory stop. First, we must acknowledge that there is no law in the state of Ohio prohibiting per se weaving within one lane. However, at least one appellate district has upheld local ordinances with such provisions. Cuyahoga Falls v. Morris (Aug. 19, 1998), 9th Dist. No. 18861, 1998 WL 487665; State v. Carver (Feb. 4, 1998), 9th Dist. No. 2673-M, 1998 WL 65483. "Courts have \* \* \* found that weaving within a lane can support an investigatory stop, even when such weaving itself is not illegal." State v. Flanagan (June 14, 2000), 9th Dist. No. 99CA0045, at 2, 2000 WL 763332, citing State v. Gedeon (1992), 81 Ohio App.3d 617, 618-619, 611 N.E.2d 972.

{¶45} We do not intend our decision to stand for the proposition that movement within one lane is a per se violation giving rise to reasonable suspicion, nor does inconsequential movement within a lane give law enforcement carte blanche opportunity to make an investigatory stop.

{¶46} "The nature of the weaving has been used to distinguish weaving which might objectively support a stop, from weaving that would not. See State v. Williams (1993), 86 Ohio App.3d 37, 43, 619 N.E.2d 1141. In conjunction with other factors, such as the nature of the weaving and community

patterns of behavior, the time of day at which the observations are made can provide support for a determination that the arresting officer reasonably suspected that a driver was intoxicated. See [State v.] Hiler [(1994)], 96 Ohio App.3d [271] at 274, 644 N.E.2d 1096. See, also, Gedeon, 81 Ohio App.3d at 619, 611 N.E.2d 972, citing [State v.] Hilleary [May 24, 1989] Miami App. No. 88-CA-5 [unreported, 1989 WL 55637], and Montpelier v. Lyon (May 1, 1987), Williams App. No. WMS-86-16, unreported [1987 WL 10630]. \* \* \* In addition, while not dispositive, we agree with the Second District's observation that '[t]he erratic driving alone was a sufficient basis for an articulable and reasonable suspicion, justifying an investigatory stop to determine the reason for the erratic driving, under the holding of Terry. The officer may have a duty \* \* \* to investigate the cause of the weaving, in order to protect the public, and even [the driver] against such possible causes as the driver being under the influence, the driver being unduly mentally fatigued or sleepy, or even some mechanical defect of the automobile.' Hilleary, Miami App. No. 88 CA 5 [unreported]." Flanagan at 2-3.

{¶47} In evaluating whether a municipal ordinance prohibiting weaving within a lane rose to the level of reasonable suspicion, the Ninth District used Webster's Third New International Dictionary (1961) 2591 to define "weave" as "to move in a devious, winding, or zigzag course." Cuyahoga Falls at 3. We are not saying that the driver of an automobile must maintain an arrow straight path

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within a lane. A slight deviation of the vehicle's path within the lane is entirely different from weaving within a lane. Even a single drift within a lane is reasonable as it is defined as "[t]o proceed or move smoothly and unhurriedly." Webster's II New Riverside University Dictionary (1984) 405.

{¶48} In determining whether Trooper Hughes had reasonable suspicion to stop Hodge, the inquiry focuses upon whether Trooper Hughes could have reasonably concluded from Hodge's driving that he was violating a traffic law. Erickson at 11-12, 665 N.E.2d at 1097. In the instant case, Hodge was charged and convicted for a violation of R.C. 4511.33, failing to drive in marked lanes. And although not cited, he was also stopped for the speed and lane violations.

{¶49} Hodge argues that the instant case may be distinguished from Erickson, and that application of Drogi requires this court to grant his motion to suppress. Specifically, Hodge argues that in Erickson, the defendant committed a readily apparent traffic violation, an improper turn at an intersection that created reasonable suspicion, while in the instant case, Hodge only insubstantially drifted leftward into the parallel lane for an unspecified period of time less than forty seconds. Hodge argues that Trooper Hughes's observation of his drift is too subjective to serve as a ground for finding reasonable suspicion to conduct the investigative stop. This argument is not persuasive, as we have concluded that Drogi is no longer good law.

{¶50} Hodge committed a readily apparent traffic violation: he left the lane in which he was traveling when it was practicable to stay within his own lane of travel. In addition, Trooper Hughes witnessed two other violations for which Hodge could have been but was not cited. Each of these offenses separately would be reasonable suspicion to make an investigatory stop. If this court were to continue to apply Drogi, then it may actually prevent law enforcement officers from stopping offenders who violate R.C. 4511.33, which is illogical and contrary to statutory intent.

