IN THE SUPREME COURT OF FLORIDA

MATTHEW DOBRIN,

Petitioner/Appellant,

v.

STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

Respondent/Appellee.
_____/

Case No. SC02-2540
Lower Case No. 5D02-987

ON DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT/APPELLEE'S AMENDED ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

In this brief, Respondent/Appellee, State of Florida, Department of Highway Safety and Motor Vehicles, will be referred to as the "Department." Petitioner/Appellant, Matthew Dobrin, will be referred to as "Dobrin." References to the Record on Appeal will be referred to as "R.__".

On September 2, 2001 at approximately 1:20 a.m., Officer Thomas of the Daytona Beach Shores Police Department, was northbound in the 2800 block of South Atlantic Avenue when he observed Dobrin traveling southbound from the 2700 block at a high rate of speed. (R.36). Officer Thomas estimated Dobrin's speed at 50 m.p.h. Officer Thomas turned his vehicle around in an attempt to pace the truck. (R.36). As Officer Thomas was attempting to pace Dobrin's truck, he observed the vehicle driving to the right then correcting itself in a quick manner. Officer Thomas observed this driving pattern several times and conducted a traffic stop. (R.36).

Upon making contact with Dobrin, Officer Thomas noticed that he had red, bloodshot eyes and an odor of alcohol on his breath. Officer Thomas requested and Dobrin agreed to perform the following field sobriety exercises: Walk and Turn, One Leg Stand, Finger to Nose and Alphabet test. Dobrin performed poorly on the tests. (R.36-37). Officer

Thomas then placed Dobrin under arrest for DUI. Dobrin was informed of the implied consent warnings and refused to submit to a breath test. (R.37, R.40). Accordingly, Officer Thomas issued Dobrin a DUI citation for refusal and suspended his driving privilege pursuant to s. 322.2615 (1)(a), Fla. Stat. (2001). (R.35). Dobrin was also issued a citation for failure to maintain a single lane. (R.35).

The arresting officer timely filed his paperwork with the Clerk of the Bureau of Administrative Reviews pursuant to section 322.2615(2) and Florida Administrative Code Rule 15A-6.013. Pursuant to section 322.2615 (1)(b)(3), Dobrin requested a formal review of his driver's license suspension that was conducted on October 9, 2001, by Hearing Officer W.A. Clark. After careful consideration of the evidence presented and the record evidence, Hearing Officer Clark determined that the preponderance of the evidence supported Dobrin's suspension. The Department informed Dobrin in an order dated October 12, 2001 that the suspension of his driving privilege for refusal was sustained for a period of one year. (R.22-23).

On November 6, 2001, Dobrin filed a Petition for Writ of Certiorari with the Circuit Court of the Seventh Judicial Circuit in and for Volusia County, Florida, challenging the Department's Order of License Suspension. On March 8, 2002, the circuit court rendered the Order

Granting Petition for Writ of Certiorari, which reversed the Department's administrative suspension of Dobrin's driver's license. (R.17-21). The circuit court held, "[t]his Court finds that it cannot uphold the stop on a basis of what the officer could have done, rather it must only analyze what in fact the officer did and why he did it." Dobrin v. Department of Highway Safety and Motor Vehicles, Order Granting Petition for Writ of Certiorari at 3 (Fla. 7th Cir. Ct. Mar. 8, 2002). (R.17-21).

The Department filed a Petition for Writ of Certiorari with the Fifth District Court of Appeal. (R.1-55). On April 25, 2002, the district court issued an Order to Show Cause ordering Dobrin to file a response to the Petition. (R.55A). Dobrin did not file a response. On September 6, 2002, the district court issued its Order granting the Department's Petition for writ of certiorari, quashing the circuit court's order quashing the suspension. Department of Highway Safety and Motor Vehicles v. Dobrin, 829 So.2d 922 (Fla. 5th DCA 2002). (R.56-57). The district court found that the officer's observations justified the reasonableness of the stop. Id. (R.56-57). Dobrin filed a Motion for Rehearing that was denied on October 28, 2002. (R.66). Dobrin then sought review in this Court for which the Department is filing its Answer Brief on the Merits.

SUMMARY OF THE ARGUMENT

The Fifth District Court of Appeal correctly quashed the circuit court order overturning the suspension of Dobrin's driver license as the facts of this case justified the reasonableness of the stop under Holland v. State, 696 So.2d 757 (Fla. 1997) and Bailey v. State, 319 So.2d 22 (Fla. 1975). This court is not limited to consideration of the reasons given by the district court but rather must affirm the district court's order as it is legally correct regardless of the reasons. Dade County School Board v. Radio Station WQBA, 731 So.2d 638, 644-45 (Fla. 1999).

