[Cite as *State v. Korman*, 2006-Ohio-1795.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2004-L-064**
- vs -	:	
TODD A. KORMAN,	:	
Defendant-Appellee.	:	

Criminal Appeal from the Willoughby Municipal Court, Case No. 04 TRC 00020.

Judgment: Reversed and remanded.

Joseph P. Szeman, Village of Kirtland Hills Prosecutor, 77 North St. Clair Street, Suite 100, Painesville, OH 44077 (For Plaintiff-Appellant).

Richard J. Perez, Interstate Square Building I, 4230 State Route 306, Suite 240, Willoughby, OH 44094 (For Defendant-Appellee).

WILLIAM M. O'NEILL, J.

{¶1} In this accelerated calendar case, appellant, the state of Ohio, appeals the judgment entered by the Willoughby Municipal Court. The trial court granted a motion to suppress evidence filed by appellee, Todd Korman.

{¶2} During the early morning hours of January 1, 2004, Korman was operating his vehicle in Kirtland Hills. Korman was stopped by Officer Ken Mescall of the Kirtland Hills Police Department.

{¶3} As a result of the traffic stop, Korman was charged with driving under the influence of alcohol, in violation of R.C. 4511.19(A), and "continuous lane of travel," in violation of Kirtland Hills Ordinance Section 331.08. Korman pled not guilty to these charges. Thereafter, Korman filed a motion to suppress the evidence resulting from his arrest.

{¶4} The municipal court held a hearing on Korman's motion to suppress. Officer Mescall and Jean Korman, Korman's wife, testified at the hearing. Officer Mescall testified that he was on duty at 1:30 a.m. on January 1, 2004. At that time, Officer Mescall was assisting a fellow officer with a traffic stop on Little Mountain Road, in Lake County, Ohio. Officer Mescall testified that, as he assisted with the traffic stop, Korman's vehicle traveled toward the traffic stop and passed him with high-beam headlights on. As a result, Officer Mescall followed Korman's vehicle in his patrol car.

{¶5} Officer Mescall testified that as he followed Korman's vehicle, he activated his patrol car's dashboard video camera. Korman turned left onto Baldwin Road, and Officer Mescall followed. Officer Mescall stated that he witnessed Korman's vehicle cross the white edge line, on the right-hand side of the road, by approximately twelve inches. A second or two later, Officer Mescall witnessed Korman's vehicle cross the double-yellow line, in the middle of the road, by approximately eight to twelve inches. Officer Mescall testified that Korman's crossing of the edge line and the centerline resulted in a traffic violation and, therefore, he initiated a traffic stop.

{¶6} Officer Mescall testified that he followed Korman's vehicle for approximately one and one half miles before initiating the traffic stop. Officer Mescall noted that Korman's vehicle was traveling at the posted speed limit of twenty-five miles

per hour. Baldwin Road was described as a narrow, unlit, two-lane road. Portions of Baldwin Road include sloping hills and curves. Officer Mescall testified that Korman navigated the slopes and curves without difficulty, and that Korman's crossing of the white edge line and solid-yellow line were the only violations he witnessed while following him.

{¶7} The videotape from the dashboard video camera was admitted as an exhibit. It is unclear from the videotape whether the vehicle ever completely crossed the yellow line or merely drove upon it.

{¶8} Following the hearing, the municipal court issued a judgment entry granting Korman's motion to suppress. The court determined that Officer Mescall's traffic stop was improper and, therefore, any evidence resulting from the stop was suppressed. The court stated that Officer Mescall "may have concluded that [Korman] was impaired. However, the ability of [Korman] to negotiate the subsequent hill and curves correctly should forstay any notion of impairment and the initial stop was invalid."

{¶9} From this judgment, the state filed a timely notice of appeal and now sets forth the following assignment of error for our consideration:

{¶10} "The trial court erred to the prejudice of the state and village in granting the motion to suppress filed by the defendant-appellee."

{¶11} Under its sole assignment of error, the state argues that the municipal court erred in granting appellee's motion to suppress. The focus of the state's argument is that the trial court failed to conduct a probable cause analysis.

