[Cite as *State v. Sitko*, 2012-Ohio-2705.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-P-0042**
- vs -	:	
RODNEY J. SITKO,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Municipal Court, Ravenna Division, Case No. R 2010 TRC 9872.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Theresa M. Scahill*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Dennis Day Lager, Portage County Public Defender, and *John P. Laczko*, Assistant Public Defender, 209 South Chestnut Street, #400, Ravenna, OH 44266, and *Patricia J. Smith*, 9442 State Route 43, Streetsboro, OH 44241 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Rodney J. Sitko, appeals the judgment of the Portage County Municipal Court, Ravenna Division, denying his motion to suppress evidence. At issue is whether the police lawfully stopped him for committing a lanes-of-travel violation; whether the officer lawfully detained him for field sobriety testing; and whether the officer had probable cause to arrest him for operating his vehicle under the influence of alcohol ("OVI"). For the reasons that follow, we affirm.

{¶2} Appellant was charged by traffic citation with OVI, in violation of R.C. 4511.19(A)(1)(a), a misdemeanor of the first degree; OVI, having previously been convicted of two prior OVI offenses and having refused to submit to a chemical test in connection with the present OVI offense, in violation of R.C. 4511.19(A)(2), an unclassified misdemeanor; and a lanes-of-travel violation of R.C. 4511.25, a minor misdemeanor. Appellant pled not guilty and filed a motion to suppress. The matter proceeded to hearing on the motion.

{¶3} Officer David Firtik of the Garrettsville Police Department testified that in the early morning hours of Sunday, August 8, 2010, at about 12:30 a.m., he was driving his cruiser southbound on South Street, which is a two-lane street with one lane in each direction separated by double yellow lines. When he was approaching the intersection of South Street and Freedom Street, he saw a pickup truck pull up to the stop sign on Freedom Street on the left side of South Street. Officer Firtik was 75 to 85 yards from Freedom Street when he saw the truck pull up to the stop sign.

{¶4} The driver of the truck, later identified as appellant, made a right-hand turn onto South Street heading northbound as Officer Firtik was travelling southbound toward him. Officer Firtik testified that, while appellant was making his right-hand turn, the front left corner of his truck crossed over the centerline and was partially in the southbound lane. He said that an imaginary line showing the part of his truck that crossed the centerline would be drawn from the base of his left window to the right tire. Appellant then veered back into his lane of travel and passed Officer Firtik, who was driving in the opposite direction. The officer turned his cruiser around and proceeded to follow appellant.

{¶5} As Officer Firtik turned around, he saw appellant entering the intersection of South Street and North Street, which was 85 to 100 yards ahead of the officer. As appellant went through the intersection, he swerved into the left-hand turn lane. Officer Firtik testified "the width" of appellant's left side tires went into the turn lane. However, he did not turn left, but rather returned to his lane of travel and continued driving northbound on South Street. Officer Firtik then activated his lights and stopped him.

{¶6} Officer Firtik approached appellant's truck from the driver's side. He told appellant that in making his turn from Freedom Street, he crossed the double yellow lines. Appellant said he was sorry. During this conversation, the officer noticed appellant's eyes were bloodshot and glassy. A "mild" odor of alcoholic beverage emanated from inside the truck. Officer Firtik testified that, based on his training and experience, this evidence indicated alcohol impairment.

{¶7} Officer Firtik asked appellant for his driver's license. Although appellant's wallet was on his lap, instead of picking it up, he opened his glove compartment and went through the papers inside looking for his license. The officer again asked appellant for it. This time, appellant looked down, picked up his wallet, took out his license, and gave it to the officer. Officer Firtik then asked appellant for proof of his insurance. Appellant again went through the papers in his glove box, retrieved a document, and gave it to the officer. However, the document had nothing to do with insurance or appellant's truck. Officer Firtik told appellant it was the wrong document. Appellant then went back to the glove box and eventually found his proof of insurance. The officer testified that appellant's difficulty in obtaining the documents he had requested evidenced alcohol impairment.

{¶8} Officer Firtik asked appellant where he was coming from. Appellant said he was coming from a friend's house on Freedom Street. The officer then asked him where he was going, and, apparently confused, appellant said Freedom Street. The officer said that appellant was speaking in incomplete sentences and his speech was "slightly slurred." Officer Firtik testified the foregoing evidence also indicated alcohol impairment.

