[Cite as *State v. Daniels,* 2018-Ohio-3113.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. John W. Wise, P. J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 17-CA-50
KEVIN L. DANIELS	:	
	:	
Defendant-Appellant	:	OPINION

CHARACTER OF PROCEEDING:	Criminal appeal from the Fairfield Municipal Court, Case No. TRC1703096A
JUDGMENT:	Affirmed in part; Reversed in part and Remanded
DATE OF JUDGMENT ENTRY:	July 13, 2018

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
DAVID KLEMP Assistant Prosecutor 136 W. Main Street Lancaster, OH 43130	DARREN MEADE 3010 Hayden Road Columbus, OH 43235

Gwin, J.,

{¶1} Appellant, Kevin Daniels ["Daniels"] appeals the October 6, 2017 judgment of the Fairfield County Municipal Court overruling his motion to suppress.

Facts and Procedural History

{¶2} On March 17, 2017 at approximately 2:28 a.m. Trooper Daniel Muck of the Ohio State Highway Patrol observed a vehicle stopped at a traffic light on Columbus Street at East Main Street in Lancaster, Fairfield County, Ohio. Trooper Muck observed that the vehicle was clearly stopped past the stop bar on Columbus Street and made an improper turn into the far lane on Main Street. According to Trooper Muck, Daniels made an improper turn into the center lane on Main Street instead of the right-turn only lane, which allowed him to proceed through the intersection at Main and Memorial. Trooper Muck noted no other erratic driving. Trooper Muck initiated a traffic stop for the improper turn violation.

{¶3} Trooper Muck approached the vehicle on the driver's side, noticed that the driver of the vehicle was on the phone, and overheard him state to the other person to come pick up the vehicle from the scene. During this initial contact with the driver, Trooper Muck observed the Driver's eyes to be red and bloodshot. Trooper Muck did not smell the odor of an alcoholic beverage, nor was Daniels' speech impaired.

{¶4} Daniels was unable to produce a license, registration, or proof of insurance. Trooper Muck returned to his cruiser to run Daniels' information and learned that Daniels' driver's license was suspended for multiple reasons.

{¶5} Based upon the improper turn and the fact that his eyes were bloodshot and glassy, Trooper Muck requested Defendant to submit to standardized field sobriety tests. ["SFT's"].

{¶6} First Trooper Muck performed the Horizontal Gaze Nystagmus Test ("HGN"). Daniels did not exhibit any of the six clues; however, Trooper Muck noticed that Daniels' pupils were constricted and barely reacted to light. Next, Trooper Muck performed the "Walk and Turn" (WAT") and "One Leg Stand" ("OLS") tests. Daniels exhibited five clues on the WAT test and four clues on the OLS test. Based upon the totality of the circumstances, Trooper Muck placed Daniels under arrest for OVI, failure to wear a seatbelt, improper turn, and three counts of driving under suspension.

{¶7} On September 26, 2017, the trial court conducted an evidentiary hearing upon Daniels' Motion to Suppress. On October 6, 2017 the court filed an entry denying Daniels' motion, finding that there was reasonable suspicion to support the traffic stop and that Trooper Muck had a sufficient basis to request Daniels submit to standardized field sobriety tests. The court held that Trooper Muck's testimony that he observed Defendant committing a violation of Ohio Revised Code 4511.36 along with his cruiser video gave him reasonable suspicion to initiate a traffic stop. Further, the trial court found that Trooper Muck had a sufficient basis to request Daniels to submit to field sobriety tests based upon the totality of the circumstances.

{¶8} On November 8, 2017, Daniels entered a plea of no contest.

Assignments of Error

{¶9} Daniels raises three assignments of error,

{¶10} "I. THE TRIAL COURT ERRED IN DENYING DEFENDANT-APPELLANT'S MOTION TO SUPPRESS BECAUSE THE ARRESTING OFFICER DID NOT HAVE LAWFUL CAUSE TO STOP DEFENDANT-APPELLANT.

{¶11} "II. THE TRIAL COURT ERRED IN DENYING DEFENDANT-APPELLANT'S MOTION TO SUPPRESS BECAUSE THE ARRESTING OFFICER DID NOT HAVE REASONABLE AND ARTICULABLE SUSPICION THAT DEFENDANT-APPELLANT WAS INTOXICATED SUFFICIENT TO SUBJECT HIM TO THE ADMINISTRATION OF FIELD SOBRIETY TESTS.

{¶12} "III. THE TRIAL COURT ERRED IN DENYING DEFENDANT-APPELLANT'S MOTION TO SUPPRESS BECAUSE THE OFFICER DID NOT HAVE SUFFICIENT EVIDENCE THAT DEFENDANT-APPELLANT HAD BEEN DRIVING WHILE INTOXICATED, AND THEREFORE DID NOT HAVE PROBABLE CAUSE FOR THE WARRANTLESS ARREST."

I, II. & III.

{¶13} Because we find the issues raised in Daniels' First, Second and Third Assignments of Error are closely related, for ease of discussion, we shall address the assignments of error together.