{¶12} "Appellate review of a motion to suppress presents a mixed question of law and fact."[1] The appellate court must accept the trial court's factual findings, provided they are supported by competent, credible evidence.[2] Thereafter, the appellate court must independently determine whether those factual findings meet the requisite legal standard.[3]

{¶13} Regarding "weaving" and marked lane violations, there are two legitimate bases for an officer to initiate a traffic stop. The first is that, pursuant to *Terry v. Ohio*, the officer has reasonable suspicion that a crime is occurring.[4] The second is that the officer has probable cause to believe that a traffic violation has occurred.[5] In many instances when a vehicle crosses the centerline, the officer could stop the vehicle based on probable cause that a traffic violation has occurred (a marked lane violation or crossing a double-yellow line); *and* based on reasonable suspicion that the driver is operating the vehicle under the influence of alcohol. However, the stop does not violate the Fourth Amendment so long as the circumstances meet *one* of the above standards.

{¶14} "The investigative stop exception to the Fourth Amendment warrant requirement allows a police officer to stop an individual if the officer has a reasonable suspicion, based upon specific and articulable facts, that criminal behavior has occurred or is imminent."[6] This standard applies to individuals driving motor vehicles.[7] Finally, "[t]he propriety of an investigative stop by a police officer must be viewed in light of the

1. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8.
2. Id., citing *State v. Fanning* (1982), 1 Ohio St.3d 19.
3. Id., citing *State v. McNamara* (1997), 124 Ohio App.3d 706.
4. *Terry v. Ohio* (1968), 392 U.S. 1, 21.
5. *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, syllabus.
6. *State v. Gedeon* (1992), 81 Ohio App.3d 617, 618, citing *Terry v. Ohio*, supra.
7. Id., citing *State v. Heinrichs* (1988), 46 Ohio App.3d 63.

totality of the surrounding circumstances."[8] These circumstances are to be "viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold."[9]

{¶15} Sufficiently "erratic" driving is justification to support a *Terry* stop based on the officer's reasonable suspicion that the driver is operating the vehicle under the influence of alcohol.[10] Significant weaving within one's lane can rise to the level of erratic driving and reasonable suspicion that the driver of the vehicle is impaired to justify a stop, even if there are no other traffic violations.[11] On the other hand, a "de minimis" marked lane violation, standing alone, does not necessarily rise to the level of reasonable suspicion that the operator of the vehicle is impaired.[12]

{¶16} The trial court thoroughly conducted a reasonable suspicion analysis. The trial court concluded that Officer Mescall did not have reasonable suspicion to initiate a *Terry* stop on the basis that Korman was operating his vehicle under the influence of alcohol. The trial court's findings are supported by the record and the applicable law.

{¶17} However, a traffic violation, standing alone, constitutes probable cause for an officer to stop a vehicle to investigate the violation itself. The Supreme Court of Ohio has held:

{¶18} "Where a police officer stops a vehicle based on probable cause that a traffic violation has occurred or was occurring, the stop is not unreasonable under the Fourth Amendment to the United States Constitution even if the officer had some

8. *State v. Bobo* (1988), 37 Ohio St.3d 177, paragraph one of the syllabus.
9. *State v. Andrews* (1991), 57 Ohio St.3d 86, 87-88.
10. *Mentor v. Phillips* (Dec. 29, 2000), 11th Dist. No. 99-L-119, 2000 Ohio App. LEXIS 6207, at *6, quoting *State v. Spikes* (June 9, 1995), 11th Dist. No. 94-L-187, 1995 Ohio App. LEXIS 2649.
11. See *State v. Weber*, 11th Dist. No. 2003-L-090, 2004-Ohio-2444, at ¶15.
12. See, e.g., *State v. Haley*, (Mar. 16, 2001), 11th Dist. No. 2000-P-0021, 2001 Ohio App. LEXIS 1242, at *4-5.

ulterior motive for making the stop, such as a suspicion that the violator was engaged in more nefarious criminal activity."[13]

{¶19} The trial court failed to conduct a probable cause analysis, pursuant to *Dayton v. Erickson.* On a motion to suppress, an appellate court must accept the factual findings made by the trial court.[14] In this matter, the problem is that the trial court did not make sufficient factual findings regarding the probable cause analysis. Further, the evidence in the record is inconsistent. There is a videotape from the officer's patrol car. This videotape is made at night, from a moving vehicle, and it *may or may not* depict Korman violating the law. For appellate purposes, without the trial court making any factual findings, it is best deemed "inconclusive." Aside from the videotape, you have the testimony of the witnesses. The testimony from Korman's wife suggests Korman operated the vehicle in a safe manner. On the other hand, Officer Mescall testified that Korman's vehicle crossed the double-yellow line and the white edge line.

