[Cite as *State v. Kotouch*, 2022-Ohio-3421.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
HARRISON COUNTY

STATE OF OHIO,

Plaintiff-Appellant,

v.

ROBERT C. KOTOUCH, III,

Defendant-Appellee.

OPINION AND JUDGMENT ENTRY
Case No. 21 HA 0012

Criminal Appeal from the
Harrison County Court of Harrison County, Ohio
Case Nos. TRC-21-00975; CRB-21-00102

BEFORE:
Cheryl L. Waite, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.
Remanded.

Atty. Lauren E. Knight, Harrison County Prosecutor and *Atty. Jack L. Felgenhauer*, Assistant Prosecuting Attorney, 111 West Warren Street, P.O. Box 248, Cadiz, Ohio 43907, for Plaintiff-Appellant

Atty. Katherine M. K. Kimble, and *Atty. Nichole D. Hamsher*, Eques, Inc., 157 South Main Street, Cadiz, Ohio 43907, for Defendant-Appellee.

Dated: September 14, 2022.

WAITE, J.

{¶1} Appellant State of Ohio appeals a December 17, 2021 Harrison County Court judgment entry which granted Appellee Robert C. Kotouch, III's motion to suppress. The state argues that the trial court erroneously determined a deputy's mistaken belief of the law cannot serve as reasonable suspicion to stop an all-terrain vehicle ("ATV"). The state also argues the court erroneously found that officers cannot use an uncharged offense to demonstrate reasonable suspicion. For the reasons provided, the state's arguments are without merit and the judgment of the trial court is affirmed. The matter is remanded to allow the state to determine if sufficient evidence remains to try the case.

Factual and Procedural History

{¶2} This incident occurred in the Village of Deersville, Harrison County, on May 2, 2021 at 6:35 p.m. While on patrol, Deputy Kevin Hall noticed an ATV parked in front of a Dollar General Store. As Dep. Hall exited his vehicle, he saw the vehicle pull out of a parking spot. (Tr., p. 6) Dep. Hall testified that the driver complied with his verbal command to stop. It is unclear how far Dep. Hall was from the vehicle, however, Dep. Hall did not need to reenter his vehicle to complete the stop. He approached Appellee and asked him his destination and how far he intended to travel in that vehicle.

{¶3} Dep. Hall explained that his sole reason for initiating the stop of the vehicle was due to his belief that the vehicle was not permitted to travel on a county road. Dep. Hall testified that he stops, but does not cite, every vehicle he believes is improperly traveling on a county road. He explained that he then makes the decision to issue a citation based on the driver's stated purpose for using the road and whether or not they are engaging in any illegal conduct.

{¶4} During his questioning of Appellee, Dep. Hall detected the odor of alcohol and noticed an open container in a cup holder that he believed was associated with the driver's seat. He asked Appellee how many drinks he had consumed and Appellee responded he had imbibed one or two beers. There are not many facts in the record due to the narrow scope of the motion to suppress, however, it appears Appellee failed a sobriety test.

{¶5} Dep. Hall issued Appellant a traffic citation for an ATV prohibition, a violation of R.C. 4519.40, and for driving while under the influence in violation of R.C. 4511.19(A)(1)(A), (A)(1)(H). A complaint was issued the next day charging Appellant with a violation of "open container," a violation of R.C. 4301.62. On June 8, 2021, Appellant filed a motion to suppress, arguing that Dep. Hall lacked reasonable suspicion to initiate a traffic stop for an act not prohibited by statute.

{¶6} On August 19, 2021, the trial court held a hearing on Appellee's motion to suppress. The trial court took the matter under advisement. We note that Judge Beetham presided over the hearing but died before issuing a decision on the motion. The Supreme Court appointed a visiting judge to preside over the matter.

