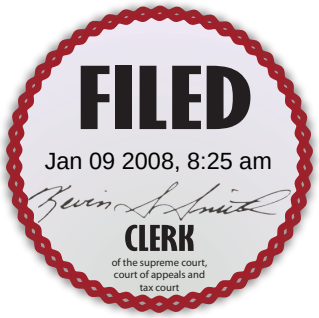

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IN THE
COURT OF APPEALS OF INDIANA

STATE OF INDIANA,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 18A05-0708-CR-447
	)	
CHRISTOPHER SIMCOE,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable John M. Feick, Judge
Cause No. 18C04-0701-FC-8

January 9, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Plaintiff the State of Indiana appeals the grant of Appellee-Defendant Christopher Simcoe's motion to suppress evidence obtained during a search of his person following a traffic stop. The State claims on appeal that the trial court erred in concluding that the evidence was obtained in violation of Simcoe's Fourth Amendment rights. We affirm.

FACTS

On January 24, 2007, at approximately 1:51 a.m., Muncie Police Sergeant Jay Turner observed a gray Chevrolet SUV, which was traveling eastbound on Jackson Street, cross the center line and weave within its lane.[1] Sergeant Turner called Officer George Hopper for backup on the grounds that the driver was possibly intoxicated. After the SUV turned into Scoobie's Bar at the corner of Jackson and Ohio Streets, Sergeant Turner parked in a nearby parking lot for further observation. At some later point, the SUV turned out of the bar and again proceeded eastbound on Jackson.[2] Sergeant Turner observed that the SUV was again weaving within its lane "to the outside fog lane marker." Tr. p. 5.

Officer Hopper arrived on the scene, pulled ahead of Sergeant Turner, and followed the SUV for approximately three quarters of a mile, during which time he

[1] Sergeant Turner's testimony was conflicting as to whether the SUV crossed the center line before turning into Scoobie's or after turning out of Scoobie's. Sergeant Turner admitted at the end of the hearing that his report, which detailed the events occurring after the SUV turned out of Scoobie's, did not mention the SUV crossing the center line. The trial court found that the SUV crossed the center line before turning into Scoobie's.

[2] Although Sergeant Turner testified that the SUV left Scoobie's within approximately two to four minutes of arriving, Simcoe contended that he had been inside Scoobie's for approximately two hours before leaving in the SUV. The trial court found that the SUV was parked at Scoobie's long enough so that the SUV's center-line crossing prior to entering Scoobie's was not necessarily attributable to Simcoe.

observed the vehicle weave within its lane in a manner which he described to be constant and erratic, and much like a pin ball. Officer Hopper specified, however, that the SUV did not cross either the fog line or the divider line.

Officer Hopper initiated a traffic stop, approached the vehicle, and requested the driver's license and registration, which Simcoe, the driver, provided. At that point, Officer Hopper noticed an odor of burnt marijuana emanating from the SUV.[3] Upon observing that Simcoe's hands were shaking, Officer Hopper asked Simcoe if he was cold, to which Simcoe responded that he was hot. Officer Hopper asked Simcoe to exit the vehicle for a field sobriety test. Officer Hopper requested Simcoe's permission to search his vehicle, which Simcoe declined.

Officer Hopper performed a horizontal gaze nystagmus test, which Simcoe passed.[4] Officer Hopper contacted Sergeant Turner, who was nearby, to bring his K-9 unit to perform a sniff-test of the SUV. At some point Officer Hopper conducted a pat-down search of Simcoe for weapons.[5] Officer Hopper also justified this search on the basis that Scoobie's, which he knew was owned by Simcoe, was a site for a "good amount of drug activity." Tr. p. 25. As a result of this pat-down test, Officer Hopper found a small .22 caliber pistol in the front outer pocket of Simcoe's sweatshirt. Officer

[3] While Officer Hopper testified that he detected the odor of burnt marijuana on Simcoe's breath and person, the trial court found only that the odor came from the SUV.

[4] Officer Hopper testified at the suppression hearing that it is the vertical nystagmus test, not the horizontal nystagmus test, which tests for marijuana.

