3 Fla. L. Weekly Supp. 701b

Criminal law -- Search and seizure -- Vehicle stop -- Failure to maintain single lane -- Traffic violation did not occur where no other traffic was affected by defendant's driving pattern -- Stop based solely on failure to stay within lane was unlawful

THE STATE OF FLORIDA, Plaintiff, vs. RAMON GONZALES, Defendant. In the County Court of the 17th Judicial Circuit in and for Broward County, Traffic Division. Case No. 95-17233MM10A. December 26, 1995. Joel T. Lazarus, Judge. Counsel: Lloyd H. Goldburgh, Essen & Essen, P.A., North Miami Beach, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO

SUPPRESS FOR LACK OF REASONABLE SUSPICION

THIS CAUSE having come on to be heard upon the Defendant's Motion to Suppress, and the Court having heard testimony of the arresting officer and argument of counsel, and being otherwise duly advised in the premises, makes the following findings of fact and conclusions of law:

FACTS

1. 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.

2. 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.

3. 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.''

4. 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.

CONCLUSIONS OF LAW

5. Fla. Statute 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.

6. In light of the fact that no other traffic was affected by the defendant's driving pattern, there was no violation of section 316.089 as alleged by the officer. Additionally, the fact that this was the sole basis for stopping the defendant, the stop was unlawful as no violation of the statute took place. *See 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. 483, *State v. Myer*, 2 Fla. L. Weekly Supp. 484, *U.S. v. Smith*, 799 F.2d 704 (1986), and *State v. Daniel*, 20 Fla. L. Weekly S49.

Accordingly, it is ORDERED AND ADJUDGED:

The stop of defendant herein was unlawful; therefore, Defendant's Motion to Suppress is hereby granted.

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MOTION TO SUPPRESS:

LACK OF REASONABLE SUSPICION

The defendant, RAMON GONZALEZ, by and through his undersigned counsel, moves this Honorable Court pursuant to Florida Rules of Criminal Procedure Rule 3.190(h)(i) to suppress any and all evidence obtained as a result of an illegal stop of the defendant without a warrant, and as grounds therefore states the following:

FACTS

On August 2, 1995, the defendant was stopped by Trooper Philip Rotunde of the Florida Highway Patrol in the vicinity of mile marker 51 of the northbound Florida turnpike for ``weaving'' and crossing the lane divider line.

Subsequent to the stop of the defendant for this alleged infraction, Trooper Rotunde proceeded to test and then charge the defendant for failing to maintain a single lane pursuant to Florida Statute 316.089(1) and Driving Under the Influence pursuant to Florida Statute 316.193.

MEMORANDUM OF LAW

THE ARRESTING OFFICER FAILED TO HAVE SUFFICIENT REASONABLE SUSPICION TO JUSTIFY HIS STOP OF THE DEFENDANT. THE SUBSEQUENT ARREST OF THE DEFENDANT WAS THEREFORE ILLEGAL AND ALL EVIDENCE OBTAINED THEREAFTER SHOULD BE SUPPRESSED AS ``FRUIT OF THE POISONOUS TREE.''

Florida Statute 316.089, subsection (1) states that:

> Whenever any roadway has been divided into two or more clearly marked lanes for traffic, the following rules, in addition to all others consistent herewith, shall apply:
>
> (1) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

The defendant in this case did not cause any accident nor did he cause any vehicle to take evasive action by his course of crossing over the lane divider line. (See arrest affidavit) Therefore, the movement that the defendant's car made was done with safety and without interference of the safe operation of any vehicle. The defendant, thus, committed no infraction which would justify his stop by the Trooper.

The Supreme Court of Florida has held in *State v. Jones*, 483 So.2d 433 (Fla. 1986) that ``stopping an automobile and detaining its occupant constitutes a seizure within the meaning of the Fourth Amendment to the United States Constitution.'' *Id*. at 435.

Whether a vehicle stop is lawful depends upon whether it is predicated on a founded or reasonable suspicion that requires further investigation to determine whether or not the occupants of the vehicle had committed, are committing, or are about to commit a crime. *Popple v. State*, 626 So.2d 185 (Fla. 1993). Such suspicion must

be articulable and based on objective facts. *Popple v. State*, supra.

An officer's mere observation that a driver crossed the lane divider line with his tires several times does not give that officer the required founded or reasonable suspicion that he needs in order to effect a stop of that driver.

