IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT
HYBRID COUNTY, OHIO

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	**App. Case No. CA2009-04-033**
	:	
- vs -	:	**(Accelerated Calendar)**
JOHN DOE,	:	
Defendant-Appellant.	:	

BRIEF OF DEFENDANT-APPELLANT, JOHN DOE

APPEAL FROM THE HYBRID COUNTY COURT OF COMMON PLEAS
Trial Court Case No. CR02-00561

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II. STATEMENT OF THE CASE

A. Procedural Posture

The Hybrid County Grand Jury issued an indictment charging defendant-appellant, John Doe, with two felony counts of operating a vehicle under the influence of alcohol in violation of R.C. 4511.19(A)(1) and (A)(3), and one count of failure to drive in marked lanes in violation of R.C. 4511.33(A). (T.d. 1). After an exchange of discovery, appellant filed a motion to suppress, claiming the arresting officer did not have probable cause to make the traffic stop leading to the arrest. (T.d. 4). Following a hearing, the trial court denied appellant's motion. (T.d. 7). Appellant changed his plea to no contest and was found guilty on all charges and sentenced of record. (T.d. 10). A timely notice of appeal was filed. (T.d. 11).

B. Statement of the Facts

On the evening of January 5, 2009, Hybrid County Deputy Sheriff Dave Jester was on patrol on State Route 888 when he observed appellant's vehicle weaving in its lane of travel. (Motion to Suppress Transcript of Proceeding 8). Deputy Jester testified that appellant was not weaving "too much" but did drive outside his lane of traffic. (T.p. Mot.Supp. 10). Deputy Jester stopped appellant's vehicle and observed that appellant had bleary eyes and slurred speech. (T.p. Mot.Supp. 12). Appellant exited his vehicle, and the deputy administered field sobriety tests. Jester testified that after appellant performed poorly on the tests, he decided to make an arrest. (T.p. Mot.Supp. 15). Appellant registered .190 on a BAC Datamaster test. (T.p. Mot.Supp. 20).

III. ARGUMENT

A. First Assignment of Error

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS.

Issue Number One

A police officer who does not have probable cause to believe a traffic offense has been committed may not make a traffic stop and arrest a suspect for OVI.

Police may stop a motor vehicle based on probable cause that a traffic violation has occurred. *Dayton v. Erickson*, 1996-Ohio-431; *State v. Moeller*, 2000 WL 1577287 (12th Dist. Oct. 23, 2020). This type of traffic stop is valid "regardless of the officer's underlying subjective intent or motivation for stopping the vehicle." *Erickson* at 11-12. *See, also, Whren v. United States*, 517 U.S. 806, 810, (1996). However, a de minimus marked lanes violation does not justify the stop of a vehicle. *See State v. Lloyd*, 126 Ohio App.3d 95 (7th Dist. 1998); *State v. Brite*, 120 Ohio App.3d 517 (4th Dist. 1997).

In this case, appellant operated his vehicle in a manner such that any lane violation was "de minimus" and did not justify the stopping of his vehicle. Deputy Jester testified that appellant was not weaving very badly. Without further evidence of impaired driving, the deputy did not have probable cause to make the stop and subsequent arrest. *Lloyd*; and *Brite*.

Accordingly, all evidence subsequent to the stop should be suppressed, and the trial court erred in failing to grant appellant's motion.

B. Second Assignment of Error

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO DISMISS THE CHARGES.

Issue Number One

Where the state fails to disclose evidence, appellant is entitled to have the charges dismissed.

Appellant timely filed a request for discovery in which it was requested that the state provide, among other things, written summaries of oral statements made by the defendant. Crim.R. 16(B)(1)(a)(ii). When it was disclosed at the hearing on the motion to suppress that the state had a written summary of appellant's oral statement that had not been provided to the defense, defense counsel moved to dismiss the charges. The trial court denied appellant's motion. (T.p. Mot.Supp. 17).

The state's failure to timely disclose an incriminating portion of the defendant's statement requires reversal of the defendant's conviction. *State v. Glander*, 139 Ohio App.3d 490 (12th Dist. 2000). The state violated its obligation to provide discovery, and the trial court should have imposed a sanction. *See State v. Terry*, 130 Ohio App.3d 253 (3rd Dist. 1998).

Issue Number Two

The local rules of court permit a party to make an oral motion to dismiss.

When appellant moved to dismiss the charges based upon the state's failure to timely provide discovery, the trial court denied the motion on the merits and because appellant failed to make the motion in writing. In so ruling, the trial court violated its own local rules, which permit motions to

dismiss to be made either orally or in writing. *See* Hybrid Loc.R. 202. The trial court's denial of the motion on this procedural ground was erroneous and should be overturned.

IV. CONCLUSION

The trial court erred in denying appellant's motions to suppress evidence and dismiss the charges. The state had no probable cause to stop appellant's vehicle and appellant's oral motion to dismiss was permitted under local rule. For these reasons, appellant respectfully requests the court to reverse the judgment of the court below and order a dismissal of the charges, or, in the alternative, the suppression of all evidence obtained after appellant was stopped.

