COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff	:	**CASE NO. 2019 CR 000324**
vs.	:	**Judge McBride**
JEREMY J. IKER	:	**DECISION/ENTRY**
Defendant	:	

Dorothy K. Smith, assistant prosecuting attorney for the state of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103.

W. Stephen Haynes, counsel for the defendant Jeremy J. Iker, 302 E. Main Street, Batavia, Ohio 45103.

On May 23, 2019, the defendant Jeremy J. Iker was indicted on both a felony drug possession charge and a felony OVI charge. The defendant was charged in Ct. #1 of the indictment with aggravated possession of drugs (methamphetamine, a schedule II drug), a felony of the fifth degree, and in Ct. #2 with operating a vehicle while under the influence of alcohol, a drug of abuse, or a combination of alcohol and a drug of abuse as a second felony OVI offense, a felony of the third degree.

This cause is now before the court for consideration of a motion to suppress filed by the defendant Jeremy J. Iker on July 2, 2019. The court held an evidentiary hearing on the motion on July 25, 2019. The court then established a briefing schedule for the submission of written arguments with respect to the motion.

Defense counsel filed his written argument on August 26, 2019. Counsel for the state filed her written argument on September 10, 2019. Defense counsel then filed a reply to the state's argument on September 16, 2019 and a notice of supplemental authority on October 1, 2019.

At the conclusion of the submission of the written arguments of counsel, the court took the motion under advisement.

Upon consideration of the motion to suppress, the record of the proceedings, the evidence presented for the court's consideration, the written arguments of counsel, and the applicable law, the court now renders this written decision.

STANDARD OF REVIEW

This matter is before the court on a motion to suppress filed by the defendant challenging the validity of the warrantless arrest of the defendant and of the seizure of evidence during the course of the arresting officer's investigation.

A motion to suppress is defined as "a device used to eliminate from a criminal trial evidence that has been secured illegally, generally in violation of the Fourth Amendment (search and seizure), the Fifth Amendment (privilege against self-incrimination), or the Sixth Amendment (right to assistance of counsel, right of confrontation, etc.) of the United States Constitution."[1] When a defendant's motion to suppress is successful, the principal remedy for a constitutional violation is to exclude the evidence from the criminal trial.[2]

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[1] *State v. Scruggs*, 12th Dist. Clinton No. CA2005-11-042, 2007-Ohio-6416, ¶ 4, citing *State v. French*, 72 Ohio St.3d 446, 449-50 (1995).
[2] *State v. Haines*, 12th Dist. Clermont No. CA2003-02-015, 2003-Ohio-6103, ¶ 8.

Pursuant to Crim.R. 12(C), before trial "any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue." A motion to suppress evidence "on the ground that it was illegally obtained" must be made prior to trial.[3]

In filing a motion to suppress, the defendant "shall state with particularity the grounds upon which it is made and shall set forth the relief or order sought."[4] The defendant must "state the motion's legal and factual bases with sufficient particularity to place the prosecutor and the court on notice of the issues to be decided."[5] When a defendant moves to suppress evidence recovered during a warrantless search, the state has the burden of showing that the search fits within one of the defined exceptions to the Fourth Amendment's warrant requirement.[6]

A motion to suppress typically "presents mixed questions of law and fact."[7] In reviewing such a motion, "the trial court, as the trier of fact, is in the best position to weigh

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[3] Crim.R. 12(C).
[4] *State v. Way*, 12th Dist. Butler No. CA2008-04-098, 2009-Ohio-96, ¶ 7, quoting Crim.R. 47.
[5] *Way*, 2009-Ohio-96 at ¶ 7, quoting *State v. Wood*, 12th Dist. Clermont No. CA2007-12-115, 2008-Ohio-5422, ¶ 10.
[6] *State v. Banks-Harvey*, 152 Ohio St.3d 368, 2008-Ohio-201, 96 N.E.3d 262, ¶ 18, citing *Athens v. Wolf*, 38 Ohio St.2d 237, 241, 313 N.E.2d 405 (1974).
[7] *State v. Wash*, 12th Dist. Preble No. CA2019-02-002, 2020-Ohio-152, ¶ 11. *See State v. Gray*, 12th Dist. Butler No. CA2011-09-176, 2012-Ohio-4769, ¶ 15 (holding same); *State v. Codeluppi*, 139 Ohio St.3d 165, 2014-Ohio-1574, 10 N.E.3d 691, ¶ 7, citing *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5373, 797 N.E.2d 71, ¶ 8 (holding same); *State v. Minton*, 12th Dist. Warren No. CA2017-08-132, 2018-Ohio-2142, ¶ 12, citing *State v. Bell*, 12th Dist. Clermont No. CA2008–05–044, 2009–Ohio–2335, ¶ 8 (holding same).

