

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 09AP-765
Plaintiff-Appellee,	:	(M.C. No. 2009 TRD 144770)
v.	:	
	:	(REGULAR CALENDAR)
Angelique Hernandez,	:	
	:	
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on May 11, 2010

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*Richard C. Pfeiffer, Jr.*, City Attorney; *Lara N. Baker*, City Prosecutor, and *Melanie R. Tobias*, for appellee.

*Felice Howard*, for appellant.

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APPEAL from the Franklin County Municipal Court

KLATT, J.

{¶1} Defendant-appellant, Angelique Hernandez, appeals from a judgment of the Franklin County Municipal Court denying her motion for acquittal or, in the alternative, for a new trial, after her conviction for a violation of R.C. 4511.33. For the following reasons, we reverse that judgment, vacate her conviction, and enter a judgment of acquittal.

{¶2} On May 4, 2009, Franklin County Sheriff's Officer Paul Chuck stopped his cruiser at the intersection of Cleveland Avenue and Morse Road. Chuck's cruiser was on Cleveland Avenue facing north. He observed appellant's car, two cars behind his cruiser,

cross a double yellow line to drive into the left hand turn lane. Chuck pulled appellant over shortly after she made the left hand turn onto westbound Morse Road. He ticketed her for driving left of center in violation of R.C. 4511.25(A) and for driving outside of marked lanes in violation of R.C. 4511.33. Appellant entered a not guilty plea and proceeded to a bench trial.

{¶3} At trial, Chuck testified to the version of events just described. The trial court found appellant not guilty of driving left of center but guilty of the marked lanes violation. The trial court sentenced appellant accordingly.

{¶4} After her trial, appellant filed a motion for acquittal or, in the alternative, for a new trial. Appellant claimed that the state failed to present sufficient evidence to prove all the elements of a marked lanes violation. The trial court denied both motions.

{¶5} Appellant appeals and assigns the following error:

THE TRIAL COURT ERRED IN DENYING APPELLANT'S  
MOTION FOR ACQUITTAL OR NEW TRIAL BECAUSE  
THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN HER  
CONVICTION FOR DRIVING OUTSIDE OF THE MARKED  
LANES.

{¶6} Appellant sought a new trial pursuant to Crim.R. 33(A)(4), which in relevant part, provides that a new trial may be granted when the verdict is not sustained by sufficient evidence.<sup>1</sup> This standard requires a determination of whether a rational fact finder, viewing the evidence in a light most favorable to the prosecution, could have found the essential elements of the offense proven beyond a reasonable doubt. *State*

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<sup>1</sup> Although appellant's motion alternatively sought a judgment of acquittal pursuant to Crim.R. 29, the trial court denied that portion of her motion after finding that such a motion was improper after a bench trial. Appellant has not appealed that ruling. Therefore, this opinion will only address the trial court's denial of appellant's motion for new trial.

*v. Stephens*, 11th Dist. No. 2001-T-0044, 2002-Ohio-2976, ¶26; *State v. Miller*, 6th Dist. No. E-02-037, 2003-Ohio-6375, ¶19.

{¶7} The trial court found appellant guilty of violating R.C. 4511.33(A)(1), which provides that:

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

(1) 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.

{¶8} Appellant claims in her assignment of error that the trial court erred in denying her motion for new trial because the state did not present sufficient evidence to prove all the elements of a marked lanes violation. She argues that the state did not present any evidence to prove that she failed to drive within one lane as nearly as practicable and that she changed lanes without first ascertaining that such movement could be made with safety. The state claims, alternatively, that it must only present evidence that appellant did not stay entirely within her lane of traffic to prove a marked lanes violation. The state claims that it presented such evidence in this case. The state argues that after it presented evidence establishing a marked lanes violation, it was appellant's burden to present evidence to prove an affirmative defense under the statute; namely, that it was impracticable to stay in her lane and that she changed lanes only after ascertaining that such movement could be made safely.

{¶9} In considering what type of evidence is sufficient to prove a marked lanes violation, this court has previously concluded that "a driver's simply crossing a lane line is

in itself insufficient to establish a prima facie violation of R.C. 4511.33(A); the evidence must address conditions of practicality and safety, for which the state bears the burden of proof." *State v. East* (June 28, 1994), 10th Dist. No. 93APC09-1307. Based upon *East*, we would reject the state's claim that it need only show that a driver left its lane of travel to prove a marked lanes violation. See also *State v. Barner*, 9th Dist. No. 04CA0004-M, 2004-Ohio-5950, ¶14 ("It is clear from a plain reading of the statute that in order to sustain a conviction pursuant to R.C. 4511.33(A), the State must put forth evidence that the driver of a vehicle moving either between lanes of traffic or completely out of a lane of traffic failed to ascertain the safety of such movement prior to making the movement."); *Middleburg Hts. v. Quinones*, 8th Dist. No. 88242, 2007-Ohio-3643, ¶57-59 (city did not provide evidence to establish impracticability or safety elements of violation); *State v. Phillips*, 3d Dist. No. 8-04-25, 2006-Ohio-6338, ¶49.

