5 Fla. L. Weekly Supp. 661b

Criminal law -- Search and seizure -- Vehicle -- Stop -- Traffic infraction -- Where officer testified that defendant was weaving within his lane, that his tires were crossing lane divider line by about a foot over two-mile stretch, and that no other traffic was affected by defendant's driving pattern, officer lacked probable cause or reasonable suspicion to stop automobile for failure to maintain a single lane -- No error in granting motion to suppress

STATE OF FLORIDA, Plaintiff/Appellant, v. RAMON GONZALES, Defendant/Appellee. 17th Judicial Circuit in and for Broward County. Case No. 96-5AC10A. L.T. Case No. 95-17233MM10A. May 15, 1998. Peter Weinstein, Judge.

OPINION

THIS CAUSE came before the Court on Appellant's timely appeal of the trial court's non-final order granting Appellee's Motion to Suppress For Lack of Reasonable Suspicion. The Court, having considered the applicable law, the Appellant's Initial Brief, the Appellee's Answer Brief, the record on appeal, and being otherwise fully advised in the premises, hereby finds and concludes as follows:

FINDINGS OF FACT

On a motion to suppress, the trial judge's conclusions of fact come to the reviewing court clothed with a presump- tion of correctness, and in testing the accuracy of these conclusions, the appellate court must interpret the evidence and all reasonable deductions and inferences which may be drawn therefrom in the light most favorable to the trial judge's conclusions. *State v. Nova*, 361 So.2d 411 (Fla. 1978). The findings of facts, as enunciated by the trial court, are as follows. ``While driving on the Turnpike in Broward County, the defendant was stopped by Trooper P.J. Rotunde of the Florida Highway Patrol on August 2, 1995 and was subsequently arrested for DUI. Trooper Rotunde testified that the defendant, while driving north on the Turnpike at approximately 1:30 a.m., was weaving within his lane and that his tires were crossing the lane divider line by about a foot over a two mile stretch.

Trooper Rotunde testified that his sole basis for stopping the defendant was for violating Florida Statute 316.089, or `failure to maintain a single lane.' However, Trooper Rotunde also testified that no other traffic was affected by the defendant's driving pattern, i.e., that no other traffic was required to take any evasive action as a result of the defendant's driving pattern."

The trial court concluded that ``Fla. Stat. 316.089(1) states in pertinent part that vehicular traffic should travel as close as practical within a single lane of travel. However, this same statute states that vehicular traffic may move out of its lane when it is safe to do so.``In light of the fact that no other traffic was affected by the defendant's driving pattern, the trial court found that there was no violation of section 316.089 as alleged by the officer. Additionally, the trial court found that since this fact was the sole basis for stopping the defendant, the stop was unlawful as no violation of the statute took place.

CONCLUSIONS OF LAW

In reaching its conclusion that the motion to suppress should be granted, the trial court relied on *State v. Riley*, 638 So.2d 507 (Fla. 1994); *Collins v. State*, 65 So.2d 61 (Fla. 1953); *State v. Alford*, 2 Fla. L. Weekly Supp. 484; *U.S. v. Smith*, 799 F.2d 704 (1986); and *State v. Daniel*, 665 So.2d 1040 (Fla. 1995).

In June of 1996, while the present appeal was pending, the United States Supreme Court decided *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). Prior to *Whren*, the stan- dard to be used in determining whether a stop was pretextual was whether the officer ``would have'' made the stop absent the desire to investigate other crimes. *State v. Daniel*, 665 So.2d 1040 (Fla. 1995).

In *Whren*, the Supreme Court determined that the standard to be applied is whether the officer had probable cause to believe that a traffic infraction had occurred. The stop will be upheld as reasonable if the officer ``could have'' stopped the vehicle for the traffic infraction, thus rejecting the more subjective ``would have'' stan- dard.

The courts of the State of Florida are constitutionally directed to construe the Fourth Amendment consistent with United States Supreme Court rulings. *See* article I, § 12, Fla. Const.; *Petrel v. State*, 675 So.2d 1049 (Fla. 4th DCA 1996); *Bernie v. State*, 524 So.2d 988 (Fla. 1988). In *Holland v. State*, 696 So.2d 757 (Fla. 1997), the Florida supreme court announced that it was receding from the standard set out in *Daniel* and adopting the standard set out in *Whren*.

As this court agrees with the trial court's finding that the officer lacked probable cause or reasonable suspicion to stop the automobile for the traffic infraction, under either *Daniel*'s reasonable officer test or *Whren*'s objective test, Appellee's motion to suppress was properly granted.

Accordingly, it is hereby

ORDERED and ADJUDGED that the decision of the trial court is AFFIRMED.

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