the evidence in order to resolve factual questions and evaluate witness credibility."[8] As such, the court is free to accept or reject any or all of the testimony presented.[9]

The issues raised by the defendant in this case involve the constitutionality of (1) the stop and detention of the defendant (reasonable suspicion), (2) the arrest of the defendant (probable cause), and (3) the obtaining of statements from the defendant (voluntariness and compliance with *Miranda* and *Berkemer v. McCarty*).

FINDINGS OF FACT

The court makes the following findings of fact based upon the testimony of the witnesses and the exhibits it found to be admissible, credible, and reliable as presented at trial:

Trooper Jordan Haggerty has been employed by the Ohio State Highway Patrol since September 30, 2016. Trooper Haggerty has received training on the National Highway Traffic Safety Administration (NHTSA) manual, including its update in 2018, relating to the detection of OVI offenses and the administration of standardized field sobriety tests. He has passed the required test for certification as to this training.

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[8] *State v. Egnor*, 12th Dist. Warren No. CA2019-05-042, 2020-Ohio-327, ¶ 16, citing *State v. Vaughn*, 12th Dist. Fayette No. CA2014-05-012, 2015-Ohio-828, ¶ 8. *See State v. Deluca*, 12th Dist. Butler No. CA2016-03-055, 2017-Ohio-1235, ¶ 9, citing *Vaughn*, 2015-Ohio-828 at ¶ 9 (holding same); *Codeluppi*, 2014-Ohio-1574 at ¶ 7, citing *Burnside*, 2003-Ohio-5373 at ¶ 8 (explaining that when the trial court reviews a motion to suppress "the 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.").

[9] *State v. Leder*, 12th Dist. Clermont No. CA2018-10-072, 2019-Ohio-2866, ¶ 20, citing *State v. Cummins*, 12th Dist. Clermont No. CA2018-07-051, 2019-Ohio-1496, ¶ 45.

Trooper Haggerty also received training in the Advanced Roadside Impaired Driving Enforcement (ARIDE) program that was developed by the National Highway Traffic Safety Administration in order to train officers to observe and identify signs of impairment related to drugs. He has received similar certification related to this training and has taken refresher courses related to the NHTSA manual and ARIDE in part because of his duties as a training officer.

In addition to his training, Trooper Haggerty has had occasion during his relatively short tenure with the Ohio State Highway Patrol to arrest more than 200 OVI offenders, including 40-50 offenders who were drug impaired drivers.

On March 22, 2019, Trooper Haggerty was on routine patrol in Union Township, Clermont County, when he observed a black station wagon being operated on the ramp off of I-275 northbound where I-275 intersects with S.R. 125. He observed the black station wagon turning right onto S.R. 125. Trooper Haggerty then proceeded to also turn right off the ramp onto S.R. 125 in order to follow the subject vehicle.

Within a short time thereafter, Trooper Haggerty observed the vehicle drift to the right to the point that the two right tires came close to the white dotted line on the right.[10] The vehicle then drifted back into the center of the lane. According to Officer Haggerty, the vehicle was noticeably weaving in its lane of travel. However, upon comparing Officer Haggerty's testimony to the video evidence, in actuality the weaving was limited to what has already been described.

Trooper Haggerty also observed that the right turn signal was still flashing for a few seconds after turning even though the vehicle was not changing lanes or turning right

[10] Trooper Haggerty testified that he saw the defendant's right two tires touch the right dotted line, but the court does not find this testimony credible and reliable.

again. The turn signal was then turned off, but it was turned back on again to signal a turn into a gas station.

At this point, Trooper Haggerty suspected that the driver could possibly be impaired, and he activated his overhead lights in order to initiate a traffic stop. At the point of activation of his lights, Trooper Haggerty's in cruiser camera, which was mounted facing the front windshield, also activated and began recording what occurred from a point of about one and a half minutes before the stop was initiated.

After Trooper Haggerty activated his overhead emergency lights, he observed the subject vehicle turning into the gas station and stopping in the parking lot. Although there were a few open parking spots in the lot, the vehicle stopped short of being pulled into one of those spots.

