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PROPOSITION OF LAW-REPLY

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

Appellant disagrees with Appellee's description of the facts that take Trooper Milligan's testimony to the extreme. When pointedly asked, Trp. Milligan clearly stated he did not observe any jerky or erratic driving and the most he could conclude was that the vehicle was slowly drifting and at some point near the intersection Appellant crossed the right white fog line. Tr. 40. Trp. Milligan stated that this drifting over the white fog line on one occasion was by one tire width and the vehicle never left the paved portion of the roadway. *Id.* In other words, there were no signs of impaired or erratic driving.

Trp. Milligan is clearly making a traffic stop because he believed that the crossing of the white fog line by itself is a violation of R.C. 4511.33, to wit; marked lanes. Tr. 24. At no point does Trp. Milligan even attempt to investigate the "marked lanes" violation. In fact, he never even attempts to discern whether Appellant was doing so safely or with purpose. Tr. 24-25. So in summary, Trp. Milligan did not consider the other aspects of R.C. 4511.33 and he found them to be irrelevant because in his opinion, if an individual crosses the right white fog line he can pull them over.

It must be also noted that the trial court weighed the facts and credibility of the officer's testimony and found that there was no erratic driving or weaving. See trial court entry. As this court stated in *State v. Mills* (1992), 62 Ohio St. 3d 357, the court should review the trial court's findings of facts of the case only for clear error and with due weight given to inferences the trial judge drew from the facts. This court should not now attempt to "re-decide" what the facts are but instead, this court needs to apply the facts as found by the trial court to the law. It was the

trial court who observed the Trooper's testimony and it was the trial court who can give proper weight to the Trooper's testimony.

STANDARD TO APPLY

Appellee seems to view reasonable suspicion and probable cause as having the same effect in the instant case. Appellant disagrees that the standard to apply does not matter and asserts that reasonable suspicion of a minor traffic violation is not constitutionally sufficient to stop a vehicle.

Even though the terms reasonable articulable suspicion and probable cause are commonly confused by lower courts, this court in *City of Bowling Green v. Godwin* (2006), 110 Ohio St.3d 58, clearly stated that the issue of whether reasonable suspicion is sufficient to effect a traffic stop for a minor misdemeanor traffic offense as opposed to probable cause had not yet been ruled upon. *Id* at 62.

All courts do agree though that searches or seizures without prior judicial approval are *per se* unreasonable unless they fall into one of the well established exceptions. The only possible exceptions remotely relevant to the instant case are: 1) the exception carved out in *Terry v. Ohio* (1968), 392 U.S. 1 and 2) the exception enunciated in *Whren v. United State* (1996), 517 U.S. 806.

In *Terry* the court held that a very narrow exception to the Fourth Amendment allows an officer to briefly stop an individual if the officer has reasonable articulable suspicion that **criminal activity** is afoot. The only acceptable purpose for allowing such a stop is to allow the officer to attempt to confirm or dispel his particular suspicions. *Terry* does not allow generalized suspicion or a stop to engage in general questioning to see what the citizen is up to. It clearly

applies only where an officer reasonably suspects **criminal activity** and where questioning an individual is likely to or can result in either confirming or dispelling the particular suspicions.

With a minor, non-criminal traffic violation not involving potential jail time, Appellant asserts that *Terry* does not apply for three reasons. 1) Minor traffic violations for which fines are the only possible penalty are not criminal activity that the *Terry* court found would justify the abridgment of the rights granted by the Fourth Amendment to the United States Constitution. 2) A stop of Appellant's vehicle was not for the purposes of confirming or dispelling the suspicions that Appellant committed a minor traffic violation, to wit; marked lanes. 3) This Court has repeatedly interpreted Ohio Constitution, Section 14, Article I to grant more rights than its Federal counterpart found in the Fourth Amendment to the United States Constitution.

In the instant case and in so many that this court must see, the officer did not question Appellant about whether or even why he might have crossed the white fog line to confirm or dispel the possible violation of the statute. Clearly this was not a *Terry* stop to investigate a marked lanes violation. This was a fishing expedition whereby the officer used the alleged marked lanes violation as a reason to stop the vehicle.

