[Cite as *State v. Lange*, 2005-Ohio-6590.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- CHRISTOPHER LANGE Defendant-Appellant	JUDGES: Hon. John F. Boggins, P. J. Hon. W. Scott Gwin, J. Hon. John W. Wise, J. Case No. 05 CA 50 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Fairfield County Municipal Court, Case No. 04 TRC 10066
JUDGMENT:	Affirmed in Part; Reversed in Part
DATE OF JUDGMENT ENTRY:	December 9, 2005

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
MATTHEW B. WIDEMAN ASSISTANT CITY PROSECUTOR 121 East Chestnut Street, P. O. Box 1080 Lancaster, Ohio 43130	JONATHAN T. TYACK TYACK, BLACKMORE & LISTON 536 South High Street Columbus, Ohio 43215

Wise, J.

{¶1} Appellant Christopher Lange appeals the decision of the Fairfield County Municipal Court that denied his motion to suppress. The following facts give rise to this appeal.

{¶2} On October 31, 2004, Sergeant Vollmer, of the Ohio State Highway Patrol, stopped appellant's vehicle after observing appellant drive through a stop sign at the intersection of Basil Western Road and Hill Road. At the time appellant committed the stop sign violation, he was traveling about 30 miles per hour as he drove through the intersection causing the vehicle's tires to squeal. Due to the stop sign violation and the speed appellant drove through the intersection, Trooper Vollmer stopped appellant.

{¶3} Following the administration of the Horizontal Gaze Nystagmus Test and a portable breath test, Trooper Vollmer arrested appellant for operating a vehicle under the influence of alcohol. On November 4, 2004, appellant entered a plea of not guilty, at his arraignment, before the Fairfield County Municipal Court. On November 12, 2004, appellant filed a motion to suppress. The trial court conducted a hearing, on appellant's motion, on April 18, 2005. The trial court denied appellant's motion on the same day.

{¶4} Thereafter, on May 5, 2005, appellant appeared, before the trial court, and changed his previously entered not guilty plea to a plea of no contest. The trial court found appellant guilty and sentenced him to 90 days in jail with 87 days suspended, a fine of $250 and two years community control sanctions.

{¶5} Appellant timely filed a notice of appeal and sets forth the following assignments of error for our consideration:

{¶6} "I. THE TRIAL COURT ERRED IN NOTING ON THE JUDGMENT ENTRY THAT DEFENDANT ENTERED A GUILTY PLEA.

{¶7} "II. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS BASED UPON THE UNREASONABLE AND ILLEGAL TRAFFIC STOP OF APPELLANT BY TROOPER VOLLMER."

I

{¶8} Appellant maintains, in his First Assignment of Error, the trial court erred when it indicated, on the judgment entry, that he entered a plea of guilty. We agree.

{¶9} A transcript of the plea hearing indicates appellant withdrew his not guilty plea and entered a plea of no contest. Tr. Plea Hrng., May 5, 2005, at 2. The trial court accepted appellant's plea and proceeded to find him guilty of the charged offense. Id. at 2-3. Upon review of the "Journal Entry-Sentence of Court" form used by the trial court, we find the court did incorrectly indicate that appellant entered a plea of guilty. This is merely a clerical error which the trial court may correct, upon remand, by filing a judgment entry nunc pro tunc. For purposes of this appeal however, we acknowledge appellant entered a plea of no contest and therefore, will address appellant's Second Assignment of Error.

{¶10} Appellant's First Assignment of Error is sustained.

II

{¶11} In his Second Assignment of Error, appellant contends the trial court erred when it overruled his motion to suppress based upon an unreasonable and illegal traffic stop by Trooper Vollmer. We disagree.

{¶12} There are three methods that may be used, on appeal, to challenge a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are against the manifest weight of the evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19; *State v. Guysinger* (1993), 86 Ohio App.3d 592.

{¶13} Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. *State v. Williams* (1993), 86 Ohio App.3d 37. Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry* (1994), 95 Ohio App.3d 93; *State v. Claytor* (1993), 85 Ohio App.3d 623; *Guysinger*, supra.

{¶14} In his brief, appellant challenges the trial court's decision denying his motion to suppress on the basis that the court incorrectly decided the ultimate issue. Thus, we will review appellant's Second Assignment of Error under a de novo analysis. In support of this assignment of error, appellant cites various sections of the Ohio Manual of Uniform Traffic Control Devices ("OMUTCD"). Section 2B.05 and 2B.06 address stop signs. Section 2B.05 concerns "Stop Sign Applications" and provides as follows:

{¶15} "STOP signs should not be used unless engineering judgment indicates that one or more of the following conditions exist:

{¶16} "A. Intersection of a less important road with a main road where application of the normal right-of-way rule would not be expected to provide reasonably safe operation;

{¶17} "B. Street entering a through highway or street * * *;

{¶18} "C. Unsignalized intersection in a signalized area; and/or

{¶19} "D. High speeds, restricted view, or crash records indicate that a need for control by the STOP sign."