{¶7} At the suppression hearing, Dep. Hall described the county road as a two-lane paved road that he believes runs east to west. Dep. Hall testified that he lives near the area and is familiar with the town and road. He stated that he also serves in the fire department located in Deersville. When defense counsel informed him that the statute on which he relies does not prohibit ATV vehicles on a county road, Dep. Hall testified that he often stops ATV vehicles on the road and has ticketed several drivers based on that statute.

{¶8} He testified that even if the law does not prohibit those types of vehicles on county roads, "we've been doing that [pulling over ATV and similar vehicles] for 11 years because the sheriff says there's no all terrain vehicles, off road vehicles allowed on the roadway." (Tr., p. 14) He testified that the village does not have its own ordinance prohibiting an ATV from operating on a county road.

{¶9} On December 17, 2021, the visiting judge granted Appellee's motion to suppress, holding that "[a]ll evidence seized from the traffic stop along with any chemical tests and statements made by [Appellee] in response to the Officer's questions are suppressed." (12/17/21 J.E., p. 3.) The court reasoned that Dep. Hall did not have a legal basis to initiate a stop of the vehicle and that his stated purpose was inconsistent with the law. The court further explained that Dep. Hall clearly testified that the sole basis for the stop was R.C. 4519.40. The court noted that a pretrial conference would be scheduled, presumably to allow the state to determine if it was able to proceed to trial on the matter in light of the suppressed evidence.

{¶10} The state filed this timely appeal pursuant to Crim.R. 12(K).

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED IN FINDING THAT THE DEPUTY'S MISTAKEN CITATION CANNOT BE REASONABLE SUSPICION TO STOP.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED IN FINDING THAT PROBABLE CAUSE NEEDED FOR A STOP CANNOT BE ESTABLISHED BY A VIOLATION

OF LAW FOR WHICH THE DEFENDANT/APPELLEE WAS NOT CHARGED.

{¶11} The state's arguments are intertwined and will be jointly addressed. The state generally contends that the deputy's belief, whether mistaken or not, is sufficient to warrant his stop of the vehicle. However, the state divides its argument into two branches: (1) even if mistaken, the deputy's reasonable belief that the ATV could not be operated on the county road was sufficient to form a reasonable suspicion for the stop and (2) the deputy stated other valid reasons to stop the vehicle which, even if uncharged, provide the legal basis for the stop. The state also argues the trial court improperly relied on the standard of probable cause instead of the appropriate standard, which involves reasonable suspicion.

{¶12} Appellee responds that Dep. Hall specifically stated the sole reason he stopped the vehicle was due to his belief a violation of R.C. 4519.40 was occurring. Appellee argues that the state cannot add additional violations once a motion to suppress is filed to revive the legitimacy of the stop. He contends that the relevant statute, R.C. 4519.40, is not ambiguous, as it clearly prohibits an ATV from operating only on a state highway, and there is no question that the road at issue is a county road. As to the reasonableness of the deputy's actions, Appellee cites to *State v. Barnett*, 2018-Ohio-2486, 114 N.E.3d 773 (7th Dist.) to argue that the deputy's good faith belief cannot serve to validate an otherwise unjustified stop. Regarding the state's argument that the vehicle did not meet the requisite registration requirements, Appellee observes that the record does not provide sufficient facts to suggest that a violation of the relevant statute occurred.

{¶13} As to the second assignment of error, Appellee responds that while the trial court used the phrase "probable cause" within the entry, the court also used the phrase "reasonable suspicion" and it is clear in reading the entire entry that the court used the correct standard despite its use of both terms.

{¶14} A motion to suppress presents mixed issues of law and fact. *State v. Lake*, 151 Ohio App.3d 378, 2003-Ohio-332, 784 N.E.2d 162, ¶ 12 (7th Dist.), citing *State v. Jedd*, 146 Ohio App.3d 167, 171, 765 N.E.2d 880 (4th Dist.2001). If a trial court's findings of fact are supported by competent credible evidence, an appellate court must accept them. *Id*. The court must then determine whether the trial court's decision met the applicable legal standard. *Id*.