{¶20} The evidence in this case is the witnesses' various versions of the events in question and the inconclusive videotape evidence. The trial court is in the best position to weigh this evidence and resolve factual matters.[15] Therefore, this case is remanded to the trial court, for the court to determine if Officer Mescall had probable cause to believe that Korman violated a statute or ordinance. Specifically, the trial court should make findings as to whether Officer Mescall had probable cause that Korman violated R.C. 4511.25, 4511.31, or 4511.33.

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13. *Dayton v. Erickson*, 76 Ohio St.3d 3, syllabus. See, also, e.g., *Whren v. United States* (1996), 517 U.S. 806, 812-813.
14. *State v. Burnside*, supra, at ¶8, citing *State v. Fanning*, supra.
15. See *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶21} The judgment of the trial court is reversed, and this matter is remanded for further proceedings consistent with this opinion.

DIANE V. GRENDELL, J., concurs in judgment only with Concurring Opinion,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

{¶22} Although I agree with the decision ultimately reached by the majority to reverse the judgment of the trial court granting the motion to suppress, I disagree that the matter requires a remand for the trial court to make a probable cause analysis for the initial stop.

{¶23} The issue here is whether Officer Mescall had the legal right to stop Korman's vehicle. Clearly, he did. The Ohio Supreme Court has held that "where a police officer stops a vehicle based on probable cause that a traffic violation has occurred or was occurring, the stop is not unreasonable under the Fourth Amendment ***." *Dayton v. Erickson*, 76 Ohio St.3d 3, 11, 1996-Ohio-431. Furthermore, "[t]his court has repeatedly held that a minor violation of a traffic regulation *** that is witnessed by a police officer is, standing alone, sufficient justification to warrant a limited stop for the issuance of a citation." *State v. Yemma* (Aug. 9, 1996), 11th Dist. No. 95-P-0156, 1996 Ohio App. LEXIS 3361, at *7 (citations omitted); *Warren v. Smith*, 11th Dist. No. 2002-T-0063, 2003-Ohio-2113, at ¶7; *State v. Livengood*, 11th Dist. No. 2002-L-044, 2003-

Ohio-1208, at ¶17; *State v. Jones*, 11th Dist. No. 2001-A-0041, 2002-Ohio-6569, at ¶17; *State v. Molk*, 11th Dist. No. 2001-L-146, 2002-Ohio-6926, at ¶15.

{¶24} Here, Officer Mescall witnessed Korman commit two moving violations within a short distance, i.e., the crossing of the white edge line and the double-yellow center line. These observations were corroborated by videotape evidence taken from Officer Mescall's police cruiser. Thus, there is evidence in the record establishing all of the elements of the offense. The fact that Officer Mescall did not observe Korman subsequently violate additional traffic laws is irrelevant. *State v. Hale*, 11th Dist. No. 2004-L-105, 2006-Ohio-133, at ¶24 ("[w]here *** there exists probable cause for a traffic stop, *** [n]o further quantifying of the basis for the stop is necessary").

{¶25} Once the aforementioned violations were observed, Officer Mescall had grounds to stop the vehicle and the motion to suppress should not have been granted, absent some evidence that further detention was unreasonable. Id. at ¶40, quoting *State v. Myers* (1990), 63 Ohio App.3d 765, 771 ("[i]f circumstances attending an otherwise proper stop should give rise to a reasonable suspicion of some other illegal activity, different from the suspected illegal activity that triggered the stop, then the vehicle and the driver may be detained for as long as that new articulable and reasonable suspicion continues").

{¶26} Here, Officer Mescall testified that upon pulling Korman's vehicle over, he detected the "very strong odor of alcoholic beverage coming from the driver." During the course of their encounter, Korman admitted to Officer Mescall that he had been drinking that night. These factors, together with Officer Mescall's observation of the initial traffic violations were enough to provide a reasonable basis to continue the

detention for the purpose of investigating Korman for impairment. Accordingly, I would reverse the judgment of the trial court.

