

[Cite as *State v. Parker*, 2016-Ohio-5094.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

MICHAEL E. PARKER

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. Craig R. Baldwin, J.

Case No. 2016 AP 02 0010

OPINION

CHARACTER OF PROCEEDING:

Appeal from the New Philadelphia
Municipal Court, Case No.
TRC1506572A-C

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

July 21, 2016

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Hoffman, J.

{¶1} Defendant-appellant Michael E. Parker appeals the December 28, 2015 Judgment Entry entered by the New Philadelphia Municipal Court, denying his Motion to Suppress. Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On October 1, 2015, Appellant was involved in a traffic accident in New Philadelphia, Ohio. Appellant left the scene of the accident, but was arrested shortly thereafter by New Philadelphia police officer Donald Woods. Appellant was charged with operating a motor vehicle under the influence of alcohol, in violation of R.C. 4511.(A)(1)(a); leaving the scene of an accident, in violation of R.C. 4549.02(A); and failure to control, in violation of New Philadelphia Codified Ordinance 331.34.

{¶3} Appellant filed a motion to suppress on November 12, 2015, arguing all evidence should be suppressed because the police cruisers used by the police officers involved were not properly marked, which rendered the stop illegal; therefore, the officers should be prohibited from testifying.

{¶4} The trial court conducted a hearing on the Motion to Suppress on November 18, 2015. Via Judgment Entry filed December 28, 2015, the trial court overruled the motion, finding the police cruiser at issue was properly marked.

{¶5} Subsequently, Appellant entered a no contest plea to physical control of a vehicle while under the influence, in violation of R.C. 4511.194 (amended from R.C. 4511.19(A)(1)(a); leaving the scene of an accident; and failure to control. Appellant was sentenced via Judgment Entry filed January 13, 2016.

{¶6} Appellant appeals the trial court's December 28, 2015 Judgment Entry denying his motion to suppress, assigning as error:

{¶7} "I. THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO SUPPRESS. THE TESTIMONY OF SGT. DONALD WOODS SHOULD HAVE BEEN SUPPRESSED BECAUSE HE WAS DRIVING A POLICE VEHICLE THAT WAS NOT MARKED IN A DISTINCTIVE MANNER."

I

{¶8} We overrule Appellant's sole assignment of error as we find the issue has not been preserved for our appellate review.

{¶9} We begin by noting this case involves the issue of competency of a witness to testify. Appellant's argument is premised on Evid.R. 601(C) and R.C. 4549.14. Neither involves a constitutional right or issue. Appellant does not assert the violation of a Fourth Amendment Right. There was no unconstitutional search or seizure. For all intents and purposes, Appellant's motion was a motion in limine.

{¶10} In its December 28, 2015 Judgment Entry, the trial court addressed this issue, noting "When a challenge to witness competence is raised in a motion *in limine*, the court's ruling is interlocutory and precautionary only, with the final decision regarding the admissibility of the testimony reserved until trial. However, where the ultimate ruling would effectively render, 'the State's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed,' the motion is indeed for suppression, from which direct appeal may be taken under ORC 2945.67 and Ohio Criminal Rule 12(J). See, *State v. Davidson*, (1985), 17 Ohio St.3d 132." December 28, 2015 Judgment Entry at 1-2.

{¶11} While we agree had the trial court granted Appellant's motion, whether identified as a motion *in limine* or identified as a motion to suppress, the state of Ohio **may**¹ have filed an appeal under Crim.R. 12(K), by certifying, in part, its case had been effectively destroyed.

{¶12} However, the trial court did not grant Appellant's motion to suppress. By failing to do so, it remained merely a motion *in limine*, an interlocutory order which needed to be raised again at trial in order to preserve the issue for appeal.

{¶13} We find Appellant's no contest plea does not preserve the issue. Whether the City of New Philadelphia's police cruisers are properly marked in accordance with Evid.R. 601(C) and R.C. 4549.14 is not yet ripe for our review.

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

By: Hoffman, J.

Gwin, P.J. and

Baldwin, J. concur

¹ We question whether the state would have so certified in the case sub judice, particularly with respect to the leaving the scene of an accident and the failure to control charges. Such charges may well have been able to be prosecuted by civilian witnesses to the initial traffic accident. The facts are not sufficiently developed in the record whether the under the influence charge would have been rendered ineffective, although we find such to more likely be the case than the other two charges.