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

KEASLER, J., filed a dissenting opinion in which JOHNSON and HERVEY, JJ., joined.

DISSENTING OPINION

In a motion to suppress, James Leming argued Officer Gilow lacked reasonable suspicion to initiate the traffic stop that led to his arrest for driving while intoxicated. Addressing the arguments before it, the court of appeals held the officer lacked reasonable suspicion to detain Leming for violating the Transportation Code and that the stop was unreasonable under the community-caretaking function. We granted all of the State's grounds for review, including whether Transportation Code § 545.060(a) requires an unsafe

movement. Admittedly, based on reasonable suspicion of criminal activity alone, this is a close case. I dissent because the majority reaches the wrong result by misconstruing the statute and finds reasonable suspicion on the basis of a single insufficient articulable fact.

I. Facts and Procedural History

At the suppression hearing, Officer Gilow testified to his observations before detaining Leming. The record reveals the following facts.

- Around 2:00 p.m. on January 20, 2012, dispatch notified Officer Gilow that a tipper reported a white jeep "swerving from side to side."
- Officer Gilow responded and followed the white Jeep and observed the Jeep for about two miles.
- Officer Gilow observed the Jeep drift within its lane.
- Officer Gilow clocked the vehicle traveling about 32 miles per hour in a 45 mile per hour speed zone, but no minimum speed limit is posted.
- Officer Gilow testified that "traffic was pretty good" and "heavy."
- Officer Gilow was concerned that Leming may have had a "medical issue . . . [such as] diabetic shock," and then stopped the Jeep.
- Officer Gilow later arrested Leming for DWI after Leming admitted to taking clonazepam and hydrocodone.

Concluding that the stop was lawful, the judge denied Leming's motion, and found that (1) dispatch informed Officer Gilow of a tip that Leming was "driving erratically" and (2) the dash-cam video "clearly show[ed]" Leming failed to maintain a single lane as required by the Transportation Code.

II. Analysis

A. Failure to Maintain a Single Lane

The majority spends considerable time de-constructing the decades-old courts of appeals' opinions in *Atkinson*[1] and *Hernandez,*[2] taking issue with the courts' statutory interpretation of § 540.060 and its predecessors.[3] Those courts' historical accounts regarding the statute's predecessor are largely irrelevant. According to the majority, the courts of appeals' undoing in *Atkinson* and *Hernandez* was omitting from its analysis the 1947 legislative language that "'to do any act forbidden or fail[ure] to perform an act required by this Act.'"[4] But relying on this language merely assumes what the Court's incorrect conclusion—that the statute's "and" means "or." We should instead interpret the current statute by its plain language, structure, and apparent purpose.

A driver fails to maintain a single lane when "[a]n operator on a roadway divided into two or more clearly marked lanes for traffic: (1) shall drive as nearly as practical entirely within a single lane; and (2) may not move from the lane unless that movement can be made safely."[5] We interpret statutes by examining the statute's text and give effect to the text's

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[1] *Atkinson v. State*, 848 S.W.2d 813 (Tex. App.—Houston [14th Dist.] 1993, no pet.).

[2] *Hernandez v. State*, 983 S.W.2d 867 (Tex. App.—Austin 1998, pet. ref'd).

[3] *See ante*, at 7–12.

[4] *See ante*, at 11 (quoting Acts 1947, 50th Leg. Ch. 421, § 22, p. 970).

[5] TEX. TRANSP. CODE § 545.060(a)(1–2) (West 2013).

plain meaning.[6] We deviate from this practice only when doing so would lead to absurd results the Legislature could not have intended or when the statute is ambiguous.[7] Should either circumstance arise, we may then turn to extratextual sources to discern the Legislature's intent.[8]

To start, the Transportation Code § 545.060(a)'s plain meaning is clear and unambiguous. "Practical" in this case, means "real as opposed to theoretical"[9] or "disposed to action as opposed to speculation or abstraction."[10] "Safely" means, "free from harm or risk," "secure from threat of danger, harm, or loss," or "affording safety or security from danger, risk, or difficulty."[11] The conjunction "and" joins the statute's two requirements: that a driver shall stay within a single lane to the extent it is practical and leave the lane only when it is safe to do so.

Contrary to the majority's position, the "and" should not be read as an "or."[12] While there are times "and" can mean "or," it is simply not the case here. Professor Garner offers

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[6] *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). *See also* TEX. GOV'T CODE § 311.011(a) (requiring words to be read in context of one another).