[5] There is conflicting evidence in the record as to whether Officer Hopper performed the pat-down search before notifying Sergeant Turner to perform a dog-sniff test or during the dog-sniff test. Sergeant Turner appeared to agree that Officer Hopper did not request the dog-sniff test until after he had performed the pat-down search and found a weapon.

Hopper asked Simcoe if he had a permit for the pistol, Simcoe answered that he did not, so Officer Hopper placed Simcoe under arrest. Officer Hopper then performed another search of Simcoe's person, at which point he discovered a black plastic jar in his pants pocket which later tested positive for cocaine.

The State charged Simcoe on January 25, 2007 with Possession of Cocaine, as a Class C and a Class D felony (Counts I and 2), and Carrying a Handgun Without a License as a Class A misdemeanor (Count 3). (App. 5-7) On May 16, 2007, Simcoe filed a motion to suppress evidence seized pursuant to the search of his person and vehicle. Following a June 18, 2007 suppression hearing, the trial court granted Simcoe's motion on August 3, 2007. The State now appeals.

DISCUSSION AND DECISION

In challenging the trial court's order granting Simcoe's motion to suppress, the State argues that Officer Hopper's traffic stop was justified on the basis that Simcoe's erratic driving created reasonable suspicion to justify an investigatory traffic stop. The State additionally argues that, contrary to the trial court's holding, the fact that Simcoe passed the field sobriety test was irrelevant to the permissibility of the subsequent search of his person and vehicle because Officer Hopper's detection of marijuana in Simcoe's vehicle and on his person established probable cause to arrest him such that the search of his person was properly incident to a lawful arrest.

I. Standard of Review

In appealing from the grant of a motion to suppress, the State appeals a negative judgment and must show the trial court's ruling on the suppression motion was contrary

to law. *State v. Cook*, 853 N.E.2d 483, 485 (Ind. Ct. App. 2006). We will reverse a negative judgment only when the evidence is without conflict and all reasonable inferences lead to a conclusion opposite that reached by the trial court. *Id*. We do not reweigh the evidence or judge the credibility of the witnesses; rather, we consider only the evidence most favorable to the judgment. *Id*. We review *de novo* the ultimate determinations of reasonable suspicion and probable cause. *Ransom v. State*, 741 N.E.2d 419, 421 (Ind. Ct. App. 2000), *trans. denied*; *VanPelt v. State*, 760 N.E.2d 218, 222 (Ind. Ct. App. 2001), *trans. denied*.

II. Reasonable Suspicion for Investigatory Stop

In granting Simcoe's motion to suppress, the trial court made the following findings of fact and conclusions:

> 1. That in the early morning hours of January 24, 2007, Sergeant J.A. Turner observed a grey Chevrolet SUV driving in an erratic ma[nn]er and crossing the center line.
> 2. That according to Sergeant Turner, the car then went into Scoobie's Bar and an individual left the car and went into the bar and an individual came back from the bar four to ten minutes later.
> 3. That the Defendant asserts he was in the bar for at least an hour to close the premises.
> 4. That thereafter, the grey Chevrolet SUV was observed driving in an erratic manner, but did not cross the center line.
> 5. That eventually, the Defendant was stopped and the car smelled of marijuana, but a sobriety test was negative.
> 6. That had Sergeant Turner stopped the grey SUV when he observed it crossing the center line, it would have been a legal search and seizure.
> 7. That due to the varying time period and the fact that the driver was not identified until he was pulled over, the driver did not violate the law.
> 8. That although the driver drove erratically, he passed the sobriety test, and there was no probable cause for the search.

App. pp. 71-72.

In determining whether an investigatory stop complies with the Fourth Amendment, we must determine whether the officers had "reasonable suspicion" of criminal activity when they made the stop. *Barrett v. State*, 837 N.E.2d 1022, 1027 (Ind. Ct. App. 2006), *trans. denied*. In evaluating whether such reasonable suspicion exists, we must look at the "'totality of the circumstances'" of each case to see whether the detaining officer has a "'particularized and objective basis'" for suspecting legal wrongdoing. *Id*. (quoting *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (internal quotations omitted)).

