[Cite as *State v. Smith*, 2010-Ohio-1232.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon: W. Scott Gwin, P.J.
	:	Hon: William B. Hoffman, J.
Plaintiff-Appellee	:	Hon: Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 09-CA-42
ROBERT SMITH	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Licking County Municipal Court, Case No. 2007TRC1682
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 25, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JONATHAN C. DIERNBACH Assistant Law Director 40 W. Main Street Newark, OH 43055	RICHARD F. SWOPE 6504 East Main Street Reynoldsburg, OH 43068

Gwin, P.J.

{¶1} Defendant-appellant Robert Smith appeals his convictions and sentences in the Licking County Municipal Court on one count of Driving under the Influence [Refusal] in violation of R.C. 4511.19 (A) (1) (a), one count of space between moving vehicles in violation of R.C. 4511.34, and one count of marked lanes in violation of R.C. 4511.33. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} On March 6, 2007 at approximately 1:50 a.m., appellant was driving a 1998 Dodge 1500 Ram westbound on State Route 37, where it merges into State Route 16. Ohio State Highway Patrol Trooper Jermaine D. Thaxton had received a dispatch concerning a black truck driving erratically on the highway. While observing traffic in the eastbound lanes of State Route 16, Trooper Thaxton noticed a vehicle, a 1998 Dodge truck, travelling eastbound following a semi truck too closely, only about a vehicle length behind at approximately sixty (60) miles per hour.

{¶3} Trooper Thaxton, after observing the two vehicles, activated his in-cruiser video and followed the vehicles. Trooper Thaxton testified he observed appellant commit one or two lane violations, specifically crossing the dotted white lane divider separating the two eastbound lanes of travel, before he activated his video camera. Trooper Thaxton observed appellant commit a total of three lane violations prior to the traffic stop. Trooper Thaxton followed appellant approximately two miles, before activating his lights and eventually his siren. Appellant exited the highway and stopped in a closed Speedway gas station lot.

{¶4} Trooper Thaxton testified that when he approached the truck, appellant was fumbling for his papers, had a flushed face, slurred speech, glassy, bloodshot eyes and a strong odor of an alcoholic beverage. Upon questioning, appellant denied consuming any alcoholic beverages.

{¶5} Based on his observations, the trooper requested appellant exit the vehicle to perform the standardized NHTSA[1] field sobriety tests, which appellant performed poorly. The tests were recorded on the cruiser's video camera. Trooper Thaxton acknowledged that his field microphone was not working and no audio was preserved of any conversations outside of the cruiser. However, the microphone located inside the cruiser was functioning and recorded what transpired inside the cruiser. The Trooper testified that appellant was not cooperative upon being told he was under arrest for OVI. The in-cruiser microphone recorded appellant's tirade upon being placed in the cruiser. Appellant was subsequently read the BMV 2255 form, which he refused to sign. Later, he refused to cooperate in the administration of a chemical test.

{¶6} At trial, appellant testified that he worked from 6:00 a.m. to 7:30 or 8:00 p.m., and then went to help his brother move furniture from Croton, Ohio. Appellant testified he did not during any time consume alcohol. Appellant testified he saw Trooper Thaxton pull in behind him, but he thought nothing about it. As the semi truck in front of him approached a traffic light, it moved into the left lane, at which time appellant testified he observed the lights from Trooper Thaxton's cruiser. Appellant believed the trooper was after the trucker. Appellant testified he thought the officer wanted to go around him,

[1] National Highway Transportation and Safety Administration.

so he pulled into the Speedway station. Appellant testified he had his cruise control set on 55 miles per hour during this entire period.

{¶7} Appellant explained he had physical problems with his ankle and knee. He also said it was cold, maybe 20 degrees and all he had on was a t-shirt and a light sweater. He testified he stood for 5 to 7 minutes before doing the field sobriety tests. Appellant testified the trooper made improper comments to him during the test about his employment and his wallet loss. Appellant further claimed that the trooper had him start and stop each test several times.

{¶8} Appellant testified that Trooper Thaxton, when putting him in the cruiser, caused him to hit his head and slammed the door on his knee. This upset appellant and he lost his composure. Appellant testified that this is why he became irate with Trooper Thaxton. Appellant also testified that he had a medical problem and needed to urinate, but Trooper Thaxton refused and he wet his pants. Appellant claims he was cold, wet and upset and tried his best to blow in the machine. Appellant attempted the test three (3) times.

{¶9} Appellant's wife arrived to pick him up at the police station at about 3:00 to 3:30 a.m. She denied she saw any signs of impairment from consumption of alcohol and said appellant did not smell of alcohol.

{¶10} Appellant was charged with space between moving vehicles in violation of R.C. 4511.34, marked lanes in violation of R.C. 4511.33 and driving while under the influence of alcohol or drugs ["OVI"][Refusal], in violation of R.C. 4511.19(A)(1)(a). Appellant filed a motion to suppress asserting Trooper Thaxton lacked probable cause

for the stop and his arrest. The trial court, on October 25, 2007, held a hearing and overruled the motion to suppress.

{¶11} A jury trial commenced October 25, 2007 and concluded with the jury finding appellant guilty of each charge. Appellant filed a motion for acquittal, pursuant to Rule 29, Ohio Rules of Criminal Procedure, and motion for new trial. The Court overruled both motions and entered a judgment of conviction on all three charges. The trial court sentenced appellant on the space between moving vehicles charge to a fine of $75.00 and court costs and the marked lanes violation of a fine of $15.00 and costs. On the OVI charge, the court imposed a jail sentence of 180 days; however, the court suspended 170 jail days and placed appellant on probation for two years. The court further imposed a fine of $500.00 plus costs, and suspended appellant's driver license for a period of two years. The trial court stayed imposition of sentence during the pendency of appeal.

{¶12} Appellant timely appealed raising the following six assignments of error:

{¶13} "I. THE TRIAL COURT ERRED WHEN IT FAILED TO SUPPRESS ALL EVIDENCE SECURED AFTER STOPPING DEFENDANT APPELLANT WITHOUT PROBABLE CAUSE.