This principle is set forth in *State v. Riley*, 638 So.2d 507 (Fla. 1994). In *Riley*, supra, Todd Riley was a passenger in a vehicle that was stopped for failure to use a turn signal when making a right-hand turn onto U.S. 1 in Cocoa, Florida. Following the stop, the police arrested Riley for possession of marijuana found in the vehicle. Riley filed a motion to suppress the evidence, arguing that the evidence was illegally obtained because the stop was illegal. The trial court granted Riley's motion to suppress, agreeing that the stop was illegal because no other vehicle was affected by the turn effected without a turn signal.

On appeal, the Fifth District Court of Appeal affirmed the trial court's suppression order, finding that because no other vehicle was affected by the turn, no offense occurred based upon section 316.155, Florida Statutes which reads as follows:

> (1) No person may turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety, and then only after giving an appropriate signal in the manner hereinafter provided...

The *Riley* court agreed with the Fifth District's ruling affirming the trial court and interpreted section 316.155 to mean that

> ``no person may turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety, and then only after giving an appropriate signal in the manner hereinafter provided *in the event any other vehicle may be affected by the movement*. The court further stated that ``the plain language of the statute only requires a signal if another vehicle would be affected by the turn. If no other vehicle is affected by a turn from the highway, then a signal is not required by the statute. If a signal is not required, then a traffic stop predicated on failure to use a turn signal is illegal and any evidence obtained as a result of that stop must be suppressed."

This principle was followed by the court in *Florida v. Alford*, 2 Fla.L.Weekly Supp. 483 (1994). In *Alford*, supra, Deputy James Herbert of the Broward Sheriff's office observed James Alford's vehicle traveling eastbound in the inside lane of Oakland Park Boulevard wherein Alford's vehicle ``moved to its right and crossed the right lane line [by several inches to one foot] approximately six or seven times in a weaving pattern." After a short time, Deputy Herbert stopped James Alford and arrested him for DUI. Deputy Herbert testified that the sole basis for his stopping Alford was an alleged violation of Section 316.089(1) which sets forth that ``a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."

James Alford filed a motion to suppress evidence for lack of reasonable suspicion. The trial court granted Alford's motion holding that:

> ``there was no evidence adduced at the suppression hearing which showed that the Defendant's driving interfered with or endangered any other vehicular or pedestrian traffic on east Oakland Park Boulevard or Federal Highway. As such, this Court finds that there was no violation of 316.089(1),

> Fla. Statutes. Failure to stay within a single lane is a violation only when coupled with the fact that the driver has not first ascertained that changing lanes can be done without endangering any other traffic. It appears that if a driver's movements from a lane can be accomplished without such endangerment, then there is no violation of this statutory section."

The Court further held that even if Alford technically committed a violation of section 316.089(1), the totality of the his driving pattern, which encompassed a distance of at least one mile, did not constitute a reasonable basis for stopping his vehicle. The Court concluded that since there was no violation of the statute, the stop was illegal. Therefore, any evidence obtained as a result thereof must be suppressed.

In *Florida v. Myer*, 2 Fla.L.Weekly Supp. 484 (1994), officer Scott Caske of the Florida Marine Patrol observed Marjorie Myer's vehicle make several lane movements during a three mile stretch while traveling along I-95 in Broward County, Florida. However, there existed no evidence to show that Ms. Myer's lane movement caused any other vehicle to take evasive action or that her lane movement was otherwise made unsafely. Nevertheless, Officer Caske effected a traffic stop of Myer based upon Ms. Myer's failure to maintain a single lane and for going 45 mph in a 55 mph zone.

After performing several roadside sobriety tests, Ms. Myer was arrested for DUI. She later filed a motion to suppress any evidence gathered by the State for lack of reasonable suspicion to stop her in the first place.

The *Myer* court granted the motion to suppress. The court cited *Kehoe v. State*, 521 So.2d 1094 (Fla. 1988) and said that ``the police may stop and investigate a motor vehicle when there is a founded suspicion of criminal activity in the mind of the police officer.'' ``[However], one must look at the cumulative impact of the circumstance perceived by the officers in determining whether a founded or reasonable suspicion of criminal activity exists.'' *Id.* at 1096.