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COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

{¶27} I respectfully dissent from the majority.

{¶28} The video from the dashboard camera was admitted as an exhibit. It verified Officer Mescall's testimony as to the surrounding circumstances of the traffic stop. It is unclear from the video whether the vehicle ever completely crossed the yellow line or merely drove upon it. Moreover, the video established that after appellee touched/crossed the lines, he adequately navigated his vehicle down sloping curves without incident.

{¶29} Following the hearing, the trial court issued a judgment entry granting appellee's motion to suppress. That court determined Officer Mescall's traffic stop was improper and any evidence resulting from it should be suppressed. The court noted it had visited and measured Baldwin Road, and confirmed that the traffic lane was ninety-two to ninety-four inches wide. The court stated that Officer Mescall "may have concluded that [appellee] was impaired. However, the ability of [appellee] to negotiate the subsequent hill and curves correctly should forstay any notion of impairment and the initial stop was invalid." I would uphold the ruling of the trial court**.**

{¶30} At a hearing on a motion to suppress, the trial court functions as the trier of fact. Accordingly, the trial court is in the best position to weigh the evidence by

resolving factual questions and evaluating the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366; *State v. Smith* (1991), 61 Ohio St.3d 284, 288.

{¶31} On review, an appellate court must accept the trial court's findings of fact if they are supported by competent and credible evidence. *State v. Retherford* (1994), 93 Ohio App.3d 586, 592. After accepting the factual findings as true, the reviewing court must independently determine, as a matter of law, whether the applicable legal standard has been met. Id. at 592. See, also, *State v. Swank* (Mar. 22, 2002), 11th Dist. No. 2001-L-054, 2002-Ohio-1337, at 8. The majority is disregarding the trial court's role as factfinder.

{¶32} The Fourth Amendment guarantees individuals the right to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. A temporary detention of an individual during a police officer's automobile stop, no matter how brief or limited in purpose, constitutes a "seizure" of the individual under the Fourth Amendment. *Delaware v. Prouse* (1979), 440 U.S. 648, 653. Hence, if the surrounding circumstances establish that an automobile stop is unreasonable, then the stop violates the individual's constitutional right to be secure in his or her person. Id. at 659.

{¶33} Whether a traffic stop violates the Fourth Amendment requires an objective assessment of a police officer's actions at the time of the stop**,** in light of the facts and circumstances then known to the officer. *United States v. Ferguson* (6th Cir. 1993), 8 F.3d 385, 388. The police officer's subjective motivation for initiating the stop is irrelevant to this analysis. *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 6.

{¶34} That being said, if the surrounding circumstances establish that a police officer witnessed an individual violate a traffic law, the officer has probable cause to affect a constitutional stop. *State v. Montes*, 11th Dist. No. 2003-L-072, 2004-Ohio-6475, at ¶¶21-25. See, also, *State v. Carleton* (Dec. 18, 1998), 11th Dist. No. 97-G-2112,1998 Ohio App. LEXIS 6163, at 8-9. Following the stop, the officer may proceed to investigate the detained individual for DUI if the officer has a reasonable suspicion that the individual may be intoxicated based upon specific and articulable facts. *Montes* at ¶20.

{¶35} In the case sub judice, the trial court's decision granting appellee's motion to suppress determined that Officer Mescall did not have probable cause to initiate a stop of appellee's vehicle. The court cited *State v. Gullet* (1992), 78 Ohio App.3d 138, in determining that appellee's alleged traveling over marked lanes was not a reasonable justification to initiate the stop, absent other articulable facts.