{¶20} Section 2B.06 addresses stop sign placement and provides, in pertinent part:

{¶21} "The STOP sign shall be installed on the correct side of the traffic lane to which it applies. When the STOP sign is installed at this required location and the sign visibility is restricted, a Stop Ahead sign * * * shall be installed in advance of the STOP sign.

{¶22} "The STOP sign shall be located as close as practical to the intersection it regulates, while optimizing its visibility to the road user it is intended to regulate.

{¶23} "STOP signs and YIELD signs shall not be mounted on the same post."

{¶24} Relying on the above provisions, appellant argues that no stop sign was required at the intersection of Basil Western Road and Hill Road because none of the criteria of Sections 2B.05 and 2B.06 have been met. Appellant also argues a "Stop Ahead" sign was necessary, under Section 2B.06, because the stop sign was not visible until half way around the curve merging Basil Western Road to Hill Road. Finally,

appellant contends the placement of the stop sign made it unenforceable due to the restricted visibility of the sign.

{¶25} We find the arguments set forth by appellant concern whether he may be found guilty of the stop sign violation. We recognize R.C. 4511.12 provides that: "No provision of this chapter for which signs are required shall be enforced against an alleged violator if at the time and place of the alleged violation an official sign is not in proper position and sufficiently legible to be seen by an ordinarily observant person. ***." This Court has previously held that stop signs that are not installed in compliance with the OMUTCD are invalid. *In re Tolliver*, 149 Ohio App.3d 403, 2002-Ohio-4538.

{¶26} However, we conclude that even if we were to determine the sign was not in the proper position or legible, we still find it necessary to address the separate issue of the propriety of the traffic stop. This is so because "* * * the issue of whether the traffic violation can be prosecuted, as raised in a motion to dismiss, is a different question from whether the traffic violation gives the officer reasonable suspicion or probable cause to stop the vehicle." *State v. Dunfee*, Athens App. No. 02CA37, 2003-Ohio-5970, at ¶ 34.

{¶27} In *State v. Ryan*, Tuscarawas App. No. 2004 AP 03 0027, 2005-Ohio-555, we discussed the requirements for a valid traffic stop and stated:

{¶28} "Before a law enforcement officer may stop a vehicle, the officer must have a reasonable suspicion, based upon specific and articulable facts, that an occupant is or has been engaged in criminal activity. *State v. Gedeon* (1992), 81 Ohio App.3d 617, 618, 611 N.E.2d 972. Reasonable suspicion constitutes something less than probable cause. *State v. Carlson* (1995), 102 Ohio App.3d 585, 590, 657 N.E.2d

591. '[I]f the specific and articulable facts available to an officer indicate that a motorist may be committing a criminal act, * * * the officer is justified in making an investigative stop.' Id. at 593, 657 N.E.2d 591. The propriety of an investigative stop must be viewed in light of the totality of the circumstances. *State v. Bobo* (1988), 37 Ohio St.3d 177, 524 N.E.2d 489, paragraph one of the syllabus." Id. at ¶ 18.

{¶29} In his brief, appellant cites two cases in support of his arguments. First, appellant cites the case of *State v. Millhouse* (Feb. 3, 1995), Lawrence App. No. 94CA4. In *Millhouse*, a sheriff's deputy stopped defendant for failing to stop at a stop sign. Id. at 1. The defendant filed a motion to suppress arguing that because the stop sign did not meet the requirements set forth in the OMUTCD, the deputy did not have a valid basis to make the investigatory stop. Id. The trial court denied defendant's motion to suppress. Id. at 2. Following a bench trial, the court found the defendant guilty of driving with a suspended license. Id. On appeal, defendant argued that because the stop sign was invalid, the trial court should have suppressed the evidence obtained by the deputy. Id. The Fourth District Court of Appeals agreed concluding "* * * that because the stop sign did not substantially comply with the OMUTCD requirements, * * * [the deputy] did not possess the requisite reasonable suspicion of criminal activity to permit an investigatory stop of * * * [defendant's] vehicle." Id. at 4.

{¶30} The second case cited by appellant is *State v. Berry*, Wood App. No. WD-02-043, 2003-Ohio-1620. In *Berry*, the officer stopped defendant after he observed her exiting a municipal parking lot at a location where a "Do Not Exit" sign had been posted. Id. at ¶ 2. After further investigation, the officer charged defendant with driving while under the influence. Id. Defendant moved the trial court to suppress evidence of the

stop on the basis that the "Do Not Exit" sign was unenforceable since it was not a sign recognized in the OMUTCD. Id. at ¶ 3. The state agreed the sign did not conform to the manual's requirements. Id. Following a hearing, the trial court granted defendant's motion. Id. On appeal, the Sixth District Court of Appeals affirmed the judgment of the trial court finding "* * * the officer could not have had reasonable, articulable suspicion that * * * [defendant] was violating the law because the sign was a nullity—it does not exist under Ohio law." Id. at ¶ 12.