{¶15} Pursuant to the established law, "[a] traffic stop is constitutionally valid only if an officer has reasonable and articulable suspicion that a motorist has committed, is committing, or is about to commit a crime." *Barnett* at ¶ 20, citing *Mays*, *supra*; *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). "The propriety of an investigative stop by a police officer must be viewed in the light of the totality of the surrounding circumstances." *Barnett* at ¶ 20, quoting *State v. Freeman*, 64 Ohio St.2d 291, 414 N.E.2d 1044 (1980).

{¶16} Our first task is to determine Dep. Hall's basis for the stop. Dep. Hall testified that R.C. 4519.40(A)(1) (the ATV statute) was the sole reason for this traffic stop. Again, Dep. Hall explained that it was his belief this statute prohibits an ATV from operating on a county road.

Q Thank you. So isn't it true that your sole reason for stopping [Appellee] was that you believed he was violating that Ohio Revised Code section that [Appellant's counsel] referenced, the 4519.40(A)(1)?

A I'm sorry. The OVI?

Q No, the ATV code. Isn't it true that that's the reason you initially stopped him?

A Yes, yes.

Q And that's the only reason that you initially stopped him.

A Initially, yes.

(Tr., pp. 10-11.)

{¶17} Dep. Hall further testified that he regularly stops all off-road vehicles on county roads but does not automatically issue a citation. He testified that his decision to issue a citation depends on why the vehicle is on the road, the age of the driver, and whether he observed any illegal behavior. (Tr., pp. 12-13.)

{¶18} With this in mind, we turn to R.C. 4519.40(A), which provides in relevant part:

The applicable provisions of Chapters 4511. and 4549. of the Revised Code apply to the operation of snowmobiles, off-highway motorcycles, and all-purpose vehicles, except that no person shall operate a snowmobile, off-highway motorcycle, or all-purpose vehicle as follows:

> (1) On any state highway, including a limited access highway or freeway or the right-of-way thereof, except for emergency travel during such time and in such manner as the director of public safety designates or except as authorized by division (F) of section 4519.41 of the Revised Code.

{¶19} As argued by Appellant, this statute does not prohibit an ATV from operating on a county road. Instead, the statute prohibits the operation of an ATV on a state highway. It is clear that this statute, on which Dep. Hall specifically relied in this case, does not prohibit an ATV from operating on a county road.

{¶20} At oral argument, the state argued that Appellee's operation of his ATV is prohibited by a different statute, R.C. 4519.41. The state suggested that Dep. Hall mistakenly cited to R.C. 4519.40 even though the correct statute is R.C. 4519.41, which articulates the permitted uses of an ATV. The state focuses on R.C. 4519.41(B) which allows that an ATV may be operated "[o]n highways in the county or township road systems whenever the local authority having jurisdiction over such highways so permits." According to the state, the local authority has not permitted the operation of an ATV on the county roads. There are two problems with the state's argument.

{¶21} First, the state did not raise this argument to the trial court. While counsel for the state explained that the trial court proceedings were handled by different counsel, this fact is irrelevant. "[I]ssues not raised in the trial court may not be raised for the first time on appeal." *Mobberly v. Wade*, 2015-Ohio-5287, 44 N.E.3d 313, (7th Dist.), ¶ 25, citing *Mauersberger v. Marietta Coal Co*., 7th Dist. Belmont No. 12 BE 41, 2014-Ohio-21; *State v. Abney*, 12th Dist. Warren No. CA2004-02-018, 2005-Ohio-146. As such, this argument is not properly before us.

{¶22} Even so, Appellee directs us to subsection (E) of that statute. R.C. 4519.41(E) provides that an ATV may operate "[o]n the berm or shoulder of a county or township road, while traveling from one area of operation of the snowmobile, off-highway motorcycle, or all-purpose vehicle to another such area." While the state attempted to introduce evidence at appellate oral argument regarding the structure of the road, this evidence is clearly not in the appellate record and will not be considered. Instead, we must review the parties' arguments based on the limited information contained in the record on appeal.

