

9 Fla. L. Weekly Supp. 626c

Criminal law -- Search and seizure -- Vehicle stop -- Traffic infraction -- Where defendant stopped in pedestrian crosswalk as traffic light changed from yellow to red and while there were no pedestrians in crosswalk, defendant's vehicle drifted within its lane but never left its lane, and defendant tapped his brakes as he approached signs indicating an expressway entrance ramp, defendant committed no traffic infractions which would authorize a lawful stop -- Erratic driving pattern -- Where there is no evidence as to whether defendant's vehicle was already past the stop bar of intersection when the traffic light changed, no evidence of how often and how much defendant's vehicle drifted within its lane, and tapping brakes was not indicative of anything erratic or unusual based on circumstances known to officer, officer did not have reasonable well-founded, articulable suspicion of DUI sufficient to justify stop -- Stop not justified as welfare check where defendant's driving was not unusual or erratic -- Motion to suppress granted

STATE OF FLORIDA, Plaintiff, vs. WARREN GSCHWENDTNER, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 395301-W. July 18, 2002. Ivan Hernandez, Judge. Counsel: Marc J. Weinstein, Best & Associates, P.A., Miami, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS***EVIDENCE OBTAINED FROM UNLAWFUL STOP***

THIS CAUSE, having come to be heard on Defendant's Motion to Suppress Evidence Obtained from Unlawful Stop and this Court having heard witness testimony and argument of counsel and being otherwise fully advised in the premises, it is hereupon:

ORDERED AND ADJUDGED that Defendant's Motion is HEREBY granted. After hearing the witness testimony presented by the State and viewing and listening to the videotape of the stop and arrest of the Defendant, this Court has made the necessary credibility determinations and findings of fact to support this Order. This Court's Order is further supported by the legal authority cited to herein.

Findings of Fact

The Defendant, a resident of Boca Raton, Florida, was driving his car northbound on South Dixie Highway in Miami-Dade County on March 20, 2002 at approximately 1:30 a.m. Officer Mark Moretti of the Village of Pinecrest Police Department drove his police car behind the Defendant as he approached the intersection at 104th Street. As the traffic light at 104th Street changed from yellow to red, the Defendant stopped his car. The Defendant's car ultimately stopped before entering the intersection, but after passing over the stop bar painted in the street and after entering the pedestrian crosswalk. No pedestrians were in the crosswalk at the time the Defendant's car stopped in the crosswalk. Moreover, Officer Moretti could not remember where the Defendant's car was positioned in relation to the stop bar at the time the traffic light changed from yellow to red. Thus Officer Moretti could not determine if in fact the light changed from yellow to red after the Defendant had already passed over the stop bar and into the pedestrian crosswalk. Finally, Officer Moretti testified that most drivers in Miami-Dade County continue traveling through intersections when a traffic light is yellow and that he does not issue citations to drivers that drive through intersections when the traffic light is yellow.

When the traffic light turned green, the Defendant proceeded northbound in a normal fashion. The Defendant

drove within the speed limit and within his lane at all times. However, Officer Moretti testified that he observed the Defendant drifting back and forth within his own lane. Officer Moretti did not state how many times the Defendant's car drifted or the extent to which the car moved from left to right or vice versa. The officer's testimony indicated that the tires of the Defendant's car did not touch the lane markers in the roadway. In addition, there was no other traffic on the road at this time. Officer Moretti could not determine whether the Defendant was doing something inside his car while driving that caused this drifting motion.

As the Defendant continued driving northbound on South Dixie Highway, he approached signs above the roadway that indicated the entrance to State Route 826, also known as the Palmetto Expressway. As the Defendant's car approached these signs, he tapped his brakes several times. By this time, Officer Moretti was two car lengths behind the Defendant's vehicle in his police cruiser and Officer Moretti activated his emergency equipment at approximately 101st Street. The Defendant then drove his vehicle into the right most lane of the South Dixie Highway and proceeded for several blocks until there was a safe place to pull over at approximately 96th Street. Officer Moretti testified that the Defendant pulled his car over at the first available safe place to do so and that the Defendant drove his car in a completely normal fashion when he pulled into a parking lot and came to a stop.