We first address the State's claim that the trial court erred in granting the motion to suppress because Officer Hopper's investigatory stop was permissible. In making this argument, the State cites *State v. Augustine*, 851 N.E.2d 1022, 1027 (Ind. Ct. App. 2006); *State v. Smith*, 638 N.E.2d 1353, 1354-56 (Ind. Ct. App. 1994); *Berry v. State*, 574 N.E.2d 960, 964 (Ind. Ct. App. 1991), *trans. denied*; and *Castle v. State*, 476 N.E.2d 522, 524 (Ind. Ct. App. 1985) for the proposition that erratic driving justifies an investigatory stop.

We first observe that while the trial court found Simcoe drove "erratically," it also observed he had not violated the law. The court determined that the only alleged traffic violation presumably justifying a traffic stop was the SUV's crossing the center line, which the trial court found as a matter of fact had occurred before the SUV pulled into Scoobie's. Importantly, the trial court additionally found, as a matter of fact, that the time period which passed between Sergeant Turner's first observation of the SUV and his and Officer Hopper's subsequent observation of Simcoe driving away in the SUV was

such that the center-line crossing occurring before the SUV turned into Scoobie's could not necessarily be attributed to Simcoe.

Given the trial court's factual findings with respect to conflicting evidence, which we will not re-evaluate, the only basis for the traffic stop was the SUV's weaving within its own lane for approximately three fourths of a mile. Contrary to the State's argument, this does not constitute per se reasonable suspicion such that the trial court's order granting Simcoe's suppression motion was an error at law. Indeed, the cases cited by the State suggest that "erratic" driving adequate to justify an investigatory stop is more egregious than merely weaving within one lane for three fourths of a mile. In *Augustine*, an identified informant reported a vehicle was "all over the roadway and driving very badly." 851 N.E.2d at 1027. In *Smith*, there were multiple CB radio and 911 reports of a vehicle going into the median of an interstate and weaving from lane to lane. 638 N.E.2d at 1354. In *Berry*, both parties agreed the defendant was driving on the wrong side of the street. 574 N.E.2d at 964. In *Castle*, the defendant made an illegal turn. 476 N.E.2d at 523.

The more recent case of *Barrett v. State*, 837 N.E.2d 1022 (Ind. Ct. App. 2005) is also instructive. In *Barrett*, Meijer loss prevention officers reported that the defendant had purchased methamphetamine precursors and was driving a specific vehicle. Police who responded to the scene and followed the defendant in his vehicle observed signs of impairment, including that the vehicle drifted toward the right side of the roadway until its tires touched the fog line for approximately thirty to fifty yards. In declining the defendant's Fourth Amendment challenge, the *Barrett* court specifically pointed to the

informants' tip and the defendant's manner of driving suggesting impairment. *See also Wells v. State*, 772 N.E.2d 487 (Ind. Ct. App. 2002) (finding that anonymous tip alleging drunk driver together with officer's observations that vehicle matching tip was traveling ten miles per hour below the speed limit and swerving in his lane adequate reasonable suspicion for investigatory stop).

Here, there was no tip alleging illegal activity, the officer closest to the SUV did not observe it touch the fog line, and there were no accompanying facts suggesting impairment beyond the single-lane weaving. Although the trial court termed this weaving "erratic," it was not a violation of law, and the trial court was apparently unconvinced that the SUV presented what the State terms an "immediate threat" justifying an investigatory stop. In light of the trial court's factual findings and the above cases, none of which endorses the State's argument that the sole fact of weaving within one's own lane creates reasonable suspicion for an investigatory stop, we find the State's challenge to the trial court's suppression order on this basis unpersuasive.

III. Conclusion

Having found no error in the trial court's granting the motion to suppress on the grounds of the impermissible investigatory stop, we find it unnecessary to address the State's argument that the officers procured the evidence during a valid search incident to lawful arrest. *See Hanna v. State*, 726 N.E.2d 384, 389 (Ind. Ct. App. 2000) (observing "fruit of the poisonous tree" doctrine operates to bar not only evidence directly obtained but also evidence derivatively gained as a result of information learned during an unlawful search or seizure).

The judgment of the trial court is affirmed.

BAKER, C.J., and DARDEN, J., concur.