[7] *Id.*

[8] *Id.* at 785–86.

[9] BLACK'S LAW DICTIONARY 1361 (10th ed. 2014).

[10] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 914 (10th ed. 1997).

[11] *Id.* at 1030.

[12] *See ante*, at 9.

an example: "'Prisoners' cases are usually heard before federal magistrates and district court judges.'"[13] This sentence does not mean that both federal magistrates and district court judges hear the cases simultaneously.[14] Rather, the sentence means that either federal magistrates or district court judges hear these cases.[15] But "and" typically means that both the words or phrases on either side are required.[16] A more basic example is "cruel and unusual punishment" or "necessary and proper."[17] An implicit "both" read before each word or phrase further clarifies this meaning.[18]

In the same way, the statute requires drivers to both drive in a single lane and not move from that lane unless it can be done safely. This is evidenced by the "and" joining the two provisions and is how we commonly understand the term. To give effect to the entire statute, the two requirements must be read together. A plain reading shows that both (a)(1) and (a)(2) are requirements, dependent on one another. To read the statute otherwise, as the majority does, overlooks the two requirements' interconnectedness. Common sense tells us that leaving an obstructed lane necessarily requires movement from that lane. It then follows

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[13] BRYAN GARNER, A DICTIONARY ON MODERN LEGAL USAGE 55 (2d ed. 1995).

[14] *Id.*

[15] *Id.*

[16] ANTONIN SCALIA AND BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 116 (2012).

[17] *Id.*

[18] *Id.*

that, to promote the statute's apparent objective to ensure roadway safety, the requirement that leaving the lane be done safely becomes operative at the time when driving in a single lane is no longer practical.

But under the majority's interpretation, the driver could be subject to two punishable offenses: one for leaving the lane if it was impractical and one for leaving the lane unsafely.[19] Ironically, this reading does what the Court finds objectionable in its review of older courts of appeals' opinions. Indeed, following the majority's analysis, we would read "safe" out of the statute by requiring a driver to remain in the lane only when it is practical to do so.[20] But reading the code with the correct use of "and" provides a single complete offense and avoids creating future unnecessary double-jeopardy issues and potential conflict with another Transportation Code section.[21]

To further support this interpretation, the majority finds an analogy in a dissimilar statute. The failure to stop and render aid statute provides:

> (a) The operator of a vehicle involved in an accident resulting in injury to or death of a person shall:
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> (1) immediately stop the vehicle at the scene of the accident or as close to the scene as possible;
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> (2) immediately return to the scene of the accident if the

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[19] *See ante*, at 14 (explaining that § 540.060(a)(1) is a wholly "independent offense" from § 540.060(a)(2)).

[20] *See ante*, at 15–16 (discussing the definition of "practical" as synonymous with "safe").

[21] *Cf.* TEX. TRANSP. CODE § 545.103 (West 2013) ("An operator may not . . . move right or left on a roadway unless movement can be made safely.).

> vehicle is not stopped at the scene of the accident; and
> (3) remain at the scene of the accident until the operator complies with the requirements of Section 550.023.
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> . . .
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> (c) A person commits an offense if the person does not stop or does not comply with the requirements of this section.[22]

The failure to stop and render aid statute's construction is entirely different than the statute here. The statute provides a list of required conduct. In a particular circumstance, failing to do any combination of § 550.021(a)(1),(2), or (3) is a punishable offense. We know this because § 550.021(a) first sets out the circumstances (the accident resulting in injury or death), that triggers required conduct (the operator shall) spelled out in the following enumerated sections.[23] The word "shall" in section (a) precedes each subsection that follows—"stop," "return," and "remain." In that instance, the Legislature require all three as the circumstances may necessitate. If that was not clear enough, § 550.021(c) further provides support that a driver must stop and remain or stop, return, and remain.

However, § 540.060(a) is not written or constructed similarly. Unlike § 550.021, § 540.060 does not state "An operator on a roadway divided into two or more clearly marked lanes for traffic shall: (1) drive as nearly as practical entirely within a single lane; and (2) not move from a single lane unless that movement can be made safely." If the statute were worded this way, a driver would violate the statute by either failing to comply with

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[22] TEX. TRANSP. CODE § 550.021 (West, 2013).