{¶51} Because Trooper Hughes had a reasonable and articulable suspicion that a violation of the law occurred, the trial court did not err in overruling Hodge's motion to suppress. Hodge's assignment of error is meritless and the judgment of the trial court is affirmed.

Judgment affirmed.

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GENE DONOFRIO, Judge, concurring in part and dissenting in part.

{¶52} I respectfully concur in part and dissent in part from the majority opinion herein. I also would affirm the judgment of the trial court. I believe that Trooper Hughes had a reasonable and articulable suspicion that a violation of the law occurred and thus the trial court did not err in overruling Hodge's motion to suppress. I dissent with that portion of the majority opinion that specifically overrules our decision in *State v. Drogi* (1994), 96 Ohio App.3d 466, 645 N.E.2d 153. *Drogi* can be distinguished in various ways from the case herein. First of all, *Drogi* involved a divided highway/interstate. In the case at bar, the trooper witnessed a speeding violation initially. In addition, in the case at bar, the driver of the motor vehicle in question drifted several feet partially into the left-hand lane from the curb lane on a five-lane road and failed to signal. Most important, the trooper, in the case at bar, witnessed three violations of traffic laws while the trooper in *Drogi* did not observe a traffic violation. The majority opinion mischaracterizes *Drogi* as involving a violation of a traffic law. That simply was not the case.

{¶53} Based on the foregoing, I respectfully dissent with that portion of the majority opinion specifically overruling *State v. Drogi*, and I concur with the balance of said opinion.

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**2003-Ohio-6997; State v. Lamb; 03-LW-5332 (3rd)**

2003-Ohio-6997

[Cite as State v. Lamb, 2003-Ohio-6997]

STATE OF OHIO, PLAINTIFF-APPELLEE v. TRAVIS LAMB, DEFENDANT-APPELLANT

CASE NUMBER 14-03-30

3rd District Court of Appeals of Ohio, Union County

Decided on December 22, 2003

CHARACTER OF PROCEEDINGS: Criminal Appeal from Municipal Court.

JUDGMENT: Judgment affirmed.

MICHAEL J. STRENG, Attorney at Law, Reg. #0072387, 302 South Main Street, Marysville, OH 43040, For Appellant.

TIM M. ASLANER, City Law Director, Reg. #068928, P.O. Box 266, Marysville, OH 43040, For Appellee.

OPINION

SHAW, J.

{¶1} The appellant, Travis Lamb, appeals the July 23, 2003 judgment of conviction and sentence of the Marysville Municipal Court, assigning as error the trial court's decision to overrule Lamb's motion to suppress.

{¶2} On April 6, 2003, Lamb was stopped by Trooper Beau Schmutz of the Ohio Highway State Patrol for crossing marked lanes while traveling westbound on State Route 33. Upon approaching the vehicle, Trooper Schmutz began speaking with Lamb and noticed that Lamb's eyes were bloodshot and glassy and that a strong odor of an alcoholic beverage was emitting from him. In addition, Lamb admitted to drinking one beer that night. Lamb was asked to exit the vehicle and perform three field sobriety tests: the horizontal gaze nystagmus ("HGN"), the one-legged-stand, and the walk-and-turn. Trooper Schmutz noticed six clues on the HGN, two clues on the one-legged-stand test, and none on the walk-and-turn. He then arrested Lamb for operating a motor vehicle while intoxicated. Lamb was taken to the local patrol post where he submitted to a breathalyzer test, which reflected a test result of 0.172. As a result, Lamb was charged with operating a motor vehicle while intoxicated in violation of R.C. 4511.19(A)(1) and (6), as well as with the marked lanes violation in accordance with R.C. 4511.33.

{¶3} Lamb initially pled not guilty to these charges. Thereafter, his counsel filed a motion to suppress Lamb's statements as well as the results of the field sobriety tests and the breathalyzer, asserting that the trooper had no reasonable, articulable suspicion of a crime to warrant the stop and no probable cause to arrest Lamb. A suppression hearing was held on the matter on July 22, 2003, wherein Trooper Schmutz was the sole witness. At the conclusion of the hearing, the trial court determined that the results of the HGN and one-legged-stand tests were inadmissible because they were not performed in strict compliance with National Highway Traffic Safety Administration ("NHTSA") standards. However, the trial court concluded that the initial traffic stop was proper and that probable cause for Lamb's arrest existed given the totality of the circumstances. The following day, Lamb pled no contest to the charge of

operating a motor vehicle while intoxicated and was sentenced accordingly. This appeal followed, and Lamb now asserts two assignments of error.

