[Cite as *State v. Guseman*, 2009-Ohio-952.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	Case No. 08CA15
v.	:	
	:	DECISION AND
Eric Guseman,	:	JUDGMENT ENTRY
	:	
Defendant-Appellant.	:	File-stamped date: 2-27-09

APPEARANCES:

Herman A. Carson, SOWASH, CARSON & FERRIER, Athens, Ohio, for appellant.

Patrick J. Lang, Athens Law Director, and Lisa Eliason, Chief Athens City Prosecutor, Athens, Ohio, for appellee.

Kline, P.J.:

{¶1} Eric Guseman appeals the Athens County Municipal Court's judgment denying his motion to suppress all evidence obtained from an allegedly illegal stop and illegal arrest. On appeal, Guseman contends that the trial court erred when it denied his motion to suppress because the officer lacked (1) reasonable articulable suspicion to stop him and (2) probable cause to arrest him for operating a motor vehicle while under the influence ("DUI"). We disagree. Accordingly, we affirm the judgment of the trial court.

I.

{¶2} At about 1:54 a.m. on April 12, 2008, Trooper Glendon Heath Ward of the Ohio State Highway Patrol observed Guseman driving on Athens County

Road 7. A painted centerline separated Guseman's lane of traffic from the on-coming lane of traffic. However, because of an intersection, the painted centerline stopped for a brief period as Guseman rounded a curve in the road and passed through the intersection.

{¶3} As Guseman drove through the intersection, the trooper observed Guseman's vehicle cross the unpainted centerline by six to twelve inches. Based on this observation, the trooper initiated a stop for a left of center traffic violation under R.C. 4511.25, a minor misdemeanor.

{¶4} As the trooper approached Guseman's vehicle on foot, he noticed a very strong odor of alcohol. When the trooper reached Guseman and his passenger, he observed that Guseman's eyes were red, bloodshot, and glassy. However, after asking Guseman to exit the vehicle, the trooper noticed a moderate odor of alcohol when Guseman was standing approximately five to ten feet away from him.

{¶5} The trooper explained to Guseman, "sir, the reason why I stopped you is because you went left of center." Guseman answered, "[W]ell, I'm sorry about that, I was talking to my sister on the cell phone."

{¶6} Initially, Guseman denied consuming any alcohol. Later, he told the trooper that he drank one beer.

{¶7} Because Guseman had a back injury, the trooper did not administer a field sobriety test. However, he did administer the Horizontal Gaze Nystagmus "(HGN)" test. The test was not performed on camera due to the trooper's safety concerns relating to the passenger, who appeared to nearly be "passed out

drunk" at this time. Guseman advised the trooper that he had a seizure disorder and that the lights were affecting him. Trooper Ward turned Guseman slightly to help diminish his exposure to the light. The HGN test registered six clues.

{¶8} After instructing Guseman to spit out his gum, the trooper then administered the portable breath test ("PBT") twice. It registered .109 both times. The trooper testified that the machine was properly calibrated and in proper working order. Based on the totality of these circumstances, Trooper Ward concluded that he had probable cause to arrest Guseman for operating a motor vehicle while under the influence ("DUI").

{¶9} Trooper Ward arrested Guseman and took him to the post where he tested Guseman's urine, which returned a result of .139. Ultimately, the trooper charged Guseman with going left of center and DUI.

{¶10} Guseman pled not guilty to both charges. Later, he moved to suppress all the evidence the state obtained, claiming that the trooper lacked reasonable suspicion to stop him and lacked probable cause to arrest him for DUI.

{¶11} At the motion to suppress hearing, the trooper testified for the state. In addition, the state introduced the video recording of the stop and various tests the trooper administered to Guseman. Guseman did not offer any evidence. The court declined to consider the PBT when reviewing the stop and arrest because both parties agreed that the trooper improperly administered the PBT. The court made its findings in writing and denied Guseman's motion to suppress.

{¶12} Guseman then entered a no contest plea to the DUI offense, a misdemeanor of the first degree, in violation of R.C. 4511.19(A)(1)(e), in exchange for the state dismissing the left of center charge, a minor misdemeanor, in violation of R.C. 4511.25. The court found Guseman guilty of the DUI and sentenced him accordingly.

{¶13} Guseman appeals the trial court's denial of his motion to suppress and asserts the following two assignments of error: I. "Trooper Ward Lacked Reasonable Articulable Suspicion to Stop Defendant-Appellant." And, II. "After stopping Defendant-Appellant, Trooper Ward did not have probable cause to make an arrest."

II.

{¶14} We address Guseman's first and second assignments of error together. Guseman contends that the court erred when it overruled his motion to suppress.