Trooper Haggerty exited his vehicle and approached the driver's side window of the subject vehicle, where he first made contact with the defendant, who was seated in the driver's position in the vehicle. He asked the defendant to extinguish the cigarette that he was holding, and the defendant acceded to this request.

The conversation that ensued included the following: Soon after stopping the defendant, Trooper Haggerty asked him: "Did you take something today?" When the answer was negative, Trooper Haggerty said, "Your driving was horrible." Later, he told the defendant, "If you're going to sit there and lie to me and not be cooperative, you're going to jail tonight. But if you're going to sit there and lie to me and disrespect me to my face when I already know, I ain't gonna help you out at all." A little later he said, "I'm asking you straight up. You gonna be honest with me?" When the defendant protested that he had not done anything, Trooper Haggerty said, "You gonna sit there and still lie to

me?" Finally, the defendant responded and admitted, "Yeah, I do have a problem man but I haven't done anything in hours..." Trooper Haggerty went ahead then to say, "What did you do? You can be honest with me man. I'm not gonna judge you." When the defendant said he "don't want any charges," Trooper Haggerty replied, "I can't help you if you have any warrants." A reasonable defendant would assume, based on this conversation, that unless the defendant must be taken to jail because he has an active arrest warrant, he will not go to jail if he "plays ball" because Trooper Haggerty will "help him."

The defendant mentioned that he was coming back from a casino that he had visited on that evening. In conversing with the defendant, Trooper Haggerty observed that the defendant's eyelids were droopy, that his pupils were constricted although it was dark outside, that his speech was low and raspy, and that he appeared to be drowsy.

Trooper Haggerty requested that the defendant exit his vehicle so that he could administer field sobriety tests. When the defendant exited his vehicle, he did not shut his driver's side door, and Trooper Haggerty instructed him to shut the door. Trooper Haggerty then instructed the defendant to step in front of his patrol car, and the defendant complied with this instruction. In response to questioning, the defendant stated that he had broken his ankles a couple of times.

Trooper Haggerty first administered a horizontal field nystagmus test, and he observed no clues of horizontal gaze nystagmus. Trooper Haggerty concluded from this test and his prior training that the defendant was not impaired as a result of consumption of alcohol, a CNS depressant, or a dissociative anesthetic.

Trooper Haggerty next administered a vertical gaze nystagmus test. If present, according to Trooper Haggerty, vertical field nystagmus would have indicated a high amount of alcohol, or a high dosage of a CNS depressant, or a dissociative anesthetic. However, Trooper Haggerty did not observe any vertical gaze nystagmus during his administration of the test.

Trooper Haggerty next performed a nasal cavity examination to determine if the defendant had inhaled any drugs through the nasal cavity. He did not observe any indicators that he had done so. The defendant had previously rolled down his sleeves, and Trooper Haggerty ordered the defendant to roll up his shirt sleeves so that he could view his arms for any track marks.

On the defendant's left arm, Trooper Haggerty observed track marks, which from his experience could be an indicator of an individual using needles to inject drugs, and what appeared to him to be a puncture mark that had blood coming from it. The defendant informed Trooper Haggerty that he had been "stuck" during his contact with a "sticker bush" earlier in the day.

At some point during their conversation, the defendant stated that he had not used heroin in six prior months. However, he sometime later stated that he had used heroin earlier in the day. He told Trooper Haggerty that he had an uncapped needle in the vehicle, and he offered to retrieve it so the officer did not get accidentally poked when he searched the vehicle.

Trooper Haggerty next administered several standardized divided attention field sobriety tests, which were the walk and turn and one-leg stand tests. He told the defendant to remain in a stationary position while he gave instructions with relation to the

administration of the tests. He then administered the tests in accordance with his training and the NHTSA standards.

With regard to the walk and turn test, Trooper Haggerty observed that the defendant moved his feet to maintain his balance while listening to instructions, stepped off the line on step number nine while walking down an imaginary line, and made an improper turn by failing to keep his lead foot planted while taking a number of small steps to turn. With regard to the one leg stand test, Trooper Haggerty observed that the defendant was swaying while standing on one leg, that he raised his arms more than 6" eight times during the test, and that he lost his balance and placed his raised foot on the ground once during the test. Trooper Haggerty assessed that the defendant had demonstrated a total of three out of four clues indicating impairment.

Finally, Trooper Haggerty administered a "lack of convergence test" which is a test he states he was trained on through ARIDE programming. According to Trooper Haggerty, if a lack of convergence is present, this indicates that a suspect is impaired by cannabis, alcohol, or CNS depressant. According to Trooper Haggerty, since both of the defendant's eyes converged normally, this indicated that he was not impaired on any of those drugs.

