

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,		IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee		
v.		
JAMAL THOMAS,		No. 2476 EDA 2012
Appellant		

Appeal from the Judgment of Sentence entered July 24, 2012,
in the Court of Common Pleas of Monroe County,
Criminal Division at No(s): CP-45-CR-0002165-2011.

BEFORE: PANELLA, ALLEN, and PLATT,* JJ.

MEMORANDUM BY ALLEN, J.:

Filed: March 15, 2013

Jamal Thomas ("Appellant") appeals from the judgment of sentence imposed after he was found guilty of three counts of driving under the influence, one count of possession of a controlled substance (Percocet), one count of possession of marijuana, one count of use/possession of drug paraphernalia, and one count of disregarding traffic lanes.¹ We affirm.

The trial court recounted the facts as follows:

On June 21, 2011, at approximately 2:30 a.m., Officer Robert Miller ("Miller") initiated a traffic stop of [Appellant's] white Hyundai Santa Fe. Miller observed the vehicle travelling on Echo Lake Road in Monroe County at a slow rate of speed and heard [Appellant] playing loud music. Miller then observed the

¹ 75 Pa.C.S.A § 3802(a)(1),(d)(1),and (d)(3), 35 P.S. § 780-113(a)(16), (a)(31) and (a)(32), and 75 Pa.C.S.A. § 3309(1).

*Retired Senior Judge assigned to the Superior Court.

vehicle cross the yellow center line of the road while negotiating a curve in the road. Officer Miller testified that both left tires crossed over the yellow center line. These observations occurred over the course of approximately 30 seconds before Officer Miller initiated a traffic stop.

Upon approaching the vehicle, Officer Miller immediately detected "an odor of marijuana." Officer Miller asked [Appellant] where he was coming from and whether he had been drinking any alcohol that night. [Appellant] answered that he had a drink about two hours earlier. Officer Miller returned to his vehicle, requested assistance, and ran [Appellant's] driver's license. From his police vehicle, Officer Miller observed [Appellant] "acting nervous," looking in his mirrors "more abnormal than any other traffic stop."

After checking [Appellant's] license, Officer Miller again approached the vehicle. At that time, he observed "small marijuana particles" on the inner door and on [Appellant's] T-shirt. Officer Miller requested that [Appellant] exit the vehicle. [Appellant] initially refused stating that he just wanted to get home. Officer Miller responded by opening [Appellant's] car door and telling him to get out.

Upon exiting the vehicle, Officer Miller detected the odor of an alcoholic beverage on [Appellant's] breath and again detected an odor of marijuana. Officer Miller conducted a "pat down" search of [Appellant] during which he located marijuana and white pills (later determined to be Percocet) in [Appellant's] front right pocket. The marijuana was packaged in aluminum foil. Officer Miller testified that he administered field sobriety tests, which [Appellant] "failed." Officer Miller administered the walk and turn, one leg stand and horizontal gaze nystagmus field sobriety tests.

After failing the field sobriety tests, [Appellant] was taken into custody and advised of his chemical test warnings. [Appellant] consented to the chemical tests. [Appellant] was taken to the Pocono Medical Center. [Appellant's] blood alcohol concentration was .07 percent. [Appellant's] toxicology results showed his blood contained delta 9 THC, delta 9 carboxy and 11 hydroxy delta 9, the active ingredients in marijuana. The affidavit of probable cause indicates that the blood was drawn at 3:55 a.m.

Trial Court Opinion, 3/2/12, at 2-3 (citations to notes of testimony omitted).

Appellant was subsequently charged with the aforementioned crimes. A preliminary hearing was conducted on September 2, 2011 before District Justice Anthony Fluegel. On December 19, 2011, Appellant filed a pre-trial motion to suppress evidence obtained from the traffic stop. The trial court conducted a hearing on the suppression motion on January 31, 2012, at which the transcript of the testimony from the preliminary hearing was admitted as Commonwealth Exhibit 1. No other testimony was offered at the January 31, 2012 hearing. On March 2, 2012, the trial court entered an opinion and order denying Appellant's suppression motion. A non-jury trial commenced on May 22, 2012, at the conclusion of which the trial court entered its guilty verdicts.