{¶36} Furthermore, "although the appellate courts of this state are in general agreement that *not every edge line crossing by a motorist permits police to conduct a traffic stop, instances of erratic or substantial roadway line crossing will vest a police officer with probable cause to perform such a stop*." (Emphasis added.) *State v. Schofield* (Dec. 10, 1999), 11th Dist. No. 98-P-0099, 1999 Ohio App. LEXIS 5945, at 9. "***[T]here must be some indicia of erratic driving to warrant an investigative stop beyond some incident of modest or minimal weaving in one's lane alone." *State v. Spikes* (June 9, 1995), 11th Dist. No. 94-L-187, 1995 Ohio App. LEXIS 2649, at 10. Thus, "police officers may lawfully stop a motor vehicle solely on the basis that the vehicle is weaving, but only when the extent of the weaving [is] what can be described

as *substantial*." (Emphasis added.) *Willoughby v. Zvonko Mazura* (Sept. 30, 1999), 11th Dist. No. 98-L-012, 1999 Ohio App. LEXIS 4642, at 8.

{¶37} To justify his stop in this case, the police officer also charged appellee with a marked lanes violation of the Kirtland Hills ordinance mirroring R.C. 4511.33, to wit:

{¶38} "(a) Whenever any roadway has been divided into two or more clearly marked lanes for traffic or wherever traffic is lawfully moving in two or more substantially continuous lines in the same direction, the following apply:

{¶39} "(1) 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."

{¶40} Contrary to the state's assertion that failure to drive in a marked lane is an automatic violation, the statute itself permits the driver discretion to cross marked lanes if the driver ascertains the movement can be made safely. The trial court's findings of fact in this matter are correct. The driver moved outside his lane**,** but did so when he was alone**,** and did not do so erratically**.** In fact, the driver demonstrated skill and proper speed when negotiating sharp curves immediately thereafter. The trial court evaluated the driver's de minimus lane infringement as being within a safe driver's discretion. The court correctly identified the aggressive attempt of law enforcement personnel to detect and control such offenses as driving under the influence. We must defer to the trial court's findings.

{¶41} The traffic code exists to protect all citizens using our roadways; its overriding purpose is to allow the safe operation of motor vehicles. It does not impose strict liability and an automatic violation every time someone goes slightly outside their

lane. It is up to the trial court to determine if a violation of both aspects of the statute has occurred, i.e., that a lane has been crossed, and that it was unsafe to do so. In this case, the trial court determined that there was no lane violation, as the driver was able to control his car safely, vitiating the second element of the statute. The trial court said as much in its findings of fact and its conclusions of law. I disagree that this case needs to be remanded so the trial court can incant "the driver operated his car safely therefore there is no marked lane violation" (and thus, no probable cause for a traffic stop). Citizens do not throw their Fourth Amendment right against illegal search and seizure out the car window simply because they drive. The statute provides for some discretion in operating a motor vehicle. It is not a pretext providing probable cause for DUI stops.

{¶42} Appellant argues that even a de minimus traffic violation provides a police officer with the requisite probable cause to stop a vehicle. Appellant cuts its argument to fit *Erickson*. *Erickson* is not about de minimus violations. It is about drivers committing an actual violation which includes objectively unsafe operation of a motor vehicle. Police cannot just follow a driver in the knowledge that eventually an over the line error will occur, allowing them to swoop in and evaluate the driver for intoxication. Police have the authority to stop motorists for probable cause for drunk driving. They do not need to disguise a DUI stop as a marked lane violation. The common habits of all drivers in going down steep hills, negotiating narrow roads, drifting to the right while adjusting the radio in the middle of the night, and keeping toward the center to avoid a dark and dangerous soft shoulder should not precipitate a traffic stop. I agree with the trial court: for a true violation of the traffic code to occur, when the statute in question

gives a driver discretion take an action when it is safe to do so, then unsafe operation must be shown.

{¶43} In *Erickson* at 11-12, the Supreme Court of Ohio concluded that minor traffic violations provide probable cause for a police stop. It did not conclude that the police could stop motorists who did not violate the traffic laws. For a marked lane violation to occur, two elements must be shown: (1) the crossing of a marked lane; and, (2) that the crossing of the lane was unsafe. In this case, the trial court determined that the second element was not shown by the evidence. Therefore, there was no traffic violation, and no probable cause to stop. The majority's analysis simply skips over this vital point, and ignores the definition of the law as written by the General Assembly.

{¶44} My independent examination of the relevant law and the video has established that the applicable legal standard for suppression has been met. Thus, the trial court did not err in granting appellee's motion.

{¶45} I hereby dissent respectfully from the judgment of the majority.