{¶14} "II. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE AUDIO PORTION OF A VIDEO BECAUSE THE TROOPER KNEW THE AUDIO WAS DEFECTIVE AND ONLY RECORDED DEFENDANT-APPELLANT'S STATEMENTS IN THE CRUISER.

{¶15} "III. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT PERMITTED TROOPER THAXTON TO TESTIFY AS AN EXPERT AS TO TIME TO STOP WITHIN THE ASSURED CLEAR DISTANCE.

{¶16} "IV. THE TRIAL COURT ERRED IN ALLOWING THE JURY TO HEAR, AND FAILING TO STRIKE, THE STATEMENT OF DEFENDANT APPELLANT IN THE BACK OF THE CRUISER WHEN THE AUDIO RECORDED ONLY DEFENDANT-APPELLANT'S STATEMENTS.

{¶17} "V. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN OVERRULING DEFENDANT-APPELLANT'S MOTION FOR A NEW TRIAL AND FOR JUDGMENT OF ACQUITTAL, BASED ON ERRORS OF LAW, SUFFICIENCY OF AND WEIGHT OF THE EVIDENCE.

{¶18} "VI. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN THE COURT SENTENCED DEFENDANT-APPELLANT AS IF HE WERE A REPEAT OFFENDER BASED ON NO PRIOR OVI CONVICTIONS OR EVIDENCE TO SUPPORT HIS REASON FOR IMPOSING A TEN DAY SENTENCE."

I.

{¶19} In his first assignment of error appellant maintains that Trooper Thaxton lacked reasonable suspicion to stop appellant's vehicle and to request that he perform the standardized field sobriety tests. We disagree.

{¶20} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside,* 100 Ohio St.3d 152, 154-155, 797 N.E.2d 71, 74, 2003-Ohio-5372 at ¶ 8. When ruling on a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and to evaluate the

credibility of witnesses. See *State v. Dunlap* (1995), 73 Ohio St.3d 308, 314, 652 N.E.2d 988; *State v. Fanning* (1982), 1 Ohio St.3d 19, 20, 437 N.E.2d 583. Accordingly, a reviewing court must defer to the trial court's factual findings if competent, credible evidence exists to support those findings. See *Burnside,* supra; *Dunlap,* supra. However, once an appellate court has accepted those facts as true, it must independently determine as a matter of law whether the trial court met the applicable legal standard. See *Burnside,* supra. [Citing *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539]; See, also, *United States v. Arvizu* (2002), 534 U.S. 266, 122 S.Ct. 744; *Ornelas v. United States* (1996), 517 U.S. 690, 116 S.Ct. 1657. That is, the application of the law to the trial court's findings of fact is subject to a *de novo* standard of review. *Ornelas*, supra. Moreover, due weight should be given "to inferences drawn from those facts by resident judges and local law enforcement officers." *Ornelas*, supra at 698, 116 S.Ct. at 1663.

{¶21} If an officer's decision to stop a motorist for a criminal violation, including a traffic violation, is prompted by a reasonable and articulable suspicion considering all the circumstances, then the stop is constitutionally valid. *State v. Mays*, 119 Ohio St.3d 406, 894 N.E.2d 1204, 2008-Ohio-4538 at ¶ 8.

{¶22} In the case at bar, Trooper Thaxton's observations gave him the requisite reasonable suspicion needed to stop appellant's vehicle. First, the Trooper discussed his training and experience regarding making observations of space between moving vehicles violations. The Trooper stated "I was trained in traffic law as well as I am a technical crash investigator...the rule of thumb (referring to the observation of Following Too Closely) is every 10 miles the vehicle needs to be a vehicle length. So for example

if you have a vehicle that is travelling 50 miles [per hour] it needs to be five car lengths behind the vehicle that is travelling behind. In this case, appellant was only about a vehicle length behind the tractor-trailer truck and was traveling at approximately sixty (60) miles per hour. In addition, the trooper observed three (3) marked lanes violations.

{¶23} In *Mays*, supra the defendant argued that his actions in the case – twice driving across the white edge line – were not enough to constitute a violation of the driving within marked lanes statute, R.C. 4511.33. Id. at ¶ 15. The appellant further argued that the stop was unjustified because there was no reason to suspect that he had failed to first ascertain that leaving the lane could be done safely or that he had not stayed within his lane "as nearly as [was] practicable," within the meaning of R.C. 4511.33(A)(1). The Supreme Court found, "Appellant's argument is not persuasive. R.C. 4511.33 requires a driver to drive a vehicle entirely within a single lane of traffic. When an officer observes a vehicle drifting back-and-forth across an edge line, the officer has a reasonable and articulable suspicion that the driver has violated R.C. 4511.33." Id. at ¶ 16. Further, the Supreme Court noted, "the question of whether appellant might have a possible defense to a charge of violating R.C. 4511.33 is irrelevant in our analysis of whether an officer has a reasonable and articulable suspicion to initiate a traffic stop. An officer is not required to determine whether someone who has been observed committing a crime might have a legal defense to the charge." Id. at ¶ 17. The Supreme Court concluded that a law-enforcement officer who witnesses a motorist drift over lane markings in violation of a statute that requires a driver to drive a vehicle entirely within a single lane of traffic has reasonable and articulable suspicion sufficient to warrant a traffic stop, even without further evidence of erratic or unsafe driving.

{¶24} Further, a number of Ohio cases have used the car-length rule as an indicator of a space between moving vehicles violation. *See, e.g.*, *United States v. Roberts* (SD OH 2005), 492 F.Supp.2d 771, 774; *State v. Meza,* Lucas App. No. L-03-1223, 2005-Ohio-1221; *State v. Gonzalez* (1987), 43 Ohio App.3d 59, 62, 539 N.E.2d 641. Trooper Thaxton's testimony resulted from the personal observations, his training and his experience.

{¶25} The judge is in the best position to determine the credibility of witnesses, and his conclusion in this case is supported by competent facts. See *State v. Burnside* (2003), 100 Ohio St. 3d 152, 154-55, 797 N.E.2d 71, 74. The fundamental rule that weight of evidence and credibility of witnesses are primarily for the trier of fact applies to suppression hearings as well as trials. *State v. Fanning* (1982), 1 Ohio St.3d 19, 20, 437 N.E.2d 583, 584. The deputy's testimony represents competent, credible evidence that appellant was not traveling within the lanes marked for travel. Therefore, the factual finding of the trial court that appellant was not traveling within the lanes marked for travel is not clearly erroneous.

