[Cite as *State v. Brown*, 2016-Ohio-1453.]

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

STATE OF OHIO, :

Plaintiff-Appellee, : Case No. 13CA3585

vs. :

JAMES E. BROWN, : DECISION AND JUDGMENT ENTRY

Defendant-Appellant. :

APPEARANCES:

Angela Wilson Miller, Jupiter, Florida, for appellant.[1]

Mark E. Kuhn, Scioto County Prosecuting Attorney, and Pat Apel, Scioto County Assistant Prosecuting Attorney, Portsmouth, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 3-25-16
ABELE, J.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court judgment of conviction and sentence. A jury found James E. Brown, defendant below and appellant herein, guilty of (1) two counts of trafficking in drugs in violation of R.C. 2925.03(A)(2), and (2) four counts of possession of drugs in violation of R.C. 2925.11(A). Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

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[1] Different counsel represented appellant during the trial court proceedings.

> "THE TRIAL COURT ERRED IN FAILING TO DISMISS THE CHARGES AGAINST APPELLANT BROWN WHEN HE WAS DENIED HIS RIGHT TO A SPEEDY TRIAL PURSUANT TO R.C. 2945.71. ADDITIONALLY, THIS FAILURE TO PROVIDE A SPEEDY TRIAL IS A VIOLATION OF BROWN'S FUNDAMENTAL RIGHTS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION."

> SECOND ASSIGNMENT OF ERROR:

> "THE TRIAL COURT ERRED IN DENYING APPELLANT'S BROWN MOTION TO SUPPRESS AS THE STATEMENTS MADE BY BROWN AND THE ITEMS OBTAINED FROM THE SEARCH WERE ELICITED IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION."

{¶ 2} On February 27, 2013, Ohio State Highway Patrol Trooper Nick Lewis observed the driver of a car look away from him. Suspicious of this behavior, Lewis followed the driver (appellant) and observed him cross the white "fog lane" by at least a tire width for a distance of thirty to forty yards. Trooper Lewis stopped the car. During his contact with appellant, Trooper Lewis detected the odor of marijuana. Subsequently, the officer took appellant into custody and eventually found drugs in the vehicle.

{¶ 3} The Scioto County Grand Jury returned an indictment that charged appellant with the aforementioned offenses, as well as one count of tampering with evidence. See R.C. 2921.12(A)(1). Appellant pled not guilty. At the conclusion of the trial, the jury found appellant guilty of all charges, except for a not guilty verdict on the tampering with evidence charge. The trial court sentenced appellant to serve eight years on each trafficking charge (with two of the possession charges merged with the trafficking counts), and one hundred eighty days

on the two possession charges. The court further ordered that the trafficking sentences be served consecutively to one another, and that the possession charges also to be served consecutively for an aggregate prison sentence of sixteen years. This appeal followed.

I

{¶ 4} In his first assignment of error, appellant asserts that the trial court erred by overruling his motion to dismiss the charges against him for a violation of his R.C. 2945.71[2] right to a speedy trial.

{¶ 5} Our analysis begins with the premise that appellate review of a trial court's decision on a motion to dismiss for a speedy trial violation involves a mixed question of law and fact. *State v. James*, 4th Dist. Ross No. 13CA3393, 2014-Ohio-1702, at ¶23; *State v. Smith*, 4th Dist. Ross No. 10CA3148, 2011–Ohio–602, at ¶18. Generally, an appellate court will defer to a trial court's factual findings if competent and credible evidence supports those findings. However, an appellate court will review de novo a trial court's application of the law to those facts. *State v. Carr*, 4th Dist. Ross No. 12CA3358, 2013-Ohio-5312, at ¶12; *State v. Fisher*, 4th Dist. Ross No. 11CA3292, 2012-Ohio-6144, at ¶8.

{¶ 6} R.C. 2945.71 states that a person against whom a felony charge is pending shall be brought to trial within two hundred seventy days of his arrest. Id. at (C)(2). If an accused is incarcerated in lieu of bail solely on the pending charge, the statute mandates that each day count

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[2] Appellant's brief raised both statutory and constitutional claims for the denial of speedy trial rights. These are separate and distinct claims. *State v. Sweat*, 4th Dist. Ross No. 14CA3439, 2015-Ohio-2689, at ¶13; *State v. Hilyard*, 4th Dist. Vinton No. 05CA598, 2005-Ohio-4957, at ¶7. Although appellant raises both claims in his brief, his motion in the trial court was based solely on his statutory right. Consequently, our review is confined to the statutory right as we will not consider a constitutional issue raised for the first time on appeal. *State v. Cottrill*, 4th Dist. Ross No. 11CA3270, 2012-Ohio-1525, at ¶6; *State v. Morris*, 4th Dist. Pickaway No. 06CA28, 2007-Ohio-5291, at ¶11.

