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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 46641-2019**
Plaintiff-Respondent,	)	
	)	**Canyon County Case No.**
v.	)	**CR14-2018-12530**
	)	
JUSTIN JAMES SMITH,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

HONORABLE THOMAS W. WHITNEY
District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Justin James Smith appeals from the district court's order denying his motion to suppress evidence following his conditional guilty plea to felony driving under the influence ("DUI") (second felony DUI within 15 years).

Statement Of The Facts And Course Of The Proceedings

According to the Presentence Report ("PSI"), the facts underlying Smith's conviction for felony DUI are as follows:

> The appended police report reflects that on June 21, 2018, Nampa Police Officer Poore arrived on scene where Sergeant Drinkwine had stopped a vehicle driven by Justin Smith. Sergeant Drinkwine had requested Officer Poore's assistance to conduct a DUI investigation. Sergeant Drinkwine had stopped the vehicle for swerving within its lane of travel and driving underneath the speed limit for quite some time. He advised that Mr. Smith's eyes were glossy, his speech was slurred and he admitted to drinking one beer.
>
> Officer Poore made contact with Mr. Smith while he was seated in his vehicle. He could smell a strong odor of an alcoholic beverage coming from the vehicle. Mr. Smith admitted to having one beer about an hour before and a couple beers earlier in the day. Mr. Smith agreed to perform the standard field sobriety tests, which he failed. Officer Poore arrested Mr. Smith for DUI. Mr. Smith provided two breath samples, which indicated a BAC of .246 and .221. Since the two samples were outside of the .02 correlation a third sample was taken and it came back as .225. Officer Poore also located an open container of alcohol. Mr. Smith had also given Sergeant Drinkwine false information when he was first pulled over. Mr. Smith was transported to the Canyon County Jail and booked for felony DUI.

(PSI, pp.2-3.)

The state charged Smith with felony DUI, driving without privileges, possession of an open container of alcohol in a motor vehicle, and providing false information to an officer. (R., pp.11-13, 21-22.) Smith, through counsel, filed a Motion to Suppress Evidence, alleging "that the State's evidence, including the statements of the Defendant, were obtained after defendant was illegally

pulled over and 'seized' without any reasonable suspicion and in violation of the Fourth Amendment of the United States Constitution and Article 1, § 17 of the Idaho Constitution." (R., pp.26-27.) The state filed an objection to the suppression motion. (R., pp.40-45.) At the suppression hearing, only Nampa Police Department Sergeant John Drinkwine testified. (See generally 8/17/18 Tr., p.4, L.11 – p.38, L.17.) At the end of the hearing, the district court rendered an oral decision denying the motion. (R., pp.46-47; 8/17/18 Tr., p.44, L.10 – p.53, L.14.)

After Smith's suppression motion was denied, pursuant to a plea agreement preserving his right to appeal the suppression order, he entered a conditional plea to felony DUI and the remaining charges were dismissed. (R., pp.50-68, 70-73; see generally 10/4/18 Tr.) The district court sentenced Smith to eight years, with two years fixed. (R., pp.70, 74, 86-87.) Smith timely appealed from the judgment of conviction. (R., pp.76-79.)

ISSUE

Smith states the issue on appeal as:

Did the district court err when it denied Mr. Smith's motion to suppress?

(Appellant's Brief, p.4.)

The State rephrases the issue as:

Has Smith failed to show error in the district court's order denying his motion to suppress evidence?

ARGUMENT

Smith Has Failed To Show Error In The District Court's Order Denying His Motion To Suppress Evidence

A. Introduction

Challenging only the basis for the traffic stop, and "mindful that his driving pattern gave rise to reasonable suspicion for the officer to make the traffic stop[,]" Smith nonetheless asserts that "the district court erred when it denied his motion to suppress." (Appellant's Brief, p.1.) Smith has failed to establish error in the district court's correct application of the law to the facts found at the suppression hearing. The judgment of the district court should therefore be affirmed.

B. Standard Of Review

"The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, [the Court] accept[s] the trial court's findings of fact that are supported by substantial evidence, but ... freely review[s] the application of constitutional principles to the facts as found." State v. Faith, 141 Idaho 728, 729-30, 117 P.3d 142, 143-44 (Ct. App. 2005). At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. State v. Valdez-Molina, 127 Idaho 102, 106, 897 P.2d 993, 997 (1995).