{¶26} Reviewing courts should accord deference to the trial court's decision concerning the credibility of the witnesses because the trial court has had the opportunity to observe the witnesses' demeanor, gestures, and voice inflections that cannot be conveyed to us through the written record, *Miller v. Miller* (1988), 37 Ohio St. 3d 71. In *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St. 3d 77, 81, 461 N.E.2d 1273, the Ohio Supreme Court explained: "[a] reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a

legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not." See, also *State v. DeHass* (1967), 10 Ohio St.2d 230, syllabus 1.

{¶27} We accept the trial court's conclusion that appellant's violation of the traffic laws gave Trooper Thaxton reasonable suspicion to stop appellant's vehicle because the factual findings made by the trial court are supported by competent and credible evidence. Thus, the trial court did not err when it denied appellant's motion to suppress on the basis that the initial stop of his vehicle was valid. *State v. Busse*, Licking App. No. 06 CA 65, 2006-Ohio-7047 at ¶ 20.

{¶28} The trooper further had a reasonable suspicion sufficient to request appellant perform the standardized field sobriety tests.

{¶29} The criminal offense involved in the case at bar is driving under the influence of alcohol. Requiring a driver to submit to a field sobriety test constitutes a seizure within the meaning of the Fourth Amendment. Courts have generally held that the intrusion on the driver's liberty resulting from a field sobriety test is minor, and the officer therefore need only have reasonable suspicion that the driver is under the influence of alcohol in order to conduct a field sobriety test. *State v. Knox*, Greene App. No. 2005-CA-74, 2006-Ohio-3039 at ¶ 11; See, also, United *States v. Hernandez-*Gomez (DC Nev. 2008), 2008WL1837255. [Citing *Vondrak v. City of Las Cruces,* 2007 WL 3319449 (D.N.M. 2007); *Rogala v. Dist. of Columbia,* 161 F.3d 44, 52 (D.C.Cir .1998); *United States v. Kranz,* 177 F.Supp.2d 760 (S.D.Ohio 2001) and *United States v. Caine,* 517 F.Supp.2d 586, 589-590 (D.Mass. 2007)].

{¶30} “What is sought to be justified here is not an arrest, but a *Terry* stop for investigation. Logically, there must be some set of circumstances short of probable

cause but sufficient for reasonable suspicion which will warrant the officer in proceeding further in his or her investigation; the evidence needed for a *Terry* stop is by definition less than probable cause for arrest. *United States v. Sokolow,* 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989).

{¶31} "It is the very nature of circumstantial evidence that one piece of it is seldom sufficient for conviction, which requires proof beyond a reasonable doubt. It is the combination of pieces of evidence, each of which is individually consistent with an innocent explanation, which may lead collectively to the eventual conclusion of guilt." *United States v. Frantz* (SD OH 2001), 177 F. Supp.2d 760, 762-763. The Court in *Frantz* further observed,

{¶32} "Obviously, glassy, bloodshot eyes at 2:20 a.m. [*State v.* (*Dixon*) (Dec. 1, 2000), Greene App. No. 2000-CA-30] are explicable by many innocent causes: the driver may have been awake for many hours or have an eye irritation or illness, etc. But glassy, bloodshot eyes are also an effect of alcohol on the body.

{¶33} "Obviously, the odor of alcohol coming from a vehicle is consistent with many innocent causes, e.g., a passenger spilling beer before being dropped off by the 'designated driver.' But the odor is also consistent with alcohol consumption by the driver. Obviously, the consumption of one or two beers is consistent with innocence: particularly persons who drink regularly and have some alcohol tolerance may drive after consuming one or two beers with no appreciable impact on their ability to do so*. The question is not whether all three of these together is sufficient to convict or even to arrest, but whether they merit the additional investigation, and consequent*

limitation on the driver's liberty, required for the field sobriety tests." 177 F.Supp.2d at 763. (Footnotes omitted). (Emphasis added).

{¶34} In Ohio, it is well settled that, "[w]here a non-investigatory stop is initiated and the odor of alcohol is combined with glassy or bloodshot eyes and further indicia of intoxication, such as an admission of having consumed alcohol, reasonable suspicion exists." *State v. Wells,* Montgomery App. No. 20798, 2005-Ohio-5008; *State v. Cooper,* Clark App. No.2001-CA-86, 2002-Ohio-2778; *State v. Robinson,* Greene App. No. 2001-CA-118, 2002-Ohio-2933; *State v. Mapes,* Lake App. No. F-04-031, 2005-Ohio-3359 (odor of alcohol, 'slurred speech' and glassy and bloodshot eyes); *Village of Kirtland Hills v. Strogin,* supra; *State v. Beeley,* Lucas App. No. L-05-1386, 2006-Ohio-4799, paragraph 16, *New London v. Gregg,* Huron App. No. H-06-030, 2007-Ohio-4611.

{¶35} We have already found that Trooper Thaxton had a sufficient basis for which to stop appellant's vehicle, based upon the traffic violations. We find that the totality of the circumstances beyond appellant's traffic violation, however, gave Trooper Thaxton sufficient indicia of intoxication to establish a reasonable suspicion to request appellant to submit to field sobriety testing.

{¶36} Trooper Thaxton testified that when he approached the truck, appellant was fumbling for his papers, had a flushed face, slurred speech, glassy, bloodshot eyes and a strong odor of an alcoholic beverage. Upon questioning, appellant denied consuming any alcoholic beverages.

{¶37} Based on the totality of the circumstances, we find that Trooper Thaxton had sufficient indicia of intoxication to establish a reasonable suspicion to request appellant to submit to field sobriety testing.

{¶38} Accordingly, appellant's first assignment of error is overruled.

II.

{¶39} In his second assignment of error, appellant argues the trial court erred when it failed to suppress the audio portion of the appellant's traffic stop as recorded by the trooper's in-cruiser video camera and microphone because the equipment failed to record the audio portion of the trooper's encounter with appellant that took place outside the cruiser. We disagree.