ARGUMENT

The District Court Reached The Correct Conclusion In Quashing The Circuit Court's Order Quashing The Department's Order Upholding The Suspension Of Dobrin's Driving Privilege.

In Schreiber Express, Inc. v. Yarborough, 257 So.2d 245 (Fla. 1971), this court set forth the standard of review by certiorari of an administrative order. The Court stated, "this Court will not evaluate evidence anew; rather our function is limited to a determination of whether the order accords with essential requirements of law and whether the agency had before it competent, substantial evidence to support its findings and conclusions." Id. As in Schreiber Express, Inc., the question of competent, substantial evidence is at issue here.

The issue before this court is therefore whether competent substantial evidence supports the Department's finding that the stop of Dobrin's vehicle was lawful. The issue is not, as Petitioner contends, whether the district court applied the correct legal standard in determining the lawfulness of Dobrin's traffic stop. Although the district court may have applied the wrong legal standard, by relying on the reasonable officer test as set forth in State v. Pollard, 625 So.2d 968 (Fla. 2d DCA 1993) and State v. McNeal, 666 so.2d 229 (Fla. 2d DCA

1995), the district court nevertheless reached the correct conclusion in ruling that the stop of Dobrin's vehicle observed traveling at a high rate of speed and unable to maintain a straight course was reasonable. This court is not limited to consideration of the reasons given by the district court but rather must affirm the district court's order as it is legally correct regardless of the reasons. Dade County School Board v. Radio Station WQBA, 731 So.2d 638, 644-45 (Fla. 1999). The district court's Order must be affirmed as it reached the right result, but for the wrong reasons. Id. at 644. Recently, in Robertson v. State, 829 So.2d 901 (Fla. 2002), this court reiterated the "tipsy coachman doctrine," the principle of appellate law that allows an appellate court to affirm a lower court whose final judgment is correct but not for the reasoning used. Id. at 906. As recognized in both Robertson and Radio Station WQBA, this court has adhered to this principle on many occasions. See Id. (citing Applegate v. Barnett Bank, 377 So.2d 1150, 1152 (Fla. 1979) ("The written final judgment by the trial court could well be wrong in its reasoning, but the decision of the trial court is primarily what matters, not the reasoning used. Even when based on erroneous reasoning, a conclusion or decision of a trial court will generally be affirmed if the evidence

or an alternative theory supports it.")). *See* Radio Station WQBA, 731 So.2d at 645 (citing Firestone v. Firestone, 263 So.2d 223, 225 (Fla. 1972) ("[T]he findings of the lower court are not necessarily binding and controlling on appeal, and if these findings are grounded on an erroneous theory, the judgment may yet be affirmed where appellate review discloses other theories to support it."); Direct Oil Corp. v. Brown, 178 So.2d 13, 15 (Fla. 1965); Cohen v. Mohawk, Inc., 137 So.2d 222, 225 (Fla. 1962) ("[T]he judgment of the trial court reached the district court clothed with a presumption in favor of its validity. Accordingly, if upon the pleadings and evidence before the trial court, there was *any* theory or principle of law which would support the trial court's judgment in favor of the plaintiffs, the district court was obliged to affirm that judgment.")).

Since this court must affirm the district court's ruling if it is supported by the record, the court's inquiry must turn to whether the facts of the instant case support the lawfulness of the stop. The record evidence established that Officer Thomas was northbound in the 2800 block of South Atlantic Avenue when he observed Dobrin traveling southbound from the 2700 block of South Atlantic Avenue at "a high rate of speed." (R.36). In his arrest affidavit, Officer Thomas stated that he

estimated Dobrin's speed at 50 m.p.h. (R.36). Officer Thomas turned his vehicle around and attempted to pace Dobrin's truck. During the attempted pace of the vehicle, Officer Thomas observed the vehicle drifting to the right, then correcting in a quick manner several times. Based on his observations of Dobrin, Officer Thomas activated his emergency lights and conducted a traffic stop. (R.36)