Finally, Trooper Haggerty administered a modified Romberg balance test in which it took the defendant 28 seconds to estimate the passage of 30 seconds.

After all of the tests were concluded, the defendant informed Trooper Haggerty that he had used heroin at 9 or 9:30 a.m. the prior day. Since it was March 22nd at the time this statement was concluded, Trooper Haggerty concluded that the defendant had used heroin on March 21st.

After all the tests had been finished, Trooper Haggerty opined that the defendant was noticeably and appreciably impaired by a drug of abuse, which he described as either a narcotic analgesic or heroin. He stated his opinion was based on the presence of constricted pupils and droopy eyelids, the defendant's low and raspy voice, fresh track marks on his left arm, his admission to using heroin, and the defendant's admission to having an uncapped needle inside his automobile, along with his own observations of the defendant's driving.

At this point, Trooper Haggerty placed the defendant under arrest for OVI under R.C. 4511.19(A), driving under a license suspension, a marked lanes violation, and possession of drug paraphernalia.

Upon placing the defendant under arrest, Trooper Haggerty immediately advised him of his *Miranda* rights. According to Trooper Haggerty, the defendant appeared to understand his rights.

Trooper Haggerty searched the defendant's vehicle, which he said was based on probable cause arising from the defendant's admission to possessing an uncapped needle. After the search was concluded, Trooper Haggerty told the defendant that if he cooperated with him, things would go one way, and if he did not, they would go another way. The defendant made several statements. He advised that he had purchased the substance earlier in the day and that whomever he bought the substance from advised that it was heroin. Trooper Haggerty believed that what he observed to be a crystal substance was methamphetamine, but the defendant advised that he uses heroin but not methamphetamine.

In his testimony, Trooper Haggerty said that the defendant told him "early on" that he had warrants. It is unclear as to when Trooper Haggerty was provided this information. However, he was able to determine that in fact the defendant did not have any open warrants, although after the defendant was arrested, he learned that the defendant's driver's license was suspended.

Trooper Haggerty read the Form 2255 to the defendant and advised him of his right to refuse to take a test. He also provided the defendant with a copy of the Form 2255 so he could read it himself. The defendant submitted to a urine test. Trooper Haggerty acknowledged that he might have told the defendant that they would get a bodily substance from him by a warrant.

LEGAL ANALYSIS

The Fourth Amendment to the United States Constitution protects people against "unreasonable searches and seizures."[11] Similarly, the Ohio Constitution provides: "The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated."[12] The United States Supreme Court has long observed that "'[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and

[11] Fourth Amendment to the United States Constitution.
[12] Ohio Constitution, Article I, Section 14.

control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.'"[13]

These Fourth Amendment principles apply to drivers in motor vehicles.[14] A traffic stop is considered a seizure of the driver.[15] Ohio recognizes two types of lawful traffic stops, non-investigatory traffic stops and investigatory traffic stops.[16]

For a non-investigatory traffic stop, "[w]hen the police stop a vehicle based on probable cause that a traffic violation has occurred, the stop is reasonable under the Fourth Amendment."[17] An officer has probable cause to stop a vehicle for a traffic stop when the officer has observed a traffic violation.[18] This is true even for minor traffic violations.[19] And a traffic stop made with probable cause that a traffic violation occurred is not unreasonable even if "* * * the officer had some ulterior motive for making the stop, such as a suspicion that the violator was engaging in more nefarious criminal activity."[20]

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[13] *Terry v. Ohio*, 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), citing *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251, 11 S.Ct. 1000, 35 L.Ed. 734 (1891).

[14] *State v. Lunce*, 12th Dist. Butler No. CA2000-10-209, 2001 WL 530541, *2 (May 21, 2001), citing *State v. Johnson*, 85 Ohio App.3d 475, 478 (12th Dist. 1993).

[15] *Brendlin v. California*, 55 U.S. 249, 255, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007), citing *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).

[16] *State v. Stover*, 12th Dist. Clinton No. CA2017-04-005, 2017-Ohio-9097, ¶ 8, citing *State v. Campbell*, 12th Dist. Butler Nos. CA2014-02-048 and CA2014-02-051, 2014-Ohio-5315, ¶ 25.