{¶40} Appellant's argument is premised on the fact that the trooper's field microphone was not working and did not record the audio portion of the field sobriety tests. Appellant equates this as a failure to preserve exculpatory evidence. Appellant further argues that Trooper Thaxton acted in bad faith because he had prior knowledge of the malfunctioning equipment.

{¶41} In *Arizona v. Youngblood* (1988), 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281, the United States Supreme Court addressed the issue of whether a criminal defendant is denied due process of law by the State's failure to preserve evidence. See, *State v. Cummings,* Stark App. No. 2005-CA-00295, 2006-Ohio-2431 at ¶ 27. The United States Supreme Court stated the following:

{¶42} "The Due Process Clause of the Fourteenth Amendment, as interpreted in [*Maryland v. Brady* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215], makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of

which might have exonerated the defendant....We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* at 57-58.

{¶43} Thus, the *Youngblood* Court established two tests: one that applies when the evidence is "materially exculpatory" and one when the evidence is "potentially useful." If the State fails to preserve evidence that is materially exculpatory, the defendant's rights have been violated. If, on the other hand, the State fails to preserve evidence that is potentially useful, the defendant's rights have been violated only upon a showing of bad faith. *Cummings*, supra at¶ 29.

{¶44} In *State v. Delarosa,* 11th Dist. No.2003-P-0129, 2005-Ohio-3399, the court noted: "..., a review of NHTSA standards shows no requirement to videotape the field sobriety tests.

{¶45} "Furthermore, a police officer's failure to videotape field sobriety tests is more akin to failing to create evidence rather than destroying evidence. See, e.g., *State v. McDade,* 12th Dist. Nos. CA2003-09-096 and CA2003-09-097, 2004-Ohio-3627, at ¶ 17. However, 'there is no constitutional, statutory or common law duty to use a specific investigative tool in satisfying *Homan's* strict compliance mandate.' *Athens v. Gilliand,* 4th Dist. No. 02CA4, 2002-Ohio-4347, at ¶ 5. As a result, it is well established that 'a

police officer's failure to make a video and audio tape of a defendant's DUI traffic stop and field sobriety tests did not violate the defendant's due process rights warranting suppression of the evidence or dismissal of the charge.' *McDade* at ¶ 17. See, also, *Gilliand* at ¶ 5; *State v. Shepherd,* 2nd Dist. No.2002-CA-55, 2002-Ohio-6383, at ¶ 26; *State v. Wooten,* 4th Dist. No. 01 CA31, 2002-Ohio-1466". Id. at 2005-Ohio-3399 at ¶ 48-49.

{¶46} In the case at bar, the State (1) did not destroy evidence; (2) did not fail to preserve evidence that had been collected; and (3) did not fail to respond to a discovery request. In the case at bar, appellant was free to argue that the missing portions of the audiotape might have supported his version of the events. In addition, the actual events were recorded on videotape.

{¶47} The appellant has failed to demonstrate that there is a reasonable probability that, had the evidence been preserved the result of the proceeding would have been different. Accordingly, we find that the evidence was not materially exculpatory but, rather, was potentially useful.

{¶48} Because we find that the missing audio portion of the tape was potentially useful evidence, we must now consider whether appellant has met his burden to show that the state acted in bad faith. *State v. Brown*, Licking App. No. 2006-CA-53, 2007-Ohio-2005 at ¶ 27. Upon due consideration, we find that appellant has not shown that the state acted in bad faith.

{¶49} The United States Supreme Court, *Youngblood,* supra, at 56, 109 S.Ct. at 336, fn. 2b discussed the following standard in determining bad faith: "[T]he presence or

absence of bad faith * * * must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed."

{¶50} Applying this standard to the facts of the case *sub judice,* we find an absence of bad faith on the part of the police. During appellant's trial, Trooper Thaxton testified,

{¶51} "…The car that I was driving that night I am not assigned the car. So whatever car is available is the car that I have to take. I drive a number of cars. That night the car...the mic wasn't working. You know that's the technician's problem that's not an issue with me.

{¶52} "Q. Have you driven the car before and had a problem with this mic?

{¶53} "A. Not with that mic.

{¶54} "Q. You have had it before with other mics?

{¶55} "A. Right.

{¶56} "Q. Did you check the mic before you went out that night?

{¶57} "A. Yes sir I did.

{¶58} "Q. And it was working before you went out?

{¶59} "A. Yes sir.

{¶60} "Q. And you are sure of that?

{¶61} "A. Yes sir.

{¶62} (Trial T. at 52-53). The unrebutted evidence shows that Trooper Thaxton did not intentionally fail to record certain portions of the audio during appellant's traffic stop. Appellant does not claim that the video tape showed Trooper Thaxton turning the field microphone off; nor does the appellant present even a scintilla of credible evidence

that the Trooper cause the microphone to malfunction so as to not record the appellant's encounter with him. Therefore, we find that appellant has not made a sufficient showing of bad faith to find that appellant's due process rights were violated.

{¶63} The trial court was correct to overrule appellant's motion to suppress the audio portion of the videotape.

{¶64} Appellant's second assignment of error is overruled.

III.

{¶65} In his third assignment of error, appellant contends that it was error for the trial court to allow Trooper Thaxton to give an expert opinion concerning whether appellant would have been able to stop within the assured clear distance. We disagree.

{¶66} Section 4511.34 of the Ohio Revised Code provides that it is unlawful for the operator of a motor vehicle to follow another vehicle "more closely than is reasonable and prudent, having due regard for the speed of such vehicle ... and the traffic upon and the condition of the highway."