The foregoing facts of the instant case support the lawfulness of the stop. Law enforcement officers have the authority to stop a vehicle on two grounds. First, an officer who observes a violation of a traffic law can conduct a traffic stop. Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.89 (1996). The Supreme Court in Whren, implemented a purely objective test for evaluating the legality of a traffic stop, which eliminated any motivation of the individual officer and asks only whether any probable cause for the stop existed. Florida adopted the objective standard in Holland v. State, 696 So.2d 757 (Fla. 1997). In Holland, this Court held that a violation of Florida's traffic laws provides sufficient probable cause to make a stop reasonable. Holland, 696 So.2d 757, 759. Second, a law enforcement officer may stop a vehicle, when its unusual operation, although not rising to the level of a traffic

infraction, provides grounds for reasonable suspicion of driving under the influence or questionable capacity of the driver even in situations less suspicious than that required for other types of criminal behavior. State of Florida, Department of Highway Safety and Motor Vehicles v. DeShong, 603 So.2d 1349, 1352 (Fla. 2nd DCA 1992).

Applying the individual objective tests as expressed above to the facts of the case at bar, the district court reached the correct conclusion in holding that Officer Thomas conducted a lawful traffic stop.[1]

First, based on the objective standard set forth in Whren and Holland, Officer Thomas was justified in stopping Dobrin on the basis of his observation of Dobrin speeding. Officer Thomas articulated in is arrest report the location and approximate rate of speed, 50 m.p.h., that Dobrin was traveling. (R.36). Officer Thomas attempted to pace the vehicle. The pace was stopped as Officer Thomas observed Dobrin drifting several times, correcting in a quick manner and conducted an immediate traffic stop. (R.36). At his formal review, Dobrin was at liberty to demonstrate that traveling at 50 m.p.h. in the 2700 block of South Atlantic Avenue is not a violation of Florida Statute. However, he did not. Dobrin also had the opportunity to subpoena Officer Thomas and present any relevant evidence. The statutory

framework of s. 322.2615, Florida Statutes specifically allows the hearing officer to conduct the formal review based on reports of law enforcement officers to determine if by a "preponderance of the evidence" there is sufficient cause to sustain, invalidate or amend a license suspension. Section 322.2615(7), Florida Statutes. A formal review held pursuant to s. 322.2615, Florida Statutes is a civil administrative proceeding. Standards applicable to the trial of a criminal matter do not necessarily apply. The legislature gave the Petitioner the power to subpoena persons and records. He chose not to do so.

Although the record established speeding as a basis for the stop, the circuit court refused to consider the speeding. The circuit court held, "[t]he arrest report never states that the officer thought speeding was a reason for the stop, 'so the court may not engage in speculation that the officer's actions in stopping the vehicle are now justified by the fact that there may have been speeding, when in fact the reason articulated for the stop was the "failure to maintain a single lane" facts'."[1] Dobrin v. Department of Highway Safety and Motor Vehicles, Order Granting Petition for Writ of

[1] Officer Thomas issued Dobrin a citation for failure to maintain a single lane; but did not issue a citation for speeding.

Certiorari at 3 (Fla. 7th Cir. Ct. Mar. 8, 2002), quoting from State v. Wainberg, 4 Fla. L. Weekly Supp 660 (Fla. 11th Dade Cty. Ct. Jan. 24, 1997).

The circuit court applied a subjective test by analyzing only "what in fact the officer did and why he did it." Dobrin, Order Granting Petition for writ of Certiorari at 3. (R.19) As recognized by petitioner throughout these proceedings, such a subjective test, which evaluates what was in the mind of the individual officer, is no longer valid. Holland, 696 So.2d at 760. The circuit court failed to apply the appropriate objective test to the facts at bar in evaluating the legality of the stop.

Under the objective test established in Whren and Holland, Officer Thomas' statement that he observed Dobrin driving at a high rate of speed along with the approximate speed and the location justified his probable cause to conduct the stop for a traffic violation. Whren; Holland, *supra*.[2] Probable cause exists "where the

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[2] Whether Dobrin was in fact speeding was irrelevant at the formal review. The hearing officer did not have to determine whether or not the driver did in fact commit the traffic infraction. *See* State v. Joy, 637 So.2d 946 (Fla. 3d DCA 1994)(lack of calibration of speedometer did not affect the officer's founded suspicion that auto was speeding); *cf.* Cantu v. Department of Highway Safety and Motor Vehicles, Case No.: CI0 00-3682 (Fla. 9th Cir. Ct. March 15, 2002)(R.24-33); Solomon v. DHSMV, 2 Fla. L. Weekly Supp. 133 (Fla. 7th Cir. Ct. 1993)(citing DHSMV v. Deshong, 603 So.2d 1349 (Fla. 2nd DCA 1992). See also Leach v. DHSMV, 2 Fla. L. Weekly Supp. 355 (Fla. 9th Cir. Ct. 1994).

facts and circumstances, as analyzed from the officer's knowledge, special training and practical experience, and of which he has reasonably trustworthy information, are sufficient in themselves for a reasonable man to reach the conclusion that an offense has been committed." Department of Highway Safety and Motor Vehicle, v. Favino, 667 So.2d 305, 308 (Fla. 1st DCA 1995). Probable cause is a conclusion often drawn from "reasonable inferences." Id. at 308 (citing State v. Cote, 547 So.2d 993 (Fla. 4th DCA 1993)).