[23] *See Huffman v. State*, 267 S.W.3d 902 (Tex. Crim. App. 2008) (interpreting the statute's "and" as an "or" based on the statute's construction and because the statute is a "circumstances surrounding the conduct offense).

subsections (1) or (2). But in the actual statute, nothing in section (a)'s lead in language—before the colon—suggests that subsections (1) and (2) can be read independently of one another. Subsection (1)—after the colon—begins with "shall;" subsection (2) begins with "may not." Had the Legislature intended § 545.060(a) to be read like § 550.021, it would have constructed the statute similarly. Therefore, the failure to stop and render aid statute is simply not helpful in interpreting the instant statute.

Likewise, the majority's citation to *Lothrop*[24] and its analysis of the driving on an improved shoulder statute[25] are equally inapplicable. The driving on an improved shoulder statute sets out permissible conduct when certain conditions are satisfied and includes permissible purposes.[26] And like the statute here, which allows a driver to move from the lane if it is impractical to remain in the lane and that requires movement from the lane be made safely, so too does driving on an improved shoulder allow a driver to drive on the shoulder if it is necessary and can be done safely.[27] While the majority plucks language from *Lothrop* suggesting the statute requires either that driving on the shoulder was unnecessary

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[24] *Lothrop v. State*, 372 S.W.3d 187 (Tex. Crim. App. 2012).

[25] TEX. TRANSP. CODE § 545.058(a)(1–7) (West 2013).

[26] *Id.* (providing in pertinent part: "An operator may drive on an improved shoulder to the right of the main traveled portion of a roadway if that operation is necessary and may be done safely, but only: . . . .").

[27] *Lothrop*, 372 S.W.3d at 191.

or that it was unsafe,[28] we went on to say: "Thus if an officer sees a driver driving on an improved shoulder, and it appears that driving on the improved shoulder was necessary to achieving one of the seven approved purposes, and it is done safely, that officer does not have reasonable suspicion that an offense occurred."[29] We concluded that an officer lacks reasonable suspicion that an offense occurred if the officer does not observe both that a driver drives on an improved shoulder unnecessarily and does so unsafely.[30] Therefore, the majority's reliance on *Lothrop* does not support its interpretation of § 540.060, and instead suggests the statute's two requirements be read together.

Applying this analysis to the facts here, Officer Gilow never testified that he had a reasonable belief that Leming failed to maintain a single lane. Even if the majority's reading of § 545.060 was correct, the record does not support finding reasonable suspicion that Leming committed one of the "actionable offenses." While the judge found as much, neither the video nor Officer Gilow's testimony support a finding that Leming left his lane. True, an officer is not required to have proof of the actual commission of the offense to make an investigative stop,[31] but the officer must testify to some reasonable belief or basis that some

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[28] *Ante*, at 14 n.13.

[29] *Lothrop*, 372 S.W.3d at 191 (citing *Castro v. State*, 227 S.W.3d 737, 741 (Tex. Crim. App. 2007).

[30] *Id.* at 190–91.

[31] *See ante*, at 16 (citing *Drago v. State*, 553 S.W.2d 375, 377 (Tex. Crim. App. 1977)).

criminal activity is afoot. Officer Gilow did not testify that he saw Leming fail to remain in a single lane and that his movement from the lane was unsafe or saw any specific and articulable facts that permitted him to reasonably believe Leming committed this traffic violation. The majority also cites to the tip as a basis to believe that Leming failed to remain in his lane as practically as possible and incorrectly disregards whether that failure was unsafe. But for reasons explained below, the tip is insufficient to support a reasonable belief that Leming was committing, had committed, or was about to commit an offense. Officer Gilow lacked reasonable suspicion that Leming failed to maintain a single lane or reasonable suspicion that Leming was driving while intoxicated.

B. Reasonable Suspicion

We examine a search's reasonableness on a case-by-case basis.[32] A temporary detention may be reasonable, if justified by reasonable suspicion.[33] While the standard for reasonable suspicion is low, it is nevertheless a standard. It is an objective one that disregards the officer's subjective beliefs.[34] Reasonable suspicion exists if, based on the totality of the circumstances, the officer has specific, articulable facts, that taken together with rational inferences from those facts, lead him to conclude that the person detained

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[32] *Natsu v. State*, 589 S.W.2d 434, 438 (Tex. Crim. App. 1979), *cert denied*, 447 U.S. 911 (1980).