STANDARD OF APPELLATE REVIEW

{¶14} 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, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 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 witness credibility. See *State v. Dunlap*, 73 Ohio St.3d 308,314, 1995-Ohio-243, 652 N.E.2d 988;

State v. Fanning, 1 Ohio St.3d 19, 20, 437 N.E.2d 583 (1982). 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; *State v. Long*, 127 Ohio App.3d 328, 332, 713 N.E.2d 1(4th Dist.1998); *State v. Medcalf*, 111 Ohio App.3d 142, 675 N.E.2d 1268 (4th Dist.1996). However, once this 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*, 124 Ohio App.3d 706, 707 N.E.2d 539(4th Dist. 1997); See, generally, *United States v. Arvizu*, 534 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740(2002); *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911(1996). 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.

ISSUES FOR APPEAL.

A. Whether Trooper Muck had probable cause to conduct a traffic stop of Daniels' vehicle.

{¶15} The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures * * *." The Fourth Amendment is enforced against the States by virtue of the due process clause of the Fourteenth Amendment of the United States Constitution. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081(1961). The stop of a vehicle and the detention of its occupants by law enforcement, for whatever purpose and however brief the detention may be, constitutes a seizure for

Fourth Amendment purposes. *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660(1979), citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-558, 96 S.Ct. 3074, 49 L.Ed.2d 1116(1976).

{¶16} The Supreme Court of Ohio has observed, "'[a]uthorities seem to be split as to whether a traffic stop is reasonable when supported merely by reasonable suspicion, or whether the heightened standard of probable cause must underlie the stop.'" *City of Bowling Green v. Godwin*, 110 Ohio St.3d 58, 850 N.E.2d 698, 2006–Ohio–3563, ¶ 13, *quoting Gaddis ex rel. Gaddis v. Redford Twp.* (E.D.Mich.2002), 188 F.Supp.2d 762, 767.

{¶17} There are actually two types of "traffic" stops, and each has a different constitutional standard applicable to it. In *State v. Moller,* the Court of Appeals observed,

> First is the typical non-investigatory traffic stop, wherein the police officer witnesses a violation of the traffic code, such as crossing over the center line of a road, and then stops the motorist for this traffic violation. Second is the investigative or "*Terry* " stop, wherein the officer does not necessarily witness a specific traffic violation, but the officer does have sufficient reason to believe that a criminal act has taken place or is occurring, and the officer seeks to confirm or refute this suspicion of criminal activity. *See Terry v. Ohio* (1968), 392 U .S. 1, 21, 88 S.Ct. 1868, 1879-1880. A non-investigatory traffic stop must be supported by probable cause, which arises when the stopping officer witnesses the traffic violation. *See Whren v. United States* (1996), 517 U.S. 806, 810, 116 S.Ct. 1769, 1772; *Pennsylvania v. Mimms* (1977), 434 U.S. 106, 109, 98 S.Ct. 330, 332. By contrast, an investigatory *Terry* stop is proper so long as the stopping

officer has "reasonable articulable suspicion" of criminal activity. *Terry*, 392 U.S. at 21, 88 S.Ct. at 1879-1880.

12th Dist. Butler No. CA99-07-128, 2000 WL 1577287(Oct. 23, 2000); *Accord, State v. Baughman*, 192 Ohio App.3d 45, 2011-Ohio-162, 947 N.E.2d 1273 (12th Dist.), ¶14; *State v. Nwachukwa,* 3rd Dist. Marion No. 9-15-03, 2015-Ohio-3282, ¶24; ¶26.

{¶18} The cause for a non-investigatory traffic stop has been succinctly stated by the Supreme Court of Ohio: "Where a police officer stops a vehicle based upon probable cause that a traffic violation has occurred or was occurring, the stop is not unreasonable under the Fourth Amendment to the United States Constitution[.]" *Dayton v. Erickson*, 76 Ohio St.3d 3, 11-21, 1996-Ohio-431, 665 N.E.2d 1091. Probable cause is defined in terms of "facts or circumstances 'sufficient to warrant a prudent man in believing that the (suspect) had committed or was committing an offense.'" *Gerstein v. Pugh*, 420 U .S. 103, 111, 95 S.Ct. 854, 861(1975), *quoting Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 225(1964). In the case at bar, Trooper Muck testified that he observed Daniels violate R.C. 4511.36(A) (1), Rules for turns at intersections.

{¶19} The dashcam video is inconclusive. However, 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,* 100 Ohio St.3d 152, 154-55, 797 N.E.2d 71, 74(2003). 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*, 1 Ohio St.3d 19, 20, 437 N.E.2d 583, 584(1982). The trooper's testimony represents competent, credible evidence that Daniels made an improper right

hand turn. Therefore, the factual finding of the trial court is based upon competent, credible evidence.

{¶20} Trooper Muck's observation of Daniels committing a traffic violation provided the trooper with probable cause to stop Daniels vehicle.

