

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

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

STATE OF FLORIDA

Appellant,

Appeal No. CRC 10-00066APANO  
UCN 522010AP000066XXXXCR

vs.

JOSE ALFONSO PENA

Appellee.

Opinion filed \_\_\_\_\_.

Appeal from an Order Granting  
Motion to Suppress  
entered by the Pinellas County Court  
County Judge John D. Carballo

James S. Jenkins III, Esquire  
Office of the State Attorney  
Attorney for Appellant

Chris Westmoreland, Esquire  
Attorney for Appellee

**ORDER AND OPINION**

PETERS, Judge.

THIS MATTER is before the Court on Appellant, State of Florida's appeal from an order of the Pinellas County Court granting Appellee's Motion to Suppress. After reviewing the briefs and record, this Court reverses the order of the trial court.

*Factual Background and Trial Court Proceedings*

On January 18<sup>th</sup>, 2010 at approximately 4:30 a.m., Sergeant Robert Wierzba of the Clearwater Police Department was on routine patrol in his unmarked police vehicle. While travelling eastbound on Drew Street, Sergeant Wierzba observed a white and orange pickup truck stopped in the westbound left through-lane on Drew Street. The truck was not stopped at a traffic light or traffic sign. Sergeant Wierzba testified as follows:

Q And what did you see as you got closer to the vehicle?

A As I got closer, I saw that there were three people directly behind the vehicle. There were two standing up, sort of kind of leaning over a third subject who was laying in the road in a fetal position, and directly behind the vehicle, pretty much in that left through lane.

Q And when you say "the fetal position," is that where his knees and arms are bent and he's curled?

A Yes.

Q And were there any other vehicles around the truck?

A No.

Q And after you saw this, did you see anything else on the ground around the three people?

A There was a wet spot on the pavement.

Q And what determination did you make at that point?

A Initially, my concern was is that this was some sort of an accident. Now, whether he, the driver, might have hit the person that was laying in the roadway, you know, or because it was a pickup truck, he might have fallen out of the back of the pickup truck, but my initial thought was that this was some sort of an accident.

Q And is that based upon the training and experience that you've had as a Clearwater Police officer for 23 years?

A Yes.

Sergeant Wierzba made the first possible u-turn he could and observed one of the people pulling the individual out of the street towards the sidewalk. While this was occurring, Sergeant Wierzba observed the pickup truck accelerate from having been at a dead stop and begin driving westbound. Sergeant Wierzba tried to find out what happened from the person pulling the individual out of the street but did not get a response due to a language

barrier and he also observed the other person walking away from the scene. Having no other information provided to him, Sergeant Wierzba decided to try to catch up to the driver of the pickup truck and stop him in case there had been a crash. Sergeant Wierzba informed dispatch at Clearwater Police what was occurring since he did not have backup at the scene and ultimately Officer Stephen Hole arrived to assist with the investigation. As Sergeant Wierzba was following the pickup truck, he noted an unusual driving pattern. He testified to the following:

Q And how was the vehicle driving when you caught up to him?

A As I was catching up to him -- again, Drew Street is divided with a concrete median and it has landscaping in the middle of it. When the driver was heading westbound, the driver's side tires were about as close as you can get to that median and it looked like he was straddling the median, like he was using it as a guide. And I was the entire way down until I pulled him over, and I was about a half a mile away.

Q And did that driving pattern seem unusual to you?

A Yes.

Q And is that based upon your training and experience of 23 years?

A Yes.

When Sergeant Wierzba made contact with the driver of the pickup truck, the Appellee, Jose Alfonso Pena, approximately a half mile away, he noticed the Mr. Pena had a very strong odor of alcohol and bloodshot, glassy eyes. Sergeant Wierzba learned from Mr. Pena that one of the occupants of the pickup truck had gotten out of the truck because he was really drunk and that two of the individuals he had seen in the street had been inside of the truck and the other individual had been riding in the pickup truck bed. The entire time period from when Sergeant Wierzba first observed the person in the road until he attempted to stop the vehicle was about ten seconds.