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

[34] *State v. Kerwick*, 393 S.W.3d 270, 274 (Tex. Crim. App. 2013) (citing *Terry*, 392 U.S. at 21–22; *York v. State*, 342 S.W.3d 528, 536 (Tex. Crim. App. 2011)).

actually is, has been, or soon will be engaged in criminal activity.[35] But the officer need not observe an actual crime; rather, some activity may be sufficient to establish reasonable suspicion,[36] even if those circumstances standing alone may be just as consistent with innocent activity as with criminal activity.[37] If a stop is not based on objectively specific and articulable facts, the risk of arbitrary and abusive police practices exceeds tolerable limits, thereby violating the Fourth Amendment.[38]

C. The Tip

A large majority of the Court's analysis focuses on the tip. But the tip, and the information it contained, is largely irrelevant for reasons I later explain. The Court cites *Navarette* and *Derichsweiler* as controlling, yet neither case addresses the real issue in this case—whether weaving within a lane is alone sufficient to establish reasonable suspicion of DWI. In *Navarette v. California*, the Court dealt with an anonymous 911 tip and addressed the reliability of such a tip to support reasonable suspicion—not whether weaving within the lane, alone, satisfies reasonable suspicion.[39] The *Navarette* Court cited several cases stating

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[35] *Curtis v. State*, 238 S.W.3d 376, 380–81 (Tex. Crim. App. 2013). *See also York*, 342 S.W.3d at 536.

[36] *Stone v. State*, 703 S.W.2d 652, 654 (Tex. Crim. App. 1986).

[37] *Id.* (citing *York*, 342 S.W.3d at 536).

[38] *Ford v. State*, 158 S.W.3d 488, 493 (Tex. Crim. App. 2005) (quoting *Brown v. Texas*, 443 U.S. 47, 52 (1979)).

[39] 134 S.Ct. 1683, 1690–91 (2014).

that certain behaviors are "sound indicia of drunk driving," such as where the defendant weaved "all over the roadway," "cross[ed] over the center line on a highway and almost caus[ed] several head-on collisions," "dr[ove] all over the road and [weaved] back and forth," or "dr[ove] in the median."[40] But in each of these cases, the officers and informants observed dangerous activities—more than merely weaving within the lane—that provided reasonable suspicion. Addressing the issue, the Court concluded the 911caller's tip was reliable because the tip included more than a hunch of criminal activity, the tip alleged that the driver "[ran] another car off the highway[,]"—something more than weaving within the lane.[41]

Likewise, *Derichsweiler* addressed a corroborated 911 caller's report as a basis for an officer's reasonable suspicion.[42] The issue in that case was whether the caller's information articulated specific facts and reasonable inferences from those facts that led to a reasonable conclusion that the defendant was in the process of or about to engage in criminal activity.[43] In other words, the Court decided whether the tip's information could be considered in the totality of the circumstances known to the officer as a basis to justify

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[40] *Id.* (quoting *State v. Prendergast*, 83 P.3d 714, 715–16 (Haw. 2004); *State v. Golotta*, 837 A.2d 359, 361 (N.J. 2003); *State v. Walshire*, 634 N.W.2d 625, 626 (Iowa 2001) (internal quotation marks omitted)).

[41] *Id.* at 1691.

[42] 348 S.W.3d at 909–10.

[43] *Id.* at 916–17.

reasonable suspicion that the defendant was engaged in some type of criminal activity. Again, addressing the tip, we found the tip alleged specific facts that under the totality of the circumstances, supported the officer's reasonable suspicion that criminal activity was about to occur.[44]

Here, the tip does not add anything to the calculus of reasonable suspicion under the totality of the circumstances because the officer personally observed Leming weave within his lane. Unlike the officer in *Derichsweiler* who detained the defendant after responding to the scene, Officer Gilow followed and observed Leming for almost two miles. The tip said nothing about Leming's driving that is consistent with impaired driving that Officer Gilow did not see himself. A tip that a driver is "swerving from side to side" and an officer's own observations of the same behavior does not afford that single observation any greater weight; it is the same specific and articulable fact. As such, the tip does not factor into our evaluation of whether reasonable suspicion existed under the totality of the circumstances. In certain circumstances a single articulable fact may satisfy reasonable suspicion, but this case does not warrant such a holding.