On July 24, 2012, the trial court sentenced Appellant to six months of intermediate punishment for driving under the influence of controlled substances, a consecutive one year of probation for possession of a controlled substance, a concurrent thirty days of probation for possession of marijuana, a concurrent one year of probation for use/possession of drug paraphernalia, and a fine of \$25 for disregarding traffic lanes. No other penalties were imposed on the remaining charges. Appellant did not file any post-sentence motions. Appellant filed a timely notice of appeal. On September 6, 2012, the trial court directed Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925.

Appellant complied. On October 18, 2012, the trial court filed a statement pursuant to Pa.R.A.P. 1925(a), indicating that the March 2, 2012 opinion and order addressed all issues raised on appeal.

Appellant presents the following issues for our review:

1. Does an Officer possess probable cause to initiate a traffic stop for Driving on Roadways Lined for Traffic based on observations of a vehicle weaving in its lane and crossing the center line twice during a turn following observations for a period of thirty seconds?
2. Does an Officer possess reasonable suspicion to initiate a traffic stop for a DUI violation based on observations of a vehicle weaving in its lane and crossing the center line twice during a turn following observations for a period of thirty seconds?

Appellant's Brief at 10.

Appellant's issues are interrelated. Therefore, we will address them together. Appellant argues that Officer Miller possessed neither probable cause nor reasonable suspicion to justify the traffic stop. Appellant's Brief at 13-19.² In reviewing Appellant's challenge to the denial of his suppression motion, our appellate standard of review is as follows:

Our standard of review of a denial of suppression is whether the record supports the trial court's factual findings and whether the legal conclusions drawn therefrom are free from error. Our scope of review is limited; we may

² Appellant argues that the charges against him should be dismissed because the traffic stop was not constitutionally valid. Appellant's Brief at 13-19. However, "the proper remedy where evidence has been discovered by an illegal search and/or incident to an illegal arrest is suppression, not dismissal." *Commonwealth v. Dobbins*, 934 A.2d 1170, 118 (Pa. 2007).

consider only the evidence of the prosecution and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports the findings of the suppression court, we are bound by those facts and may reverse only if the court erred in reaching its legal conclusions based upon the facts.

Commonwealth v. Reppert, 814 A.2d 1196, 1200 (Pa. Super. 2002) (citations omitted).

With regard to a law enforcement officer's authority to stop a vehicle for an alleged violation, the Motor Vehicle Code provides:

Whenever a police officer is engaged in a systematic program of checking vehicles or drivers or has reasonable suspicion that a violation of this title is occurring or has occurred, he may stop a vehicle, upon request or signal, for the purpose of checking the vehicle's registration, proof of financial responsibility, vehicle identification number or engine number or the driver's license, or to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title.

75 Pa.C.S.A. § 6308(b), amended by 2003 Pa. Laws 24, § 17 (effective Feb. 1, 2004).

Case law interpreting § 6308(b) relative to whether police officers may stop a vehicle based upon reasonable suspicion or the higher standard of probable cause, focuses on the "investigative nature" of the stop. Specifically, we consider whether the police officer has an expectation of learning additional relevant information concerning the suspected criminal activity, or whether no further evidence could be obtained from the stop. ***Commonwealth v. Chase***, 960 A.2d 108, 115 (Pa. 2008). In

Commonwealth v. Feczko, 10 A.3d 1285 (Pa. Super. 2010) (*en banc*), this Court clarified the appropriate “quantum of cause” necessary to effectuate a stop pursuant to § 6308(b). We explained:

Mere reasonable suspicion will not justify a vehicle stop when the driver's detention cannot serve an investigatory purpose relevant to the suspected violation. In such an instance, “it is incumbent [sic] upon the officer to articulate specific facts possessed by him, at the time of the questioned stop, which would provide probable cause to believe that the vehicle or the driver was in violation of some provision of the Code.” **Commonwealth v. Gleason**, 785 A.2d. 983, 898 (Pa. 2001) (citation omitted). **See also Commonwealth v. Chase**, 960 A.2d 108, 116 (Pa. 2008) (reaffirming **Gleason's** probable cause standard for non-investigative detentions of suspected Vehicle Code violations).

