9 Fla. L. Weekly Supp. 562a

Criminal law -- Search and seizure -- Vehicle stop -- Erratic driving pattern -- Where defendant driving 25 mph in 45 mph zone abruptly applied brakes on two occasions, defendant drifted within her lane and hugged the right side of her lane at times but never left her lane or interfered with other traffic, and defendant's driving did not constitute a traffic infraction, objective analysis does not support a finding that stop was based on founded suspicion -- Motion to suppress granted

STATE OF FLORIDA vs. PAOLA F. CRAWFORD. County Court, 15th Judicial Circuit in and for Palm Beach County, Criminal Division. Case No. 01-013194TC A04. June 25, 2002. Barry M. Cohen, Judge. Counsel: Greg Kridos, Assistant State Attorney, for Plaintiff. Scott Richardson, for Defendant.

ORDER GRANTING DEFENDANT'S

MOTION TO SUPPRESS

THIS CASE came before the Court on May 29, 2002, for an evidentiary hearing on Defendant's Motion to Suppress. The State was represented by Greg Kridos, Assistant State Attorney; Defendant was represented by Scott Richardson, Esquire.

The Court heard testimony from the arresting officer and reviewed the relevant portion of the in-car video which depicted the Defendant's driving pattern prior to being stopped by the officer. The Court listened to very persuasive arguments from counsel for *both* sides, reserved ruling, and directed counsel to submit proposed orders supporting their respective positions. These proposed orders have now been received and reviewed by the Court. *Both* orders are well reasoned.

Having considered the evidence presented, the proposed orders of counsel, and the case law cited therein, the Court grants Defendant's Motion to Suppress, based upon the following Findings of Fact and Conclusions of Law.

FACTS

On June 7, 2001, at approximately 12:35 a.m., in Boca Raton, Palm Beach County, Florida, the Defendant was followed by a police officer as he drove eastbound on Glades Road. This section of Glades Road is multi lane in each direction. The roadway in question was well lit, dry, and free of obstruction.

The Defendant was traveling 25 mph in a 45 mph zone. The Defendant abruptly applied his brakes on two separate occasions.

The Defendant was drifting within her lane of travel and, at times, hugged the right side of her lane.

At one point, the Defendant moved her vehicle from the extreme right side of her lane to the left side of her lane.

The officer testified that he felt the Defendant was showing signs of impairment, or was perhaps ill, and, therefore, effectuated a traffic stop.

The Defendant never left her lane or traffic or interfered with any other vehicle on the roadway.

The prosecutor agrees that the observations by the officer did not form the basis of a traffic infraction for which

the Defendant could have been issued a traffic citation.

ANALYSIS

The validity of the stop in this case requires a comprehensive analysis of considerable case law. At first blush, much of this case law seems to support the state's position. However, upon closer examination, as noted below, a different picture emerges.

An appropriate starting point for this analysis is the case of *Bailey v. State,* 319 So.2d 22, (Fla. 1975). In that case, the law enforcement officer followed the defendant's vehicle for almost three miles, observing weaving to some extent, but which wasn't ``all that bad'', p. 23. The officer pulled the Defendant over ``to determine why the car was proceeding in such a manner'', p. 23. The case went on to discuss the search of the vehicle, and the issue was whether there was a valid consent to search. The defendant did not raise in the appellate court whether the initial stop was lawful. In dicta, the Court made the following statement:

> Because of the dangers inherent to our modern vehicular mode of life, there *may be* justification for the stopping of a vehicle by a patrolman to determine the reason for its unusual operation. In this instance, although no vehicular regulation was being violated, it seemed strange to the officer that the vehicle was proceeding at only 45 miles per hour and was weaving, although not so much as to move out of its lane on one side or the other. Perhaps some of the possibilities occurring to the officer were defective steering mechanism or that the operator was driving under the influence of alcohol or some other drug. (Emphasis supplied). P. 26

This language has been cited repeatedly by other courts in addressing the issue of the lawful authority of an officer to stop a motor vehicle. However, inasmuch as this language is dicta, and not central to the holding of the case, a more detailed analysis of each factual situation must be made in order to determine if an officer has the requisite founded suspicion to stop a motorist.

The next case addressing this issue in *Esteen v. State,* 503 So.2d 356, (5th DCA 1987). The officer observed the defendant in that case to be ``driving in an erratic fashion, which he described as `weaving within the right lane; in other words, executing an S shape up the Interstate.' '' p. 356, for half a mile. The officer testified that he believed the manner of operation was consistent with the behavior of a person driving under the influence of alcohol, drugs, or of a person falling asleep at the wheel. The Court, relying in part on *Bailey*, upheld the stop because of the officer's concern that the driver was drunk or asleep, or because the vehicle might be having some mechanical difficulty. The factual situation in the *Esteen* case is different from the factual situation in this case. In *Esteen*, there were objective indicators supporting the officer's suspicion of impairment, primarily the weaving within the lane over a significant distance. In this case, the observations are objectively less supportive of a founded suspicion.