[17] *State v. Casey*, 12th Dist. Warren No. CA2013-10-090, 2014-Ohio-2586, ¶ 18, citing *Bowling Green v. Godwin*, 110 Ohio St.3d 58, 2006-Ohio-2563, ¶ 11. *See State v. Grenoble*, 12th Dist. Preble No. CA2010-09-011, 2011-Ohio-2343, ¶ 11, quoting *Dayton v. Erickson*, 76 Ohio St.3d 3 (1996), at the syllabus ("Where a police officer stops a vehicle based on 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 even if the officer had some ulterior motive for making the stop, such as a suspicion that the violator was engaging in more nefarious criminal activity.").

[18] *State v. Turner*, 12th Dist. Clermont No. CA2018-11-082, 2019-Ohio-3950, ¶ 11, citing *Stover*, 2017-Ohio-9097 at ¶ 8.

[19] *State v. Egnor*, 12th Dist. No. CA2019-05-042, 2020-Ohio-327, ¶ 25, citing *City of Dayton v. Erickson*, 76 Ohio St. 3d 3, 11-12 (1996).

[20] *State v. Kelly*, 188 Ohio App.3d 842, 2010-Ohio-3560, 937 N.E.2d 149, ¶ 15 (12th Dist.), quoting *Dayton v. Erickson*, 76 Ohio St.3d 3, 665 N.E.2d 1091 (1996), syllabus.

Trooper Haggerty testified that the only traffic violation he observed was a marked lanes violation.[21] R.C. 4511.33 governs driving in marked lanes and provides, in pertinent part:

> "(A) Whenever any roadway has been divided into two or more clearly marked lanes for traffic, or wherever within municipal corporations traffic is lawfully moving in two or more substantially continuous lines in the same direction, the following rules apply:
>
> (1) A vehicle or trackless trolley shall be driven, as nearly as is practicable, entirely within a single lane or line of traffic and shall not be moved from such lane or line until the driver has first ascertained that such movement can be made with safety. * * *"

Even a single marked lanes violation under R.C. 4511.33 can constitute probable cause to stop a vehicle.[22] So too, an officer has reasonable and articulable suspicion that a driver has violated R.C. 4511.33 when an officer observes a motorist drive on a marked lane line.[23]

Thus, if Trooper Haggerty observed the defendant cross or even drive on a marked lane line, then he would have, at the very least, articulable suspicion that the defendant violated R.C. 4511.33. However, upon extensive and repeated review of the video evidence, the court finds that the defendant's tires did not touch a marked lane line, much less cross it.

Even so, the state posits that if Trooper Haggerty was mistaken in his belief that a traffic violation occurred, such mistake is permissible under the recent case of *State v.*

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[21] The defendant's failure to turn off his turn signal upon completing a stop and the alleged weaving are not, in and of themselves, traffic violations.
[22] *State v. Starks*, 2d Dist. Montgomery No. 28158, 2019-Ohio-2842, ¶ 8.
[23] *Turner*, 2019-Ohio-3950 at ¶ 19.

Leder, 12th Dist. Clermont No. CA2018-10-072, 2019-Ohio-2866.[24] In *Leder* the appellate court affirmed the trial court's factual finding, which was corroborated by video evidence, that Trooper Haggerty had reasonable, articulable suspicion that the defendant committed multiple traffic violations. The portion of *Leder* that dealt with mistakes, which the state cites to, is dicta,[25] and states as follows:

> "Although we find no mistake occurred in this case, this outcome would not change even if Trooper Haggerty was mistaken in his belief that a traffic violation had in fact occurred. This is because '[a] police officer's objectively reasonable belief that a traffic violation has occurred, including reasonable mistakes of law, can constitute reasonable suspicion to justify a traffic stop.' *State v. Kirkpatrick*, 1st Dist. Hamilton Nos. C-160880 thru Hamilton Nos. C-160882, 97 N.E.3d 871, 2017-Ohio-7629, ¶ 6, citing *Heien v. North Carolina*, 574 U.S. 54, 135 S.Ct. 530, 540, 190 L.Ed.2d 475 (2014)."[26]

This portion of *Leder* cites to *Heien v. North Carolina*, 574 U.S. 54, 135 S.Ct. 530, 190 L.Ed.2d 475 (2014), which contains further explanation regarding mistakes by an officer that nevertheless amount to reasonable suspicion. In *Heien*, a vehicle was stopped because one of its two brake lights was inoperable, and the officer believed that both were required to be working.[27] This belief was a mistake of law by the officer because a single working brake light was all the law required.[28] The Court examined whether reasonable suspicion can rest on a mistaken understanding of what was legally