D. Weaving Within the Lane

Our review for reasonable suspicion requires determining whether the facts known to the officer under the totality of the circumstances objectively permit an officer to conclude that "crime is afoot." A number of the courts of appeals have held that weaving within the

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[44] *Id.* at 917.

lane is an insufficient basis to support reasonable suspicion for a traffic stop.[45] To be sure, weaving within the lane is a factor to consider in the totality of the circumstances and may be "sound indicia of drunk driving,"[46] but that fact alone does not satisfy reasonable suspicion of DWI. The record here shows that Officer Gilow had but one fact to base his reasonable suspicion—Leming's weaving within his lane. The only fact the Court relies upon in finding reasonable suspicion is the officer observed Leming weaving within his lane.

With the principle that specific and articulable facts need not be criminal in and of itself, the Court waters down reasonable suspicion to almost no standard at all by creating permissible DWI investigations from weaving alone. In a DWI context, there are nearly infinite circumstances, that in theory, may indicate a loss of mental and physical faculties—speeding, failing to signal, following too closely, failing to turn on one's headlights at night, or driving onto the shoulder—even if these behaviors fall short of a Transportation Code offense. By the Court's rationale, anything short of an actual traffic violation would establish reasonable suspicion that a driver is driving while intoxicated. Obviously, if an officer observes an actual violation, the officer has more than reasonable suspicion of criminal activity. But that is not the case here. The Court would hold that a

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[45] *See, e.g.*, *State v. Tarvin*, 972 S.W.2d 910, 912 (Tex. App.—Waco 1998, pet. ref'd) (holding that weaving within the lane, alone, is insufficient to support reasonable suspicion). *See also Hernandez v. State*, 983 S.W.2d 867 (Tex. App.—Austin 1998, pet. ref'd) (same); *State v. Cerny*, 28 S.W.3d 796 (Tex. App.—Corpus Christi 2000, no pet.) (same); *State v. Huddleston*, 164 S.W.3d 711 (Tex. App.—Austin 2005, no pet.) (same); *Ehrhart v. State*, 9 S.W.3d 929 (Tex. App.—Beaumont 2000, no pet.) (same).

[46] *Navarette*, 134 S.Ct. at 1690.

single behavior, theoretically or abstractly suggesting impairment, is alone, while not against the law, sufficient for reasonable suspicion.

What is more, the Court mischaracterizes the record and claims Leming swerved in his lane over a considerable amount of time and distance.[47] But this claim is unsupported by either the record or the video. By its own account, the Court's factual recitation, consistent with the video, shows that Leming weaved within his lane for a period of about thirty seconds, all the while remaining in his lane. The record provides no support for the Court's contention that the tip provided anything more than Leming swerving in his lane. Nowhere in the record is there any information from which the officer or this Court can infer that Leming weaved within his lane for any length of time. Contrary to the Court's position, the existence of a tip, even if motivated by bona fide public safety concerns, is simply not enough to support reasonable suspicion. This is particularly so where the tip fails to add any additional facts supporting reasonable suspicion.

An observation of weaving within a single lane, which presumably is not a criminal violation, insufficiently supports reasonable suspicion for DWI because it is the only fact the officer witnessed. And in this case, it is an insufficient single fact. The Court also seems to believe that failing to stop doing what the Court already announces is sufficient for reasonable suspicion, is just more evidence of suspicion. It is an argument that simply

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[47] *Ante*, at 23 n.20 (characterizing Leming's swerving as "sustained and significant").

bootstraps a single insufficient fact of swerving into reasonable suspicion. As explained above, the Court's rationale would equally hold that any driving behavior that someone may associate with DWI would be sufficient to execute an investigative detention for DWI. The Court's expansive holding that Officer Gilow had reasonable suspicion elevates weaving within the lane to establish reasonable suspicion *per se* for DWI.

I recognize that reasonable suspicion is a low standard, but it is nevertheless a meaningful one for a lawful Fourth Amendment detention. The Court's holding today only increases the likelihood of fishing expeditions the Fourth Amendment protects against.

III. Conclusion

I would find that a § 540.060(a) violation requires that (1) a driver leave his or her lane when it is impractical to remain in the lane and (2) move from the lane only when it is safe to do so. I would also find that Officer Gilow lacked reasonable suspicion to detain Leming. I would affirm the court of appeals' judgment and remand the case to the trial court for further proceedings consistent with this opinion.

DELIVERED: April 13, 2016

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