{¶67} Appellant has failed to specifically cite any portion of the record or the transcript where the trial court told the jury that Trooper Thaxton was qualified as an "expert" witness, or where the state moved to have Trooper Thaxton determined by the trial court to be an "expert" witness. "The omission of page references to the relevant portions of the record that support the brief's factual assertions is most troubling. Appellate attorneys should not expect the court 'to peruse the record without the help of pinpoint citations' to the record. *Day v. N. Indiana Pub. Serv. Corp.* (C.A.7, 1999), 164 F.3d 382, 384 (imposing a public reprimand and a $500 fine on an attorney for repeated

noncompliance with court rules). In the absence of the page references that S.Ct.Prac.R. VI(2)(B)(3) requires, the court is forced to spend much more time hunting through the record to confirm even the most minor factual details to decide the case and prepare an opinion. That burden ought to fall on the parties rather than the court, for the parties are presumably familiar with the record and should be able to readily identify in their briefs where each relevant fact can be verified." *State ex rel. Physicians Commt. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees,* 108 Ohio St.3d 288, 2006-Ohio-903, at ¶ 13; *See also, State v. Davis*, Licking App. No. 2007-CA-00104, 2008-Ohio-2418 at ¶ 91.

{¶68} Our review of the trial transcript indicates that the state made no attempt during the trial to establish Trooper Thaxton's testimony as that of an expert, and the trial court made no acknowledgment of Trooper Thaxton as an expert witness. The state merely asked Trooper Thaxton to give his personal opinion regarding the speed and proximity of the appellant's pick-up truck to the tractor-trailer truck that was in front of him. Thus, we find Trooper Thaxton's testimony was a lay opinion.

{¶69} A trial court has broad discretion to determine the admissibility of lay witness opinion testimony. *State v. Auerbach* (1923), 108 Ohio St. 96, 98, 140 N.E. 507; *State v. Cooper* (Oct. 2, 1985), Logan App. No. No. 8-84-31. Accordingly, a reviewing court will not disturb a trial court's determination on the admissibility of lay witness opinion testimony absent an abuse of discretion. *Auerbach,* 108 Ohio St. at 99. An abuse of discretion connotes more than an error in law or judgment; it suggests that a decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219; *State v. Adams,* 62 Ohio St.2d 151, 157-58.

{¶70} Evid. R. 701 provides two limitations on the admissibility of a non-expert opinion:

{¶71} "If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue."

{¶72} In *State v. Morris* (1982), 8 Ohio App. 3d 12, 18, it is stated, "Where the testimony is based on recited personal observations, a non-expert can express opinions about another's sanity, *Weis v. Weis* (1947), 147 Ohio St. 416 [34 O.O. 350]; about another's physical condition *Bronaugh v. Harding Hospital, Inc*., (1967), 12 Ohio App. 2d 110 [41 O.O. 2d 185]; about height, temperature, time, light, weight, dimension, distance, *State v. Auerbach* (1923), 108 Ohio St. 96, 98; about another's emotional state, *Railroad Co. v. Schultz*, supra; about the speed of a moving object, *State v. Auerbach*, supra; or about another's sobriety, *Railroad Co. v. Schultz*, supra."

{¶73} In the case at bar, Trooper Thaxton testified as to the appellant's speed, his distance from the vehicle which he was following and whether appellant would be able to stop within the assured clear distance ahead.

{¶74} A number of Ohio cases have used the car-length rule as an indicator of a R.C. 4511.34 violation. *See, e.g.*, *United States v. Roberts* (SD OH 2005), 492 F.Supp.2d 771, 774; *State v. Meza,* Lucas App. No. L-03-1223, 2005-Ohio-1221; *State v. Gonzalez* (1987), 43 Ohio App.3d 59, 62, 539 N.E.2d 641. Trooper Thaxton's testimony resulted from the personal observations, his training and his experience; expert qualifications were not required.

{¶75} The trial court did not abuse its discretion in allowing Trooper Thaxton's lay opinion testimony.

{¶76} Appellant's third assignment of error is overruled.

IV.

{¶77} In his fourth assignment of error, appellant argues that it was prejudicial error to allow the jury to hear the defective audio portion of the videotape of appellant's interactions with Trooper Thaxton. We disagree.

{¶78} The admissibility of evidence lies within the sound discretion of the trial court. *State v. Robb* (2000), 88 Ohio St .3d 59, 68, 2000-Ohio-275, 723 N.E.2d 1019; see also *State v. Smith,* 97 Ohio St.3d 367, 2002-Ohio-6659, 780 N.E.2d 221. Absent a showing, that a trial court has abused its discretion an appellate court will not disturb the trial court's ruling as to the admissibility of evidence. *Millstone Dev., Ltd. v. Berry,* Franklin App. No. 01AP-907, 2002-Ohio-2241. An abuse of discretion implies that the court acted unreasonably, arbitrarily or unconscionably. *Rigby v. Lake Cty. (1991),* 58 Ohio St.3d 269, 271, 569 N.E.2d 1056.

{¶79} In *State v. Coleman* (1999), 85 Ohio St.3d 129, 141, 707 N.E.2d 476, 488, 1999-Ohio-258, the Supreme Court observed, "To be admissible, a tape recording must be "'authentic, accurate and trustworthy.'" *State v. Rogan* (1994), 94 Ohio App.3d 140, 148, 640 N.E.2d 535, 540. Whether to admit "tape recordings containing inaudible portions is a matter within the sound discretion of the trial court." *State v. Gotsis* (1984), 13 Ohio App.3d 282, 283, 13 OBR 346, 347- 348, 469 N.E.2d 548, 551, citing *United States v. Williams* (C.A.8, 1977), 548 F.2d 228." See, also, *State v. Robb* (2000), 88 Ohio St.3d 59, 172, 723 N.E.2d 1019, 1038, 2000-Ohio-275.

{¶80} In *Coleman,* the Supreme Court held that "recorded tapes of actual events, such as street drug sales, should be admissible despite audibility problems, background noises, or the lack of crystal clear conversations, since they directly portray what happened." *Coleman,* 85 Ohio St.3d at 141, 707 N.E.2d 476, citing *State v. Rodriquez* (1990), 66 Ohio App.3d 5, 15-16, 583 N.E.2d 384. Admissibility of tape recordings is particularly strong “where a witness who heard the statements also testifies and the recording gives independent support to this testimony.” *U.S. v. Brinklow* (10th cir 1977), 560 F.2d 1008, 1011.