as three days. Id. at (E). If an accused is not brought to trial within the statutory time limit, he must be discharged. R.C. 2945.73(B). Also, the R.C. 2945.71 time limits may be extended for reasons set out in R.C. 2945.72, but those extensions will be strictly construed against the state. *State v. Alexander*, 4th Dist. Scioto No. 08CA3221, 2009-Ohio-1401, at ¶17; *State v. Monroe*, 4th Dist. Scioto No. 05CA3042, 2007-Ohio-1492, at ¶27.

{¶ 7} Although the original papers are unclear as to the precise date on which appellant was arrested and incarcerated, the October 13, 2015 transcript reveals that the state conceded it "would probably stipulate [appellant] was arrested on – and incarcerated on 2-27, February 27th of 2013." Both parties apparently agree that appellant remained jailed from that time to the date of the trial. Thus, the triple-count provision should apply.

{¶ 8} Our review further reveals that the first tolling event occurred on May 7, 2013 when appellant filed a waiver of time. Thus, from appellant's arrest to May 7, sixty-nine days elapsed. That waiver, as originally typed, set forth no end date. However, a handwritten sentence states that it "is for a period of 30 additional days to June 27, 2013." Thus, June 27, 2013 is the date specified in the time waiver. This sentence appears to be somewhat contradictory, however, as it appears that a thirty day time period would have expired earlier than the specified date of June 27, 2013.

{¶ 9} If we use June 27, 2013 as the date that the speedy trial clock re-started[3], the next tolling event is appellant's July 3, 2013 motion to continue the trial date. Thus, five days elapsed between the end of appellant's previous waiver and appellant's motion for a continuance.

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[3] We also base our analysis on the June 27th date because appellant argues in his brief that an extension was needed at least to this date so that new trial counsel could prepare for trial.

The trial date was then continued to October 15, 2013, when the trial actually occurred. We believe that this time is properly chargeable to appellant. Thus, by our calculation, seventy-four of the ninety days elapsed for speedy trial purposes and appellant's trial occurred within the statutory time limit.

{¶ 10} We recognize that the thrust of appellant's argument centers upon the state's June 19, 2013 motion for a continuance of the scheduled trial date due to the unavailability of an expert witness. The trial court granted the state's request on June 25, 2013 and rescheduled the trial to July 22, 2013. Further, in the entry granting the request, the trial court stated that speedy trial time would be tolled during this delay and concluded that the continuance was reasonable and necessary under R.C. 2945.72.(H). However, this new date apparently conflicted with appellant's trial counsel's schedule and, on July 3, 2013, counsel requested a continuance of the July 22, 2013 trial date. The trial court granted that request and rescheduled the trial date to October 15, 2013.

{¶ 11} Appellant argues that the state's continuance violated his statutory right to a speedy trial. We, however, disagree with appellant for two reasons. First, as we pointed out above, appellant's July 3, 2013 request for a continuance tolled the speedy trial clock. Thus, it makes no difference whether the state's June 19, 2013 request for a continuance tolled the speedy trial time because appellant's trial occurred within the prescribed time limit.

{¶ 12} Second, we believe that the trial court's granting of the state's request for a continuance due to the unavailability of an expert witness did, in fact, properly toll the speedy trial clock. R.C. 2945.72(H) tolls the running of speedy trial time for "the period of any reasonable continuance granted other than upon the accused's own motion." Therefore, the

speedy trial time runs against the state if a continuance is unreasonably granted. The Ohio Supreme Court has held that continuances granted on the state's motion will toll the running of speedy trial time if the continuance is reasonable and necessary under the circumstances of the case. *State v. Saffell* (1988), 35 Ohio St.3d 90, 91, 518 N.E.2d 934. Again, the record must affirmatively demonstrate that the continuance was reasonable and necessary. Id. The reasonableness of a continuance is determined by examining the purpose and length of the continuance as specified in the record. *State v. Lee* (1976), 48 Ohio St.2d 208, 210. The Ohio Supreme Court has stated that "it is difficult, if not unwise, to establish a *per se* rule of what constitutes 'reasonableness' beyond the ninety-day stricture of R.C. 2945.71. Invariably resolution of such a question depends on the peculiar facts of a particular case." *State v. Saffell* (1988), 35 Ohio St.3d 90, 91.