Respectfully submitted,
Defense & Defense
Counsel for Defendant-Appellant,
John Doe

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V. CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing brief was served upon the following persons by regular U.S. Mail, postage prepaid, this 4th day of January 2010:

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State of Ohio

_____
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VI. APPENDIX

6. Trial Court's Sentencing Entry

8. Trial Court's Entry Denying Motion to Suppress

9. Trial Court's Opinion on Motion to Suppress

10. Trial Court's Denial of Motion to Dismiss

12. Hybrid County Local Rule 202

The appendix must include all materials that are required to be attached by the local appellate rules.

See Local Appellate Rule 11(D)

COURT OF COMMON PLEAS
HYBRID COUNTY, OHIO

STATE OF OHIO,	:	
Plaintiff,	:	Case No. CR02-00561
- vs -	:	
JOHN DOE,	:	JUDGMENT OF CONVICTION AND SENTENCING ENTRY
Defendant.	:	

This matter came before the court for sentencing on April 1, 2002. Present were the defendant and defense counsel, Dillon Defense. The defendant was afforded all rights pursuant to Crim.R. 32.

The court has considered everything required by law and finds that the defendant has been found guilty of:

Count One: OVI, a violation of R.C. 4511.19(A)(3), a felony of the fourth degree as defendant has been convicted of three other violations of R.C. 4511.19 during the previous six year period prior to this offense.

Count Two: OVI, a violation of R.C. 4511.19(A)(1), a felony of the fourth degree as defendant has been convicted of three other violations of R.C. 4511.19 during the previous six year period prior to this offense.

Count Three: Failure to drive in marked lanes, a violation of R.C. 4511.33(A), a minor misdemeanor.

It is therefore ORDERED that the defendant be sentenced as follows:

Count One: 15 months incarceration in the state prison system; $2,000.00 fine; mandatory attendance of an alcohol and drug addiction program; forfeiture of the motor vehicle involved; a permanent revocation of defendant's driving privileges; court costs.

Count Two: 15 months incarceration in the state prison system; $2,000.00 fine; mandatory attendance of an alcohol and drug addiction program; forfeiture of the motor vehicle involved; a permanent revocation of defendant's driving privileges; court costs. The sentence in Count Two

shall be served concurrent with the sentence in Count One.

Count Three: $50 fine.

_____

PEABODY, J.

COURT OF COMMON PLEAS
HYBRID COUNTY, OHIO

STATE OF OHIO,	:	
Plaintiff,	:	Case No. CR02-00561
- vs -	:	
JOHN DOE,	:	ENTRY DENYING MOTION TO SUPPRESS
Defendant.	:	

This matter came on to be considered upon the Defendant's motion to suppress.

For the reasons stated in its opinion of March 15, 2009, the Court hereby denies the motion to suppress.

_____
PEABODY, J.

COURT OF COMMON PLEAS
HYBRID COUNTY, OHIO

STATE OF OHIO,	:	
Plaintiff,	:	Case No. CR02-00561
- vs -	:	
JOHN DOE,	:	OPINION ON MOTION TO SUPPRESS 3/15/2009
Defendant.	:	

This matter came on to be considered upon the Defendant's motion to suppress.

The defendant claims all evidence obtained subsequent to his stop by Deputy Jester should be suppressed since the deputy had no probable cause to believe a traffic offense occurred and had no reason to stop defendant.

The court finds that, based upon the evidence presented at the hearing on defendant's motion, the deputy observed defendant's vehicle outside its lane of travel. Under such circumstances, the deputy could stop defendant. Dayton v. Erickson (1996), 76 Ohio St.3d 3; State v. Brock (Dec. 17, 2001), Warren App. No. CA2001-03-020.

Based upon the foregoing, defendant's motion is without merit and is denied. The court will prepare its own entry of record.

_____
PEABODY, J.

NOTE: The trial court did not issue a written entry or decision denying appellant's motion to dismiss. The court orally denied the motion. Appellant has attached that section of the transcript of proceedings in which the motion to dismiss was denied.

Q: Did the defendant make any statements to you?

A: Yes.

Q: Do you remember what he said?

A: Not really, but I made a written summary of his statements. He admitted having too many drinks before driving that night.

DEFENSE: Objection, Your Honor. Neither this statement nor any summary of the defendant's statements was provided to the defense during discovery.

THE COURT: Does the state wish to respond?

PROSECUTOR: Your Honor, until now, I was not aware of this written summary.

Q (To Witness): Why didn't you tell me about this?

A: Gee, . . . It must've slipped my mind!

PROSECUTOR: Your Honor, the state does not believe that the failure to provide this written summary prejudices the defense.

DEFENSE: Your Honor, we believe the summary contains incriminating evidence that should have been disclosed in discovery. We therefore move to dismiss the charges.

THE COURT: Well, Mr. Defense, your motion is not in writing. Without a written motion, I just can't dismiss these charges. The court denies the motion to dismiss. I may, however, decide to suppress the statement if your motion to suppress has merit.

DEFENSE: Your Honor, the defense takes exception to the court's ruling. We believe that we may make such an oral motion to dismiss.

THE COURT: All right, let's move on. The motion is denied. Counselor, you may continue your questioning of Deputy Jester.

PROSECUTOR: Thank you, Your Honor.

HYBRID COUNTY
COMMON PLEAS COURT

LOCAL RULE 202 – MOTIONS TO DISMISS

(a) All motions to dismiss in criminal cases shall be filed with the court prior to the scheduled trial date.

(b) The court may entertain oral motions to dismiss if there is no time to file a written motion before trial and the defense would be prejudiced if not permitted to make the motion.