{¶9} Officer Firtik took appellant's license to his cruiser and ran a records check. A few minutes later, a backup officer arrived. Both officers then approached appellant. Although appellant denied drinking, based on his observations, Officer Firtik suspected he had been driving while impaired. As a result, he asked appellant to exit his truck for field sobriety tests to make sure he was safe to continue driving and appellant agreed.

{¶10} Officer Firtik testified that appellant had difficulty getting out of his truck. Once outside his vehicle, appellant was unsteady on his feet and swaying. The officer said this conduct evidenced alcohol impairment. When Officer Firtik was giving appellant instructions regarding the horizontal gaze nystagmus test, the officer smelled a mild odor of alcoholic beverage on his breath. The officer instructed appellant several times to keep his head still and to follow his finger using only his eyes. Although appellant said he understood the instructions, he refused to comply with them and just stared straight ahead. Appellant also refused to comply with the officer's repeated instructions that he keep his hands down and stop moving. Due to appellant's refusal to cooperate with the instructions, Officer Firtik was unable to administer the tests. Appellant became belligerent with Officer Firtik. Appellant stepped back, spread his

feet, and crossed his arms, telling the officer, "Just take me to jail." Officer Firtik then arrested him for OVI.

{¶11} Appellant did not testify or present any countervailing evidence at the hearing. Thus, Officer Firtik's testimony was undisputed.

{¶12} Following the hearing, the trial court entered judgment denying appellant's motion to suppress. The court found that Officer Firtik observed appellant commit a lane violation by traveling left of center while he was turning right from Freedom Street onto South Street. Thus, the court found that Officer Firtik had grounds to stop appellant. The court did not reference appellant's second lane violation. Further, the court found the facts warranted appellant's continued detention for field sobriety tests. The court also found that Officer Firtik had probable cause to arrest appellant.

{¶13} Appellant subsequently pled no contest to OVI. He stipulated to a finding of guilty to OVI, a third offense, in violation of R.C. 4511.19(A)(2), an unclassified misdemeanor. At appellant's sentencing, the court noted that appellant actually had three prior OVI convictions in Geauga and Trumbull Counties. The trial court sentenced appellant to 365 days in jail and a fine of $2,750, suspending 305 days and $1,900 of the fine on certain conditions, including probation for 18 months and the suspension of his driver's license for two years. The remaining charges were dismissed on the state's motion. The court stayed execution of sentence pending appeal.

{¶14} Appellant appeals the trial court's denial of his motion to suppress, asserting the following for his sole assignment of error:

{¶15} "The investigatory stop, investigatory detention, and arrest of the appellant, where no probable cause existed, violated the appellant's Fourth and

Fourteenth US Amendments [sic] and Ohio State Protections against unreasonable search and seizure."

{¶16} "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. The appellate court must accept the trial court's factual findings, provided they are supported by competent, credible evidence. *Id*. Thereafter, the appellate court must determine, without deference to the trial court, whether the applicable legal standard has been met. *Id.* Thus, we review the trial court's application of the law to the facts de novo. *State v. Holnapy*, 194 Ohio App.3d 444, 2011-Ohio-2995, ¶28 (11th Dist.).

{¶17} Appellant claims the arresting officers did not have grounds to stop, detain, or arrest him. As a result, he contends the court should have granted his motion to suppress and excluded all evidence against him. We disagree.

{¶18} First, appellant argues that Officer Firtik was not legally authorized to stop him. This court has repeatedly held that when a police officer witnesses a minor traffic violation, sufficient grounds exist for the officer to stop the vehicle to issue a citation. *State v. Simmons*, 11th Dist. No. 2011-L-029, 2011-Ohio-6339, ¶15; *State v. Burdick*, 11th Dist. No. 98-G-2209, 2000 Ohio App. LEXIS 2264, *13 (May 26, 2000); *State v. Yemma*, 11th Dist. No. 95-P-0156, 1996 Ohio App. LEXIS 3361, *7 (Aug. 9, 1996). "[E]ven a de minimus traffic violation provides probable cause for a traffic stop * * *." *State v. Hicks*, 7th Dist. No. 01 CO 42, 2002-Ohio-3207, ¶30, citing *Dayton v. Erickson*, 76 Ohio St.3d 3, 9 (1996). Further, in *State v. Wooten*, 11th Dist. No. 2004-L-084, 2006-Ohio-199, ¶11, this court held that when a vehicle crosses the centerline, there are two legitimate grounds for an officer to make a traffic stop. First, pursuant to *Terry*

v. Ohio, 392 U.S. 1 (1968), an officer may initiate the stop based upon his or her suspicion that a traffic violation has occurred. *Id*. Second, pursuant to *Erickson, supra*, the officer can make the stop based on probable cause to believe a traffic violation has occurred (a marked lane violation). The stop does not violate the Fourth Amendment as long as it is supported by at least one of these grounds. *Wooten, supra*.