{¶ 13} In the case sub judice, we do not believe that the trial court's decision to grant the state's June 19, 2013 request to continue the trial date due to the unavailability of its expert witness is either unreasonable or unnecessary under the circumstances of this case. The state advised the court that its expert witness had scheduling conflicts with other criminal trials and would not be available to testify. Many courts have concluded that reasonable continuances are appropriate, and may toll the time for speedy trial, in order to accommodate the schedule of a witness or a prosecutor. *Saffell, State v. Crocker*, 38 N.E.3d 369, 2015-Ohio-2528; *State v. Watson*, 10th Dist. Franklin No. 13AP-148, 2013-Ohio-5603; *State v. Camon*, 10th Dist. Franklin No. 11AP-818, 2012-Ohio-1615.

{¶ 14} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's first assignment of error.

II

{¶ 15} In his second assignment of error, appellant asserts that the trial court erred by overruling his motion to suppress evidence. We disagree.

{¶ 16} Generally, appellate review of a decision on a motion to suppress evidence involves mixed questions of law and fact. See *State v. Grubb*, 186 Ohio App.3d 744, 930 N.E.2d 380, 2010-Ohio-1265, at ¶12 (3rd Dist.); *State v. Book*, 165 Ohio App.3d 511, 847 N.E.2d 52, 2006-Ohio-1102, at ¶9 (4th Dist.). In hearing such motions, trial courts assume the role of trier of fact and are best situated to resolve factual disputes and to evaluate witness credibility. *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, at ¶100; *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, at ¶8.

{¶ 17} Appellate courts will accept a trial court's factual finding if competent and credible evidence supports that finding. *State v. Little*, 183 Ohio App.3d 680, 918 N.E.2d 230, 2009-Ohio-4403, at ¶15 (2nd Dist.); *State v. Metcalf*, 111 Ohio App.3d 142, 145, 675 N.E.2d 1268 (4th Dist. 1996). However, appellate courts will review de novo a trial court's application of law to those facts. See *State v. Higgins*, 183 Ohio App.3d 465, 917 N.E.2d 363, 2009-Ohio- 3979, at ¶14 (5th Dist.); *State v. Poole*, 185 Ohio App.3d 38, 923 N.E.2d 167, 2009-Ohio-5634, at ¶18 (11th Dist.).

{¶ 18} The basis for the suppression motion in the case sub judice is that Trooper Lewis did not have "sufficient probable cause" to stop appellant's vehicle.

{¶ 19} The Fourth and Fourteenth Amendments to the United States Constitution, as well as Section 14, Article I of the Ohio Constitution, protect individuals against unreasonable governmental searches and seizures. *Delaware v. Prouse*, 440 U.S. 648, 662, 99 S.Ct. 1391,

1400, 59 L.Ed.2d 660 (1979); *State v. Gullett*, 78 Ohio App.3d 138, 143, 604 N.E.2d 176 (1992). "[S]earches [and seizures] conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967); *Leak* at ¶15; *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶98. Once the defendant demonstrates that he was subjected to a warrantless search or seizure, the burden shifts to the state to establish that the warrantless search or seizure was constitutionally permissible. *Roberts* at ¶98; *Maumee v. Weisner*, 87 Ohio St.3d 295, 297, 720 N.E.2d 507 (1999); *Xenia v. Wallace*, 37 Ohio St.3d 216, 524 N.E.2d 889 (1988), paragraph two of the syllabus.

{¶ 20} A traffic stop initiated by a law enforcement officer constitutes a seizure within the meaning of the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809-810, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996); *Delaware v. Prouse*, 440 U.S. at 653. Thus, a traffic stop must comply with the Fourth Amendment's general reasonableness requirement. *Whren*, 517 U.S. at 810. "[T]he decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Id*. (citations omitted); *accord* Dayton v. Erickson, 76 Ohio St.3d 3, 11–12, 665 N.E.2d 1091 (1996). Consequently, "[p]robable cause is * * * a complete justification for a traffic stop * * *." *State v. Mays*, 119 Ohio St.3d 406, 2008–Ohio–4539, 894 N.E.2d 1204, ¶23; *accord Bowling Green v. Godwin*, 110 Ohio St.3d 58, 2006-Ohio-3563, 850 N.E.2d 698, ¶11.

{¶ 21} We note, however, that probable cause is not required to justify a traffic stop. *Mays* at ¶23. Instead, a traffic stop may be based upon less than probable cause when an officer

possesses reasonable suspicion that the driver has committed, or is committing, a crime, including a minor traffic violation. *Id.* at ¶¶7-8; *State v. Williams*, 4th Dist. Ross No. 14CA3436, 2014-Ohio-4897, ¶8; *State v. Ward*, 4th Dist. Washington No. 10CA30, 2011-Ohio-1261, ¶13. To justify a traffic stop based upon reasonable suspicion, the officer must be able to articulate specific facts that would warrant a person of reasonable caution to believe that the driver has committed, or is committing, a crime, including a minor traffic violation. *E.g.*, *Williams* at ¶8.

{¶ 22} A court that must determine whether an officer possessed probable cause or a reasonable suspicion to stop a vehicle must examine the totality of the circumstances. *Mays* at ¶7. "[T]he question whether a traffic stop violates the Fourth Amendment * * * requires an objective assessment of a police officer's actions in light of the facts and circumstances." *Bowling Green* at ¶14. "[T]he existence of probable cause [or reasonable suspicion] depends on whether an objectively reasonable police officer would believe that [the driver]'s conduct * * * constituted a traffic violation, based on the totality of the circumstances known to the officer at the time of the stop." *Id.* at ¶16.

{¶ 23} Moreover, simply because a driver cannot ultimately be convicted of a traffic offense "is not determinative of whether the officer acted reasonably in stopping and citing [the driver] for that offense. Probable cause does not require the officer to correctly predict that a conviction will result." Id. at ¶15. As we explained in *State v. Emerick*, 4th Dist. Washington No. 06CA45, 2007-Ohio-4398, ¶15:

> "A traffic stop may pass constitutional muster even where the state cannot convict the driver due to a failure in meeting the burden of proof or a technical difficulty in enforcing the underlying statute or ordinance. * * * The very purpose of an investigative stop is to determine whether criminal activity is afoot. This does not require scientific certainty of a violation nor does it invalidate a

> stop on the basis that the subsequent investigation reveals no illegal activity is present."

(citations omitted); *accord Mays* at ¶17 (explaining that whether a driver has a possible defense to traffic violation "is irrelevant in our analysis of whether an officer has a reasonable and articulable suspicion to initiate a traffic stop"). See also *Heien v. North Carolina,* 135 S.Ct. 530, 190 L.Ed.2d 475 (2014) (officer's mistake of law in stopping a vehicle with one functioning brake light, when the state vehicle code requires only one working brake light, was a reasonable mistake that did not violate the Fourth Amendment's prohibition against unreasonable searches and seizures.)

{¶ 24} This court has previously determined that a traffic stop complies with the Fourth Amendment's reasonableness requirement if an officer possesses probable cause or reasonable suspicion to believe that a driver committed a marked lanes violation.[4] *State v. Crocker*, 4th Dist. No. 14CA3640, 2015-Ohio-2528, 38 N.E.3d 369, ¶62; *State v. Littlefield*, 4th Dist. Ross No. 11CA3247, 2013-Ohio-481, ¶15.

{¶ 25} In the case sub judice, we agree with the trial court's conclusion that the evidence adduced at the hearing, if believed, reveals that the officer observed appellant appear to violate a traffic statute. Trooper Lewis observed appellant drive over the "white fog line" by at least one tire width for thirty to forty yards. R.C. 4511.33(A) requires, inter alia, 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." The Ohio Supreme Court held that "[w]hen an officer observes a

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[4] The marked lanes statute, R.C. 4511.33(A)(1), states that upon "any roadway * * * divided into two or more clearly marked lanes for traffic," a vehicle to "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."

vehicle drifting back-and-forth across an edge line," the driver has violated R.C. 4511.33. *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, 894 N.E.2d 1204, at ¶16. Here, the evidence reveals that appellant failed to operate his vehicle within marked lanes. Therefore, we agree with the trial court's conclusion that the stop of appellant's vehicle was constitutionally justified and the trial court correctly overruled appellant's motion to suppress evidence.

{¶ 26} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's second assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant 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 Scioto County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

Harsha, J.: Concurs in Judgment & Opinion
Hoover, J.: Concurs in Judgment & Opinion as to Assignment of Error I and Dissents as to Assignment of Error II

For the Court

BY:_________________
Peter B. Abele, 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.