{¶81} In the case at bar, appellant had ample opportunity to cross-examine Trooper Thaxton, "thereby clarifying any problems caused by poor quality, * * * as well as the opportunity to offer his version of the inaudible portions [.]" *Coleman,* supra 85 Ohio St.3d at 141, 707 N.E.2d at 488. (Quoting *Rogan,* 94 Ohio App.3d at 149, 640 N.E.2d at 541). Further, appellant took the witness stand at trial to offer his version of the inaudible portions to clear up any ambiguities that the recording may have raised. *Coleman,* supra; *Rogan,* 94 Ohio App.3d at 149, 640 N.E.2d 535. Further, the video portion of the tape displays what actually transpired.

{¶82} Based on the foregoing, we conclude that the trial court did not abuse its discretion in admitting the audio portion of the tape and allowing the tape to be played for the jury.

{¶83} Appellant's fourth assignment of error is overruled.

V.

{¶84} In his fifth assignment of error, appellant alleges that the trial court erred in not granting his Crim. R. 29 motion for acquittal at the conclusion of the State’s case. In

determining whether a trial court erred in overruling an appellant's motion for judgment of acquittal, the reviewing court focuses on the sufficiency of the evidence. See, *e.g., State v. Carter* (1995), 72 Ohio St.3d 545, 553, 651 N.E.2d 965, 974; *State v. Jenks* (1991), 61 Ohio St.3d 259 at 273, 574 N.E.2d 492 at 503. He further argues that his conviction is against the sufficiency of the evidence and against the manifest weight of the evidence, respectively. Appellant further argues that he was entitled to a new trial due to "irregularities in the proceedings, errors of law and because the verdict is against the manifest weight of the evidence." We disagree.

{¶85} In support of his fifth assignment of error, appellant simply reiterates that the trial court erred in not sustaining his motion to suppress [Appellant's Brief at 24]; that the trial court erred in allowing the trooper to give expert testimony. [Appellant's Brief at 25] and that it was error to allow the jury to hear the audio portions of the videotape. [Appellant's Brief at 24; 25-26]. We have previously found no merit to these arguments. Because we have found no instances of error in this case based upon those arguments, we reject appellant's arguments that the trial court erred by not granting him an acquittal or a new trial. That leaves for our consideration appellant's arguments that his convictions are not supported by sufficient evidence and/or are against the manifest weight of the evidence.

{¶86} When reviewing the sufficiency of the evidence, our inquiry focuses primarily upon the adequacy of the evidence; that is, whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt. See *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541, 546 (stating, "sufficiency is the test of adequacy"); *State v. Jenks* (1991), 61 Ohio St.3d 259 at 273, 574 N.E.2d 492

at 503. The standard of review is whether, after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781; *Jenks,* 61 Ohio St.3d at 273, 574 N.E.2d at 503.

{¶87} Weight of the evidence addresses the evidence's effect of inducing belief. *State v. Wilson,* 713 Ohio St.3d 382, 387-88, 2007-Ohio-2202 at ¶ 25-26; 865 N.E.2d 1264, 1269-1270. “In other words, a reviewing court asks whose evidence is more persuasive--the state's or the defendant's? Even though there may be sufficient evidence to support a conviction, a reviewing court can still re-weigh the evidence and reverse a lower court's holdings.” *State v. Wilson,* supra. However, an appellate court may not merely substitute its view for that of the jury, but must find that "the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins*, supra, 78 Ohio St.3d at 387. (Quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720-721). Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *State v. Thompkins,* supra.

{¶88} Employing the above standard, we believe that the state presented sufficient evidence from which a jury could conclude, beyond a reasonable doubt, that appellant committed the offenses with which he was charged.

{¶89} R.C. 4511.34, space between moving vehicles, provides that it is unlawful for the operator of a motor vehicle to follow another vehicle “more closely than is

reasonable and prudent, having due regard for the speed of such vehicle ... and the traffic upon and the condition of the highway." In the case at bar, Trooper Thaxton testified as to the appellant's speed, his distance from the vehicle which he was following and whether appellant would be able to stop within the assured clear distance ahead. From these facts, the jury could find that all the elements of this space between moving vehicles had been proven beyond a reasonable doubt. See *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶90} Appellant was also convicted of marked lanes in violation of R.C. 4511.33. In *State v. Mays*, 119 Ohio St.3d 406, 894 N.E.2d 1204, 2008-Ohio-4538, the Ohio Supreme Court found that R.C. 4511.33 requires a driver to drive a vehicle entirely within a single lane of traffic. When an officer observes a vehicle drifting back-and-forth across an edge line, the officer has a reasonable and articulable suspicion that the driver has violated R.C. 4511.33. In the case at bar, Trooper Thaxton testified that he observed the appellant's pick-up truck cross the edge line on three occasions. Further, the video tape from the trooper's dash camera was submitted which purported to show one of the occasions when the vehicle traveled across the edge lines. From these facts, the jury could find that all the elements of the marked lanes violation had been proven beyond a reasonable doubt.

{¶91} To find appellant guilty of Driving Under the Influence as charged in the case at bar, the jury would have to find appellant operated any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply:(a) The person is under the influence of alcohol, a drug of abuse, or a combination of them.

{¶92} The phrase "under the influence of intoxicating liquor" has been defined as "[t]he condition in which a person finds himself after having consumed some intoxicating beverage in such quantity that its effect on him adversely affects his actions, reactions, conduct, movement or mental processes or impairs his reactions to an appreciable degree, thereby lessening his ability to operate a motor vehicle." *Toledo v. Starks* (1971), 25 Ohio App .2d 162, 166. See, also, *State v. Steele* (1952), 95 Ohio App. 107, 111 ("[B]eing 'under the influence of alcohol or intoxicating liquor' means that the accused must have consumed some intoxicating beverage, whether mild or potent, and in such quantity, whether small or great, that the effect thereof on him was to adversely affect his actions, reactions, conduct, movements or mental processes, or to impair his reactions, under the circumstances then existing so as to deprive him of that clearness of the intellect and control of himself which he would otherwise possess"). See, *State v. Henderson,* 5th Dist. No. 2004-CA-00215, 2005-Ohio-1644 at ¶ 32. [Citing *State v. Barrett* (Feb. 26, 2001), Licking App. No. 00CA 47].