Feczko, 10 A.3d at 1291. Thus, to conduct a non-investigative stop for a violation of the Pennsylvania Motor Vehicle Code, a police officer must have probable cause to believe an offense has occurred. **Chase**, 960 A.2d at 116.

Here, Officer Miller described the circumstances surrounding his stop of Appellant’s vehicle as follows:

Assistant District Attorney: What initially drew your attention to [Appellant’s] vehicle?

Officer Miller: Initially what drew my attention was that there was loud music being played. I saw the vehicle driving at a slower rate of speed.

Assistant District Attorney: Did it ever leave its lane of travel at any time?

Officer Miller: Yes, it did.

Assistant District Attorney: How many times did it leave its lane of travel?

Officer Miller: Approximately two – two times. It was weaving within the lane, but it did cross the lane, the center lane.

Assistant District Attorney: About how far behind [Appellant's] vehicle were you?

Officer Miller: At the time it crossed the lane? Approximately 25, 30 yards.

Assistant District Attorney: Okay. You conduct a traffic stop on that?

Officer Miller: Yes, I did.

Assistant District Attorney: Did you make any observations about the driver?

Officer Miller: I did.

Assistant District Attorney: What were they?

Officer Miller: Upon approaching the driver's side door, I immediately detected an odor of marijuana coming from inside the vehicle?

Assistant District Attorney: Okay. Did you make any other observations about how he was acting?

Officer Miller: Yeah. During – while I was in my patrol car, he was acting nervous, looking in his mirror more abnormal than any other traffic stop. He was reaching around

inside the vehicle, making furtive movements.

Assistant District Attorney: Okay. After you ran his driver's license, did you reapproach him?

Officer Miller: I did.

Assistant District Attorney: Did you make any other observations at that point?

Officer Miller: At that time, I noticed that there was marijuana particles, small marijuana particles, on the inner door, as well as the front of his T-shirt.

* * *

I opened up the car door and told him to get out.

* * *

He had red eyes at that time. I detected an odor of alcohol on his breath, as I did initially; however, this time I detected an odor of marijuana coming from his breath as well.

Assistant District Attorney: Okay, did you pat him down?

Officer Miller: I did.

* * *

[I]n the right front pocket I located marijuana and white pills.

* * *

Assistant District Attorney: Did you administer field sobriety tests?

Officer Miller: I did. ... [H]e failed.

N.T., 9/2/11, at 4-9. Officer Miller further testified that he had been following Appellant for approximately thirty seconds prior to initiating the traffic stop and that Appellant's two left tires crossed the center line of the roadway. *Id.* at 11-13.

The trial court concluded that Officer Miller's stop of Appellant's vehicle was lawful based upon a reasonable suspicion of DUI and probable cause to believe that a violation of §3309(1) had occurred. The trial court explained:

[Officer Miller] needed probable cause of a violation of the summary offense, Disregard of Traffic Lanes, or reasonable suspicion of DUI. The testimony of Officer Miller was not clear on which ground he based his decision to stop the vehicle. However, given the observation of crossing the center line on the roadway, as well as the slow speed and weaving within the lane, either ground appears sufficient for the initiation of a stop.

* * *

Officer Miller observed [Appellant] disregard traffic lanes. Crossing over the center lane while negotiating a curve in the road is an unsafe endeavor and provided Officer Miller with probable cause to believe that Section 3309 of the Motor Vehicle Code was being violated. Crossing over the center line, coupled with the slow rate of speed and the weaving within a lane are factors which could lead a reasonable officer to suspect that the motorist is DUI. Based on the above reasoning ... the initial traffic stop was based on either reasonable suspicion of DUI or probable cause of a violation of section 3309(1), Driving Within a Single lane. On either ground, the traffic stop was lawfully initiated.

Trial Court Opinion, 3/2/12, at 5-6.