The objective facts of this case support a conclusion that Officer Thomas had probable cause to stop Dobrin for speeding. In addition, the high rate of speed coupled with the failure to maintain a single lane, the drifting and correcting in a quick manner all presented Officer Thomas with a founded suspicion to initiate a traffic stop. DeShong, 603 So.2d at 1352. The founded suspicion standard is the second ground that supports the lawfulness of Dobrin's stop.

While an officer's observation of a traffic infraction provides a per se lawful basis for a stop, the driving pattern does not have to rise to the level of a traffic infraction to justify a stop. 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. DeShong, 603 So.2d at 1352. As such, an officer may also initiate a traffic stop when the driving pattern creates a reasonable suspicion that the driver is under the influence or in need of assistance, although a violation of the traffic code is not observed.

In Bailey v. State, 319 So.2d 22 (Fla. 1975) this court articulated the reasonable suspicion standard for a vehicle stop. The Court recognized the lawfulness of a stop based on a reasonable suspicion when it upheld the traffic stop of a driver who was observed driving her vehicle at a slow rate of speed and weaving within her lane of traffic. The Court stated

> Because of the dangers inherent to our modern 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. In this instance, although no vehicular regulation was being violated, it seemed strange to the officer that the vehicle was proceeding at only 45 miles per hour and was weaving, although not so much as to move out of its lane on one side or the other.

Id. at 26. Like the driver in Bailey, Dobrin was observed proceeding at an improper speed and weaving.[3] Subsequent to the holding in Bailey, numerous cases have upheld the legality of a stop based on a "reasonable

[3] Described by Officer Thomas as drifting to the right and correcting in a quick manner. (R.36).

suspicion" where the facts did not give rise to a traffic infraction.

In Roberts v. State, 732 So.2d 1127 (Fla. 4th DCA 1999), *review denied*, 743 So.2d 510 (Fla. 1999), the Fourth District Court of Appeal upheld a stop where the driver was continually weaving within her lane but did not cross over the lines. The court held that even in the absence of a traffic violation, an officer may stop a driver's vehicle when the officer has a reasonable suspicion that the driver is driving under the influence. Roberts, 732 So.2d at 1128. The Court held that Roberts' "continuous weaving, even if only within her lane, during the time that she was being followed presented an objective basis for suspecting that she was under the influence. Thus, the objective facts supported the stop." Id. at 1128.

See State v. Davidson, 744 So.2d 1180 (Fla. 2d DCA 1999)(court upheld stop where defendant was traveling on interstate 75 between 40 and 48 miles per hour, where the minimum speed limit was 40 miles per hour; officer followed defendant and also observed him drift across a lane marker and then jerk the car back into the lane).

In Roberts and Davidson, the courts also distinguished Crooks v. State, 710 So.2d 1041 (Fla. 2d DCA 1998), relied on by Petitioner. The Courts recognized that a critical fact that distinguished Crooks was that in

Crooks, there was no indication, suggestion, or basis for suspecting that the driver was intoxicated or impaired. Roberts, 732 So.2d at 1128; Davidson, 744 so.2d at 1181. In fact, in Crooks, the arresting Deputy testified that he did not think the driver was intoxicated or impaired. Crooks, 710 So.2d at 1042. No such testimony or evidence was present in Roberts or in the case at bar.

In Ellis v. State, 755 So.2d 767, fn. 1 (Fla. 4th DCA 2000), after quoting with approval from DeShong, supra, the court stated

> Notwithstanding language in Whren, v. United States, 517 U.S. 806, 116 S.Ct. 1789, 135 L.Ed.89 (1996), that "[a]s a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred," we do not believe that the United States Supreme Court intended to changed the long-standing standard of "founded" or "reasonable" suspicion to initiate a *Terry* stop.