{¶93} The evidence produced at trial supports the inference that appellant's consumption of alcohol on the night in question adversely affected his actions, reactions, conduct, movement or mental processes or impaired his reactions to an appreciable degree, thereby lessening his ability to operate his car on the night in question. Trooper Thaxton testified that when he approached the truck, appellant was fumbling for his papers, had a flushed face, slurred speech, glassy, bloodshot eyes and a strong odor of an alcoholic beverage. In addition, the jury was able to view the videotape of the traffic stop.

{¶94} Viewing the evidence in the case at bar in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that appellant had committed the offense of driving under the influence.

{¶95} Based on the foregoing, we hold, therefore, that the state met its burden of production regarding each element of the crimes with which appellant was charged and, accordingly, there was sufficient evidence to support appellant's convictions.

{¶96} "A fundamental premise of our criminal trial system is that 'the *jury* is the lie detector.' *United States v. Barnard,* 490 F.2d 907, 912 (C.A.9 1973) (emphasis added), cert. denied, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974). Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.' *Aetna Life Ins. Co. v. Ward,* 140 U.S. 76, 88, 11 S.Ct. 720, 724-725, 35 L.Ed. 371 (1891)". *United States v. Scheffer* (1997), 523 U.S. 303, 313, 118 S.Ct. 1261, 1266-1267.

{¶97} Although appellant testified, cross-examined the witnesses, and argued that he had not had any alcohol to drink on the night in question, the weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, certiorari denied (1990), 498 U.S. 881.

{¶98} The jury was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. "While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the

evidence". *State v. Craig* (Mar. 23, 2000), Franklin App. No. 99AP-739, citing *State v. Nivens* (May 28, 1996), Franklin App. No. 95APA09-1236 Indeed, the jurors need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver,* Franklin App. No. 02AP-604, 2003- Ohio-958, at ¶ 21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548.; *State v. Burke,* Franklin App. No. 02AP-1238, 2003-Ohio-2889, citing *State v. Caldwell* (1992), 79 Ohio App.3d 667, 607 N.E.2d 1096. Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks* (1991), 61 Ohio St. 3d 259, 574 N.E. 2d 492.

{¶99} After reviewing the evidence, we cannot say that this is one of the exceptional cases where the evidence weighs heavily against the convictions. The jury did not create a manifest injustice by concluding that appellant was guilty of the driving under the influence, space between vehicles and marked lanes violations.

{¶100} We conclude the trier of fact, in resolving the conflicts in the evidence, did not create a manifest injustice to require a new trial. The jury heard the witnesses, evaluated the evidence, and was convinced of appellant's guilt.

{¶101} Appellant’s fifth assignment of error is overruled.

VI.

{¶102} In his sixth assignment of error, appellant argues that the trial court’s imposition of more than the minimum sentence for the OVI offense was an abuse of discretion because the trial court relied upon previously dismissed, uncharged or reduced alcohol related offenses. We disagree.

{¶103} At the outset, we note there is no constitutional right to an appellate review of a criminal sentence. *Moffitt v. Ross* (1974), 417 U.S. 600, 610-11, 94 S.Ct. 2437, 2444; *McKane v. Durston* (1894), 152 U.S. 684, 687, 14 S. Ct. 913. 917; *State v. Smith* (1997), 80 Ohio St.3d 89, 1997-Ohio-355, 684 N.E.2d 668; *State v. Firouzmandi*, 5th Dist No. 2006-CA-41, 2006-Ohio-5823. An individual has no substantive right to a particular sentence within the range authorized by statute. *Gardner v. Florida* (1977), 430 U.S. 349, 358, 97 S.Ct. 1197, 1204-1205; *State v. Goggans*, Delaware App. No. 2006-CA-07-0051, 2007-Ohio-1433 at ¶ 28. In other words "[t]he sentence being within the limits set by the statute, its severity would not be grounds for relief here even on direct review of the conviction…It is not the duration or severity of this sentence that renders it constitutionally invalid…." *Townsend v. Burke* (1948), 334 U.S. 736, 741, 68 S.Ct. 1252, 1255.

{¶104} R.C. 2929.22 governs sentencing on misdemeanors and states the following as amended on January 1, 2004:

{¶105} "(B) (1) In determining the appropriate sentence for a misdemeanor, the court shall consider all of the following factors:

{¶106} "(a) The nature and circumstances of the offense or offenses;

{¶107} "(b) Whether the circumstances regarding the offender and the offense or offenses indicate that the offender has a history of persistent criminal activity and that the offender's character and condition reveal a substantial risk that the offender will commit another offense;

{¶108} "(c) Whether the circumstances regarding the offender and the offense or offenses indicate that the offender's history, character, and condition reveal a

substantial risk that the offender will be a danger to others and that the offender's conduct has been characterized by a pattern of repetitive, compulsive, or aggressive behavior with heedless indifference to the consequences;

{¶109} "(d) Whether the victim's youth, age, disability, or other factor made the victim particularly vulnerable to the offense or made the impact of the offense more serious;

{¶110} "(e) Whether the offender is likely to commit future crimes in general, in addition to the circumstances described in divisions (B) (1) (b) and (c) of this section.

{¶111} "(2) In determining the appropriate sentence for a misdemeanor, in addition to complying with division (B)(1) of this section, the court may consider any other factors that are relevant to achieving the purposes and principles of sentencing set forth in section 2929.21 of the Revised Code.

{¶112} "(C) Before imposing a jail term as a sentence for a misdemeanor, a court shall consider the appropriateness of imposing a community control sanction or a combination of community control sanctions under sections 2929.25, 2929. 26, 2929.27, and 2929.28 of the Revised Code. A court may impose the longest jail term authorized under section 2929.24 of the Revised Code only upon offenders who commit the worst forms of the offense or upon offenders whose conduct and response to prior sanctions for prior offenses demonstrate that the imposition of the longest jail term is necessary to deter the offender from committing a future crime."

{¶113} R.C. 2929.21 as referenced in R.C. 2929.22(B) (2) states the following in pertinent part:

{¶114} "(A) A court that sentences an offender for a misdemeanor or minor misdemeanor violation of any provision of the Revised Code, or of any municipal ordinance that is substantially similar to a misdemeanor or minor misdemeanor violation of a provision of the Revised Code, shall be guided by the overriding purposes of misdemeanor sentencing. The overriding purposes of misdemeanor sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the impact of the offense upon the victim and the need for changing the offender's behavior, rehabilitating the offender, and making restitution to the victim of the offense, the public, or the victim and the public."

