IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0072-15

JAMES EDWARD LEMING, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE SIXTH COURT OF APPEALS GREGG COUNTY

RICHARDSON, J., filed a concurring opinion in which MEYERS, J., joined.

CONCURRING OPINION

I agree with in the majority's conclusion that Manfred Gilow, a Longview police officer, had reasonable suspicion to detain Appellant in order to investigate the offense of driving while intoxicated. I also agree with the court's decision to reverse the court of appeals's judgment and reinstate the trial court's judgment.

I agree that Officer Gilow had an "objectively justifiable basis" for the detention because he had "specific, articulable facts that, combined with rational inferences from those

facts, would lead [a police officer] reasonably to conclude that the person detained is, has been, or soon will be engaged in criminal activity."[1] Such specific, articulable facts are that Officer Gilow was notified of a citizen's report of a white jeep vehicle on the road that was "swerving from side to side;" when following the jeep, Officer Gilow observed that Appellant was traveling thirteen miles per hour below the posted speed limit; and that Appellant was swerving within his lane, almost hitting the curb a few times. As pointed out by the majority, these facts provide an objectively justifiable basis for any police officer to reasonably conclude that Appellant could be driving while intoxicated.

Moreover, I do not disagree with the majority's analysis of Transportation Code § 540.060. The statute provides that a driver "shall drive as nearly as practical entirely within a single lane," *and* a driver "may not move from the lane unless that movement can be made safely." This means that a person *could* be in violation of that statute if he or she fails to do *either one* of the required actions. This interpretation does not turn the "and" into an "or." The "and" means that *both* are statutory requirements. It is the *potential violation of the statute* that incorporates the "or."[2]

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[1] *Derichsweiler v. State*, 348 S.W.3d 906, 914-15 (Tex. Crim. App. 2011).

[2] This is somewhat analogous to how jury charges are drafted. For example, in the context of a self-defense jury charge instruction, a person's belief that force used in self-defense was immediately necessary is presumed to be reasonable if three requirements are met (the word "and" is used). TEX. PENAL CODE § 9.31(a). That presumption applies unless the State proves beyond a reasonable doubt that the facts giving rise to the presumption do not exist. TEX. PENAL CODE § 2.05(b)(2)(A). This means that if the State disproves any one of the three required actions – one, two, *or* three – then the presumption will not apply. Here, section 540.060 places two requirements on drivers. A violation can occur if the driver fails to do one *or* the other.

Finally, even though, in its petition for discretionary review, the State seemingly abandoned its argument regarding the community caretaking exception, I believe it, too, provided justification for the officer's stop. An officer's community caretaking function may be invoked where an officer stops to assist an individual "whom a reasonable person—given the totality of the circumstances—would believe is in need of help."[3] Given the totality of the circumstances here, consistent with Officer Gilow's testimony that he believed Appellant might have been "somewhat impaired," a reasonable person would believe that Appellant may have been in need of help because of the way he was driving.

With these additional comments, I join the majority opinion.

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[3] *Wright v. State*, 7 S.W.3d 148, 151 (Tex. Crim. App. 1999). *See also*, *Corbin v. State*, 85 S.W.3d 272 (Tex. Crim. App. 2002) and *Gonzales v. State*, 369 S.W.3d 851 (Tex. Crim. App. 2012).