C. The District Court Correctly Denied Smith's Suppression Motion

A routine traffic stop by a police officer constitutes a seizure of the vehicle's occupants and implicates the Fourth Amendment's prohibition against unreasonable searches and seizures. Delaware v. Prouse, 440 U.S. 648, 653 (1979); State v. Flowers, 131 Idaho 205, 208, 953 P.2d 645, 648 (Ct. App. 1998). Because a routine traffic stop is normally limited in scope and duration, it is more analogous to an investigative detention than a custodial arrest and therefore is analyzed

under the principles set forth in Terry v. Ohio, 392 U.S. 1 (1968). Prouse, 440 U.S. at 653-54. Under Terry, an officer may lawfully stop a suspect for investigative purposes only when the officer has a reasonable suspicion that the person has committed or is about to commit a crime. Terry, 392 U.S. at 30; State v. DuValt, 131 Idaho 550, 552-53, 961 P.2d 641, 643-44 (1998).

Smith challenges the district court's conclusion that Sergeant Drinkwine had reasonable suspicion to make a traffic stop of Smith's vehicle. (See Appellant's Brief, pp.5-6.) An officer who has observed a traffic infraction, even if minor and insignificant, has reasonable suspicion to stop the driver who committed that infraction. Whren v. United States, 517 U.S. 806, 810 (1996). Sergeant Drinkwine testified at the suppression hearing as follows:

> Q. And while you were on duty in that location did anything unusual catch your attention?
>
> A. Yes, it did.
>
> Q. And what was that?
>
> A. A maroon red Mercury Mountaineer that was traveling on Greenhurst to the west as I was also headed that way noting that it was driving slowly for no apparent reason.
>
> Q. When you say driving slowly, what do you mean by that?
>
> A. The speed limit in that area is 35. It's a very nice wide open roadway with, you know, no parked cars on the side of the road, and it has parking lanes and sidewalks. So it's a big wide open roadway that you can see straight for a mile. And there were no other cars on the roadway, and the vehicle was traveling around 25 miles an hour in a 35 mile an hour zone.
>
> Q. Why did that stand out to you?
>
> A. Just because it was traveling slowly, and, the roadway, there was no apparent reason for it. There were no other cars on the roadway.
>
> Q. Was it dark outside at that time –
>
> A. Yes, it was.

Q. – 1:00 in the morning? Is that an uncommon thing for an individual to be driving 10 miles under the speed limit at night?

A. Sometimes but not always.

Q. What were the weather conditions like?

A. Clear.

Q. What was the road condition like?

A. Decently lit, clear, and no traffic

Q. Okay. Now as you followed this – how long did you follow this vehicle?

A. I ended up following for a little over a mile. . . . In that next area, which goes up to a 45 zone, it never reached that speed. And then I noted that it was weaving within its lane of travel going from the fog line to the lane divider or yellow line to the lane divider or yellow line several times.

Q. Based on your training and experience is that normal driving behavior?

A. No, it is not.

Q. Based on your training and experience is it normal to drive 10 miles under the speed limit in good conditions even if it's nighttime?

A. No.

(8/17/18 Tr., p.10, L.18 – p.12, L.19.)

Sergeant Drinkwine explained that Smith drove into a large subdivision, but soon came back out and continued to travel "west on Greenhurst and again drove approximately 10 miles an hour under the speed limit until [he] stopped [the vehicle]." (8/17/18 Tr., p.12, L.23 – p.13, L.23.) The officer further testified that Smith's vehicle "was varying in its weaving," "it wasn't like it was back and forth back and forth 15 times, but it had traveled from the fog line to the centerline numerous times." (8/17/18 Tr., p.14, Ls.9-17.)

The district court's basis, in part, for finding the officer had reasonable suspicion to conduct a traffic stop was the officer's testimony that, as he followed Smith's vehicle, he saw it weave

numerous times "from fog line to lane divider line over the course of one mile of driving." (Tr., p.46, L.20 – p.47, L.1.) The second aspect of Smith's driving that added to the court's "reasonable suspicion" determination was that Sergeant Drinkwine "did pace the defendant's vehicle, and that it was, in fact, going 10 miles per hour approximately under the speed limit throughout the entire period of one mile of observation" (Tr., p.47, Ls.3-8), and after Smith pulled into a subdivision and soon reentered the main road, Smith's vehicle passed "a 45 mile per hour sign and again goes below the speed limit" (Tr., p.47, L.25 – p.48, L.4).