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[24] The state actually does not proffer any specific argument regarding *Leder*, but it does cite to it extensively in block quotes.
[25] Courts have defined dicta as "statements made by a court in an opinion that are not necessary for the resolution of the issues." *State v. Petty*, 2019-Ohio-4241, 134 N.E.3d 222, fn. 1 (4th Dist.), quoting *State v. Lewis*, 4th Dist. Lawrence No. 10CA24, 2011-Ohio-911, ¶ 19.
[26] *Leder*, 2019-Ohio-2866 at ¶ 19.
[27] *Heien*, 135 S.Ct. at 534.
[28] Id.

prohibited.[29] The Court held that a mistake of law can provide reasonable suspicion to justify a stop of a vehicle.[30] However, "[t]he Fourth Amendment tolerates only reasonable mistakes, and those mistakes—whether of fact or of law—must be *objectively* reasonable."[31] As such, "an officer can gain no Fourth Amendment advantage through a sloppy study of the laws he is duty-bound to enforce."[32]

The *Heien* Court found that the officer's mistake regarding the brake light was reasonable because, although the statute refers 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."[33] The use of "other" suggests that a "stop lamp" is a type of "rear lamp." And another subsection of the same provision required that vehicles "have all originally equipped rear lamps or the equivalent in good working order," arguably indicating that if a vehicle has multiple "stop lamps" all must be functional.[34] As such, the Court resolved that the officer's mistake of law was reasonable, thus providing reasonable suspicion justifying the stop of the defendant.[35]

In the instant case, the state has not explained whether Trooper Haggerty made a mistake of law or fact. As to mistakes of law, "*Heien* does not support the proposition that a police officer acts in an objectively reasonable manner by misinterpreting an unambiguous statute."[36] Indeed, Ohio courts examining *Heien* do not permit mistakes of

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[29] Id. at 536.
[30] Id.
[31] (Emphasis original.) Id. at 539.
[32] Id. at 539-540.
[33] Id. at 540.
[34] Id.
[35] Id.
[36] *State v. Trout*, 5th Dist. Licking No. 18-CA-00043, 2019-Ohio-124, ¶ 22, citing *United States v. Stanbridge*, 813 F.3d 1032, 1037 (7th Cir. 2016).

law when they are unreasonable.[37] Moreover, Ohio courts have found that R.C. 4511.33, governing marked lanes, is unambiguous.[38]

In any case, it seems to the court that Trooper Haggerty's mistake was not so much one of misinterpreting R.C. 4511.33 as it was a mistake of fact. He testified that the defendant's right tires touched a marked lane line, but as discussed, the court has concluded that he was incorrect. The court finds that, upon reviewing the video evidence at length, Trooper Haggerty's belief that the defendant violated the marked lanes statute was not objectively reasonable.[39] Notably, the state has not offered any argument as to why such mistake would be reasonable, and it is the state's burden to demonstrate the stop of the defendant was legal.

Thus, the court rejects the state's implied argument that the stop of the defendant in this case was justified by an observed traffic violation, even if Trooper Haggerty made a mistake of law or fact. However, the state seems to imply in its written argument, although it does not expressly argue, that even if Trooper Haggerty was not justified in

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[37] *See Trout*, 5th Dist. 2019-Ohio-124 at ¶ 22 (finding troopers' mistake of law not objectively reasonable when the traffic statute was clear); *State /City of Vermilion v. Lane*, 6th Dist. Erie No. E-18-008, 2018-Ohio-5284, ¶ 20 (finding officer's mistake of law not objectively reasonable when the traffic statute at issue was unambiguous and clear); *State v. Dowty*, 2d Dist. Montgomery No. 26982, 2016-Ohio-4719, ¶ 18 (finding that, because no reasonable officer could have read an unambiguous statute to believe that a traffic violation occurred, *Heien* was inapplicable).

[38] *Lane*, 2018-Ohio-5284 at ¶ 18.