Officer Stephen Hole eventually made contact with Sergeant Wierzba and Mr. Pena at the location of the traffic stop after investigating the scene where the pickup truck had left. Officer Hole was unable to locate any of the three individuals Sergeant Wierzba

had seen outside of the vehicle. However, Officer Hole was able to locate the wet spot and discovered that the wet spot appeared to be from a broken bottle of beer based upon the odor and the presence of broken glass. Officer Hole initiated a DUI investigation with included multiple signs of impairment, poor performances on field sobriety exercises, and a breath test sample of .160 and .158. Mr. Pena was arrested for DUI and a Misdemeanor Information charging Mr. Pena with that offense was filed on April 6, 2010. Through counsel, Mr. Pena filed a motion to suppress which was granted after hearing. The trial court commented “[m]y gut tells me it was good police work and a good stop, but I think I got to follow *Keeling* and grant the motion.” The trial court entered the following order:

THIS CAUSE having come on to be heard upon Defendant’s Motion to Suppress, and the Court having heard testimony and argument of counsel, the Court finds the issue regarding the legality of the traffic stop is controlled by *Keeling v. State*, 929 So2d 1169 (Fla. 2<sup>nd</sup> DCA 2006). Accordingly, it is hereby ORDERED that Defendant’s motion is GRANTED.

The State appeals this order granting the motion to suppress.

#### *Standard of Review*

Our review of a trial court's ruling on a motion to suppress evidence involves a mixed question of law and fact. We accord a presumption of correctness with regard to the trial court's determination of facts where the trial court's factual findings are supported by competent, substantial evidence. However, we review the trial court's application of the law to those facts de novo. *Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); *Connor v. State*, 803 So.2d 598 (Fla.2001); *State v. Pruitt*, 967So2d 1021 (Fla. 2<sup>nd</sup> DCA 2007).

### *Stops for Traffic Infractions or Suspected Crimes.*

It is well established that the prohibition against unreasonable searches and seizures contained in the Fourth Amendment of the United States Constitution applies to investigatory stops of automobiles. *United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981). An examination of the validity of a traffic stop under the Fourth Amendment thus requires courts to determine whether the stop was reasonable. *Terry v. Ohio*, 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The constitutional reasonableness of a traffic stop under the Fourth Amendment does not depend on the actual, subjective motivations of the individual officers involved in conducting the stop, but rather it depends on the validity of the basis asserted by the officers involved in the stop. *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). The Florida Supreme Court has adopted this objective test. *Holland v. State*, 696 So2d 757 (Fla. 1997). The correct test to be applied is whether the particular officer who initiated the traffic stop had an objectively reasonable basis for making the stop. *Dobrin v. Department of Highway Safety & Motor Vehicles*, 874 So2d 1171 (Fla. 2004). Specifically, in the *Whren* case, the United States Supreme Court held that the temporary detention of a motorist is reasonable when an officer has *probable cause* to believe that the motorist has committed a traffic infraction.

To justify an investigatory stop, the officer must have a *reasonable suspicion* that the person detained committed, is committing, or is about to commit a crime. § 901.151(2) Fla. Stat. (2006); *Popple v. State*, 626 So2d 185 (Fla. 1993); *Dept. of Highway Safety & Motor Vehicles v. DeShong*, 603 So2d 1349 (2<sup>nd</sup> DCA Fla. 1992); *Randall v. State*, 600 So2d 553 (Fla. 2<sup>nd</sup> DCA 1992). A *reasonable suspicion* is "a

suspicion which has some factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer's knowledge." *McMaster v. State*, 780 So2d 1026 (5<sup>th</sup> DCA Fla. 2001). While "reasonable suspicion" is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop. The officer must be able to articulate more than an "inchoate and unparticularized suspicion or 'hunch' " of criminal activity. *Illinois v. Wardlow*, 528 U.S. 119, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000). "Mere" or "bare" suspicion, on the other hand, cannot support detention. *State v. Stevens*, 354 So2d 1244 (4<sup>th</sup> DCA Fla.1978); *Coleman v. State*, 333 So.2d 503 (Fla. 4th DCA 1976). Mere suspicion is no better than random selection, sheer guesswork, or hunch, and has no objective justification. See *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and *Thomas v. State*, 250 So.2d 15 (Fla.1st DCA 1971). The court determines the stop's legitimacy by considering the totality of the circumstances surrounding the stop. *McMaster*, 780 So.2d at 1029. In order for a traffic stop for an infraction or a crime to be proper, the police must have a *reasonable suspicion* of criminal activity, or *probable cause* to believe a traffic infraction has been committed. *Jones v. State*, 842 So2d 889 (Fla. 2<sup>nd</sup> DCA 2003).