{¶23} In his investigative report, Dep. Hall asserted:

> I WAS ON PATROL IN THE VILLAGE OF DEERSVILLE WHEN I OBSERVED AN OFF ROAD SIDE BY SIDE PARKED IN FRONT OF THE GENERAL STORE. I PULLED MY PATROL CAR OVER AND AS I EXITED MY VEHICLE THE OPERATOR STARTED TO TAKE OFF. I THEN VERBALLY TOLD THE MALE TO STOP AND HE COMPLIED.

(6/8/21 Motion to Suppress, Exh, 1.)

{¶24} From this description, it does not appear that the deputy observed the ATV actually operating on the roadway, as Dep. Hall initiated his stop immediately after Appellee pulled out of his parking spot. Similarly, Dep. Hall testified at the hearing that he immediately flagged the vehicle and the operator immediately complied. From this evidence, there is no way to know whether the vehicle had previously traveled on the roadway or the berm. Thus, even under the state's new theory, Appellee could have been appropriately driving the vehicle pursuant to R.C. 4519.41(E). There is no evidence that

Appellee indicated he planned to operate the vehicle on the actual roadway. There is nothing within the record to suggest that Dep. Hall asked Appellee if he intended to operate the vehicle on the roadway. He merely asked him his intended destination, not how he planned to get to that point. Thus, even if the state were entirely correct in its argument and the issue had not been waived on appeal, the argument has no merit, here.

{¶25} Turning to whether Dep. Hall's mistake of law was reasonable and validly formed the basis for reasonable suspicion, we begin our analysis by addressing the authority pertaining to an officer's mistake of law. There appears to be three cases that provide guidance on the issue. Although these cases arrive at different conclusions, each remains good law as the different holdings are due to factual differences.

{¶26} The first case was decided by the Ohio Supreme Court, *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, 894 N.E.2d 1204. In *Mays*, the appellant crossed a solid line on multiple occasions while driving, prompting officers to initiate a traffic stop of the vehicle. On appeal, the Court held that the appellee's argument, that he had good reason to go outside the lines, was a defense to a valid citation. The officer in *Mays* did not have a mistaken belief of the law and his citation to the appropriate law did provide valid reasons for the stop. The issue in *Mays* was whether the appellant could attack one of the elements of the law by raising a defense.

{¶27} The United States Supreme Court issued a decision in *Heien v. North Carolina*, 574 U.S. 54, 135 S.Ct. 530, 190 L.Ed.2d 475 (2014). *Heien* involved a slightly different fact pattern, concerning an ambiguous law that made it difficult for the officer to determine if a violation of law occurred or not. In *Heien*, the relevant statute referred "to 'a stop lamp,' suggesting the need for only a single working brake light, it also provides

that '[t]he stop lamp may be incorporated into a unit with one or more other rear lamps.' " (Emphasis deleted.) *Id*. at 67, citing N.C. Gen.Stat. Ann. § 20-129(g).

{¶28} The *Heien* Court decided the citation was improper, but held that because of the ambiguity in the language caused by the words "single" and "other" within the statute, the officer's actions were reasonable, rationalizing that "just because mistakes of law cannot justify either the imposition or the avoidance of criminal liability, it does not follow that they cannot justify an investigatory stop." *Id*. at 67. In other words, while the ambiguous nature of the law could not support a citation, the officer's interpretation of the ambiguity supported his reasonable suspicion.

{¶29} Next, we turn to our decision in *Barnett, supra*. Briefly, the facts of *Barnett* are as follows. The appellee approached an intersection leading to downtown Youngstown where the left lane is designated as a turn-only lane and the right lane is designated as a straight-bound lane, although it requires a slight turn. *Id*. at ¶ 3. The appellee stopped at the intersection and after the light turned green, he activated his turn signal and then proceeded in the straight-bound lane. Police had been following the vehicle and immediately initiated a traffic stop, leading the officers to discover evidence of a crime. The officers stopped appellee because he failed to activate his turn signal prior to reaching the apparent intersection.