In view of *Kehoe,* supra, the *Myer* court concluded that the cumulative impact of the circumstances surrounding Ms. Myer's driving pattern was not adequate to constitute a founded or reasonable suspicion of criminal activity sufficient to justify the stop of Ms. Myer's vehicle. The Court said that

> ``it is clear that the primary basis for the stop of the defendant's vehicle was her alleged failure to maintain a single lane in violation of Section 316.089(1), Fla. statutes. However, the issue is whether officer Caske had a founded or reasonable suspicion that the defendant violated this statute. Section 316.089(1) Fla. Statute, provides that a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety. *The failure to stay within a single lane is a violation only when coupled with the fact that the driver has not first ascertained that changing lanes can be done with safety.* In other words, if the lane movement can be accomplished safely, as was the case here, then there is no violation of this statutory section."

In other words, if no other vehicle was endangered by Ms. Myer's lane movements, then no violation of the statute occurred. The court concluded therefore that if the basis for the stop was a violation of the traffic statute, the failure to have a traffic violation renders the stop invalid.

On September 28, 1995, the Florida Supreme Court decided this issue in the case of *State of Florida v. Alan Daniel*, 20 Fla. L. Weekly S497.

In *Daniel*, supra, Alan Daniel was arrested in Jacksonville for possession of cocaine and paraphernalia. Sergeant Bobby Deal said he made the initial stop of Daniel based on his observation that Daniel's windshield had a large crack and a windshield wiper stuck directly across the driver's view. Daniel was arrested after he failed to produce a driver license. The drugs were later discovered on Daniel's person. Daniel argued the stop was illegal.

The specific issue decided by the Supreme Court in *Daniel*, id. was: *how to determine what constitutes an impermissible pretextual traffic stop for Fourth Amendment purposes.*

In reaching its decision, the Supreme Court examined competing approaches outlined by the First District Court of California. Two of the approaches used to determine what constitutes an impermissible pretextual traffic stop are the ``objective'' test and the ``reasonable officer'' test.

The ``objective test'' asks only if the officer was objectively authorized and legally permitted to make the stop in question[...].'' id. at page S497.

The ``reasonable officer'' test refines the objective test by also asking ``whether the stop, if occasioned by a minor infraction, was of a kind falling within the usual practices of the same or similar agencies.'' id. at page S497.

In other words, the Supreme Court asks, ``*could* the officer make the stop'' and ``*would* the officer make the stop.'' Both prongs have to be satisfied before a stop will be considered legal.

The Supreme Court alluded to the *Riley* decision mentioned above and affirmed that the stop in *Riley* was illegal. It said,

> ``it did not matter whether the trial court below had found competent substantial evidence that these stops were a routine practice of similar events (i.e., the ``reasonable officer'' test), *because the stop was inherently contrary to law. Even customary practices cannot transform an illegal act into a legal one.* id. at S498.

In other words, the officer still has to observe a violation of law or an infraction before he can make a traffic stop.

The case at hand is completely analogous to the cases cited herein. Trooper Rotunde stopped Mr. Gonzalez because he was ``weaving within his lane'' and ``crossed the lane divider line numerous times by a foot.'' Trooper Rotunde testified at deposition that he stopped Mr. Gonzalez solely for his ``failing to maintain a single lane.'' (see deposition transcript; page 11, line 11-12). In fact, he also testified that he had no suspicions that Mr. Gonzalez was driving while impaired. (see transcript; page 9, line 18). Trooper Rotunde further testified that absolutely no other traffic was affected by Mr. Gonzalez's driving pattern, that ``he was no threat to anyone.'' (see transcript; page 9, line 14).

According to the foregoing authority, Mr. Gonzalez did not commit the traffic infraction of ``failure to maintain a single lane.'' Also, Trooper Rotunde did not have any suspicion that Mr. Gonzalez was driving while impaired. Therefore, the stop and arrest of Ramon Gonzalez was illegal, and the fruits of the unlawful stop and arrest, i.e., any and all physical or intangible evidence secured thereby, should be inadmissible in any proceeding against the defendant. *Etheridge v. United States*, 380 F. 2d 804, 808 (U.S. DCA 5th Cir. 1967). *See also*: *Wong Sun v. United States*, 371 U.S. 47, 83 S. Ct. 407 (1963).

WHEREFORE, the defendant, RAMON GONZALEZ, respectfully moves this Department to suppress any and all physical and testimonial evidence obtained which relates to the defendant on the night of his arrest including

but not limited to any statements made by the defendant to the officers, any observations of the defendant by any officer, any and all results of field sobriety tests and/or breath tests and all other evidence obtained as a result of his unlawful seizure.

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