[39] *Cf. State v. Nevarez-Reyes*, 2d Dist. Montgomery No. 27047, 2017-Ohio-2610 (finding a mistake of fact reasonable where a deputy pulled over a driver based on an incorrect license plate number, leading the deputy to believe the vehicle's registration was expired and fictitious; the license plates were from Illinois and the deputy visually confirmed the license plate number prior to stopping the vehicle; the 'B' at the end of the number (which was inadvertently not entered by the deputy) was smaller than the numbers, the 'B' was not an obvious part of the license plate number; and the deputy's search result was consistent with the results that two detectives had also received when they independently ran the license plate number); *City of Bowling Green v. Godwin*, 110 Ohio St.3d 58, 2006-Ohio-3563, 850 N.E.2d 698 (finding that an officer made a reasonable mistake of fact where he stopped a driver for exiting a municipal parking lot in violation of posted signs, although in fact the signs had not been given the requisite authorization by the city council, and therefore were of no effect).

stopping the defendant for a marked lanes violation, he still had a reasonable suspicion under the totality of the circumstances to conduct an investigatory stop to determine if the defendant was engaged in criminal activity, that being driving under the influence of alcohol or a drug of abuse.

The second type of lawful traffic stop is an investigative stop, also known as a *Terry* stop, in which the officer has reasonable suspicion based upon specific or articulable facts that criminal behavior is imminent or has occurred.[40] With respect to a *Terry* stop, the concept of "reasonable and articulable suspicion" has not been precisely defined, but "it has been described as something more than an undeveloped suspicion or hunch but less than probable cause."[41] "The determination of whether an officer had reasonable and articulable suspicion to initiate an investigative stop must be based on the totality of circumstances viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold."[42]

In the case at hand, the state cites the following facts to imply that Trooper Haggerty had a reasonable, articulable suspicion to conduct an investigative stop: (1) Trooper Haggerty saw the defendant's two tires cross the white dotted lines, (2) the defendant was weaving in his lane, and (3) the defendant's turn signal remained on for an "extensive period" of time. First, as explained, the defendant's tires did not touch or cross a marked lane line.

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[40] *State v. Bullock*, 2017-Ohio-497, 85 N.E.3d 133, ¶ 7 (12th Dist.), citing *State v. Pfeiffer*, 12th Dist. Butler No. CA2003-12-329, 2004-Ohio-4981, ¶ 23.
[41] *State v. Hawkins*, 2018-Ohio-1983, 101 N.E.3d 520, ¶ 17 (12th Dist.), citing *State v. Baughman*, 192 Ohio App.3d 45, 2011-Ohio-162, 947 N.E.2d 1273, ¶ 15 (12th Dist.).
[42] (Internal quotations omitted.) *Egnor*, 2020-Ohio-327 at ¶ 18, quoting *State v. Hairston*, 156 Ohio St.3d 363, 2019-Ohio-1622, ¶ 10.

As to the second fact, the alleged weaving, "weaving, even within a single lane of traffic, can be sufficient basis to make an investigatory stop if the totality of the circumstances surrounding the stop support a conclusion that the officer had a reasonable suspicion that the defendant was involved in criminal activity at the time of the stop."[43] However, "[c]learly, not all instances of weaving within one's lane of travel will justify a traffic stop. Modest weaving within one's lane, without more, is insufficient."[44] Here, any alleged weaving was modest, at best, and falls far short of justifying an investigatory stop.

The last fact cited by the state is that the defendant's turn signal remained on after he used it for a right-hand turn. Although the state characterizes this as "extensive," it actually only remained on for approximately 17 seconds after the defendant completed a right turn. He then turned it off before properly using it again to signal another right-hand turn into a gas station, which he in fact made. Notably, this is not a situation where the defendant turned on his turn signal but then did not turn. Instead, he turned it on, made a turn, and the turn signal did not automatically turn off. As with the weaving, the court finds this fact insufficient to create a reasonable and articulable suspicion of criminal activity.

However, as explained, the court must look to the totality of the circumstances, so it will consider the mild weaving in conjunction with the defendant's rogue turn signal. The court has carefully and repeatedly reviewed the video footage of the defendant's driving, but even when considering the very moderate weaving and rogue turn signal, it

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[43] *Egnor*, 2020-Ohio-327 at ¶ 25, citing *City of Middletown v. Myers*, 12th Dist. Butler No. CA97-04-085, 1997 Ohio App. LEXIS 4729, *5-6 (Oct. 27, 1997).
[44] *State v. Luckett*, 1st Dist. Hamilton No. C-070359, 2008-Ohio-1441, ¶ 14, citing *State v. Brown*, 11th Dist. No.2006-T-0077, 2007-Ohio-4626.

cannot find that under the totality of the circumstances that Trooper Haggerty had reasonable, articulable suspicion that the defendant was engaged in criminal activity.[45] Instead, Trooper Haggerty was operating under a mere hunch that the defendant was impaired, and he prematurely stopped the defendant, thus infringing upon his Fourth Amendment rights.[46]

"It is the role of a trial court in a suppression hearing such as this to determine whether there was sufficient evidence of the officer having reasonable and articulable

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[45] *See State v. Howell*, 2018-Ohio-591, 106 N.E.3d 337, ¶ 16 (1st Dist.) (finding evidence insufficient to establish a reasonable suspicion that the defendant had been engaged in criminal activity, i.e. driving under the influence, where the trooper testified that the traffic stop occurred at 2:30 a.m., that the defendant had initially failed to dim her headlights upon coming up behind the trooper's vehicle, that the defendant had bounced within her lane, and that she had refused to pass the trooper when he slowed his speed).