Officer Moretti informed the Court that he has the discretion under his department's standard operating procedures to activate his in-car video recording equipment at any time while observing a driving pattern or that the camera will come on automatically when he activates his emergency equipment. In this case, Officer Moretti elected not to videotape the Defendant's driving pattern prior to activating his emergency equipment.

Accordingly, the only portion of the Defendant's driving this Court was able to see was the portion after the officer activated his emergency equipment. As presented during the hearing, the video of the stop shows the Defendant's car traveling in the right most Northbound lane of South Dixie Highway. In the video, the Defendant's car is driving within its lane without drifting. Moreover, the Defendant applied his brakes in a steady manner and activated his right turn signal as he approached the driveway into which he pulled his car. After the Defendant's car pulled into the parking lot, he drove a short distance to accommodate the police car pulling in behind him and stopped his car in an unremarkable fashion.¹

Discussion and Conclusions of Law

It is well settled that a police officer may only stop an individual driving an automobile if the police officer has probable cause to believe that person violated a traffic law or if the officer has reasonable suspicion that the Defendant is committing or about commit a crime. *Whren v. United States*, 517 U.S. 806 (1996); *Terry v. Ohio*, 392 U.S. 1 (1968); *Holland v. State*, 696 So.2d 757 (Fla. 1997) (Adopting *Whren* as applied to the State of Florida). In justifying his stop of the Defendant, Officer Moretti stated that the Defendant committed a traffic infraction by stopping in the pedestrian crosswalk at 104th Street after the traffic light turned red. Officer Moretti also testified that he suspected that the Defendant was impaired by alcohol based on the totality of the driving he observed. However, this Court finds based on the facts presented at the hearing on this motion that Officer Moretti had neither probable cause that the Defendant committed a traffic infraction nor reasonable suspicion that the Defendant was driving under the influence of alcohol to the extent his normal faculties were impaired (hereinafter ``DUI").

Probable Cause the Defendant Committed a Traffic Violation

In order for a violation of Florida Statute 316.075(1)(c) to occur, an officer must observe ``a vehicle facing a steady red signal" fail to stop ``before entering the pedestrian crosswalk or, if none, then before entering the

intersection." The facts elicited during the testimony of Officer Moretti make clear that the Defendant stopped his car *as the traffic light changed* from yellow to red. Therefore, the Defendant's vehicle was not ``facing a steady red signal" when he came upon 104th Street. The Defendant could have lawfully continued through the intersection under the facts presented at the hearing. In addition, if the Defendant's car was already in the pedestrian crosswalk when the light changed from yellow to red, it would be impossible for him to stop his car before entering the crosswalk. However, Officer Moretti could not inform this court where the Defendant's car was in relation to the stop bar or crosswalk at the time the light changed from yellow to red. Thus there was no evidence the Defendant violated the plain language of the statute when he stopped within the pedestrian crosswalk as the traffic signal changed from yellow to red. Moreover, as noted above, there were no pedestrians in the crosswalk at the time the Defendant's vehicle entered the crosswalk. Accordingly, there was no evidence that the Defendant failed to yield to pedestrians in the crosswalk.

In order for a violation of Florida Statute 316.089 to occur, an officer must observe a vehicle move from within its lane without the driver first ascertaining that such movement can be made with safety. The facts of the case at bar are undisputed that the Defendant's car never left its lane. The testimony indicated that the tires of the Defendant's car did not even touch the lane markers in the roadway. Moreover, there were no other vehicles on the road at the time Officer Moretti followed the Defendant. Again, under the plain language of the statute, the movement of the Defendant's car within his own lane is not a traffic violation.