{¶115} Appellant argues the trial court abused his discretion by imposing an unreasonably harsh sentence upon the basis that appellant committed prior alcohol related offenses for which he neither was charged nor convicted.

{¶116} In the case at bar, appellant was convicted of driving under the influence, a misdemeanor of the first degree. A misdemeanor of the first degree carries a maximum sentence of one hundred and eighty days. The trial court imposed a sentence of 180 days; however, the court suspended 170 jail days and placed appellant on probation for two years. Accordingly, appellant's overall sentence, and specifically his ten-day jail sentence, imposed in this case are within the statutory limits for a first-degree misdemeanor. There is no requirement that a trial court in sentencing on misdemeanor offenses specifically state its reasons on the record. *State v. Harpster*, Ashland App. No. 04COA061, 2005-Ohio-1046 at ¶ 20; *State v. Adams,* Licking App. No.2002CA00089, 2003-Ohio-3169, ¶ 16.

{¶117} Pursuant to R.C. 2929.22(B) (2) and R.C. 2929.21, the trial court is permitted to consider "any other factors that are relevant" "to protect the public from future crime by the offender and others and to punish the offender." In *Mt. Vernon v. Hayes*, Knox App. No. 09-CA-00007, 2009-Ohio-6819, this Court observed that courts have consistently held that evidence of other crimes, including crimes that never result in criminal charges being pursued, or criminal charges that are dismissed because of a plea bargain, may be considered at sentencing. See, *State v. Cooey* (1989), 46 Ohio St.3d 20, 35, 544 N.E.2d 895 (such uncharged crimes are part of the defendant's social history and may be considered); *State v. Tolliver,* 9th Dist. No. 03CA0017, 2003-Ohio-5050, ¶ 24 (uncharged crimes in a presentence investigation report may be a factor at sentencing); *United States v. Mennuti* (C.A.2, 1982), 679 F.2d 1032, 1037 (similar though uncharged crimes may be considered); *United States v. Needles* (C.A.2, 1973), 472 F.2d 652, 654-56 (a dropped count in an indictment may be considered in sentencing). This has long been the rule in Ohio:

{¶118} "[I]t is well-established that a sentencing court may weigh such factors as arrests for other crimes. As noted by the Second Circuit United States Court of Appeals, the function of the sentencing court is to acquire a thorough grasp of the character and history of the defendant before it. The court's consideration ought to encompass negative as well as favorable data. Few things can be so relevant as other criminal activity of the defendant [.]" *State v. Burton* (1977), 52 Ohio St.2d 21, 23, 368 N.E.2d 297; *State v. Snook* (April 26, 1999), Stark App. No. 1998CA00244 at *4; *State v. Starkey*, Mahoning App. No. 06 MA 110, 2007-Ohio-6702 at ¶ 17-18.

{¶119} It appears to this Court that the trial court's statements at the sentencing hearing were guided by the overriding purposes of misdemeanor sentencing to protect the public from future crime by the offender and others and to punish the offender. R.C. 2929.21. Based on the transcript of the sentencing hearing and the subsequent judgment entry, this Court cannot find that the trial court acted unreasonably, arbitrarily, or unconscionably, or that the trial court violated appellant's rights to due process under the Ohio and United States Constitutions in its sentencing appellant to less than the maximum sentence of incarceration.

{¶120} A trial court is vested with discretion to impose a jail term within the statutory range. See *State v. Mathis,* 109 Ohio St.3d 54, 846 N.E.2d 1, 2006- Ohio-855 at ¶ 36. Appellate courts can find an “abuse of discretion” where the record establishes that a trial judge refused or failed to consider statutory sentencing factors. *Cincinnati v. Clardy* (1978), 57 Ohio App.2d 153, 385 N.E.2d 1342; *State v. Goggans,* Delaware App. No.2006-CA-07-0051, 2007-Ohio-1433 at ¶ 32. An “abuse of discretion” has also been found where a sentence is greatly excessive under traditional concepts of justice or is manifestly disproportionate to the crime or the defendant. *Woosley v. United States* (1973), 478 F.2d 139, 147. The imposition by a trial judge of a sentence on a mechanical, predetermined or policy basis is subject to review. *Woosley*, supra at 143-145. Where the severity of the sentence shocks the judicial conscience or greatly exceeds penalties usually exacted for similar offenses or defendants, and the record fails to justify and the trial court fails to explain the imposition of the sentence, the appellate court’s can reverse the sentence. *Woosley*, supra at 147. This by no means is an exhaustive or exclusive list of the circumstances under which an appellate court may

find that the trial court abused its discretion in the imposition of sentence in a particular case. *State v. Firouzmandi,* supra at ¶56; *State v. Goggans*, supra, at ¶ 32.

{¶121} There is no evidence in the record that the judge acted unreasonably by, for example, selecting the sentence arbitrarily, basing the sentence on impermissible factors, failing to consider pertinent factors, or giving an unreasonable amount of weight to any pertinent factor. We find nothing in the record of appellant's case to suggest that his sentence was based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment.

{¶122} In light of the fact the sentence imposed in the instant action was within the statutory limits, and after review of the entire record in this matter, we conclude the trial court's attitude was not unreasonable, arbitrary, or unconscionable; therefore, we find the trial court did not abuse its discretion in sentencing appellant. *State v. Snook*, supra.

{¶123} Appellant's sixth assignment of error is overruled.

{¶124} The judgment of the Licking County Municipal Court is hereby affirmed.

By Gwin, P.J.,

Hoffman, J., and

Delaney, J., concur

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

_____

HON. PATRICIA A. DELANEY

WSG:clw 0304

[Cite as *State v. Smith*, 2010-Ohio-1232.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
ROBERT SMITH	:	
Defendant-Appellant	:	CASE NO. 09-CA-42

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Licking County Municipal Court is hereby affirmed. Costs to appellant.

_____
HON. W. SCOTT GWIN

_____
HON. WILLIAM B. HOFFMAN

_____
HON. PATRICIA A. DELANEY