

IN THE SUPREME COUNTY OF MISSOURI

ATHONY JAMES SMITH,)
)
 Appellant,)
)
 vs.) No. SC97811
)
 STATE OF MISSOURI,)
)
 Respondent.)

ON TRANSFER FROM THE MISSOURI DOURT OF APPEALS,
 EASTERN DISTRICT
 APPEAL NO ED106830
 ON APPEAL FROM THE CIRCUIT COURT OF MONTGOMERY
 COUNTY MISSOURI
 TWELVETH (12TH) JUDICIAL CIRCUIT
 DIVISION 1
 THE HONORABLE WES DALTON
 CAUSE NO. 17AA-CR00052-01

APPELLANT SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Anthony Smith, appeals his conviction in the Montgomery County Circuit Court, Twelveth (12th) Judicial Circuit, the Honorable Wes Dalton presiding, of felony possession of a controlled substance in violation of R.S.Mo. § 579.015. This appeal has been transferred from the Eastern District Court of Appeals to the Supreme Court of Missouri by order of this Court pursuant to Missouri Supreme Court Rule 83.02 and jurisdiction of the Supreme Court of Missouri is authorized under Art. V § 10.

STATEMENT OF FACTS

On January 8, 2017, Sgt. S.B. Johnson, MSHP, conducted a vehicle stop of a car driven by Appellant, Anthony Smith. Transcript p. 4 ln.16-24. The stop occurred on the side of interstate highway 70 in Montgomery county, Mo. *Id.* at p. 4 ln. 25 – p. 5 ln. 5 and p. 5 ln 25 – p. 6 ln. 5. Sgt. Johnson’s attention was drawn to Appellant’s vehicle because Appellant would activate his turn signal, begin to change lanes, and then the turn signal would stop blinking before the lane change had been completed. *Id.* at p. 6 ln. 12-24. While observing Appellant’s vehicle, Sgt. Johnson noticed that the passenger tire(s) of Appellant’s vehicle appeared to cross the “fog line” on one occasion. *Id.* at p. 5 ln. 6-18. Because he observed Appellant’s wheel(s)

cross over the “fog line” on one occasion, Sgt. Johnson initiated a traffic stop of Appellant. *Id.* at p. 7 ln. 4-6.

While Appellant was detained during this traffic stop, Sgt. Johnson smelled marijuana emanating from the vehicle *Id.* at p. 7 ln. 17-20. Subsequently, Sgt Johnson searched the vehicle and located a felony amount of marijuana. *Id.* at p. 9 ln. 2-12.

POINT RELIED ON

The trial court erred in denying Defendant’s motion to suppress evidence and subsequent objections at trial to the introduction of evidence and testimony obtained during the traffic stop because all such evidence was illegally obtained and the fruit of the poisonous tree of an illegal and unreasonable detention of Appellant’s person in that Sgt. Johnson’s observation of Appellant’s tire(s) crossing the “fog line” once fails to establish reasonable articulable suspicion that Appellant had committed or was committing a traffic violation or other crime.

State v. Beck, 436 S.W.3d 566 (Mo. App. S.D. 2013).

Jefferson County v. Dennis, 441 S.W.3d 152 (Mo. App. E.D. 2014).

State v. Roark, 229 S.W.3d 216, 220 (Mo. App. W.D. 2007).

State v. Abeln, 136 S.W.3d 803, 812 (Mo. App. W.D. 2004).

ARGUMENT

The appropriate standard of review of a trial court's decision to deny a motion to suppress is for abuse of discretion. *State v. Selvy*, 462 S.W.3d 756, 764 (Mo. App. E.D. 2015) (citation omitted). The decision should be reversed only if it is clearly erroneous. *Id.* (citation omitted). Review is limited to a determination of whether the ruling is supported by substantial evidence. *Id.* (citation omitted).