#### *Traffic Stops Based Upon Unusual or Erratic Driving.*

Florida courts have recognized that a legitimate concern for the safety of the motoring public can warrant a brief investigatory stop to determine whether a driver is ill, tired, or driving under the influence in situations less suspicious than that required for other types of criminal behavior. *Bailey v. State*, 319 So.2d 22 (Fla.1975); *State of*

*Florida, Department of Highway Safety and Motor Vehicles v. DeShong*, 603 So.2d 1349 (Fla. 2<sup>nd</sup> DCA 1992); *Shively v. State*, --- So3d ----, 2011 WL 2029622 (Fla. 2<sup>nd</sup> DCA May 25, 2011); *State v. Bean*, 12 Fla. L. Weekly Supp. 610 (Fla. 6<sup>th</sup> Jud. Cir. App. Ct. March 9, 2005). “Because of the dangers inherent to 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*, 319 So.2d at 26, (emphasis added).

“A stop may be justified even in the absence of a traffic infraction when the vehicle is being operated in an *unusual manner*.” *State v. Rodriguez*, 904 So.2d 594, 598 (Fla. 5th DCA 2005) (citing *Ndow v. State*, 864 So.2d 1248, 1250 (Fla. 5th DCA 2004)); see *Bailey v. State*, 319 So.2d 22, 26 (Fla.1975) (upholding stop to determine reason for driver's “unusual operation” of vehicle at slow speed and weaving within lane, even where court stated that no circumstances reasonably would have led the officer to believe criminal activity was taking place); accord *Brown v. State*, 595 So.2d 270, 270–71 (Fla. 2d DCA 1992).

*Shively v. State*, 2011 WL 2029622, 2 (Fla. 2<sup>nd</sup> DCA May 25, 2011), (emphasis added).

There is no statutory definition of *erratic driving* and it must necessarily be determined on a case by case basis. *Nicholas v. State*, 857 So.2d 980, 982 (Fla. 4<sup>th</sup> DCA 2003).

There is also no such definition of *unusual operation*. The *unusual* or *erratic* driving must have been observed for a sufficient period of time to support the conclusion of the police that the driving was not just an isolated incident but was approaching a pattern of unusual driving. *Bean*, 12 Fla. L. Weekly Supp at 613.

#### *The Present Case*

The issue presented in this appeal is whether there was sufficient *unusual operation* or *erratic driving* to justify the traffic stop in the absence of a traffic infraction or reasonable suspicion that a crime had been committed. This court well understands the difficulty presented to a trial court when such issues must be determined on a case by case basis. In the present case the trial court concluded that the *Keeling* case was

controlling. That case is cited in trial court's order. The *Keeling* case involved a question of whether there was sufficient *reasonable suspicion* that a crime had been committed to justify the traffic stop in that case. *Keeling* did not involve or address any issue of *unusual operation* or *erratic driving*. In the present case the trial court erred in concluding that the *Keeling* case was dispositive or controlling.

This court concludes that the totality of the circumstances that Sergeant Wierzba confronted justified a stop to determine the reason for such *unusual operation* of this truck by Mr. Pena at that hour. It was both the Sergeant's initial observations of the truck stopped in the middle of the street with the people behind it, a man laying in the road with a wet spot on the pavement and the subsequent observations of the truck proceeding west on Drew street. As the trial court observed, "[m]y gut tells me it was good police work and a good stop..." We agree.

#### *Conclusion*

This court concludes that the order of the trial court granting Appellee's Motion to Suppress should be reversed.

IT IS THEREFORE ORDERED that the order of the trial court granting Appellee's Motion to Suppress is reversed and the case is remanded to the trial court for further action.

ORDERED at Clearwater, Florida this 23 day of June, 2011.

Original order entered on June 23, 2011 by Circuit Judges Michael F. Andrews, Raymond O. Gross, and R. Timothy Peters.



cc: Honorable John D. Carballo  
Office of the State Attorney  
Chris Westmoreland, Esquire