The last observation that Officer Moretti made of the Defendant's driving that caused him to activate his emergency equipment and stop the Defendant's car was when the Defendant tapped his brakes as he approached signs above the roadway that indicated the entrance ramp to the Palmetto Expressway. Yet even Officer Moretti agreed that tapping brake lights can in no way constitute a traffic infraction under Florida Statutes. Accordingly, the Defendant committed no infraction by tapping his brakes.

Based on the foregoing analysis, the Defendant committed no traffic infractions at the time Officer Moretti stopped him. Thus, *Whren* does not authorize a lawful stop under the facts of the instant case. The Court must next consider whether Officer Moretti had an independent reasonable suspicion of DUI at the time he stopped the Defendant.

Reasonable Suspicion of DUI

A police officer may lawfully stop a driver where the officer has a reasonable, well-founded, articulable suspicion that the driver is impaired by alcohol. Such reasonable suspicion of DUI may be established where a police officer observes the driver operate his car in an erratic manner for no apparent reason. *See Donaldson v. State*, 803 So.2d 856 (Fla. 4th DCA 2002); *State Department of Highway Safety and Motor Vehicles v. De Shong*, 603 So.2d 1349 (Fla. 3rd DCA 1992). Moreover, the officer need not observe the driver commit any traffic violations in order to conduct a traffic stop if the officer has an independent reasonable suspicion of DUI after observing an erratic driving pattern. *See Id.* However, ``a founded suspicion is a belief which has a factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer's knowledge." *Donaldson* at 856.

In determining whether Officer Moretti had a reasonable, well-founded, articulable suspicion sufficient to justify stopping the Defendant, this court must examine the facts and circumstances surrounding the driver's operation of the vehicle that were clearly known to Officer Moretti at the time he made the stop. Officer Moretti testified at the hearing about three observations of the Defendant's driving that caused him to believe that the Defendant was DUI: (1) the Defendant's stop in the pedestrian crosswalk at the traffic light at 104th Street; (2) the Defendant's

car drifting within its lane; (3) the Defendant tapping his brake lights near the entrance to the Palmetto Expressway.

First, regarding the manner in which the Defendant stopped in the pedestrian crosswalk at the traffic light at 104th Street, the hearing testimony established Officer Moretti's lack of knowledge about exactly when the traffic light changed and exactly where the Defendant's car was at the time the light changed from yellow to red. Officer Moretti could not inform this court whether the Defendant's car was already past the stop bar of the intersection at 104th Street when the traffic light changed from yellow to red. The unknown answer to this question is extremely important to this court in determining whether the Defendant's stopping in this manner was unusual or erratic. Based on the evidence adduced at the hearing, Officer Moretti simply did not have a factual foundation to determine that the Defendant's driving was out of the ordinary by stopping in the manner that he did. Without a factual foundation in the circumstances observed by the officer, neither a police officer nor this court should consider this portion of the Defendant's driving when determining whether the driving amounted to reasonable suspicion of DUI.

Next, as to the drifting of the Defendant's vehicle within its lane, this court heard no evidence at the hearing to establish how many times the Defendant's vehicle drifted, in what direction or directions, and how far the vehicle moved within the lane as it drifted. The absence of the aforementioned evidence again indicates a lack of factual foundation in the circumstances observed by Officer Moretti that led to his belief that the Defendant was DUI.

Finally, Officer Moretti's observation that the Defendant tapped his brakes does not indicate anything erratic or unusual based on the circumstances known to the officer at the time he made these observations. Officer Moretti testified that the Defendant was traveling immediately below road signs that indicated the entrance to the Palmetto Expressway at the time he tapped his brakes. In addition, Officer Moretti stated that he was two car-lengths behind the Defendant at this point. When interpreting the Defendant's tapping his brakes in the light of the officer's knowledge of the expressway signs and the position of the officer's car in close range behind the Defendant, it is unreasonable to suspect criminal activity.

