IN THE SUPREME COURT OF FLORIDA

MARTIN MATTHEW DOBRIN,

Petitioner,

v. Case No. SC02-2540

FLORIDA DEPARTMENT OF
HIGHWAY SAFETY AND
MOTOR VEHICLES,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

WHITED, FULLER, MILLER & FOXMAN

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STATEMENT OF THE CASE AND FACTS

Petitioner Martin Dobrin was arrested for driving under the influence[1] ("DUI") on September 2, 2001. (R.36-37). The arresting officer, Michael Thomas of the Daytona Beach Shores Department of Public Safety, issued a citation which suspended Petitioner's driving privilege for one year. (R.35). Thomas also cited Petitioner for failure to maintain a single lane, a traffic infraction.[2] (R.35).

On October 9, 2001, Field Hearing Officer W.A. Clark of the Department of Highway Safety and Motor Vehicles ("Department") conducted a formal review hearing. (R.47-55). The evidence introduced at the hearing was entirely documentary and included the police reports, affidavits, and the traffic citations. (R.34-46,49-50). The undisputed evidence established the following:

Officer Thomas observed Petitioner driving on South Atlantic Avenue "at a high rate of speed," which Thomas estimated to be 50 miles per hour. (R.36). Thomas turned his patrol car around and followed Petitioner in an attempt to pace him. (R.36). Petitioner's truck drifted to the right, then corrected itself "in a quick manner." (R.36). "This was observed several times and a traffic stop was conducted[.]" (R.36). During the ensuing traffic stop, Officer Thomas noticed that Petitioner had red, bloodshot eyes and an odor of alcohol. (R.36). He performed poorly on the field sobriety exercises and was arrested for DUI. (R.36-37,41-42).

[1] § 316.193, Fla. Stat. (2001).
[2] § 316.089, Fla. Stat. (2001).

After receiving the implied consent warning, Petitioner refused a breath test. (R.37,40,43).

At the conclusion of the formal review hearing, Petitioner moved to invalidate the suspension on the ground that the traffic stop was illegal. (R.50-54). On October 12, 2001, Hearing Officer Clark issued a Final Order of License Suspension, sustaining the suspension and rejecting without comment Petitioner's motion to invalidate. (R.22-23).

Petitioner filed a petition for writ of certiorari in the Circuit Court, challenging the Department's order. (R.17). The circuit court granted the petition, quashing the suspension order and directing the Department to remove the suspension. (R.17-21); Dobrin v. DHSMV, 9 Fla. L. Weekly Supp. 355 (Fla. 7th Cir. Mar. 8, 2002)("Dobrin I"). The court found 1) there was no basis to stop Petitioner for failing to maintain a single lane because the evidence failed to show that Petitioner crossed the lane divider or that he failed to ascertain that his movements could be safely made; 2) the stop could not be justified based on speeding because Officer Thomas did not stop or cite Petitioner for speeding and the evidence failed to establish the speed limit where Petitioner was driving; and 3) the stop could not be upheld based on a reasonable suspicion of DUI because the evidence did not show that Officer Thomas suspected Petitioner of DUI or stopped him on that basis. (R.17-21).

The Department petitioned the Fifth District Court of Appeal for a writ of certiorari, challenging the circuit court's opinion. (R.1-14). In a 2-1 decision, the circuit court granted the Department's petition on September 6, 2002. (R.56-57); DHSMV v. Dobrin, 829 So. 2d 922 (Fla. 5th DCA 2002) ("Dobrin II"). The district court found that the circuit court applied the wrong law when it declined to uphold the stop on the alternative basis that the officer had reasonable suspicion to stop Petitioner for DUI:

> Here, the court applied the wrong law. The issue is not why this particular officer conducted the traffic stop; the question should be whether the established facts would have caused a reasonable officer under the same circumstances to make the stop. See State v. Pollard, 625 So. 2d 968 (Fla. 2d DCA 1993); see also State v. McNeal, 666 So. 2d 229 (Fla. 2d DCA 1995). In other words, would it be unreasonable for an officer who observed one driving a truck at a high rate of speed and unable to maintain a straight course to pull the driver over to check the safety of the vehicle, the health of the driver or the capacity of the driver?

(R.57); Dobrin II, 829 So. 2d 922. Judge Griffin dissented without opinion. (R.57). Petitioner's timely filed motion for rehearing was denied October 28, 2002. (R.58-61,66). He timely filed a notice to invoke on November 25, 2002. (R.68-69).

