

[Cite as *State v. Gardner*, 2002-Ohio-692.]

**IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
ALLEN COUNTY**

STATE OF OHIO

CASE NO. 1-01-101

PLAINTIFF-APPELLEE

v.

BETSY GARDNER

OPINION

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Criminal Appeal from Municipal Court

JUDGMENT: Judgment Reversed and Remanded

DATE OF JUDGMENT ENTRY: February 21, 2002

ATTORNEYS:

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For Appellee

HADLEY, J.

{¶1} Defendant-appellant, Betsy Gardner, appeals from the conviction and sentence of the Lima Municipal Court for driving under the influence of alcohol, in violation of R.C. 4511.19(A)(1). For the following reasons, we reverse the judgment of the trial court.

{¶2} The facts and procedural history of the case are as follows. On April 11, 2001, at approximately 1:12 a.m., appellant was driving her vehicle southbound on Cable Road, located in Lima, Ohio. Cable Road is a four-lane road with two northbound lanes and two southbound lanes. Trooper Charles Jordan, Jr., of the Ohio State Highway Patrol, was approximately ten car lengths behind appellant when he observed appellant drive her vehicle half way between the left and right southbound lanes before drifting back into the left lane. Trooper Jordan initiated a traffic stop of appellant's vehicle for a violation of R.C. 4511.33(A), failing to drive within marked lanes.

{¶3} According to Trooper Jordan's report, upon approaching the vehicle and after speaking with the appellant, he detected the odor of an alcoholic beverage on appellant's breath. Trooper Jordan asked the appellant whether she had been drinking to which she replied that she had consumed one beer and was taking prescribed lithium. Trooper Jordan observed that appellant's eyes were

glassy and bloodshot, and her speech was slurred. After such observations, Trooper Jordan asked the appellant to come to the back of the patrol car to perform field sobriety tests. After completion of the field sobriety tests, the appellant was placed under arrest for driving under the influence of alcohol, in violation of R.C. 4511.19(A)(1).

{¶4} On April 18, 2001, the appellant entered a plea of not guilty to the offense of driving under the influence of alcohol and/or with a prohibited concentration of breath alcohol in violation of R.C. 4511.19(A)(1) and (A)(3). On May 10, 2001, the appellant filed a motion to suppress, including, but not limited to, the results of the field sobriety tests. A hearing was held on the matter in the Lima Municipal Court. By judgment entry of June 15, 2001, the trial court overruled the appellant's motion to suppress.

{¶5} The appellant changed her plea to no contest following the ruling on the motion to suppress. The trial court ultimately found the appellant guilty of driving under the influence and imposed a fine and sentence.

{¶6} The appellant now appeals asserting the following two assignments of error for our review.

ASSIGNMENT OF ERROR NO. I

{¶7} Whether the Lima Municipal Court of Allen County, Ohio, committed reversible error when applying the wrong standard to justify an investigatory stop.

ASSIGNMENT OF ERROR NO. II

{¶8} Whether the Lima Municipal Court of Allen County, Ohio, committed reversible error when finding that the actions of defendant/appellant did constitute reasonable articulable suspicion to stop and therefore overruled defendant/appellant's pre-trial motion to suppress.

{¶9} In her first assignment of error, the appellant argues that the trial court applied an incorrect legal standard when overruling her motion to suppress evidence. As the appellant correctly points out, the standard that the trial court should have applied is whether a police officer had a reasonable, articulable suspicion that a traffic violation took place.¹ Instead, the trial court applied a standard that would allow an officer to stop a motorist, not based upon a traffic violation, but in order to determine the reason for the motorist's behavior at issue. Upon that record, we may not correct the trial court's error of law by applying the correct standard to the evidence received at the suppression hearing. At a suppression hearing, the trier of fact evaluates the evidence and decides the credibility of witnesses.² Therefore, our review is limited to the trial court's judgment as contained in its entry. The case must be remanded to the trial court for its consideration applying the correct constitutional standard to its findings of fact and its entry of judgment accordingly.

{¶10} In light of our decision as to the first assignment of error, we need not consider the appellant's second assignment of error.

{¶11} The judgment of the Lima Municipal Court is reversed and the cause remanded for further proceedings in accordance with this opinion.