Officer Moretti observed the Defendant's driving for a total of approximately three blocks before deciding to pull him over on suspicion of DUI. The only portion of the Defendant's driving captured on videotape was after Officer Moretti activated his emergency equipment. In finding no reasonable suspicion of DUI in this case, this court took into consideration the video presented at the hearing. The video showed the Defendant's driving was entirely "normal" and otherwise unremarkable as the Defendant traveled at a steady speed, in a straight line in the right most lane, turned on his turn signal, applied his brakes evenly, pulled into a parking lot and stopped his vehicle in such a way to leave room for the police car behind him. Officer Moretti stated that the Defendant pulled his car over in the first safe place to do so. The Defendant's perfectly normal driving as observed by this court on the videotape seriously calls into question Officer Moretti's decision to stop the Defendant based on the limited observations he made just before the stop.

At the hearing on this motion, the State relied heavily upon the opinion of the Fifth District Court of Appeal in *DeShong*. The State's reliance on *DeShong* is misplaced. The facts of the instant case are entirely distinguishable from the facts of *DeShong*. In *DeShong*, the police officer followed the Defendant's vehicle for "a period of time" and observed the Defendant "using the lane markers to position his vehicle and, *for no apparent reason*, the driver abruptly slowed from 55 to 30 miles per hour and then accelerated rapidly. [emphasis added]" 603 So.2d at 1350. In contrast with *DeShong*, Officer Moretti made all of his observations of the Defendant's driving within a three-block span. Although Officer Moretti could not remember many details about the manner in which the Defendant's car "drifted" within its lane, he was able to remember the Defendant's car never touched the lane

markers. Moreover, unlike the driver's behavior in *DeShong*, the evidence in the instant case established readily apparent, lawful and reasonable explanations for the Defendant's manner of driving when he stopped in the pedestrian crosswalk at the late-changing traffic light at 104th Street and when he tapped his brakes just below the signs for the Palmetto Expressway while the officer drove just two car-lengths behind the Defendant.

This Court also rejects the position urged on it by the State that this stop could be justified as a ``welfare check'' to determine the reason for its ``unusual'' operation. When considered in the context of all the facts and circumstances known to the officer at the time he conducted the traffic stop, the Defendant's driving was not unusual or erratic. Moreover, the officer did not suspect anything was wrong with the Defendant's vehicle or the Defendant's health; the testimony established only that he suspected that the Defendant was DUI. The officer's suspicion of DUI in this case was simply not reasonable in light of the facts and circumstances known to him at the time of the stop. *See Donaldson*, 803 So.2d 856 (Finding no reasonable suspicion of DUI where officer observed defendant's truck ``pull out of a hotel parking lot with squealing tires'' at 2:00 a.m.); *Noorigan v. State*, 2000 WL 291557 (4th Cir. Ct. App. 2000) (Finding no reasonable suspicion of DUI where officer observed defendant's vehicle ``cross the line dividing the inside lane from the center turn lane and drift into the center turn lane by approximately one foot'' at 12:00 a.m.); *State Department of Highway Safety and Motor Vehicles v. Bell*, 9 Fla. L. Weekly Supp. 354 (7th Cir. Ct. App. 2002) (Finding no reasonable suspicion of DUI where officer observed defendant's vehicle tapping brakes while driving down center of two-way roadway with no marked ``centerline'' then making erratic swerve followed by a wide left turn onto another road).

Conclusion

Based on the facts of this case in conjunction with the authority discussed herein, this Court finds that the Defendant did not commit any traffic violations nor was the Defendant's driving so erratic or unusual to provide a reasonable, well-founded, articulable suspicion to authorize Officer Moretti to stop the Defendant. Accordingly, the Defendant's motion is granted.

¹Although this fact may go beyond the scope of the Defendant's motion, it is worth noting that, when questioned on video by Officer Moretti as to why he was driving in the manner that the Officer had observed, the Defendant stated that he was lost.

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