SUMMARY OF ARGUMENT

The district court of appeal applied the wrong legal standard in granting the Department's certiorari petition. The reasonable officer test was abandoned by this Court when it adopted the objective test in Holland v. State, 696 So. 2d 757, 759 (Fla. 1997). Applying the objective test to the facts of this case, the arresting officer possessed neither probable cause to believe Petitioner committed a traffic infraction, nor a reasonable suspicion of drunk driving. The traffic stop was illegal and the district court erred in reversing the well-reasoned opinion of the circuit court.

ARGUMENT

THE DISTRICT COURT OF APPEAL EMPLOYED THE WRONG LEGAL STANDARD IN QUASHING THE TRIAL COURT'S ORDER.

The issue before this Court is whether the district court applied the correct legal standard in determining the lawfulness of Petitioner's traffic stop. The standard of review is *de novo*. See Files v. State, 613 So. 2d 1301, 1304 (Fla. 1992); Vaughn v. State, 711 So. 2d 64, 66 (Fla. 1st DCA 1998).

Upon his arrest for driving under the influence, Petitioner was issued a uniform traffic citation which suspended his driving privilege for one year. (R.35). At the formal review hearing conducted by Respondent, The Department of Highway Safety and Motor Vehicles ("Department"), Petitioner moved to invalidate the suspension because the traffic stop was illegal. (R.50-54). The hearing officer denied this motion without comment. (R.22-23).

Petitioner challenged the Department's order by filing a petition for writ of certiorari in the circuit court. The circuit court granted the petition, finding that vehicle stop was not illegal. (R.17-21). In rejecting the Department's alternative argument that the stop could be upheld because Officer Thomas had reasonable suspicion to believe Petitioner was driving under the influence, the circuit court wrote:

> However, the arrest report never states that the officer thought impairment was a reason for the stop. As such,

> this Court may not engage in speculation that the stop may have been justified by the fact of intoxication or impairment when in fact the reason articulated for the stop was Failure to Maintain a Single Lane.

(R.19-20); Dobrin v. DHSMV, 9 Fla. L. Weekly Supp. 355, 356 (Fla. 7th Cir. Mar. 8, 2002).

The Department petitioned the district court of appeal for certiorari relief. (R.1-14). The district court found that the reasonable officer test provided the proper framework for reviewing the legality of the traffic stop:

> Here, the court applied the wrong law. The issue is not why this particular officer conducted the traffic stop; the question should be whether the established facts would have caused a reasonable officer under the same circumstances to make the stop. See State v. Pollard, 625 So. 2d 968 (Fla. 2d DCA 1993); see also State v. McNeal, 666 So. 2d 229 (Fla. 2d DCA 1995). In other words, would it be unreasonable for an officer who observed one driving a truck at a high rate of speed and unable to maintain a straight course to pull the driver over to check the safety of the vehicle, the health of the driver or the capacity of the driver?

(R.57); DHSMV v. Dobrin, 829 So. 2d 922 (Fla. 5th DCA 2002).

The district court employed the wrong legal standard. The reasonable officer test described in Pollard and McNeal is a relic of the now-defunct pretext doctrine. See State v. Daniel, 665 So. 2d 1040 (Fla. 1995); Kehoe v. State, 521 So. 2d 1094 (Fla. 1988). In Whren v. U.S., 517 U.S. 806 (1996), the Supreme Court rejected the reasonable officer test in favor of a strictly objective test which asks

only whether the stop was supported by probable cause, regardless of whether a reasonable officer would have stopped the vehicle. In Holland v. State, 696 So. 2d 757, 759 (Fla. 1997), this Court receded from Daniels, discarding the reasonable officer test in favor of the objective test announced in Whren.

This court summarized Whren's criticism of the reasonable officer standard: "The [Whren] Court characterized the reasonable officer test as an attempt 'to reach subjective intent through ostensibly objective means' and noted that the test was too difficult in application because the determination would rely on the 'collective consciousness of law enforcement.'" Holland, 696 So. 2d at 759 (quoting Whren, 517 U.S. at 814-815). Under the reasonable officer test, "one would be reduced to speculating about the hypothetical reaction of a hypothetical constable--an exercise that might be called virtual subjectivity." Whren, 517 U.S. at 815. Now, courts are constrained to review the record under Whren's objective test. Holland, 696 So. 2d at 759.