Judgment reversed and cause remanded.

WALTERS, J., concur.

/jlr

BRYANT, J., Dissenting:

{¶12} **BRYANT, J., Dissents.** I respectfully dissent with the majority in reasoning and result.

{¶13} It is well established law that when reviewing a trial court's decision on a motion to suppress evidence this court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence and then independently determine as a matter of law, without deference to the trial court's conclusion, whether the facts meet the applicable legal standard. *State v. Clay* (1972), 34 Ohio St.2d 250. See also: *State v. Noggle* (Sept. 18, 2000), Crawford App. No. 3-2000-09, *unreported*; *State v. Vance* (1994), 98 Ohio App.3d 56, 58-59; *State v. Daisy* (Feb. 3, 2000), Hardin App. No. 6-99-7, *unreported*.

¹ *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 11-12.

² *State v. Mills* (1992), 62 Ohio St.3d 357.

{¶14} Therefore, it is not necessary, as the majority suggests, to remand this case. While the lower court may have in fact applied the wrong standard when rendering its decision on the appellant's motion to suppress, it is well within this court's authority to correct that error and enter judgment.

{¶15} Secondly, the facts as found by the trial court establish that the arresting officer had the requisite probable cause or reasonable, articulable suspicion to effectuate a traffic stop on the appellant.

{¶16} According to the arresting officer, the appellant was proceeding in the left lane of the roadway when her vehicle drifted a half a car width into the right lane and then back into the left lane without signaling.

{¶17} R.C. 4511.33(A) states:

{¶18} 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.

{¶19} Appellant asserts that this is a *de minimus* traffic violation and without other evidence of impairment did not justify an investigative stop. However, the United States Supreme Court, the Ohio Supreme Court and this court have previously found that contention to be without merit. *Whren v. U.S.* (1996), 517 U.S. 806; *Dayton v. Erickson* (1996), 76 Ohio St.3d 3; *Village of McComb v. Andrews* (March 22, 2000), Hancock App. No. 5-99-41, *unreported*.

{¶20} In *Village of McComb*, supra, this court considered similar facts where an officer conducted a traffic stop on a vehicle after he observed it making an improper lane change. In that case, the majority of this court held:

{¶21} “While we recognize the existence of those cases holding essentially that a de minimis violation does not necessarily give a police officer reasonable suspicion to stop a vehicle, see, *Id.*, we disagree with the general reasoning of those cases and note that such cases have effectively been overruled by the United States Supreme Court in *Whren v. United States* (1996), 517 U.S. 806 and the Ohio Supreme Court in *Dayton v. Erickson* (1996), 76 Ohio St.3d 3. *Whren* and *Erickson* established 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. The reasoning in *Whren* and *Erickson* is applicable to Terry stops, notwithstanding the fact that the cases dealt with probable cause. Without exception readily apparent, every Appellate Court in Ohio presented with the opportunity, including this Court, has applied the *Whren* and *Erickson* rationale to Terry stops. Further, that *Whren* and *Erickson* are “pretextual” cases is similarly a distinction without significance to the present case.

{¶22} Consistent with *Whren* and *Erickson*, we hold that where a police officer stops a vehicle based on reasonable articulable suspicion or 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. That is, when a police officer observes criminal activity taking place, including a violation of the traffic laws, they are automatically justified in effecting a Terry stop and pulling over the motor vehicle involved. That is not to say, by way of example, that every crossing of a highway edge or centerline makes a traffic stop constitutionally permissible. A driver crossing the centerline to avoid an apparent obstruction in the highway or crossing the centerline to properly pass a vehicle traveling in the same direction would not be instances where a traffic stop would be constitutionally permissible. But, where a driver, while approaching and/or traversing a railroad crossing, crosses the center line on one or more occasions and does so for no apparent reason, we think it reasonable for an officer observing such action to initiate a traffic stop in an effort to at least investigate possible violations. That the driver may have a

reasonable explanation for traveling left of center might serve to alleviate the suspicion or be a defense to a charge, however, such explanation has no bearing on the propriety of the initial contact and obviously can not be obtained until an investigative stop is made.”

{¶23} Accordingly, I would overrule Appellant’s first and second assignments of error and would affirm the ruling of the lower court.