{¶10} In 2008, however, the Supreme Court of Ohio decided *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539. In *Mays*, the court dealt with the constitutionality of a traffic stop based on a marked lanes violation. Specifically, an officer stopped Mays after observing him twice drive over the white edge line marking the berm of the road. The officer observed no other traffic violations. Mays argued that the traffic stop was improper because his conduct did not constitute a marked lanes violation and that there was no reason to believe that he failed to ascertain the safety of such movement prior to making the movement or that he did not stay within his lane as nearly as practicable. The court rejected both arguments.

{¶11} In rejecting Mays' first argument, the court noted that an officer's decision to stop a vehicle for a traffic violation must be prompted by a reasonable and articulable

suspicion that the motorist has committed the violation. *Id.* at ¶8. The court concluded that the officer had reasonable and articulable suspicion that Mays violated R.C. 4511.33 because the officer twice observed him drive across the white edge line of the road. *Id.* at ¶16.

{¶12} The court went further to reject Mays' second argument. The court noted that R.C. 4511.33 does allow for drivers to cross a lane line in certain circumstances without violating the statute. *Id.* at ¶17. The court, however, construed these circumstances as "a possible defense" to the charge and, therefore, irrelevant to the reasonable and articulable suspicion analysis. *Id.* ("An officer is not required to determine whether someone who has been observed committing a crime might have a legal defense to the charge.").

{¶13} The state argues that *Mays* overruled this court's interpretation of R.C. 4511.33(A)(1) in *East*. The state's argument is premised on its claim that the impracticability and safety issues in the statute are affirmative defenses that must be proved by the defendant. The state notes that the Second District Court of Appeals has concluded, in light of *Mays*, that a defendant charged with a marked lanes violation has the burden to prove, as an affirmative defense, that it was impracticable to remain in a lane and that the defendant ascertained the safety of movement prior to leaving the lane. *State v. Rochowiak*, 2d Dist. No. 2008 CA 12, 2009-Ohio-2550, ¶52. We are not persuaded by the state's argument for a number of reasons.

{¶14} First, *Mays* does not use the term "affirmative defense" to define the circumstances when a driver may leave a lane of travel without violating the statute. Instead, the court used the phrase "a possible defense." *Id.* at ¶17. Thus, *Mays* does not

hold that these circumstances are affirmative defenses, as there are many defenses that are not affirmative defenses. For example, when a defendant argues that his or her conduct did not violate the statute, that defendant is asserting a defense to the charge that is not an affirmative defense.

{¶15} Second, we note that the question presented to the *Mays* court was whether or not an officer who twice observed a driver cross over a white edge line marker could make a constitutionally valid stop of the driver based only on those observations. *Id.* at ¶1. *Mays* did not discuss the elements of a marked lanes violation or what evidence is sufficient to prove such a violation.<sup>2</sup> These are two distinct analyses, as an officer must only have a reasonable and articulable suspicion that a violation has occurred to conduct a traffic stop; whether a violation actually occurred is not relevant. See *id.* at ¶17 (noting that possible defenses to an offense are irrelevant in reasonable and articulable suspicion analysis); *State v. Stokes*, 10th Dist. No. 07AP-960, 2008-Ohio-5222, ¶21 (noting that the question of whether or not officer had reasonable suspicion to stop someone is not concerned with whether defendant actually violated statute); *State v. Binegar* (Aug. 13, 2001), 4th Dist. No. 00CA21 (noting that the state need not show that driver actually violated statute to justify traffic stop, the officer only needed to have reasonable suspicion); *State v. Davis*, 11th Dist. No. 2005-P-0077, 2006-Ohio-3424, ¶16 (arguments challenging whether sufficient evidence supported traffic violation irrelevant when

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<sup>2</sup> In fact, the cases cited by the state in support of its claim that simply driving outside the marked lanes is a violation also concern the constitutionality of traffic stops based on alleged marked lanes violations. *State v. Lamb*, 3d Dist. No. 14-03-30, 2003-Ohio-6997, ¶11; *State v. Hodge*, 147 Ohio App.3d 550, 2002-Ohio-3053, ¶50; *State v. McFadden*, 11th Dist. No. 2006-P-0015, 2006-Ohio-5184, ¶24. These cases also do not address the elements of the violation itself or the quantum of evidence necessary to sustain a conviction.

determining constitutionality of traffic stop based on reasonable and articulable suspicion).

