NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

ON APPEAL TO THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

APPELLATE DIVISION

LYNN EUGENE MAXWELL

Appellant,

Appeal Case No.: CRC 08- 00076 APANO
UCN No.: 522007CT179373XXXXXX

v.

STATE OF FLORIDA,

Appellee.
_____/

Opinion filed: 1/8/10.

Appeal from the County Court
for Pinellas County
County Judge William Overton

Jay A. Hebert, Esquire
Attorney for Appellant

Bernie McCabe, Esquire
State Attorney
Sixth Judicial Circuit of Florida
Attorney for Appellee

ORDER AND OPINION

DEMERS, JUDGE

Appellant was charged with DUI. He filed a Motion to Suppress contesting the lawfulness of the vehicle stop. After an evidentiary hearing and argument, the trial court denied

the Motion to Suppress on the grounds that Appellant's driving pattern was sufficiently unusual to justify a stop of the vehicle to determine whether the driver was ill, tired, under the influence, or experiencing a mechanical problem. The trial court relied on *Dep't of Highway Safety & Motor Vehicles v. Deshong*, 603 So.2d 1349 (Fla. 2d DCA 1992) and *State v. Bean*, 12 Fla. L. Weekly Supp. 610 (Fla. 6th Cir. Ct. March 4, 2005). Appellant pled nolo contendere, reserving his right to appeal the denial of the Motion to Suppress. Reversal of the trial court's order would be dispositive of this case; therefore, this Court has jurisdiction.

Deputy Langlais stopped Appellant's vehicle because his observations caused him to be concerned that there was something wrong with the driver or vehicle. There was no argument that the deputy had probable cause to make the stop. The State's position in the trial court was that the stop was lawful because the officer had a founded suspicion that the driver was under the influence or that the vehicle had a defect. Appellant argues that the deputy had insufficient facts for a stop. The law on this subject has been repeatedly considered and is well developed. But the rub is in the application of the law to the facts in close cases.

It is well established in Florida that because of the dangers inherent in driving motor vehicles, a brief investigatory stop is warranted when a law enforcement officer has a founded suspicion that the driver is ill, tired, impaired, or experiencing problems with the vehicle. *Bailey v. State*, 319 So.2d 22 (Fla. 1975); *Deshong v. Dep't of Highway Safety & Motor Vehicles*, 603 So.2d 1349 (Fla. 2d DCA 1992). "Because of the dangers inherent in our vehicular mode of life, there may be justification for the stopping of a vehicle by a patrolman to determine the reason for its unusual operation." *Bailey v. State*, 319 So.2d at 26. An officer, therefore, does not have to wait to stop the vehicle until there is an accident, nor does the unusual driving behavior have to rise to a level warranting a traffic citation. *Deshong*, 603 So.2d at 1352. Instead, the officer must

be able to articulate specific facts about the unusual driving behavior that led to the inference that the driver was experiencing vehicle problems, was ill, tired, or impaired. *Id.*

In deciding whether the officer had founded suspicion to stop the vehicle, the court must take into account the totality of the circumstances, as viewed by an experienced police officer. *U.S. v. Cortez*, 49 U.S.411, 417 (1981); *State v. Marrero*, 890 So.2d 1287, 1281-1282 (Fla. 2d DCA 2005). A consideration of the totality of the circumstances "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" *Marrero*, 890 So.2d at 1281-82.

The totality of the circumstances that the court should consider include time of day, the day of the week, the location, the physical appearance of the suspect, the behavior of any involved vehicle, or anything unusual in the situation as interpreted in light of the officer's knowledge. See e.g. *Grant v. State*, 718 So.2d 238 (Fla. 2d DCA 1998). In the present case, the Appellant's truck caught the attention of the deputy around 1:30 a.m. on a Sunday morning. At that time and day of the week people might reasonably be suspected of recently have consumed alcoholic beverages to excess. The physical appearance of the driver was not something the deputy observed before making the stop; therefore, it is not a factor. The truck did not behave in a way that one would reasonably expect a vehicle to normally behave. It jerked once followed by twice weaving within its lane. According to the deputy this included the driver favoring the inside of the lane, leaving three to four feet to the right side of the vehicle and only one foot to the left side of the vehicle. The trial judge concludes in the record that this took place in over a quarter of a mile. (R 57). Finally, the deputy had extensive experience dealing with DUI cases and was well versed in circumstances indicating that a driver might be impaired or a vehicle

defective. The sum total of the deputy's observations and circumstances surrounding the stop created a reasonable suspicion to conduct an investigatory stop in the interest of public safety.

While this Court upholds the trial court's decision, we do so with some hesitancy. After a detailed and thorough analysis of the evidence and the law, the trial judge said, "And this is a very, very close case." (R 58). That is certainly an accurate assessment. It brings to mind this important message from *Taylor v. State*, 355 So.2d 180, 185-86 (Fla. 3d DCA 1978):

> "[I]f a doubt exists as to whether the officer was reasonable in concluding that a search was justified, such a doubt must be resolved in favor of the defendant whose property was searched." .... Our conclusion herein is further supported by the long standing rule that the Fourth Amendment to the United States Constitution and Article I, Section 12, of the Florida Constitution should receive a liberal construction so as to safeguard our most precious right of privacy. The courts must be vigilant to scrutinize the attendant facts in a search and seizure case with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods. Constitutional provisions for the security of person or property are to be liberally construed and it is the duty of the courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. The Fourth Amendment was adopted in view of a long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right. Although such a liberal construction does not forbid the application of common sense in the detection of crime and the apprehension of criminals or require us to strain our Constitution through a filament of unrealistic exactitude, nonetheless **we are compelled in close cases to decide in favor of the individual rights of the citizen as guaranteed by the above constitutional provisions because of the extreme importance of such rights to the maintenance of a free society.** (internal citations omitted)(emphasis added).

These fundamental principles have caused this Court to struggle with the validity of the stop in this instance. As the trial court's well considered analysis suggests, this stop was made because the driver of the vehicle jerked the vehicle once and weaved twice within his lane. As our analysis states, when you add to these facts the day of the week, the time of day, and the deputy's experience, the stop was reasonable and consistent with the principles set forth in *Taylor.*

ACCORDINGLY, this Court AFFIRMS the trial court's order denying the Motion to Suppress and the judgment and sentence in this case.

BULONE and HELINGER, C. JJ. Concur.

ORDERED at St. Petersburg, Florida this 8th day of January 2010.

Original order entered on January 8, 2010 by Circuit Judges David A. Demers, Joseph A. Bulone, and Chris Helinger.

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