This Court is of the opinion that it must objectively evaluate the observations of the law enforcement officer to determine whether they support the officer's suspicion. Some of the cases cited below support this Court's view that an objective analysis must be made of the facts allegedly observed to determine whether a founded suspicion existed. If the Court were to automatically accept the testimony of every law enforcement officer that he or she suspected impairment, however well-intentioned and vigilant the officer may be, the Court would not be fulfilling its duty to evaluate such testimony in light of the law pertaining to such circumstances. If the Court were to accept, without objective analysis, the testimony of every law enforcement officer that he or she suspected a driver may be impaired, then all any law enforcement officer would need to say, in order to justify a stop, was

that he or she suspected, based upon his or her observations, a driver may be impaired. This Court believes that it must objectively analyze all such testimony as part of its duty to apply the law fairly and uniformly.

The next case of note is *State v. Carrillo*, 506 So.2d 495 (5th DCA 1987). In this case, the officer observed the driver move to the extreme right side of the road and then to the extreme left side of the road. Carrillo's tires touched the lane boundaries, but did not leave the lane. The officer observed the driver weave in this manner in excess of five times. The officer testified that he believed Carrillo was intoxicated. The Court upheld the stop, without actually determining that there was founded suspicion for the stop. The facts in *Carrillo* are distinguishable from the facts in this case. The Defendant in this case did not weave in excess of five times, and did not touch the lane boundaries.

The case of *State Department of Highway Safety and Motor Vehicles v. DeShong,* 603 So.2d 1349 (2nd DCA 1992), is frequently cited on the issue which is central to this case. In *DeShong,* the driver seemed to be using the lane markers to position his vehicle. In addition, for no apparent reason, he slowed from 55 mph to 30 mph, and then accelerated rapidly. The officer found this driving pattern to be ``erratic'', p. 1350, and was concerned that either the driver was impaired or that the vehicle was malfunctioning. Citing to *Bailey*, *Esteen*, and *Carrillo*, the Court concluded that there was founded suspicion to stop the driver to determine the cause of his erratic driving. The facts in *DeShong* are distinguishable from the facts in this case. Here, there was no unexplained slowing and acceleration; the braking is consistent with the Defendant realizing that a police officer was following her; and the Defendant's driving was smooth and not erratic.

Another important case in the evolution of this area of the law is *Crooks v. State,* 710 So.2d 1041, (2nd DCA 1998). In that case, the driver drove over the right hand line on the edge of the right lane of northbound traffic three times. There was no other traffic, and the officer did not testify that the driver was intoxicated or otherwise impaired. The Court in *Crooks* invalidated the stop, commenting that even if the driver was briefly outside the margin of error, there was no *objective* evidence suggesting that the driver failed to ascertain that his movements could be made with safety. It is noted that the *Crooks* Court utilized an *objective* standard for determining the validity of the stop. The driving pattern in *Crooks* is more erratic than the Defendant's driving pattern in this case. Although the officer in *Crooks* testified that he did not think the driver was impaired, and the officer in the instant case testified that he did have such a suspicion, again, an *objective* analysis is required. In this case, an objective analysis does not support a founded suspicion.

The officer in the case of *Roberts v. State,* 732 So.2d 1127 (4th DCA 1999), testified that the driver was weaving from side to side within her lane, *continually weaving,* and crossing both the right and left lane several times. The in-car video did not show the driver cross over the lines as described by the officer. The Fourth District upheld the stop, noting that, based upon *DeShong* and *Carrillo,* a police officer can stop a driver based upon a founded suspicion that a driver is under the influence, even where the driver is not committing a separate traffic offense. The *Roberts* Court determined that the driver's continuous weaving presented an *objective* basis for suspecting the driver was under the influence, and thus the objective facts supported the stop. Here, an objective analysis does not support a finding of a founded suspicion.

Finally, of the appellate cases cited by the State, *Finizio v. State,* 800 So.2d 347 (4th DCA 2001) seems to be the last pronouncement on this issue. *Finizio* involved a driver pulling his pick up truck into a gas station/market parking lot. The driveway leading to the market was between 25 and 30 feet wide. The driver turned into the lot. As he did so, it appeared that the front and back tires on the driver's side struck a raised curb. The driver then sped up quite rapidly to the pay phone area, and came to a quick stop. After the driver exited the truck, the police officer detained the driver. The Fourth District upheld the stop, stating ``if a police officer observes a

motor vehicle operated in an unusual manner, there *may be* justification for a stop even where there is no violation of vehicular regulations and no citation is issued." p. 349 (emphasis supplied). However, the Fourth District applied an objective standard for reviewing whether the officer had a reasonable or well-founded suspicion of criminal activity. The facts in *Finizio* are distinguishable from the facts in this case. In *Finizio,* the driver struck a curb, even though the driveway was 25-30 feet wide; and the driver accelerated rapidly before coming to a quick stop. In this case, the Defendant stayed within her lane and braked twice. An objective analysis of the facts in *Finizio* supported the stop. An objective analysis of the facts in this case do not.