We note that the trial court in its Pa.R.A.P. 1925(a) opinion determined that “[t]he testimony of Officer Miller was not clear as to whether his decision to stop the vehicle was based on a suspicion of DUI, or on a suspected violation of 3309(1)” in order to determine whether reasonable suspicion or probable cause was required to justify the stop. Trial Court Opinion, 3/2/12, at 5. However, the trial court reasoned that, on either basis, the stop was supported by the requisite level of suspicion. We agree.

A vehicle stop for DUI may be based on reasonable suspicion. *Chase*, 960 A.2d at 116.

Reasonable suspicion is a less stringent standard than probable cause necessary to effectuate a warrantless arrest, and depends on the information possessed by police and its degree of reliability in the totality of the circumstances. In order to justify the seizure, a police officer must be able to point to specific and articulable facts leading him to suspect criminal activity is afoot. In assessing the totality of the circumstances, courts must also afford due weight to the specific, reasonable inferences drawn from the facts in light of the officer's experience and acknowledge that innocent facts, when considered collectively, may permit the investigative detention

Commonwealth v. Downey, 39 A.3d 401, 406 (Pa. Super. 2012) quoting *Commonwealth v. Brown*, 606 Pa. 198, 996 A.2d 473, 477 (2010).

Here, we conclude that under the totality of the circumstances, Officer Miller possessed reasonable suspicion to effectuate the stop. At 2:30 a.m., Officer Miller observed Appellant's vehicle travelling at a noticeably slow rate of speed while weaving within his lane. Officer Miller then observed

Appellant's vehicle cross the center line, with his left two tires entering the lane utilized by oncoming traffic. Officer Miller did not testify as to any obstructions or road conditions that would explain Appellant's weaving. We agree with the trial court that Officer Miller possessed reasonable suspicion, based on the foregoing, to believe that Appellant was driving under the influence, and the stop was therefore legal. ***See Commonwealth v. Angel***, 946 A.2d 115 (Pa. Super. 2008) (police officer had reasonable suspicion to effectuate a stop after witnessing defendant's vehicle cross the fog line two times within a half mile and fail to use a turn signal when turning on to exit ramp); ***Commonwealth v. Fulton***, 921 A.2d 1239 (Pa. Super. 2007), *appeal denied*, 934 A.2d 72 (Pa. 2007) (holding reasonable suspicion established by testimony of experienced officer of his observation of driver crossing the fog line twice and center line once despite the presence of oncoming traffic and foggy conditions).

We also agree with the trial court that Officer Miller possessed probable cause to effectuate a stop based on a belief that a violation of 75 Pa.C.S.A. § 3309(1) (failure to maintain a single lane) was occurring. A traffic stop based on a violation of section 3309(1) (failure to maintain a single lane) must be supported by probable cause. ***See Feckzo, supra***. "[P]robable cause is shown when the facts and circumstances which are within the knowledge of the officer at the time of the arrest, and of which he has reasonably trustworthy information, are sufficient to warrant a man of

reasonable caution in the belief that the suspect has committed or is committing a crime.” *Commonwealth v. McLaurin*, 45 A.3d 1131, 1137, n.2. (Pa. Super. 2012) (citations omitted).

75 Pa.C.S.A. § 3309 mandates that “[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that the movement can be made with safety.” Upon review of the record, we agree with the trial court that Officer Miller possessed probable cause to conduct the traffic stop, having observed Appellant’s vehicle, which was travelling at a noticeably slow rate of speed, cross the center line into the lane of oncoming traffic, as well as weave within his lane. *See Feczko*, 10 A.3d at 1291 (probable cause to conduct stop existed where defendant weaved within his lane, crossed the double yellow center line on two occasions, and drifted over the white fog line, even though other vehicles in the oncoming lane were not forced to take evasive action to avoid defendant, giving rise to probable cause that 75 Pa.C.S. § 3309(1) was being violated). Accordingly, we conclude that the trial court did not abuse its discretion in denying Appellant’s suppression motion. Therefore, we affirm the judgment of sentence.

Judgment of sentence affirmed.