On appeal, Smith is mindful of two decisions by the Idaho Court of Appeals: (1) State v. Atkinson, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996) ("[Officer] saw Atkinson's vehicle twice in two blocks of travel veer to the left and touch or cross over the center line. After the second such movement to the left, the vehicle swerved back across its lane of travel and touched the fog line on the extreme right side of the traffic lane."), and (2) State v. Flowers, 131 Idaho 205, 208, 953 P.2d 645, 648 (Ct. App. 1998) (affirmed magistrate holding that "[Flowers'] slow speed, hugging of the fog line, weaving in his lane of travel, crossing the fog line to the width of a tire, and then moving left to touch the center line one or two times, all within a mile or two, give rise to reasonable suspicion."). (See Appellant's Brief, p.6.) As seen in the above parentheticals, both Atkinson and Flowers support the district court's denial of Smith's motion to suppress, as Smith drove from fog line to lane divider numerous times (similar to Atkinson), and was going 10 miles per hour under the speed limit and weaving (similar to Flowers).

More recently, in State v. Fuller, 163 Idaho 585, 416 P.3d 957 (2018), the Idaho Supreme Court made clear that, although an *isolated* instance of traveling over a fog line does not constitute reasonable suspicion for a traffic stop, such driving, combined with other factors, may. Fuller explained:

> [*State v. Neal*, 159 Idaho 439, 362 P.3d 514 (2015)] was unequivocally clear that an *isolated* incident of touching the fog line does not violate section 49-637(1). And given that the fog line does not signify a formal lane barrier, an *isolated* incident of temporarily crossing the fog line likewise does not violate section 49-637(1). . . .
>
> . . . .
>
> We reiterate the rule recently pronounced in *Neal* by emphasizing that the fog line, if present, does not serve to demarcate the boundary of the lane of travel. If present, the fog line serves as a point of reference that is geared toward ensuring drivers' safety. *Neal*, 159 Idaho at 447, 362 P.3d at 522 ("The evil to be remedied in this statute is to prevent dangerous, unsafe movement out of a lane of traffic and into another lane of traffic."). The fog line is especially useful when driving in inclement weather or when driving conditions are otherwise adverse. *Merely that a tire temporarily touches or crosses the fog line will not by itself gives rise to a reasonable, articulable suspicion* that section 49-637(1) has been violated. *To be sure, driving onto or across the fog line may be considered when evaluating whether an overall pattern of erratic or unsafe driving give rise to a reasonable, articulable suspicion that section 49-637(1) has been violated under the totality of circumstances. But that suspicion must be based on more than one tire temporarily touching or briefly crossing the fog line.*

Fuller, 163 Idaho at 590, 416 P.3d at 962 (emphasis added).

This case involves more than just an isolated instance where Smith's vehicle went onto the fog line. As summarized by the district court, not only did Sergeant Drinkwine testify that Smith's vehicle weaved numerous times "from fog line to lane divider line over the course of one mile driving" (8/17/18 Tr., p.46, L.20 – p.47, L.1), he also testified that Smith's vehicle was consistently traveling 10 miles under the speed limit (8/17/18 Tr., p.47, Ls.3-8). Therefore, under the totality of the circumstances, Sergeant Drinkwine had a reasonable, articulable suspicion that Smith's driving pattern was erratic.

Because Smith was traveling 10 miles under the speed limit for about a mile, and weaved numerous times from fog line to lane divider, Sergeant Drinkwine had a reasonable, articulable suspicion to stop Smith's vehicle in order to investigate his apparent inability to drive in a normal and safe manner.

Smith has failed to establish error in the district court's correct application of the law to the facts found at the suppression hearing. The district court correctly denied Smith's suppression motion, and its judgment should be affirmed.

CONCLUSION

The state respectfully requests this Court affirm the judgment and the district court's denial of Smith's motion to suppress evidence.

DATED this 17th day of September, 2019.

/s/ John C. McKinney
JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 17th day of September, 2019, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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JCM/dd