[46] *Cf. Egnor*, 2020-Ohio-327 at ¶ 26 (finding that an officer had reasonable, articulable suspicion to stop the defendant when he drifted to the right-hand lane and straddled the center line for some time after turning, weaved several times within his lane of traffic, and went over the lines a couple of times while weaving); *Bullock*, 2017-Ohio-497 (officer had reasonable, articulable suspicion that the defendant was driving under the influence where, at approximately 2:00 a.m., the officer observed the defendant drive with his turn signal for significant distance but did not turn down the roadway available to him, the defendant pulled off to the side of the road by straddling the white line with his turn signal still on, the defendant then pulled back onto the road and made an immediate left turn without a turn signal, and the defendant drove completely off the road into a field where he eventually stopped near a driveway); *In re Eric W.*, 113 Ohio App.3d 367, 370, 680 N.E.2d 1275, 1277 (6th Dist. 1996) (officer's observations of defendant's car swerving off side of road, nearly striking bridge abutment, and thereafter weaving slightly within lane justified officer in making initial traffic stop based on reasonable suspicion that driver was under influence of alcohol); *State v. Stamper*, 102 Ohio App.3d 431, 657 N.E.2d 365 (11th Dist. 1995) (highway patrol officer had reasonable and articulable suspicion that defendant was driving while under the influence, justifying investigatory stop of vehicle, though roads were covered with small amount of snow, where officer observed defendant momentarily drive off edge of road, officer observed back of defendant's vehicle fishtail several times, officer observed defendant driving left of road's center, and officer testified that instances of fishtailing appeared to be caused by the fact defendant was accelerating too quickly, that edges of road were easily discernible despite snow, and that officer did not experience any difficulties in driving on right side of road while following defendant); *State v. Brandenburg*, 41 Ohio App.3d 109, 534 N.E.2d 906 (2d Dist. 1987) (police officer had specific and articulable suspicion warranting investigative stop of suspected drunk driver; driver's speed of 21 m.p.h. over posted limit and weaving in and out of his lane and onto berm of road several times in relatively short period of time were sufficient to create reasonable suspicion that driver was intoxicated)

suspicion to effectuate a traffic stop * * *."[47] Because Trooper Haggerty lacked both probable cause to stop the defendant for a traffic violation as well as a reasonable suspicion that the defendant had been engaged in criminal activity, the court finds that the defendant's motion to suppress should be granted. "If the seizure is unlawful, any evidence obtained after the unlawful seizure must be suppressed as the 'fruit of the poisonous tree.'"[48] As such, all evidence discovered and statements made subsequent to Trooper Haggerty stopping the defendant must be suppressed.

CONCLUSION

For the foregoing reasons, the defendant's motion to suppress is well-taken and is hereby granted.

Counsel are directed to contact the Assignment Commissioner (513-732-7108) within five days and to schedule a trial setting conference, which shall be held within fifteen days.

IT IS SO ORDERED.

DATED: 2-21-19

Judge Jerry R. McBride

[47] *Leder*, 2019-Ohio-2866 at ¶ 30, quoting *State v. Hatfield*, 5th Dist. Morrow No. 10-CA-8, 2011-Ohio-597, ¶ 38.
[48] *Jones*, 2010–Ohio–2854 at ¶ 27, quoting *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

CERTIFICATE OF SERVICE

I certify that copies of the within Decision/Entry have been provided on this 21st day of February 2020 by e-mail to Dorothy Branson-Smith, Assistant Prosecuting Attorney, at dksmith@clermontcountyohio.gov, and to W. Stephen Haynes, at shaynes@clermontcountyohio.gov, and to Christopher J. Feldhaus, at cjfeldhaus@clermontcountyohio.gov, Attorneys for the Defendant. Printed copies have been provided to the Prosecuting Attorney's Office, the Public Defender's Office, and the Probation Department.

Bailiff to Judge McBride