THE TRIAL COURT ERRED BY FINDING THAT THE LAW ENFORCEMENT OFFICER HAD LEGALLY SUFFICIENT FACTS TO CREATE AN OBJECTIVE REASONABLE ARTICULABLE SUSPICION TO INITIATE THE TRAFFIC STOP.

THE TRIAL COURT ERRED BY FINDING THAT PROBABLE CAUSE EXISTED TO ARREST APPELLANT.

*First Assignment of Error*

{¶4} In his first assignment of error, Lamb maintains that the trial court erred in overruling his motion to suppress because the traffic stop by Trooper Schmutz violated his right to be free from unreasonable searches and seizures. Specifically, Lamb contends that no competent, credible evidence existed that he committed a lanes violation or any other traffic violation. In support of this contention, Lamb provides alternative reasons for his driving; i.e. that he was eating and the weather was windy that night. We find Lamb's argument to be without merit.

{¶5} Initially, we note that when ruling on a motion to suppress evidence, the trial court serves as the trier of fact and is the primary judge of the credibility of the witnesses and the weight to be given the evidence presented. *State v. Johnson* (2000), 137 Ohio App.3d 847, 850. An appellate court must uphold the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Dunlap* (1995), 73 Ohio St.3d 308, 314. However, this process is two-fold, as an appellate court "must then conduct a de novo review of the trial court's application of the law to the facts." *State v. Hodge*, 147 Ohio App.3d 550, 2002-Ohio-3053, at ¶ 9 (citations omitted).

{¶6} The Ohio Supreme Court has held that "[t]he question whether a traffic stop violates the Fourth Amendment to the United States Constitution requires an objective assessment of a police officer's actions in light of the facts and circumstances then known to the officer." *Dayton v. Erickson*(1996), 76 Ohio St.3d 3, 6, citing *United States v. Ferguson* (6th Cir. 1993), 8 F.3d 385, 388. Therefore, when determining whether a violation of the Fourth Amendment has occurred, "an objective assessment of the officer's actions at the time of the traffic stop, and not upon the officer's actual (subjective) state of mind" must be made. *Erickson*, supra. Thus, the Court has held that "where an officer has \* \* \* probable cause to stop a motorist for any criminal violation, including a minor traffic violation, the stop is constitutionally valid. *Id.* at 11-12. However, probable cause for a investigatory stop is not always required. Rather, reasonable suspicion of illegal activity is sufficient. *State v. Bobo* (1988), 37 Ohio St.3d 177, 179, citing *Terry v. Ohio* (1968), 392 U.S. 1, 21. Reasonable suspicion is defined as the ability of the officer "to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." *Bobo*, 37 Ohio St.3d at 178, citing *Terry*, 392 U.S. at 20-21.

{¶7} In the case sub judice, Trooper Schmutz testified that he stopped Lamb based on a lanes violation in accordance with R.C. 4511.33(A). However, Lamb contends that the videotape produced by the trooper did not show any such violation. Furthermore, Lamb contends that the trooper admitted during cross-examination that Lamb never crossed either the yellow lines dividing the driving lanes or the white edge marker.

{¶8} Revised Code section 4511.33(A) provides:

Whenever any roadway has been divided into two or more clearly marked lanes for traffic \* \* \* the following rules apply:

(A) 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.

The Seventh District Court of Appeals has recently addressed this statute, specifically ascertaining the meaning of the phrase "as nearly as is practicable." *State v. Hodge*, 147 Ohio App.3d 550, 2002-Ohio-3053. In *Hodge*, the court examined the legislative intent of this phrase and held as follows: "The logical conclusion is that the legislature intended only special circumstances to be valid reasons to leave a lane, not mere inattentiveness or carelessness. To believe that the statute was intended to allow motorists the option of when they will or will not abide by the lane requirement is simply not reasonable." *Id.* at ¶ 43. Thus, the court concluded that the officer in that case had a reasonable and articulable suspicion that a violation of the law occurred when he witnessed the defendant leave "the lane in which he was traveling when it was practicable to stay within his own lane of travel." *Id.* at ¶ 50.

{¶9} The facts of this case are similar to those in *Hodge*. In *Hodge*, the defendant insubstantially drifted leftward into the parallel lane for an unspecified period of time less than forty seconds. *Id.* at ¶ 49. In addition, the officer that stopped Hodge testified that "Hodge's partial crossing into the parallel lane of traffic posed little danger because there was no other traffic on the road at this time." *Id.* at ¶ 3. Nevertheless, the court found that this minor violation was a sufficient reason to stop Hodge's vehicle. *Id.* at ¶ 50.