B. Whether Trooper Muck had reasonable articulable suspicion to believe Daniels was driving under the influence of alcohol or drugs in order to ask Daniels to submit to the standardized field sobriety tests.

{¶21} "'[W]hen detaining a motorist for a traffic violation, an officer may delay a motorist for a time period sufficient to issue a ticket or a warning.'" *State v. Batchili,* 113 Ohio St.3d 403, 865 N.E.2d 1282, 2007-Ohio-2204, at ¶ 12, *quoting State v. Keathley*, 55 Ohio App.3d 130, 131, 562 N.E.2d 932(1988). "This measure includes the period of time sufficient to run a computer check on the driver's license, registration, and vehicle plates ... Further, '[i]n determining if an officer completed these tasks within a reasonable length of time, the court must evaluate the duration of the stop in light of the totality of the circumstances and consider whether the officer diligently conducted the investigation.'" *State v. Batchili, supra* (internal quotations omitted). *See, also State v. Woodson*, Stark App. No.2007-CA00 151, 2008-Ohio-670, ¶ 21.

{¶22} However, "[a]n officer may not expand the investigative scope of the detention beyond that which is reasonably necessary to effectuate the purposes of the initial stop unless any new or expanded investigation is supported by a reasonable, articulable suspicion that some further criminal activity is afoot." *State v. Batchili, supra* at ¶ 34. [Citations omitted]. "In determining whether a detention is reasonable, the court must look at the totality of the circumstances." *State v. Matteucci*, 11th Dist. Lake

No.2001-L-205, 2003-Ohio-702, ¶ 30, *citing State v. Bobo*, 37 Ohio St.3d 177, 178, 524 N.E.2d 489(1988).

{¶23} In *State v. Bright,* this Court observed,

> 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)].
>
> "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)

5th Dist. Guernsey No. 2009-CA-28, 2010-Ohio-1111, ¶17.

{¶24} In the case at bar, the dashcam video and testimony of Trooper Muck establish that the only "erratic" driving observed was an improper right hand turn. (T. at 17). Trooper Muck also testified that Daniels' eyes appeared "red and bloodshot." (T. at 22). Trooper Muck did not detect an odor of alcohol. (T. at 75). Daniels told Trooper Muck he had not consumed any alcohol that night. (T. at 24). Daniels did not slur his speech in any way. Daniels further disagreed that he had made an improper turn explaining to the Trooper he was in the lane because he was going straight and believed the lane closest to the curb was a turn lane. Trooper Muck also found it suspicious that Daniels was calling someone to pick up his vehicle. (T. at 19). Trooper Muck noted the time of the stop was 2:30 a.m. (T. at 24). Trooper Muck testified that his reason for asking Daniels out of the car was "based on his eyes." (T. at 25).

{¶25} In *United States v. Frantz* (S.D.Oh.2001), 177 F.Supp.2d 760, 762-763(S.D. OH 2001, the Court observed,

> 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.

{¶26} Trooper Muck's reliance upon Daniels calling someone to pick up his car is unpersuasive as a factor to suspect that Daniels was under the influence. Daniels told the Trooper that he did not have a driver's license or proof of insurance. (T. at 18; 70). Upon checking Daniels' record, Trooper Muck was informed that Daniels license was suspended. (T. at 72-73). Trooper Muck would not have allowed Daniels to drive the car

home. (T. at 73). Thus, the only factors upon which the Trooper based his decision were Daniels' red bloodshot eyes, improper right hand turn and the time of night. Here, based upon the totality of the circumstances we find the Trooper did not have a reasonable suspicion to justify the request that Daniels perform the FST's.

B. Whether Trooper Muck had probable cause to arrest Daniels for driving under the influence of alcohol or drugs.

{¶27} We note that Trooper Muck had probable cause to arrest Daniels for driving under a suspended license. However, as previously mentioned the Trooper did not have a reasonable, articulable suspicion of impairment sufficient to justify his request that Daniels submit to the SFT's. Therefore, the only indicia of impairment were Daniels' red, bloodshot eyes, improper right hand turn and the time of day. Based upon the totality of the circumstances we find the Trooper Muck did not have a probable cause to justify arresting Daniels for driving under the influence.

CONCLUSION.

{¶28} Trooper Muck had probable cause to effectuate a traffic stop of Daniels' vehicle. Accordingly, Daniels' First Assignment of Error is overruled.

{¶29} Trooper Muck did not have a reasonable, articulable suspicion to believe Daniels was driving under the influence of alcohol or drugs in order to ask Daniels to submit to the standardized field sobriety tests. Accordingly, Daniels' Second Assignment of Error is sustained

{¶30} Trooper Muck did not have a probable cause to justify arresting Daniels for driving under the influence. Accordingly, Daniels' Third Assignment of Error is sustained.

{¶31} The judgment of the Fairfield County Municipal Court is sustained, in part, and reversed in part. This case is remanded to the trial court for proceedings for proceedings in accordance with our opinion and the law.

By Gwin, J.,

Wise, John, P.J.,

Delaney, J., concur