[Cite as *State v. Brown*, 2013-Ohio-5351.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio — Court of Appeals No. WD-12-070

Appellee — Trial Court No. 11 CR 163

v.

Terrance Brown — **DECISION AND JUDGMENT**

Appellant — Decided: December 6, 2013

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, Gwen Howe-Gebers, Chief Assistant Prosecuting Attorney, and David E. Romaker Jr., Assistant Prosecuting Attorney, for appellee.

Lawrence A. Gold, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant, Terrance Brown, was indicted in a single-count indictment alleging a violation of R.C. 2925.11(A)(C)(1)(c), possession of 30 mg. of oxycodone, a second-degree felony. The trial court accepted appellant's no-contest plea, and sentenced him to a mandatory term of three years of imprisonment. Appellant appealed the

November 28, 2012 judgment of conviction and sentencing of the Wood County Court of Common Pleas and asserts the following assignments of error:

> Assignment of Error I: The trial court erred in its Judgment entry by stating that Appellant had been informed that he was eligible for judicial release when, in fact, he was ordered to serve a mandatory sentence.
>
> Assignment of Error II: The arresting officer was without statutory authority to initiate Appellant's traffic stop in violation of Appellant's right to be free from unlawful search and seizure under the Fourth Amendment of the United States Constitution and Article 1, Section 14 of the Ohio Constitution.
>
> Assignment of Error III: The trial court erred in denying Appellant's motion to suppress in violation of Appellant's right to be free from unlawful search and seizure under the Fourth Amendment of the United States Constitution and Article I, Section 14 of the Ohio Constitution.

{¶ 2} In his first assignment of error, appellant argues the trial court erred when it stated in its judgment entry appellant had been informed that he was eligible for judicial release when, in fact, he was ordered at the sentencing hearing to serve a mandatory sentence and he was not informed that he was eligible for judicial release. The state agrees. However, the trial court issued a nunc pro tunc judgment removing the language regarding judicial release on August 12, 2013.

Therefore, we find this issue has been rendered moot. Appellant's first assignment of error is not well-taken.

{¶ 3} In his second and third assignments of error, appellant argues the arresting officer was without statutory authority to initiate appellant's traffic stop in violation of appellant's right to be free from unlawful search and seizure under the Fourth Amendment of the United States Constitution and Article 1, Section 14 of the Ohio Constitution. Therefore, he argues the evidence obtained as a result of the illegal stop should have been excluded under the exclusionary rule. We agree.

{¶ 4} The following evidence was admitted at the motion to suppress hearing. Kelly Clark, a patrol officer and K-9 handler for the Lake Township Police Department, testified that at approximately 6:00 p.m. on March 16, 2011, she was watching the southbound traffic on I-280 in Wood County while parked in a marked patrol car in the median. She pulled out into the passing lane of the southbound traffic to observe another vehicle, but could not recall the reason for following the car. When she was approximately two car lengths behind appellant's vehicle, she observed both of his right tires cross over the white line for about one hundred feet along a curve near the 795 exit ramp, but the car did not leave the paved highway. She did not, however, include the details of her observations in her report. The officer testified she continued to follow appellant because he was not in a good area to make a stop. As she pulled up alongside appellant, she observed him staring straight ahead and he did not turn to look at her. She initiated a stop just north of the intersection with the Ohio Turnpike, approximately

two and one-half miles from where she had been parked. The officer testified that in her 11 years as an officer, she attempts to stop every vehicle where both tires cross over the white line, but she has not always given the driver a citation.

{¶ 5} The officer testified she informed appellant that he was being cited for a marked lane violation for leaving his lane of travel. She did not, however, ultimately write him a citation for the violation because she arrested him for possession of drugs.

{¶ 6} Appellant and Deszira Gatewell, a passenger in appellant's vehicle, both testified the officer informed appellant that he should have yielded to a truck that merged onto the highway and never said appellant had left his lane. Appellant denied crossing the fog line and explained that he was driving very deliberately to avoid being stopped because of his outstanding warrant and because he had drugs on him that evening.

{¶ 7} The trial court held that the officer had probable cause to stop appellant because of the marked lane violation. Therefore, the court denied the motion to suppress the evidence obtained as a result of the stop.