There are multiple Circuit Court appellate and County Court cases which have also addressed this issue. In *State of Florida v. Meyers*, 6 Fla. L. Weekly Supp. 646 (County Court, Pinellas County, 1999), the driver did not travel in a straight line on a few occasions, in a construction zone. The Court granted the Motion to Suppress, finding the case to be more consistent with *Crooks* than with *Roberts,* in that *Roberts* was a case where ``continued weaving'' justified the stop. The Court in *Meyers* held that the facts in that case amounted to no more than a mere suspicion. *State v. Townley*, 6 Fla. L. Weekly Supp. 531 (9th Judicial Circuit in and for Orange County) affirmed a lower court's granting of a Motion to Suppress. The officer in that case observed the driver straddle a solid white line, then drift from the center lane three feet into the outside lane, and then one foot into the left lane for approximately 50 feet. The officer initiated that stop because he suspected the driver was DUI. In affirming the Circuit Court stated:

> The specific verbiage employed by the officer in relating his degree of suspicion should have no bearing whatsoever on the court's legal determination whether the officer's suspicion was reasonable. Reasonable suspicion based on articulable facts may not be had by merely an officer asserting that his suspicion was reasonable, nor will reasonable suspicion be precluded for the absence of such a conclusory statement. Thus, while erratic driving can justify a stop even in the absence of a traffic violation, the suspect's driving pattern must be so atypical that it reasonably suggests to an officer that the driver is impaired after the officer exercises reasonable caution against misinterpretation. An ostensibly reasonable suspicion of criminal activity is ipso facto rendered unreasonable when the acts giving rise to that suspicion are susceptible to an interpretation that more reasonably indicates noncriminal activity. P. 532.

Other cases which have addressed this issue include *Staley v. State*, 6 Fla. L. Weekly Supp. 761, (19th Judicial Circuit in and for Indian River County, 1999) (driver drifted from the right lane across the lane divider into the inside lane and then back into the right lane, changed lane without using turn signal twice, officer suspected driver was either impaired, sleepy or sick; The Court found that the evidence failed to support the State's position that the driving was erratic to the point of being sufficient to establish a founded suspicion to validate a stop for suspected DUI, citing *Carrillo* and *DeShong*); *Noorigan v. State,* 2000 WL 291557 (4th Judicial Circuit, 2000) (vehicle crossed line dividing the inside lane from the center turn lane and drift into the center lane by approximately one foot, driver made a slow correction to return to original lane; officer determined that the driving pattern was indicative of a possible impairment; Court found that, without any other objective facts, the officer simply acted on a bare suspicion or a hunch that the driver might possibly be impaired) [7 Fla. L. Weekly Supp. 369a]; *Dobrin v. State DMV,* 9 Fla. L. Weekly Supp. 355 (7th Judicial Circuit, 2002) (officer observed driver traveling at high rate of speed, estimated at 50 mph; while pacing the vehicle officer observed vehicle drifting to the right and correcting itself in a quick manner several times; arrest report did not state that driver thought impairment was a reason for the stop; Court discusses many of the cases discussed above and invalidates stop); *Bell v. State DMV*, 9 Fla. L. Weekly 354 (9th Judicial Circuit in and for Volusia County, 2002) (officer observed driver tapping his brakes, stopping and going and traveling down the center of the road,

making an ``erratic" swerve to the left, appearing to turn, driving down the middle of the road, making a wide left turn by making a big loop, veering to the right and then turning left; officer stopped driver to check on his well-being; Court found no founded suspicion that driver had committed, was committing, or was about to commit a crime; Court found that the evidence failed to support the conclusion that the driving was erratic to the point of being sufficient to establish a founded suspicion to validate a stop for suspected DUI).

CONCLUSION

This Court is not unmindful of the carnage caused by drunk drivers in our society. This Court is also aware that anti-crime measures and court decisions giving the police wide latitude to detect crime are more popular than those providing protections for the rights of the accused. However, this Court should not and will not base its decisions on public opinion polls.

To quote the Circuit Court for the 7th Judicial Circuit in Volusia County, sitting in its appellate capacity, ``This Court will not grant police officers blanket authority to conduct investigatory stops for DUI, by virtue of a `well being check' on motorists who simply are lost, unfamiliar with the vicinity, or pose no danger to surrounding traffic." *Bell v. State,* 9 Fla. L. Weekly Supp. 354 (April 10, 2002), at p. 355.

The Motion to Suppress in this case is granted.

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