{¶10} Here, Trooper Schmutz testified that he observed Lamb's vehicle "cross over the center line with its left two tires, and then it jerked it over the white fog line with his right two tires." The trooper further testified that Lamb crossed these lines both prior to the activation of the camera in the patrol car and while the camera was taping. However, during cross-examination, Trooper Schmutz was asked, "Mr. Lamb never actually crossed either edge line, did he," to which the trooper answered in the negative. Nevertheless, during re-direct, the following discussion occurred between the prosecutor and Trooper Schmutz:

Q. Trooper, I'm sorry. I thought that I heard you testify that the defendant never crossed either edge line when he was driving. Is that -- What did you (INAUDIBLE)?

A. He didn't cross them and he just -- and he drove over them. So crossing and driving over, he was -- drove over them, but he didn't --

\* \* \*

Q. How many times did he cross over either line? When I say cross over, any part of his vehicle, any part of his tires, or --

A. Twice.

\* \* \*

Q. Okay. And how much of his vehicle crossed the center line the first time you

observed?

A. About a tire width.

\* \* \*

Q. And how much of his vehicle crossed over the right edge line?

A. Approximately a tire width. And his tire was on it, but also over it on the right hand side.

In addition, the videotape of Trooper Schmutz following Lamb and of the subsequent stop was admitted into evidence. Towards the beginning of this tape, the left tires of Lamb's vehicle are shown both on and across the center line.

{¶11} Like the facts in *Hodge*, although Lamb committed only a minor violation of R.C. 4511.33, he, nonetheless, committed a violation when he left the lane in which he was traveling when it was practicable to stay within his own lane of travel, as there was no evidence that something or someone was blocking the roadway in any fashion. Moreover, the fact that he was eating does not excuse this violation nor does the windy weather in light of the fact that no evidence was provided that the wind velocity was so substantial that it made driving within one's own lane impracticable. Therefore, the trial court did not err in overruling Lamb's motion to suppress as to the propriety of the stop, and the first assignment of error is overruled.

#### *Second Assignment of Error*

{¶12} Lamb next contends that the trial court erred in overruling his motion to suppress based upon a lack of probable cause for his arrest. The Ohio Supreme Court has previously held:

In determining whether the police had probable cause to arrest an individual for DUI, we consider whether, at the moment of arrest, the police had sufficient information, derived from a reasonably trustworthy source of facts and circumstances, sufficient to cause a prudent person to believe that the suspect was driving under the influence.

*State v. Homan* (2000), 89 Ohio St.3d 421, 427, citing *Beck v. Ohio* (1964), 379 U.S. 89, 91; *State v. Timson* (1974), 38 Ohio St.2d 122, 127. This determination is made based upon an examination of "the 'totality' of facts and circumstances surrounding the arrest." *Homan*, supra (citations omitted).

{¶13} In the case sub judice, the trial court suppressed the results of the HGN and one-legged-stand tests because these tests were not performed in strict compliance with NHTSA standards. However, in *Homan*, the Supreme Court noted that "probable cause to arrest does not necessarily have to be based, in whole or in part, upon a suspect's poor performance on one or more of these tests." *Id.* In fact, "[t]he totality of the facts and circumstances can support a finding of probable cause to arrest even where no field sobriety tests were administered or where, as here, the test results must be excluded for lack of strict compliance." *Id.* The Court then found that the facts of the case amply supported the defendant's arrest because the trooper observed that her eyes were red and glassy, that her breath smelled of alcohol, that she admitted to consuming alcohol, and her driving was erratic. *Id.*

{¶14} Here, Trooper Schmutz testified that he stopped Lamb at 11:35 p.m. for crossing marked lanes. Upon approaching the vehicle, Trooper Schmutz noticed that Lamb's eyes were "bloodshot and glassy"

and that Lamb had a strong odor of alcoholic beverage. In addition, Lamb admitted to having consumed one beer. Like *Homan*, the totality of these facts and circumstances amply supported Trooper Schmutz's decision to place Lamb under arrest. This is true even without the results of the suppressed field tests. Therefore, the trial court did not err in overruling the motion to suppress for lack of probable cause, and the second assignment of error is overruled.

{¶15} For these reasons, the judgment of the Marysville Municipal Court is affirmed.

Judgment affirmed.

WALTERS and CUPP, JJ., concur.

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