{¶15} Our review of a decision on a motion to suppress "presents mixed questions of law and fact." *State v. McNamara* (1997), 124 Ohio App.3d 706, 710, citing *United States v. Martinez* (C.A.11, 1992), 949 F.2d 1117, 1119. At a suppression hearing, the trial court is in the best position to evaluate witness credibility. *State v. Dunlap* (1995), 73 Ohio St.3d 308, 314, 1995-Ohio-243. Accordingly, we must uphold the trial court's findings of fact if competent, credible evidence in the record supports them. Id. We then conduct a de novo review of the trial court's application of the law to the facts. *State v. Anderson* (1995), 100

Ohio App.3d 688, 691; *State v. Fields* (Nov. 29, 1999), Hocking App. No. 99CA11.

{¶16} The Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution provide for "[t]he right of the people to be secure * * * against unreasonable searches and seizures * * *." Searches and seizures conducted without a prior finding of probable cause by a judge or magistrate "are per se unreasonable under the Fourth Amendment, subject to only a few specifically established and well-delineated exceptions." *California v. Acevedo* (1991), 500 U.S. 565; *State v. Tincher* (1988), 47 Ohio App.3d 188. If the government obtains evidence through actions that violate an accused's Fourth Amendment rights, that evidence must be excluded at trial.

A.

{¶17} Guseman contends in his first assignment of error that the trooper lacked a reasonable articulable suspicion to initially stop him for going left of center.

{¶18} R.C. 4511.25(A) states, "Upon all roadways of sufficient width, a vehicle or trackless trolley shall be driven upon the right half of the roadway, except as follows:

> (1) When overtaking and passing another vehicle proceeding in the same direction, or when making a left turn under the rules governing such movements;
> (2) When an obstruction exists making it necessary to drive to the left of the center of the highway; provided, any person so doing shall yield the right of way to all vehicles traveling in the proper direction upon the unobstructed portion of the highway within such distance as to constitute an immediate hazard;
> (3) When driving upon a roadway divided into three or more marked lanes for traffic under the rules applicable thereon;

> (4) When driving upon a roadway designated and posted with signs for one-way traffic;
> (5) When otherwise directed by a police officer or traffic control device."

{¶19} The investigative stop exception to the Fourth Amendment warrant requirement allows a police officer to conduct a brief investigative stop if the officer possesses a reasonable suspicion, based upon specific and reasonable facts, which, taken together with rational inferences from those facts, warrants the belief that criminal behavior is imminent. *Terry v. Ohio* (1968), 392 U.S. 1; *United States v. Brignoni-Ponce* (1978), 422 U.S. 873; *State v. Andrews* (1991), 57 Ohio St.3d 86. To justify an investigative stop, the officer must be able to articulate specific facts that would warrant a person of reasonable caution in the belief that the person stopped is about to commit a crime. *Terry* at 21. "The propriety of an investigative stop by a police officer must be viewed in the light of the totality of the surrounding circumstances." *State v. Bobo* (1988), 37 Ohio St.3d 177, 178.

{¶20} A police officer may stop the driver of a vehicle after observing a de minimis violation of traffic laws. *State v. Bowie,* Washington App. No. 01CA34, 2002-Ohio-3553, ¶¶ 8, 12, and 16, citing *Whren v. United States* (1996), 517 U.S. 806. See, also, *Dayton v. Erickson* (1996), 76 Ohio St.3d 3*,* syllabus. When the officer has probable cause to believe that a traffic violation has occurred, the detention of a motorist is reasonable and constitutional. Id.; see, also, *State v. McDonald,* Washington App. No. 04CA7, 2004-Ohio-5395, ¶¶ 17-18.

{¶21} Here, we find that the trooper had probable cause to make the stop based on the trooper's observation of the left of center traffic violation. However, Guseman maintains that the case of *Village of New Lebanon v. Blankenship* (Montgomery C.P, 1993), 65 Ohio Misc. 2d 1 is inapposite of such a conclusion. In *Blankenship*, the driver was stopped after he was observed weaving in his own lane of travel, on a road without a centerline.

{¶22} We distinguish *Blankenship* from the facts in this case. In *Blankenship*, the state charged the defendant with a marked lane violation, contrary to R.C. 4511.33, despite the fact that the lanes were not marked and despite the fact that the officer only observed the defendant weaving within his own lane of travel. The court concluded that the officer's observations of the defendant weaving in his own lane did not support a charge under R.C. 4511.33 or R.C. 4511.25. In addition, the key issue in *Blankenship* was whether the officer could properly stop the defendant under R.C. 4511.33 or R.C. 4511.25 when the officer only observed the defendant weaving in his own lane. That is not the issue in this case.