{¶30} On appeal, this Court held that the traffic sign clearly indicated the lane in which the appellee's vehicle was traveling was designated as a straight-bound lane, and does not require the use of a turn signal. Although the lane involved a slight turn, there was no mistaking that it was intended as a straight-bound lane. We also held that the good-faith exception did not apply to justify the stop, because no reasonable officer would

have concluded that failure to activate a turn signal to proceed in a straight-bound lane was a violation of law. *Id*. at ¶ 31.

{¶31} We note that a dissent opined that a sign showing a straight arrow where the road involves a slight turn does not constitutionally prohibit law enforcement from initiating a stop of a vehicle making less than a ninety-degree turn without the use of a turn signal. *Id*. at ¶ 38. It seems the dissent sought to take a third approach, allowing the curvature of the straight-bound lane to justify the officer's reasonable suspicion when no turn signal was used, but opining that the traffic sign clearly designating the lane as straight bound and not turn could then be used to defend against a citation. Again, this position was not the holding in *Barnett*.

{¶32} In summation, *Mays* provides guidance only where the defendant's argument operates as a defense to a valid citation and does not involve a mistake of law. *Heien* provides guidance only where officers held a reasonable but mistaken belief regarding an ambiguous law. *Barnett* applies where officers are mistaken about an unambiguous law.

{¶33} Again, it is clear that R.C. 4519.40 does not prohibit the operation of an ATV on a county road. Because the statute is not ambiguous, *Heien* does not apply. This case also does not present a situation where the officer relies on an unambiguous law but Appellee attempts to raise a defense as to an element of that law, so *Mays* is also inapplicable. Because the statute on which the officer relied is unambiguous and does not prohibit an ATV from traveling on a county road, this matter is most closely analogous to *Barnett*. There is nothing within the cited statute that would give an officer reason to

believe that the operation of an ATV on a county road is unlawful. Hence, Dep. Hall could not have reasonable suspicion to stop this vehicle.

{¶34} Alternatively, the state argues that the vehicle did not have a license plate in violation of R.C. 4519.02(A)(1). R.C. 4519.02(A)(1) provides that:

> Except as provided in divisions (B), (C), and (D) of this section, no person shall operate any snowmobile, off-highway motorcycle, or all-purpose vehicle within this state unless the snowmobile, off-highway motorcycle, or all-purpose vehicle is registered and numbered in accordance with sections 4519.03 and 4519.04 of the Revised Code.

{¶35} Again, we emphasize that reasonable suspicion must exist at the time of a traffic stop. Again, there is no evidence of record to demonstrate how far away Dep. Hall was from the vehicle or if he was in a position to observe whether the vehicle had a license plate, windshield wipers, or a horn when it was initially stopped. Absent this evidence, the record does not support an inference that, at the time the officer stopped the vehicle, he held a reasonable suspicion that the vehicle was in violation of R.C. 4519.02.

{¶36} The state also takes issue with the trial court interchangeably using the terms "reasonable suspicion" and "probable cause." It is apparent from the trial court's judgment entry that the only reference to probable cause relates to the discussion of the state's alternative argument. Despite this misstatement, it is clear from the entry that the court undertook the appropriate legal analysis and reached the appropriate legal conclusion.

{¶37} As such, the state's first and second assignments of error are without merit and are overruled.

Conclusion

{¶38} The state argues that the trial court erroneously determined a deputy's mistaken citation or belief that a certain law exists cannot serve as reasonable suspicion to stop an ATV. The state also argues that the court erroneously found that officers cannot use an uncharged offense to demonstrate reasonable suspicion. For the reasons provided, the state's arguments are without merit and the judgment of the trial court is affirmed. The matter is remanded to allow the state to determine if sufficient evidence remains to bring the matter to trial.

Donofrio, P.J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the County Court of Harrison County, Ohio, is affirmed. However, this matter is remanded to allow the state to determine if sufficient evidence remains to bring the matter to trial. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.