{¶19} The only argument asserted by appellant on the issue of the propriety of his initial stop is that the dash cam video, which the state introduced in evidence, does not reveal a lanes-of-travel violation. However, in making this argument, appellant ignores Officer Firtik's testimony that he saw appellant commit two lane violations before he stopped him. Appellant also ignores the fact that the video corroborates at least part of Officer Firtik's testimony regarding appellant's violations.

{¶20} Officer Firtik stopped appellant due to his violation of R.C. 4511.25, which requires that vehicles be driven on the right half of the roadway. With respect to appellant's right-hand turn onto South Street, Officer Firtik testified that he saw appellant drive the front left corner of his truck over the centerline and then veered back into his lane of travel. While appellant's headlights partially obscure his right-hand turn on the video, it shows appellant crossing the centerline and then returning from the southbound lane into his proper lane of travel. The video thus corroborates appellant's lane violation during his right-hand turn. To the extent the video is unclear, because the trial court functions as the trier of fact, that court is in the best position to weigh the evidence by resolving factual questions and evaluating the credibility of witnesses. *State v. Mills*, 62 Ohio St.3d 357, 366 (1992). We therefore defer to the trial court's findings of fact. *Columbus v. Ellyson*, 10th Dist. No. 05AP-573, 2006-Ohio-2075, ¶4.

{¶21} Further, Officer Firtik testified that at the intersection of South and North Streets, he saw appellant swerve his truck outside the right lane and into the left-hand turn lane. He said the width of appellant's left side tires was in the left-hand turn lane before he returned to his lane of travel. The officer testified that, while the video does not show appellant's tires crossing into the left-hand turn lane, it shows his truck swerve into the left lane. The officer said the dash cam was unable to clearly record this violation because he was 85 to 100 yards away from appellant at the time. We also note that the video is grainy; the violations took place late at night; and appellant presented no evidence to rebut Officer Firtik's testimony. Thus, while the trial court upheld the stop based on appellant's first lane violation, there was evidence in the record of a second lanes-of-travel violation.

{¶22} We therefore hold the trial court did not err in concluding that Officer Firtik was justified in stopping appellant based on probable cause that appellant had committed a lanes-of-travel violation. *Wooten, supra*.

{¶23} Second, appellant argues the trial court erred in finding that Officer Firtik was justified in detaining him for field sobriety testing. "Because this is a greater invasion of an individual's liberty interest than the initial stop, the request to perform these tests must be separately justified by specific, articulable facts showing a reasonable basis for the request." *State v. Evans*, 127 Ohio App.3d 56, 62 (11th Dist.1998), citing Y*emma*, *supra*. Once an officer has stopped a vehicle for a minor traffic offense and begins the process of obtaining the offender's license and registration, the officer may proceed to investigate the detainee for driving under the influence if there exists reasonable suspicion that the detainee may be intoxicated

based on specific and articulable facts, such as where there are symptoms that the detainee is intoxicated. *Evans, supra*, at 63, citing *Yemma, supra*, at *8.

{¶24} Cases considering an officer's decision to conduct field sobriety tests rely on the totality of the circumstances. *Evans, supra*. This court has held that such factors include, but are not limited to:

> **{¶25}** (1) the time and day of the stop (Friday or Saturday night as opposed to, e.g., Tuesday morning); (2) the location of the stop (whether near establishments selling alcohol); (3) any indicia of erratic driving before the stop that may indicate a lack of coordination (* * * weaving, * * * etc.); (4) whether there is a cognizable report that the driver may be intoxicated; (5) the condition of the suspect's eyes (bloodshot, glassy, glazed, etc.); (6) impairments of the suspect's ability to speak (slurred speech, * * * etc.); (7) the odor of alcohol coming from the interior of the car, or, more significantly, on the suspect's person or breath; (8) the intensity of that odor, as described by the officer ("very strong," "strong," "moderate," "slight," etc.); (9) the suspect's demeanor (belligerent, uncooperative, etc.); (10) any actions by the suspect after the stop that might indicate a lack of coordination (* * * fumbling for a wallet, etc.); and (11) the suspect's admission of alcohol consumption * * *, if given. All of these factors, together with the officer's previous experience in dealing with drunken drivers, may be taken into account by a reviewing court in

determining whether the officer acted reasonably. No single factor is determinative. *Id*. at fn. 2.