{¶23} Here, the court found that the trooper observed Guseman go left of center. Competent, credible evidence from the suppression hearing supports this finding. First, the trooper testified to the same. Second, the video recording, while not totally clear, is some evidence that Guseman went left of center. And, third, Guseman implicitly admitted that he went left of center. The trooper testified that when he told Guseman the reason he stopped him, Guseman said, "[W]ell, I'm sorry about that, I was talking to my sister on the cell phone."

{¶24} Based on the totality of these circumstances, we find that the trial court did not err when it found that the trooper had probable cause to stop Guseman for a left of center violation. In addition, because a determination of probable cause subsumes the reasonable suspicion standard, we find that the initial stop by the trooper was justified. *State v. Mays,* 119 Ohio St.3d 406, 2008-Ohio-4539, ¶ 23.

{¶25} Accordingly, we overrule Guseman's first assignment of error.

B.

{¶26} In his second assignment of error, Guseman contends that the trial court erred when it denied his motion to suppress because the trooper did not have probable cause to arrest him for DUI.

{¶27} R.C. 4511.19(A)(1)(e) provides, "No person shall operate any vehicle * * * within this state, if, at the time of the operation * * * [t]he person has a concentration of eleven-hundredths of one gram or more but less than two hundred thirty-eight-thousandths of one gram by weight of alcohol per one hundred milliliters of the person's urine."

{¶28} To determine whether an officer had probable cause to arrest an individual for a violation of R.C. 4511.19, the court must examine whether, at the moment of the arrest, the officer had knowledge from a reasonably trustworthy source of facts and circumstances sufficient to cause a prudent person to believe that the suspect was driving while under the influence of alcohol. *Beck v. Ohio* (1964), 379 U.S. 89, 91; *State v. Timson* (1974), 38 Ohio St.2d 122*,* paragraph one of the syllabus. Traditionally, courts evaluate the totality of the facts and

circumstances when reviewing drunk-driving cases. *State v. McCaig* (1988), 51 Ohio App.3d 94, citing *Atwell v. State* (1973), 35 Ohio App.2d 221, 226; see, also, *State v. Finch* (1985), 24 Ohio App.3d 38, 39-40. An arrest for driving under the influence need only be supported by the arresting officer's observations of indicia of alcohol consumption and operation of a motor vehicle while under the influence of alcohol. *State v. Van Fossen* (1984), 19 Ohio App.3d 281, 283; *State v. Taylor* (1981), 3 Ohio App.3d 197, 198.

{¶29} Here, the record shows the following facts and circumstances existed at the time Trooper Ward placed Guseman under arrest:[1] Guseman went left of center; he smelled of moderate alcohol; his passenger was nearly "passed out drunk" (possibly with an open container); he admitted to drinking one beer; his eyes were glassy, red, and bloodshot; and he registered six clues on the HGN test. We also note that scoring four or more clues on the HGN test is a reliable indicator of intoxication. *State v. Bresson* (1990), 51 Ohio St.3d 123, 126.

{¶30} Based on the totality of these circumstances, we find that Trooper Ward had probable cause to arrest Guseman for DUI. Specifically, we find that, at the moment of the arrest, the trooper had knowledge from his observations of the facts and circumstances sufficient to cause a prudent person to believe that Guseman was driving while under the influence of alcohol.

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[1] In addition, the PBT revealed a probable breath-alcohol content of .109 grams per 210 liters of breath. We have previously considered a PBT result as a valid factor upon which to base probable cause. See *State v. Ousley* (Sept. 20, 1999), Ross App. No. 99CA2476; and *State v. Moore* (June 29, 1999) Lawrence App. No. 98CA44. During the motion to suppress, however, the trial court determined that it should not consider the PBT results in deciding Guseman's motion. Because the state has not filed a cross-appeal or raised a cross-assignment of error concerning the PBT results, we do not consider the propriety of the court's decision to sustain Guseman's objection. See *Ousley, supra,* at fn. 2.

{¶31} Accordingly, we overrule Guseman's second assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

Harsha, J., concurring:

{¶32} I concur in judgment only in the First Assignment of Error because I see no need to "distinguish" *Blakenship*, supra, factually or otherwise. *Blakenship* is a decision from a court of common pleas from Montgomery County, i.e. it is not binding upon this court. Moreover, any persuasive effect its rationale may have carried has been extinguished by the subsequent rulings of the Supreme Court of the United States and the Supreme Court of Ohio to the effect that even deminimis violations may form the basis for traffic stops. See *Whren*, supra, and *Erickson*, supra.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and Appellant pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Harsha, J.: Concurs in Judgment and Opinion as to Assignment of Error II; Concurs in Judgment Only with Concurring Opinion as to Assignment of Error I.
Abele, J.: Concurs in Judgment and Opinion.

For the Court

BY: _____
Roger L. Kline, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.