{¶16} Third, the impracticability and safety issues in the statute are not consistent with the definition of an affirmative defense as that term is defined in R.C. 2901.05(D)(1)(b). That statute defines an affirmative defense as a "defense involving an excuse or justification peculiarly within the knowledge of the accused, on which the accused can fairly be required to adduce supporting evidence."

{¶17} The impracticability and safety issues in the statute are not necessarily within the peculiar knowledge of a driver. For example, if it is impracticable for a driver to remain in a lane because of an object on the road, that knowledge would be apparent to an officer also driving on the road. Similarly, if there was nothing on the road in front of the driver, that fact could be established by persons other than the accused. Additionally, an officer could observe a driver change lanes without using a turn signal or without checking for the presence of other vehicles. If an officer observed a driver change lanes in a manner that caused or almost caused an accident, the officer would have circumstantial evidence or knowledge that the driver changed lanes without first ascertaining whether such movement could be made safely. Thus, we conclude that the issues of impracticability and safety are not affirmative defenses to a marked lanes violation.

{¶18} Finally, we also reject the state's claim that these issues are affirmative defenses because to interpret the statute as the state argues would lead to absurd results. Under the state's interpretation of R.C. 4511.33(A)(1), a marked lanes violation would occur every time a driver changed lanes (subject to a potential affirmative defense).

We do not believe this result was the intent of the legislature. A driver may change lanes for a variety of reasons: to pass a slow-moving car, to get a better view of homes on one side of the street, or simply because the other lane is smoother. Each of these drivers would have committed a marked lanes violation, under the state's interpretation of the statute, subject to the affirmative defense of impracticability and safety. This is an absurd and unreasonable reading of the statute. See *Delahoussaye v. Ohio State Racing Comm.*, 10th Dist. No. 03AP-954, 2004-Ohio-3388, ¶14 (statutes should not be construed to yield an unreasonable or absurd result).

{¶19} For all these reasons, we conclude that *Mays* did not overrule or otherwise impact this court's interpretation of R.C. 4511.33(A)(1) in *East*. Accordingly, we continue to follow the *East* decision and place the burden of proof on the state to prove impracticability and safety in order to prove a marked lanes violation.

{¶20} Applying *East* to the present case, we agree with appellant that the state did not present any evidence tending to demonstrate that she did not drive within one lane as nearly as practicable and that she changed lanes without ascertaining that such movement could be made with safety. Absent such evidence, the state did not present sufficient evidence to prove a marked lanes violation. *East*. Accordingly, the trial court erred by denying appellant's motion for new trial. Appellant's lone assignment of error is sustained.

{¶21} Because the state presented insufficient evidence to find appellant guilty, we must reverse the trial court's decision denying appellant's motion for new trial, vacate the judgment of conviction entered by the Franklin County Municipal Court, and enter a judgment of acquittal. *State v. Byerly* (Aug. 21, 1998), 11th Dist. No. 97-P-0034



(concluding that the only remedy available if state presented insufficient evidence is acquittal, even though argument presented in motion for new trial); *State v. Young* (Aug. 31, 1989), 8th Dist. No. 55769 (insufficient evidence presented by state leads to judgment of acquittal, even when issue raised by motion for new trial).

{¶22} Lastly, we sua sponte certify a conflict between our holding in this case and the Second District Court of Appeals' opinion in *Rochowiak*. Section 3(B)(4), Article IV, Ohio Constitution vests in the courts of appeals of this state the power to certify the record of a case to the Supreme Court of Ohio for review and final determination "[w]henever the judges \* \* \* find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state[.]"

{¶23} Specifically, we certify the following question to the Supreme Court of Ohio:

In a prosecution for a violation of R.C. 4511.33(A)(1), must the state prove beyond a reasonable doubt that the driver did not drive within one lane as nearly as practicable and changed lanes without first ascertaining that such movement could be made with safety.

*Judgment denying motion for new trial reversed;  
judgment of conviction vacated; judgment of acquittal entered;  
and conflict certified.*

BRYANT and McGRATH, JJ., concur.

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