[Cite as *State v. Ingram*, 2010-Ohio-3546.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA	)	

STATE OF OHIO	C. A. No. 10CA0022-M
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
RAYMOND R. INGRAM	COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO
Appellant	CASE No. 08 CR 0476

DECISION AND JOURNAL ENTRY

Dated: August 2, 2010

WHITMORE, Judge.

{¶1} Defendant-Appellant, Raymond Ingram, appeals from the judgment of the Medina County Court of Common Pleas, denying his motion to suppress. This Court affirms.

I

{¶2} On October 22, 2008, Medina County Sherriff's Deputy Paul Schismenos stopped a vehicle after witnessing a marked lane violation. When Deputy Schismenos approached the driver, later identified as Ingram, he smelled burnt marijuana. Deputy Schismenos left Ingram's passenger in the vehicle, but asked Ingram to exit. He then placed Ingram in the back of the police cruiser. Ingram admitted that he had a suspended license, and Deputy Schismenos called for a canine unit. The canine alerted on Ingram's vehicle, and the officers searched it. The officers discovered crack cocaine in Ingram's trunk. At some point, the officers removed Ingram's passenger from the vehicle and placed her in the back of the police cruiser with Ingram. During their time in the rear seat of the police cruiser, Ingram and his passenger made several

incriminating statements. Their statements were recorded on tape by the police cruiser's recording device.

{¶3} On May 6, 2008, a grand jury indicted Ingram on one count of the possession of crack cocaine, in violation of R.C. 2925.11(A)(C)(4)(e), and an attendant forfeiture specification. On December 9, 2008, Ingram filed a motion to suppress, arguing that Deputy Schismenos lacked reasonable suspicion to stop his vehicle and violated his reasonable expectation of privacy by recording the conversations he had while detained in the backseat of the police cruiser. The court held a hearing on Ingram's motion on January 6, 2009. On January 9, 2009, the court denied Ingram's motion. Subsequently, Ingram changed his plea and entered a plea of no contest. The trial court sentenced him to five years in prison.

{¶4} Ingram appealed from the trial court's sentencing entry, but this Court dismissed his appeal due to a defective post-release control notification. *State v. Ingram*, 9th Dist. No. 09CA0020-M, 2009-Ohio-6371. Subsequently, the court resentenced Ingram. Ingram now appeals from the court's judgment and raises two assignments of error for our review.

II

Assignment of Error Number One

> "THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS AS THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A FINDING THAT THE ARRESTING OFFICER HAD A REASONABLE AND ARTICULABLE SUSPICION TO MAKE A TRAFFIC STOP OF THE APPELLANT'S VEHICLE."

{¶5} In his first assignment of error, Ingram argues that the trial court erred by denying the portion of his motion to suppress related to the traffic stop. Specifically, he argues that the record does not contain competent, credible evidence in support of the basis for the stop. We disagree.

{¶6} The Ohio Supreme Court has held that:

> "Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. *State v. McNamara* (1997), 124 Ohio App.3d 706." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8.

Accordingly, this Court reviews the trial court's factual findings for competent, credible evidence and considers the court's legal conclusions de novo. *State v. Conley*, 9th Dist. No. 08CA009454, 2009-Ohio-910, at ¶6, citing *Burnside* at ¶8.

{¶7} To justify an investigative stop, an officer must point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Maumee v. Weisner* (1999), 87 Ohio St.3d 295, 299, quoting *Terry v. Ohio* (1968), 392 U.S. 1, 21. In evaluating the facts and inferences supporting the stop, a court must consider the totality of the circumstances as "viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training." *State v. Bobo* (1988), 37 Ohio St.3d 177, 179, quoting *United States v. Hall* (C.A.D.C. 1976), 525 F.2d 857, 859. A totality of the circumstances review includes consideration of "(1) [the] location; (2) the officer's experience, training or knowledge; (3) the suspect's conduct or appearance; and (4) the surrounding circumstances." *State v. Biehl*, 9th Dist. No. 22054, 2004-Ohio-6532, at ¶14, citing *Bobo*, 37 Ohio St.3d at 178-79. "Where an officer has an articulable reasonable suspicion or probable cause to stop a motorist for any criminal violation, including a minor traffic violation, the stop is

constitutionally valid[.]" (Internal quotations, citations, and emphasis omitted.) *State v. Campbell*, 9th Dist. No. 05CA0032-M, 2005-Ohio-4361, at ¶11.