{¶26} Applying these factors to the instant case, the traffic violations at issue occurred late on a Saturday night as opposed to a weekday morning. The officer observed appellant drive outside the right lane and into the left lane of traffic twice and each time swerve back into his proper lane. Appellant was therefore driving erratically. Further, Officer Firtik testified that appellant's eyes were bloodshot and glassy; that he spoke in incomplete sentences; and that his speech was slurred. He gave confusing, conflicting statements as to where he was coming from and going. Also, the officer smelled a mild odor of alcohol emanating from the interior of appellant's truck and no one else was in his truck. Further, appellant fumbled in his glove box looking for the documents the officer requested. Finally, the officer recounted his training and experience in dealing with drunk drivers. We therefore hold the trial court did not err in concluding that these factors gave rise to a reasonable suspicion, based on articulable facts, which authorized Officer Firtik to ask appellant to exit his vehicle for field sobriety testing.

{¶27} Third, appellant challenges Officer Firtik's probable cause for arrest. Because an arrest is the ultimate intrusion upon a citizen's liberty, the arresting officer must have more than a reasonable, articulable suspicion of criminal activity. He must have probable cause to believe the individual has committed a crime. *Brinegar v. United States*, 338 U.S. 160, 175 (1949); *Beck v. Ohio*, 379 U.S. 89 (1964). In determining whether the police had probable cause to arrest appellant for OVI, we must determine whether, at the moment of arrest, the police had information sufficient to cause a

prudent person to believe that the suspect was driving under the influence. *Id.* at 91; *State v. Timson*, 38 Ohio St.2d 122, 127 (1974). A probable cause determination is based on the "totality" of facts and circumstances within a police officer's knowledge. *State v. Miller*, 117 Ohio App.3d 750, 761 (11th Dist.1997). While the odor of alcohol, glassy eyes, slurred speech, and other indicia of alcohol use by a driver are, in and of themselves, insufficient to constitute probable cause to arrest, they are factors to be considered in determining the existence of probable cause. *Kirtland Hills v. Deir*, 11th Dist. No. 2004-L-005, 2005-Ohio-1563, ¶16.

{¶28} As noted above, at the time of his violations, appellant was driving erratically. When the officer told him he had crossed the double yellow lines, appellant said he was sorry. Police testimony regarding a defendant's erratic driving may be considered in the probable-cause determination. *State v. Molk*, 11th Dist. No. 2001-L-146, 2002-Ohio-6926, ¶20. Further, appellant made confusing statements about where he was coming from and going. In *Holnapy, supra*, this court held that a defendant's confusing statements about where he was coming from and his destination can be considered in evaluating probable cause. *Id*. at ¶29. Also, appellant had difficulty getting out of his truck. Then, after exiting his vehicle, he was unsteady on his feet and swaying. Testimony regarding the defendant's physical instability is pertinent to the probable-cause determination. *Molk*, *supra*. Moreover, the officer detected a mild odor of alcohol coming from appellant's breath. The odor of alcohol, glassy eyes, slurred speech, and other indicia of alcohol use may be considered in determining probable cause. *Deir, supra*. Further, appellant refused to perform field sobriety tests. This court has held that the "'refusal to submit to field sobriety tests is another factor that

may be considered in determining the existence of probable cause in an arrest for driving under the influence of alcohol.'" *Holnapy*, *supra*, at ¶49, quoting *Molk*, *supra*, at ¶19. Moreover, while the officer was giving appellant instructions regarding field sobriety tests, he was uncooperative and became belligerent toward Officer Firtik. An officer's observation of uncooperative and belligerent behavior on the part of the defendant can be used to establish probable cause. *Deir, supra,* at ¶20.

{¶29} Based on Officer Firtik's testimony regarding appellant's lane violations, the indicia of his alcohol use, his difficulty locating documents, his confusing statements, his physical instability, his refusal to cooperate with field sobriety testing, his belligerent behavior, and the officer's other observations noted in our analysis concerning his request that appellant perform field sobriety tests, we hold the trial court did not err in finding that Officer Firtik had probable cause to arrest appellant for OVI.

{¶30} In accordance with the foregoing analysis, we hold the trial court did not err in denying appellant's motion to suppress.

{¶31} For the reasons stated in this opinion, appellant's assignment of error is overruled. It is the judgment and order of this court that the judgment of the Portage County Municipal Court, Ravenna Division, is affirmed.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDELL, J.,

concur.