{¶ 8} The review of a motion to suppress decision involves a mixed question of law and fact. *United States v. Combs*, 369 F.3d 925, 937 (6th Cir.2004). Because the trial court acts as the trier of fact, it alone weighs the evidence and determines the credibility of the witnesses. The reviewing court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 26, and *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶ 100. Accepting the supported factual findings,

the appellate court must independently determine as a matter of law, without deference to the trial court's conclusion, whether the facts met the appropriate legal standard. *Id.*

{¶ 9} The Fourth Amendment to the United States Constitution protects persons from *unreasonable* searches and seizures. This privilege is applicable to the states through the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

{¶ 10} The "reasonableness" of a stop and seizure "is measured in objective terms by examining the totality of the circumstances." *Ohio v. Robinette*, 519 U.S. 33, 39, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996). Any search or seizure that occurs "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." *Mincey v. Arizona*, 437 U.S. 385, 390, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978), quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

{¶ 11} Furthermore, any evidence obtained as a result of an unlawful search in violation of the Fourth Amendment must be excluded from trial. *Wong Sun v. United States*, 371 U.S. 471, 484-485, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). The exclusionary rule is not applicable to violations of state law unless there is also a constitutional infringement. *State v. Wilmoth*, 22 Ohio St.3d 251, 262-264, 490 N.E.2d 1236 (1986) and *State v. Myers*, 26 Ohio St.2d 190, 196, 271 N.E.2d 245 (1971).

{¶ 12} Appellee concedes that the officer in this case did not have statutory authority to stop appellant for a misdemeanor violation of R.C. 4511.33, driving outside the marked lanes, because the officer was outside her jurisdiction. R.C. 4513.39(A). R.C. 4513.39(A) provides state highway patrol and county sheriffs or their deputies have the exclusive authority to make arrests on interstate highways for specific offenses. *State v. Holbert*, 38 Ohio St.2d 113, 311 N.E.2d 22 (1974), paragraph two of the syllabus. There is no statutory penalty for violation of the jurisdiction statute.

{¶ 13} The fact that the township officer violated this statute in stopping appellant does not automatically require exclusion of the evidence obtained as a result of the stop. *See Atwater v. Lago Vista*, 532 U.S. 318, 354, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001); *State v. Wilmoth*, 22 Ohio St.3d 251, 262, 490 N.E.2d 1236 (1986); and *City of Kettering v. Hollen*, 64 Ohio St.2d 232, 235, 416 N.E.2d 598 (1980). The unlawful stop would also have to rise to the level of a constitutional violation before the exclusionary rule would be applicable. *Id*.

{¶ 14} Generally, seizures based upon probable cause to arrest are reasonable under the constitution. *Atwater* and *Florida v. Royer*, 460 U.S. 491, 498, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). A police officer may stop and arrest a person without a warrant if the officer has reasonable cause to believe the person is guilty of a felony or the officer observes with his own senses that a misdemeanor has been or is about to be committed in his presence. *Carroll v. United States*, 267 U.S. 132, 156-157, 45 S.Ct. 280, 69 L.Ed. 543 (1925). In *Atwater*, an officer made an arrest rather than the issuance of a citation for

an observed minor misdemeanor in violation of a state statute. The United States Supreme Court held that the existence of probable cause was sufficient to make the arrest without a warrant a reasonable intrusion upon a person's right to privacy, without the need to balance the interests of the government and the individual's right to privacy. *Atwater* at 354.

{¶ 15} In the case before us, based upon the officer's observations, the officer had probable cause to stop appellant for a traffic violation, i.e., driving outside the marked lane. Therefore, the stop did not violate the Fourth Amendment to the United States Constitution. However, the Ohio Constitution can afford greater protection than the United States Constitution. *California v. Greenwood*, 486 U.S. 35, 43, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988).

{¶ 16} The Ohio Supreme Court has also relied upon the existence of probable cause to find that a warrantless stop was reasonable even though the officer violated statutory jurisdiction provisions. *Hollen* at 235. In *Hollen*, the court found that because the officer had probable cause to arrest a driver for a misdemeanor traffic violation, stopping the driver outside the officer's jurisdiction, in violation of R.C. 2935.03(D), was not an unreasonable infringement of the individual's constitutional rights under the United States *or* Ohio Constitutions. *Id*.