{¶8} Ingram concedes that a traffic stop is constitutionally valid when it is based upon an officer's observation of a minor traffic violation, *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, but argues that the record does not support the conclusion that he committed a minor traffic violation. The trial court determined that Deputy Schismenos stopped Ingram's vehicle because he twice observed it drift onto the white fog line. According to Ingram, Deputy Schismenos offered contradictory testimony as to whether he saw Ingram commit a marked lane violation and the video recording of his traffic stop did not depict a violation.

{¶9} Deputy Schismenos, an officer with twenty years of experience, testified that he stopped Ingram's vehicle based on his observation of a marked lane violation. Deputy Schismenos specified on direct that he observed Ingram's vehicle "cross over the white [fog] line" two separate times and travel directly on the line. On cross-examination, Ingram's counsel played the video recording of the traffic stop for Deputy Schismenos. Defense counsel asked Deputy Schismenos about one particular point in the video where he claimed to have observed a violation. Deputy Schismenos testified that the tires of Ingram's vehicle crossed "partially over" the white fog line, which he then stated meant it crossed about three quarters of the way over the line. Ingram claims that Deputy Schismenos contradicted himself by stating on direct that he saw the vehicle cross completely over the white fog lane and then denying that statement on cross-examination. Deputy Schismenos never testified that he saw Ingram's vehicle cross completely over the white fog line. Rather, he testified that he saw the vehicle "cross over the white [fog] line" two times. He then clarified on cross-examination that, as to the particular

violation about which Ingram's counsel questioned him, he saw about three quarters of the vehicle's tires cross over the line. Thus, no contradiction occurred.

{¶10} The video recording of Ingram's traffic stop depicts Ingram's vehicle traveling on the far right side of the lane of travel. Although the video recording is somewhat grainy and its details are difficult to discern, one can clearly see Ingram's vehicle remains to the extreme right side of the lane of travel. Additionally, it appears from the video recording that Ingram drove directly on the white fog line for sometime and crossed the threshold of the line at least once.

{¶11} The record contains competent, credible evidence in support of the trial court's finding that Deputy Schismenos witnessed Ingram's vehicle "drift onto the white fog line." In fact, the record contains competent, credible evidence that Ingram's vehicle at least partially drifted over the white fog line. Ingram only challenges the trial court's factual findings. Because the court's findings are supported by the record, Ingram's first assignment of error lacks merit.

Assignment of Error Number Two

> "THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS HIS RECORDED CONVERSATIONS AS THOSE CONVERSATIONS WERE CLEARLY PROTECTED BY OHIO REVISED CODE § 2933.52."

{¶12} In his second assignment of error, Ingram argues that the trial court erred by denying the portion of his motion to suppress related to the tape recorded statements he made while inside the police cruiser. Specifically, Ingram argues that his statements were obtained in violation of R.C. 2933.52, Ohio's wiretapping statute. We disagree.

{¶13} We incorporate the standard of review set forth in Ingram's first assignment of error. Ingram does not challenge the trial court's factual findings in this assignment of error, only the court's legal conclusions. Therefore, this Court will accept the facts set forth in the

record and conduct a de novo review. *Burnside* at ¶8. The undisputed facts are that Ingram made several incriminating statements while inside Deputy Schismenos' cruiser. He made these statements to: (1) his passenger, who was in the cruiser with him; and (2) his mother, who he called on his cell phone while inside the cruiser. Deputy Schismenos activated the cruiser's recording device after *Mirandizing* Ingram.