{¶31} Because we view the issue of the validity of the sign as a separate issue from whether Trooper Vollmer had reasonable, articulable suspicion to stop appellant, we decline to follow the *Millhouse* and *Berry* decisions. Instead, we find persuasive the cases of *State v. Dunfee*, supra and *State v. Walters*, Warren App. No. CA2004-04-043, 2005-Ohio-418. In *Dunfee*, the Fourth District Court of Appeals addressed the issue of whether an officer possesses reasonable suspicion or probable cause to stop a vehicle for committing what the officer reasonably believes to be a traffic violation, when evidence subsequently reveals that the traffic violation cannot be enforced due to the failure of the traffic control device to comply with the OMUTCD. Id. at ¶ 26.

{¶32} In concluding the officer had reasonable suspicion to stop the defendant, the court stated:

{¶33} "Traffic safety and enforcement of the traffic rules are legitimate concerns. To promote highway safety, officers must be afforded some leeway in investigating traffic violations. To demand certainty that a traffic sign complies with the OMUTCD before stopping a vehicle that the officer reasonably believes is violating the traffic rules would allow those who put other travelers in harm's way to continue unabated. Thus,

law enforcement officers need not confirm strict compliance with the OMUTCD in order to make a stop reasonable under the Fourth Amendment where non-compliance would not be blatantly obvious." Id. at ¶ 34.

{¶34} In *Walters*, an officer stopped the defendant after he observed her make a left turn allegedly in violation of a "No Left Turn" sign. *Walters* at ¶ 2. The trial court granted the defendant's motion to suppress finding the stop initiated by the officer lacked an objective finding of probable cause as there was no testimony that the defendant committed an actual violation of the law. Id. at ¶ 3. On appeal, the Twelfth District Court of Appeals stated that because the sign at issue did not conform to the OMUTCD, the defendant clearly could not have been convicted of disobeying a traffic control device. ¶ 8.

{¶35} However, the court noted that the guilt or innocence as to the traffic offense was a separate issue from whether the officer had probable cause to stop the defendant. Id. Based upon the totality of the circumstances, the court of appeals determined the officer did have probable cause to believe that a traffic violation had occurred. Id. at ¶ 10. Specifically, the court stated that "[w]hile * * * [defendant] technically did not commit a traffic violation because the sign was not posted in compliance with the OMUTCD, we find that the stop was not unreasonable under the Fourth Amendment." Id.

{¶36} Thus, in the case sub judice, even if we were to agree with appellant's argument that the stop sign does not conform to the OMUTCD, we decline to further conclude that the traffic stop was invalid. Rather, we view the issue of compliance with the OMUTCD as a separate issue from the validity of the traffic stop under the Fourth

Amendment. Accordingly, we must determine whether Trooper Vollmer had a reasonable suspicion, based upon specific and articulable facts, that appellant engaged in criminal activity.

{¶37} Upon review of Trooper Vollmer's testimony, we find reasonable suspicion existed and therefore, the stop of appellant's vehicle did not violate the Fourth Amendment. At the suppression hearing, Trooper Vollmer testified that he observed appellant drive through the stop sign at a speed of approximately 30 miles per hour. Tr. Suppression Hrng., Apr. 18, 2005, at 6. Appellant's tires squealed as he drove through the intersection due to the curve in the road and the speed he was traveling. Id. at 6, 17, 42. Trooper Vollmer testified that the vehicle was not traveling at a safe speed as it proceeded through the intersection and appellant was not in reasonable control of the vehicle. Id. We would also note that appellant admits to the stop sign violation in his brief. See Appellant's Brief at 2. Therefore, because appellant admits to the violation and the compliance of the sign is not an issue that impacts our decision regarding the propriety of the stop, we find Trooper Vollmer properly stopped appellant's vehicle based upon the stop sign violation.

{¶38} Appellant's Second Assignment of Error is overruled.

{¶39} For the foregoing reasons, the judgment of the Fairfield County Municipal Court, Lancaster , Ohio, is hereby affirmed in part and reversed in part.

By: Wise, J.

Boggins, P. J., and

Gwin, J., concur.

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JUDGES

JWW/d 1116

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
CHRISTOPHER LANGE	:	
	:	
Defendant-Appellant	:	Case No. 05 CA 50

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Fairfield County Municipal Court, Lancaster, Ohio, is affirmed in part and reversed in part for further proceedings consistent with this opinion.

Costs assessed to Appellant.

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JUDGES