A proper application of *Terry* to vehicle stops for minor traffic violations makes sense when compared to *Whren v. United States, supra*. On a quick side note, Appellee argues that *State v. Hodges* (2002), 147 Ohio App.3d 550 held that cases such as *State v. Drogi* (1994), 96 Ohio App.3d 466 were overturned by *Whren* and *Dayton v. Erickson* (1996), 76 Ohio St.3d 3. Appellant disagrees with *Hodges* and the proposition that *Wren* and *Erickson* go that far, however, he does agree that pre-textual or ulterior motive stops are legal as long as the officer has *probable cause* to believe that an offense has been committed. Appellant also agrees that the trial court only needs to determine if a violation occurred and not the extent of the violation,

however, that does not mean that an offense occurred in the instant case by Appellant merely crossing the white fog line.

In *Whren*, the court held that an officer can stop a vehicle for a minor traffic violation if the officer has probable cause to believe the driver committed said minor traffic violation. In *Erickson*, the court held that where an officer has probable cause to conduct a traffic stop, the stop is not unreasonable even if the officer has some ulterior motive for making the stop. The point that seems to be lost on many is that there must be *probable cause* first prior to making these types of pre-textual or ulterior motive stops where the officer goes fishing for other violations based upon hunches.

In the instant case, the officer did not have probable cause to believe that a traffic violation occurred or reasonable suspicion that “criminal activity” was afoot. It is impossible to believe that when *Terry* was fashioned that the definition of criminal activity was going to include minor, non-jailable, non-criminal traffic violations such as marked lanes. Instead, when analyzing *Terry* and *Whren*, and their application as exceptions to the Fourth Amendment one has to visualize a sliding scale, with more urgent and important reasons to deviate from the general rule that non-judicial approved searches or seizures are *per se* unconstitutional the less facts and information should be needed to conduct said search or seizure. These examples are found in certain exigent circumstances or public safety situations where there is an immediate apparent danger as found in *Terry*. On the other end of the scale then are the instances whereby the activity is non-urgent and the danger to the public is not so certain. These are situations that include minor, non-jailable, non-criminal traffic offenses. In these situations there needs to be more evidence that an offense is occurring prior to deviating from the general rule against non-judicially approved searches or seizures. When officers are investigating or conducting searches

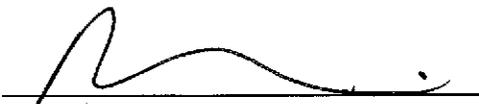
or seizures in cases that are not of great public safety, the officer must have more than just reasonable suspicion that a violation of the law is taking place, rather he must have probable cause to believe an offense has, is or will take place. This type of analysis is what the word reasonable means in a Fourth Amendment context.

This honorable court has held that Section 14, Article I of the Ohio Constitution provides greater protection than the Fourth Amendment. See *State v. Brown* (2003), 99 Ohio St.3d 323 and *State v. Robinette* (1997), 80 Ohio St.3d 234. Even if there has been an erosion of the limits of *Terry* on the federal level, Appellant submits that this court should continue to provide the same or more protection to the Ohio citizens than the Fourth Amendment does to Ohio citizens.

Without this Court stepping up and enforcing an individual's right to be free from unnecessary searches and seizures, any citizen driving on Ohio roadways today and from here on out is subject to being stopped for an alleged violation of the ambiguous and vague marked lanes statute. As set forth in Appellant's Merit Brief, R.C. 4511.33 does not proscribe all movements across lane lines but that is exactly what the effect of this Court's ruling would be if it rules against Appellant. This Court would be expanding R.C. 4511.33 and declaring all crossings of the white fog line to be a violation of the marked lanes statute no matter that the statute itself does not do so.

CONCLUSION

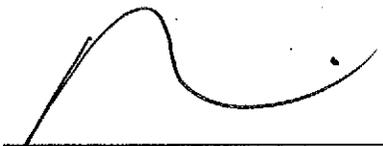
WHEREFORE, Appellant-Defendant Mays respectfully requests this Court to affirm the trial court's ruling suppressing the traffic stop in this matter.



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CERTIFICATE OF SERVICE

The undersigned attorney certifies that a copy of the foregoing Reply Brief of Defendant-Appellant was served in accordance with Rule 5 of the Ohio Rules of Civil Procedure upon Tricia M. Klockner, Assistant Newark Law Director, 40 West Main Street, Newark, Ohio 43055, Attorney for State of Ohio, by hand delivery this 10 day of January, 2008.



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