{¶14} While subject to several exceptions, R.C. 2933.52 prohibits a person from intercepting a wire, oral, or electronic communication in the absence of an interception warrant. R.C. 2933.52(A)-(B). The phrase "oral communication" means "an oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation." R.C. 2933.51(B). In other words, an oral communication only qualifies as a protected oral communication under R.C. 2933.52 if the person uttering it had a reasonable expectation of privacy. Id. This rule applies to in-person conversations as well as to telephone calls. *State v. Bidinost* (1994), 71 Ohio St.3d 449, 462 ("In Ohio, the terms of the statute defining 'oral communication' clearly encompass cordless telephone conversations.").

{¶15} As to the statements he made to his mother, Ingram relies upon *Bidinost* to argue that his statements were protected oral communications. *Bidinost* held that statements made over a cordless telephone were protected oral communications. Id. at 461. Yet, *Bidinost* dealt with former R.C. 2933.51. Former R.C. 2933.51(B) defined an oral communication only as "any human speech that is used to communicate by one person to another person." Post-*Bidinost*, the General Assembly amended R.C. 2933.51(B) to include a reasonable expectation of privacy element. See Current R.C. 2933.51(B). While *Bidinost* still stands for the proposition that a telephone call is an oral communication, its assertion that R.C. 2933.51(B) does not require a

protected statement to have been made with a reasonable expectation of privacy no longer holds true. See *Bidinost*, 71 Ohio St.3d at 462 (comparing Ohio's former definition of oral communication with the federal law's definition). Ingram's conversations both with his mother and with his passenger were protected oral communications only if he made them with a reasonable expectation of privacy.

{¶16} Ingram would have this Court hold that a person placed in the backseat of a police cruiser enjoys a reasonable expectation of privacy, which can be dispelled only if the police first inform the person that any statements he or she makes will be recorded. He does not cite any law in support of this proposition. App.R. 16(A)(7). Rather, he attempts to distinguish one of the cases relied upon by the State, *State v. Wynter* (Mar. 13, 1998), 2d Dist. No. 97CA36. In *Wynter*, the Second District held that a person does not have a reasonable expectation of privacy after being arrested, *Mirandized*, and placed in the backseat of a police cruiser. *Wynter*, at *5-6. Although Ingram was *Mirandized*, he argues that *Wynter* is distinguishable because he was not under arrest when he made incriminating statements. Further, he argues that he expected his conversations to be private.

{¶17} Ingram's subjective expectation of privacy is not the issue in this case. Rather, the issue is whether an objective expectation of privacy existed. To the extent he claims to have expected his conversations to be private, his argument is irrelevant. Further, his argument that he had an objective expectation of privacy because a formal arrest had not yet occurred lacks merit. E.g., *State v. Blackwell*, 8th Dist. No. 87278, 2006-Ohio-4890, at ¶33-34, quoting *United States v. Clark* (C.A.8 1994), 22 F.3d 799, 801-02.

> "A marked police car is owned and operated by the state for the express purpose of ferreting out crime. It is essentially the trooper's office, and is frequently used as a temporary jail for housing and transporting arrestees and suspects. The general public has no reason to frequent the back seat of a patrol car, or to believe

> that it is a sanctuary for private discussions. A police car is not the kind of public place, like a phone booth (e.g., *Katz v. United States* (1967), 389 U.S. 347), where a person should be able to reasonably expect that his conversation will not be monitored. In other words, allowing police to record statements made by individuals seated inside a patrol car does not intrude upon privacy and freedom to such an extent that it could be regarded as inconsistent with the aims of a free and open society." *Clark*, 22 F.3d at 801-02.

Because Ingram did not have a reasonable expectation of privacy when making statements to his mother and passenger in the backseat of Deputy Schismenos' cruiser, R.C. 2933.51, et seq. does not apply. Therefore, the trial court did not err by refusing to suppress Ingram's statements. Ingram's second assignment of error is overruled.

III

{¶18} Ingram's assignments of error are overruled. The judgment of the Medina County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

CARR, P. J.
MOORE, J.
CONCUR

APPEARANCES:

LOUIS M. DEFABIO, Attorney at Law, for Appellant.

DEAN HOLMAN, Prosecuting Attorney, and RUSSELL A. HOPKINS, Assistant Prosecuting Attorney, for Appellee.