2 Fla. L. Weekly Supp. 484a

Criminal law -- Search and seizure -- Vehicle stop -- Traffic infraction -- Totality of defendant's driving pattern was not adequate to give officer founded or reasonable suspicion of criminal activity sufficient to justify stop of vehicle -- Failure to stay in single lane is not violation of statute if movement from lane is accomplished without endangering other traffic -- Even if defendant's driving pattern constituted technical violation of statute, minor deviations from traffic law over short mile do not constitute reasonable basis for stop -- Fact that defendant was driving 10 miles per hour below speed limit not so unusual under circumstances as to give officer reasonable suspicion of criminal activity

THE STATE OF FLORIDA, Plaintiff, vs. MARJORIE MYER, Defendant. In the County Court of the 17th Judicial Circuit in and for Broward County, Traffic Division. Case No. 93-16334MM10A. September 29, 1994. Mary Rudd Robinson, Judge. Counsel: Sheri Stewart, Assistant State Attorney, for Plaintiff. Douglas J. Glaid, for Defendant.

ORDER GRANTING MOTION TO SUPPRESS EVIDENCE

This cause having come on to be heard upon the Defendant's Motion to Suppress Evidence for lack of reasonable suspicion, and both the State and the Defendant being given the opportunity to offer testimony, present evidence and give argument, and the Court having had the opportunity to evaluate the credibility of the witness presented by the State, the Court makes the following findings of fact and issues the following conclusions of law:

FINDINGS OF FACTS

On August 31, 1993, at approximately 9:34 p.m., Officer Scott Caske of the Florida Marine Patrol observed the defendant's vehicle traveling northbound on I-95 near Oakland Park Blvd. As officer Caske followed the defendant's car a short distance, he observed that it was traveling about 45 miles per hour in a 55 mile per hour zone. Thereafter, Officer Caske passed the defendant's vehicle, having observed no unusual driving pattern on the defendant's part. After passing the defendant's vehicle, Officer Caske observed, through his rear view mirror, the defendant's car move from one lane to another. However, no evidence was adduced to show that the defendant's lane movement caused another vehicle to take evasive action or that the defendant's lane movement was otherwise made unsafely. Upon seeing this lane movement, Officer Caske reduced his speed and again began following the defendant's vehicle a distance of approximately 3 miles. Although Officer Caske observed the defendant's vehicle make several lane movements during this 3 mile stretch, there is nothing to indicate that the lane movements on the part of the defendant were made unsafely. Upon activating his overhead lights, Officer Caske effected a traffic stop of the defendant's vehicle on I-95 just south of Copan's Road Exit. Officer Caske testified that the basis for his stop of the Defendant's vehicle was the Defendant's failure to maintain a single lane and her slow speed. Officer Caske did not characterize the defendant's driving as erratic. After a Florida Highway Patrol trooper arrived at the site of the stop and administered several roadside tests to the defendant, the defendant was placed under arrest for driving while under the influence.

CONCLUSIONS OF LAW

As our Supreme Court opined in *Kehoe v. State*, 521 So. 2d 1094 (Fla. 1988), 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. The Supreme Court observed that a ``founded suspicion'' has some factual foundation in the

circumstances observed by the officer, when those circumstances are interpreted in the light of the officer's knowledge. *Id.*, 521 So. 2d at 1095-1096; *State v. Stevens,* 354 So. 2d 1244, 1247 (Fla. 4th DCA 1978). As our Supreme Court instructed in *Kehoe,* 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 viewing the totality of the defendant's driving pattern in the instant case, this Court concludes that the ``cumulative impact of the circumstances'' was not adequate to constitute a founded or reasonable suspicion of criminal activity sufficient to justify the stop of the defendant's vehicle. It is clear that the primary basis for the stop of the defendant's vehicle was her alleged failure to maintain a single lane. Indeed, the defendant was cited for 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*.'' A careful review of the language of Section 316.089(1), reveals that 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.

Although this Court does not hold that there must be a traffic violation committed before a lawful stop can be made of a vehicle, recent case law indicates that, where the primary basis for the stopping of an automobile is the violation of a traffic statute, the failure to have a traffic violation renders the stop invalid. For example, in *State v. Riley,* 638 So. 2d 507 (Fla. 1994), our Supreme Court held that where a defendant driver did not violate the statute governing the use of a turn signal when he failed to use his turn signal, he should not have been stopped by the police. Thus, the Court ruled that the evidence obtained as a result of the improper stop was properly suppressed. *Id.* at 508. *See also, State v. Clark*, 511 So. 2d 726 (Fla. 1st DCA 1987) (Since defendant did not violate 316.238(1), Fla. Statute, by using his headlights as he did, the stop of defendant's vehicle by officer was not authorized); *State v. Wolcoff,* 514 So. 2d 394 (Fla. 4th DCA 1987) (Since defendant did not obstruct traffic in violation of Section 316.2045(1), Fla. Statute, the stop of the defendant and resulting search were improper).

Even assuming the defendant technically committed a violation of 316.089(1), this Court concludes that the totality of the defendant's driving pattern did not constitute a reasonable basis for stopping the defendant's vehicle. Several analogous cases instruct that, in order to justify the stopping of an automobile, more than minor deviations from the traffic law must exist. *See, Kehoe v. State, supra*, 521 So. 2d at 1097 (``It is difficult to operate a vehicle without committing some trivial violation....'').

For example, in *Collins v. State,* 65 So. 2d 61 (Fla. 1953), the Florida Supreme Court held that a defendant who drove on the wrong side of the road on three occasions in the course of one mile by driving one foot over the center line of the highway was insufficient to justify the police officer's stop of the defendant. Similarly, in *United States v. Smith,* 799 F. 2d 704 (11th Circuit 1986), the Court held that a state trooper who followed the defendant car for about a mile and a half on I-95 and observed the car's right wheels cross over the white line about six inches into the emergency lane and observed slight ``weaving'' within the single lane of the highway did not have sufficient cause, under Florida law, to stop the car for a traffic violation. *See also, State v. Williams*, 619 N.E. 2d 1141 (Ohio App. 4th Dist. 1993) (Fact that the defendant was driving new pick up truck and that his vehicle twice moved out of its lane of travel by one tire width during a two mile stretch did not constitute reasonable suspicion justifying stop by officer).

Moreover, although Officer Caske testified that the defendant was traveling approximately 10 miles per hour below the speed limit, this Court does not find this fact to be unusual under the circumstances so as to have given the officer a reasonable suspicion of criminal activity on the defendant's part. Certainly, the 55 mile per hour speed limit is just that, a limit. There was no evidenced adduced at the suppression hearing to show that the defendant's slower speed of 45 miles per hour was in violation of any law. In addition, since Officer Caske passed the defendant's car after following it, it is obvious to the Court that the officer did not believe that the defendant's slower speed constituted unsafe or unusual operation of a motor vehicle. *See, Foss v. State,* 355 So. 2d 225 (Fla. 2nd DCA 1978) (police officer who observed automobile traveling 10 to 15 miles per hour below 30 mile per hour speed limit, but who observed no erratic driving nor any violation of traffic laws, could not legally stop such automobile).

Accordingly, The Defendant's Motion to Suppress Evidence for Lack of Reasonable Suspicion is hereby GRANTED.

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