Applying the Whren/Holland objective test to the facts of this case, Officer Thomas did not have probable cause or reasonable suspicion to stop Petitioner. In the course of this litigation, the Department has suggested three grounds in support of the traffic stop: 1) speeding; 2) weaving; and 3) suspicion of drunk driving. (R.17-21). Petitioner will address each of these grounds seriatim to demonstrate that the stop was without a lawful basis.

First, there is no objective evidence that Petitioner was speeding. Although the officer "estimated" that Petitioner was driving at 50 miles per hour, he did not verify his subjective belief by radar or by pacing Petitioner. (R.36). The report states only that he "attempted to pace the truck." (R.36). It would seem axiomatic that the objective standard requires that a stop be based on objective facts, rather than an officer's subjective hunch:

> In closing, we note that … it is essential that there be an objective standard in which to justify the stop of a motorist because, absent an objective standard, there would be no protection against unreasonable seizures. A seizure of one's person by the police implicates the Fourth and Fourteenth Amendments because the Fourth Amendment protects against unreasonable seizures. The reasonableness standard requires, at a minimum, that the facts upon which a seizure is based be capable of measurement against an objective standard. Without the reasonableness standard, officers would be authorized to stop vehicles at their unrestrained discretion.

State v. Garcia, 696 So. 2d 1352, 1354 (Fla. 5th DCA 1997)(citations omitted). Moreover, as the circuit court noted, (R.19), there is no evidence establishing the posted speed limit for the road on which Petitioner was traveling. (R.36-37).

A stop based on a traffic violation must be supported by probable cause. See Glock v. Moore, 776 So. 2d 243, 251-252 (Fla. 2001); State v. Kindle 782 So. 2d 971, 973 (Fla. 5th DCA 2001); see also Jones v. State, 842 So. 2d 889, 891 (Fla. 2d DCA 2003)(stop is proper if the police have reasonable suspicion of criminal

activity or probable cause to believe a traffic violation occurred). Officer Thomas lacked probable cause to stop Petitioner for speeding.

Second, Officer Thomas cited Petitioner for failure to maintain a single lane. (R.35,37). The applicable statute is Section 316.089(1), Florida Statutes (2001):

> (1) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

The case law interpreting this statute has concluded that a violation occurs only where the failure to maintain a single lane creates a reasonable safety concern. See Crooks v. State, 710 So. 2d 1041 (Fla. 2d DCA 1998); Jordan v. State, 831 So. 2d 1241 (Fla. 5th DCA 2002). In Crooks, the officers observed Crooks drive over the right-hand line on three occasions. There was no evidence he went far over the line or that he endangered other drivers. Id., 710 So. 2d at 1042. He was stopped for violating 316.089. Id. The district court held that the stop was illegal, holding that a violation of 316.089 "does not occur in isolation, but requires evidence that the driver's conduct created a reasonable safety concern." Id. at 1043.

The Fifth District Court of Appeal cited Crooks with approval in Jordan. In that case, the motorist failed to maintain a single lane, but did not endanger other vehicles. The court held, "The applicable statute in this case recognizes that it is not practicable, perhaps not even possible, for a motorist to maintain a single lane at all times and that the crucial concern is safety rather than precision." Jordan,

831 So. 2d at 1243. Thus, the officer did not have probable cause to stop Jordan's vehicle. Id. Both Crooks and Jordan analogized to this Court's opinion in State v. Riley, 638 So. 2d 507 (Fla. 1994)(a motorist who turns without a signal does not violate the applicable statute, Section 316.155, Florida Statutes (1995), unless other vehicles are affected).

In this case there is no evidence that Petitioner failed to ascertain that his movements could be made safely or that he placed other traffic in danger. Worse, there is no evidence that he departed from a single lane; the police report merely states that Petitioner drifted to the right, then corrected himself. (R.18-19,36). Accordingly, Officer Thomas lacked probable cause to stop Petitioner for violating Section 316.089.

Finally, the Department has suggested that the stop was supported by a reasonable suspicion that Petitioner was driving under the influence. (R.19-20). However, as the circuit court found, there is no evidence that Officer Thomas suspected Petitioner of drunk driving. (R.19-20); Crooks, 710 So. 2d at 1042 (noting that officer who effected stop did not believe that defendant was impaired). The reasonable suspicion standard requires a particularized and objective basis for the officer's suspicion. United States v. Arvizu, 534 U.S. 266, 273 (2002). A mere or bare suspicion is insufficient. Hunter v. State, 660 So. 2d 244, 249 (Fla. 1995).

As discussed above, there was no particularized and objective basis to say that Petitioner exceeded the speed limit or failed to maintain a single lane. While a driving pattern which does not violate traffic laws may furnish a reasonable suspicion of drunk driving, see Roberts v. State, 732 So. 2d 1127 (Fla. 4th DCA 1999), the mere fact that a defendant was weaving does not create reasonable suspicion as a matter of law. In a trio of cases from fifty years ago, this Court recognized that every driver occasionally departs from a straight line of travel and that there is nothing remarkable or suspicious about this activity. In Brown v. State, 62 So. 2d 348 (Fla. 1953), a motorist driving in the early morning with scarce traffic "accelerated their speed and appeared to wobble from one side of the center line of the road to the other." Id., at 349. This Court observed "Most any one driving under such circumstances is not too careful to stay consistently to the right of the center line of the road." Id., at 349. In Graham v. State, 60 So. 2d 186 (Fla. 1952) the defendant was observed driving over the center line three times. The stop was invalidated and the Court observed, "If one is to be charged with reckless driving for crossing the center line of the road, except where 'no passing zones' have been plainly marked, then we are all going to jail, sooner or later." Id., at 187. In Collins v. State, 65 So. 2d 61 (Fla. 1953), the defendant on three occasions drove one foot over centerline. The Court held the stop illegal: "A holding that such a feeble reason would justify a halting and searching would mean

that all travelers on the highway would hazard such treatment, for who among them would not be guilty of crossing the center so much as a foot from time to time. All could, therefore, be subjected to inconvenience, ignominy and embarrassment on the excuse that an occasional incident might yield some contraband or other." Id., at 63. Despite its age, this case law remains as vital today as it was in the 1950's.

Here, the evidence shows that Petitioner drifted to the right an unspecified number of times, for an unspecified distance and duration, correcting himself each time. (R.36). This vague evidence is insufficient to establish a well-founded suspicion of drunk driving. See State v. Arriaga, 5 S.W.3d 804 (Tex.App.-San Antonio 1999, pet. refused)(trial court properly granted motion to suppress where officer failed to testify with any specificity regarding the number of times he observed defendant drift within his lane). Officer Thomas lacked a reasonable suspicion, based on objective, articulable facts to warrant a vehicle stop.

Accordingly, the circuit court properly determined in its well-reasoned opinion that there was no lawful basis for the vehicle stop. In reviewing the circuit court's opinion, the district court's scope of review was limited to determining whether the circuit court afforded procedural due process and whether it applied the correct law. Haines City Community Development v. Heggs, 658 So. 2d 523, 530 (Fla. 1995). Mere legal error is insufficient to warrant exercise of the district

court's certiorari power; the error must be a violation of a clearly established principle of law resulting in a miscarriage of justice. Combs v. State, 436 So. 2d 93, 96 (Fla. 1983); DHSMV v. Alliston, 813 So. 2d 141, 144 (Fla. 2d DCA 2002).

Here, the circuit court applied the correct law. It relied primarily on State v. Wainberg, 4 Fla. L. Weekly Supp. 660 (Fla. Dade Co. Jan. 24, 1997), a case which analyzed and followed Whren. It is the district court, with its reliance on the moribund reasonable officer standard, which failed to apply the correct law. Even assuming *arguendo* that the circuit court applied an incorrect legal standard, it nonetheless reached the correct result in finding the traffic stop illegal, for the reasons discussed above. Accordingly, there was no miscarriage of justice to justify the district court's issuance of a writ of certiorari. See Combs; Alliston.

In summary, the district court of appeal applied the incorrect law. Its opinion conflicts with this Court's decision in Holland. The decision of the district court should be quashed and the circuit court's ruling reinstated.

CONCLUSION

BASED ON THE foregoing argument and authority, Petitioner respectfully requests that this Honorable Court quash the decision of the Fifth District Court of Appeal and reinstate the order of the circuit court.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to Heather Rose Cramer, Esq., Assistant General Counsel, DHSMV, 6801 Lake Worth Road, Suite 230, Lake Worth, FL 33167, this 17th day of June, 2003.

_____
COUNSEL FOR PETITIONER

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the font used in this pleading is 14-point Times New Roman.

_____
COUNSEL FOR PETITIONER