See also Brown v. State, 595 So.2d 270 (Fla. 2d DCA 1992) (finding that the absence of a traffic offense does not establish the absence of a valid objective basis for the stop); State v. Frederick, 525 So.2d 516 (Fla. 4th DCA 1988) (stop of automobile was legally permissible on trooper's observations of varying rate of speed and that vehicle was drifting from one edge of lane of traffic to the opposite edge and eventually crossed into passing lane); State v. Carillo, 506 So. 2d 496 (Fla. 5th DCA 1987) (an officer has legislative authority to stop vehicle based upon founded suspicion that driver is under

the influence, notwithstanding absence of probable cause for arrest on that charge prior to stop, and officer may thereafter establish probable cause for arrest through investigation); Esteen v. State, 503 So.2d 356 (Fla. 5th DCA 1987) (stop of automobile which was weaving in manner consistent with behavior of person driving under influence of alcohol or drugs or of person falling asleep behind wheel was valid…).

Pursuant to these authorities, Officer Thomas had a reasonable suspicion to stop Dobrin to determine the cause of his erratic driving. Officer Thomas' full observations of Dobrin's driving pattern were legally sufficient to find an objective, reasonable suspicion of driving under the influence or other incapacity.

Moreover, the trio of cases cited and relied on by Dobrin: Brown v. State, 62 So.2d 348 (Fla. 1953), Graham v. State, 60 So.2d 186 (Fla. 1952) and Collins v. State, 65 So.2d 61 (Fla. 1953), to support his argument that Officer Thomas did not have a reasonable suspicion to stop his vehicle all took place in the 1950's, prior to this court's ruling in Bailey. In 1975, the Bailey Court acknowledged the "dangers inherent to our modern vehicular mode of life." Id. at 26. Courts have continued to recognize the danger of vehicles and drunk driving. *See also* Michigan Dep't of State Police v. Sitz, 496 U.S

444, 110 S.Ct. 2481, 110 L.Ed.2d 410 (1990) (emphasizing the state's interest in preventing drunk driving); State v. Potter, 438 So.2d 1085 (Fla. 2d DCA 1983)(noting the public policy concerns surrounding the dangerousness of vehicles in general and impaired drivers in particular). While the facts of this case establish a reasonable suspicion for the stop, again the circuit court incorrectly refused to consider the reasonable suspicion as an alternative basis for the stop and considered only the "failure to maintain a single lane" facts. Dobrin, Order granting petition for Writ of Certiorari at 3. (R.19). In the instant case, the District Court properly held that Officer Thomas' stop of Dobrin based on his observations of Dobrin driving at a high rate of speed coupled with his inability to maintain a straight course justified the reasonableness of the stop to determine the cause of his erratic driving. Bailey, 319 So.2d at 25; DeShong, 603 So.2d at 1352. Dobrin's driving pattern presented an objective basis for suspecting that he was driving under the influence or of other incapacity. Although the district court in Dobrin enunciated the wrong legal standard for evaluating the legality of the stop by relying on the reasonable officer standard set forth in State v. Pollard, 625 So.2d 968 (Fla. 2d DCA 1993) and State v. McNeal, 666 so.2d 229 (Fla. 2d DCA

1995), it correctly held that the lower court applied the wrong law in limiting its inquiry as to the lawfulness of the stop to "what in fact the officer did and why he did it." Dobrin, 829 So.2d at 922. (R.56-57). The correct inquiry was whether the established facts justified the reasonableness of the stop. The reasonableness of the stop is justified when the facts viewed objectively establish that the officer either has probable cause to believe a traffic infraction occurred or has a reasonable suspicion to believe an individual, based on his driving pattern, may be ill, tired or impaired. *See* Whren, Holland, Bailey and DeShong, *supra*. The foregoing case law supports the district court's holding that it was lawful for Officer Thomas to stop Dobrin to check on his health or capacity where the officer observed him driving his truck at a high rate of speed and unable to maintain a straight course. Dobrin, 829 So.2d 922.

CONCLUSION

For the foregoing reasons, the Department respectfully requests this Court to deny Dobrin's appeal and affirm the Fifth District Court of Appeal's Order quashing the circuit court's Order Granting Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to FLEM K. WHITED, ESQUIRE, 630 N. Wild Olive, Suite A, Daytona Beach, Florida 32118, this 17th day of July, 2003.

CERTIFICATE OF COMPLIANCE

I hereby certify that the font size used in the Department's Answer Brief is Courier New 12 point.

_____

HEATHER ROSE CRAMER
Assistant General Counsel

[1] The Department argued the respective grounds to the district court in its Petition for Writ of Certiorari (R.1-55).