Facts and any reasonable inferences therefrom must be taken in the light most favorable to the court's ruling and evidence and inferences contrary to the ruling must be disregarded. *Id.* (citation omitted). The Court must defer to the trial court's determinations of the weight of the evidence and the credibility of witnesses; but, the ultimate issue of whether the Fourth Amendment was violated is a question of law to be reviewed *de novo*. *Id.*

Generally speaking, a search or seizure without a warrant is unreasonable unless a well-recognized exception applies. *State v. Beck*, 436 S.W. 3d 566, 568 (Mo. App. S.D. 2013). Under the *Terry* exception to the warrant requirement, officers may conduct a brief detention where they have "reasonable suspicion" based on "articulable facts" that illegal activity has occurred or is occurring. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). In the case of

a traffic stop, reasonable suspicion can be based on an officer's observation of erratic operation of a motor vehicle. *Id.*

Repeatedly, however, the Missouri Court of Appeals has held that "a traffic stop is not justified where the only articulable fact offered to support the conclusion of reasonable suspicion is that the tires of a motor vehicle crossed the fog line." Beck, 436 S.W.3d at 568 (citing *State v. Roark*, 229 S.W.3d 216, 220 (Mo. App. W.D. 2007); *State v. Abeln*, 136 S.W.3d 803, 812 (Mo. App. W.D. 2004); *State v. Mendoza*, 75 S.W.3d 842, 845-46 (Mo. App. S.D. 2002)).

The only additional fact noted by the officer in this case prior to initiating a stop of Appellant's vehicle is that the Appellant would signal to change lanes and then terminate the vehicle's turn signal before the lane change was fully completed. Transcript p. 6 ln. 12-24. The officer's subjective belief and opinion based on his observations was that there was nothing unlawful about the manner in which Appellant was changing lanes. *Id.* Objectively, both the officer's description and the video evidence from his dash cam (Exhibit 1) appear to demonstrate that Appellant complied with the basic mandate of R.S.Mo. § 304.019.1 that movement to the right or left on a roadway be made with reasonable safety "only *after* the giving of an appropriate signal. . ." (emphasis added).

At the trial level, the State's sole argument to distinguish this case from other "fog line" cases was that the officer saw the passenger wheel completely cross the white line such that pavement could be seen between the outside of the "fog line" and the inside of the passenger tire. That argument is contradicted by the plain language of standing case law. See e.g., Beck, 436 S.W.3d at 568 (finding no reasonable suspicion where "the tires of a motor vehicle *crossed* the fog line.") (emphasis added). The most recent case Appellant could locate regarding similar circumstances found no reasonable suspicion and concluded that an extended opinion would have no precedential value. *Jefferson County v. Dennis*, 441 S.W.3d 152 (Mo. App. E.D. 2014).

The present case is indistinguishable from prior case law. Appellant crossed the fog line once, which resulted in his detention by Sgt. Johnson. Merely touching or crossing the fog line does not give reasonable suspicion that any crime or traffic offense has occurred.

CONCLUSION

Wherefore, for the above stated reasons, the Appellant submits that the trial court committed reversible error by not granting Defendant's motion to suppress evidence obtained as a result of the traffic stop and Defendant's subsequent objections to such evidence and testimony at trial;

that no evidence of the crime charged exists other than that which was obtained as a direct result of the unreasonable and illegal detention of Appellant; and that the Appellant is entitled to be discharged or have the case remanded with direction to the trial court to suppress all evidence obtained as a result of the detention of Appellant without reasonable suspicion.

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CERTIFICATE OF SERVICE

A copy of the above and foregoing was via electronically filed to: Mr. Garrick Aplin, Assistant Attorney General, Po Box 899, Jefferson City, MO 65102 on this 15th day of July, 2019.

/s/ John D. James
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ATTORNEY CERTIFICATION

I, John D. James, certify to the Court the following:

1. The attached substitute brief complies with the limitations contained in Rule 84.06(b).
2. The attached brief contains 2,267 words, not including the certificate required by Rule 84.06(c), and signature block.

/s/ John D. James

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