{¶ 17} In *State v. Weideman*, 94 Ohio St.3d 501, 764 N.E.2d 997 (2002), the court also determined that when an "officer, acting outside the officer's statutory territorial jurisdiction, stops and detains a motorist for an offense committed and observed outside

the officer's jurisdiction, the seizure of the motorist by the officer is not unreasonable per se under the Fourth Amendment." *Id*. at the syllabus. However, the court noted that in the *Hollen* case, it had considered the totality of the circumstances to determine if the extraterritorial stop violated the defendant's constitutional rights. The additional considerations that the *Hollen* court considered were the facts that the offense was *committed within the officer's jurisdiction* and the officer was in *hot pursuit.* *Id*. at 504. Therefore, the *Weideman* court held that to determine whether the officer's extraterritorial stop, which violated Ohio law, would be unreasonable under the standards of the United States and Ohio Constitutions, despite the existence of probable cause, the court must also consider the totality of the circumstances and balance the government's interests in making the stop against the intrusion upon the individual's privacy. *Id*. at 505. The court applied the balancing test first enunciated in *State v. Jones*, 88 Ohio St.3d 430, 727 N.E.2d 886 (2000), syllabus. The court later recognized the *Jones* holding conflicted with *Atwater*, 532 U.S. 318, 121 S.Ct. 1536, 149 L.Ed.2d 549, and limited the *Jones* balancing test to infringements of the Ohio Constitution. *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175, syllabus.

{¶ 18} Since *Brown* was decided, our court has addressed several cases without distinguishing between the scope of protection provided under the United States and Ohio Constitutions. *State v. Fitzpatrick*, 152 Ohio App.3d 122, 2003-Ohio-1405, 786 N.E.2d 942, ¶ 12 (6th Dist.) (we addressed only whether an extraterritorial stop for a minor traffic violation was unreasonable under the Fourth Amendment, but applied the test for

determining whether the Ohio Constitution was violated when we held that the stop was unreasonable because the driver did not present an imminent danger to other motorists); *State v. Black,* 6th Dist. Fulton No. F-03-010, 2004-Ohio-218 (without distinguishing whether the defendant asserted a United States or Ohio Constitutional infringement, we held that the exclusionary rule was not applicable where an officer had probable cause to stop and arrest a driver outside the officer's jurisdiction when the officer observed the driver commit a misdemeanor traffic offense within his jurisdiction and immediately followed the driver); *State v. Jones*, 187 Ohio App.3d 478, 2010-Ohio-1600, 932 N.E.2d 904, ¶ 17 (6th Dist.) (defendant asserted violations of the United States and Ohio Constitutions when a township police officer stopped the defendant, on an interstate highway outside the officer's jurisdiction after observing traffic offenses, but we found only that the stop was reasonable under the United States Constitution because the officer had probable cause to stop the driver even if he did not have statutory authority to arrest or detain appellant or to issue traffic citations); and *State v. Caldwell*, 6th Dist. Wood No. WD-8-075, 2010-Ohio-1700, ¶ 21 (defendant asserted violations of both constitutions, but we held only that the Fourth Amendment was not infringed when a township police officer violated state law by stopping a driver for crossing the fog line on an interstate highway outside the officer's municipal jurisdiction because the officer had probable cause to chase the driver after he initially pulled over in response to the officer activating his lights and then drove off at a high speed).

{¶ 19} Today, however, we conclude that we must respond to the assignment of error raised by a defendant in an extraterritorial stop case by addressing the specific constitutional violation alleged. The violation of the United States Constitution and the violation of the Ohio Constitution are separate issues which require the application of two separate rules of law as set forth in *Atwater* and *Brown*: A stop, even if in violation of state law, is not unreasonable under the Fourth Amendment to the United States Constitution if the stop was based on probable cause. *Atwater*. However, a stop made in violation of state law is reasonable under Article I, Section 14, of the Ohio Constitution only when probable cause to make the stop exists and the government's interests in allowing unauthorized officers to make this type of stop outweighs the intrusion upon individual privacy. *Brown*.

{¶ 20} Upon a review of the evidence and the law, we find that there was no violation of the Fourth Amendment in this case because the township officer had probable cause to initiate the stop. Nonetheless, the drugs seized as a result of the stop should have been excluded from evidence because the stop was unreasonable under Article I, Section 14, of the Ohio Constitution. It is undisputed that the township officer violated R.C. 4513.39 by making the extraterritorial stop on an interstate highway for a marked lane violation, which is specified in R.C. 4513.39(A) as being within the exclusive jurisdiction of the state highway patrol, sheriffs, and sheriff deputies. Further, no extenuating circumstances were presented to justify an extraterritorial stop by

township police officers for this type of traffic violation. Therefore, we find the extraterritorial stop was unreasonable under the Ohio Constitution.

{¶ 21} Appellant's second and third assignments of error are well-taken in part.

{¶ 22} The judgment of the Wood County Court of Common Pleas is reversed in part. The judgment is reversed only as to the finding that the exclusionary rule was not applicable. We find that the evidence seized as a result of the unreasonable, warrantless stop should have been suppressed. This case is remanded for proceedings consistent with this decision. Appellee is ordered to pay the court costs of this appeal pursuant to App.R. 24.

Judgment reversed in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE