No. SC97811

IN THE

Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

ANTHONY J. SMITH,

Appellant.

Appeal from the Circuit Court of Montgomery County
12th Judicial Circuit
The Honorable Wesley C. Dalton, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Mr. Anthony Smith (Defendant) appeals from a Montgomery County Circuit Court judgment convicting him of possession of a controlled substance and possession of drug paraphernalia, for which he received a suspended sentence of 7 years' imprisonment and a $100 fine. (A1).

Defendant was charged with the class D felony of possession of more than 35 grams of marijuana in Count I and the class D misdemeanor of possession of drug paraphernalia with the intent to use in Count II, for events occurring on or about January 8, 2017. (D9; Tr. 16-18). Defendant waived his right to a jury trial, and a bench trial was held on March 7, 2018. (D6, p. 10; Tr. 16-18). The trial court found Defendant guilty as charged. (D6, p. 10; Tr. 36-37). The trial court sentenced Defendant to seven years' imprisonment for Count I and a $100 fine for Count II, but it suspended execution of the sentence for Count I and placed Defendant on supervised probation for a period of five years. (D6, p. 12; A1-2).

On appeal, Defendant does not challenge the sufficiency of the evidence to support the convictions. (Def's Br. 2). Viewed in the light most favorable to the finding of guilt, the evidence presented at trial showed the following:

On January 8, 2017, Sergeant Steven Johnson of the Missouri State Highway Patrol conducted a traffic stop of Defendant's vehicle on Interstate 70 after observing it cross the "fog line" and travel onto the shoulder of the

highway. (Tr. 24-26). Sgt. Johnson also saw the vehicle's turn signal deactivate before completing several lane changes. (Tr. 25). Defendant was the driver and sole occupant of the vehicle. (Tr. 26). Immediately upon contacting Defendant through the front passenger window, Sgt. Johnson detected an odor of marijuana emanating from the vehicle. (Tr. 24, 26-27). Defendant informed the trooper that he was returning to Ohio after a skiing trip in Colorado. (Tr. 25, 28). When asked about the odor of marijuana, Defendant admitted that he had smoked marijuana in the car while he was in Colorado. (Tr. 29-30). Defendant further admitted that there was marijuana in the vehicle. (Tr. 30).

Sgt. Johnson searched Defendant's car and found marijuana cigarettes in a small pill container in a backpack in the passenger compartment of the vehicle and approximately five pounds of marijuana in sealed bags in the trunk. (Tr. 30). Some of the marijuana in the sealed bags was "the typical plant substance," and the remainder was "shatter," which is "an extracted form of marijuana that has a higher THC concentrate." (Tr. 31). Before the search of the car, Defendant admitted that everything in the vehicle belonged to him. (Tr. 31). When asked how much the marijuana weighed, Defendant told the trooper that the leaf-style marijuana weighed approximately two and a half pounds and that the "shatter" weighed approximately one and a half pounds. (Tr. 32). The marijuana was seized and submitted to the Missouri State Highway Patrol crime lab for analysis. (Tr. 32). A copy of the lab report

identifying the substance as marijuana and listing its weight was admitted into evidence. (Tr. 22, 32-33, 36-37).

Defendant did not testify or present any evidence. (Tr. 35).

ARGUMENT

The trial court did not clearly err in denying Defendant's motion to suppress and admitting evidence obtained following a traffic stop of Defendant's vehicle because the stop was supported by reasonable suspicion, in that Defendant committed a traffic violation by driving over the "fog line," off the roadway, and onto the shoulder, which was a violation of section 304.015.2, RSMo.

Alternatively, the stop of Defendant's vehicle was supported by reasonable suspicion of unusual or erratic operation, in that Defendant crossed the "fog line" and deactivated his turn signal before completing lane changes, which the trooper reasonably believed was odd and indicative of inattention.

A person committing a traffic violation may be lawfully stopped under the Fourth Amendment. Although there have been many cases involving motorists who were stopped for driving across the "fog line" (the white line separating the roadway from the shoulder), Missouri appellate courts have yet to hold that driving across the "fog line" constitutes a traffic violation under section 304.015.2, RSMo, which requires vehicles to drive "upon the right half of the *roadway*." This Court should provide direction to police officers, prosecutors, the courts, and the motoring public that driving across the "fog line" constitutes a traffic violation justifying a lawful stop.

A. The record regarding this claim.

Before trial, Defendant filed a motion to suppress. (D6, p. 7; D7). The motion claimed, *inter alia*, that Defendant's vehicle was unlawfully stopped and that any evidence obtained after the seizure should be suppressed as fruit of the poisonous tree. (D7).

During a pretrial hearing on Defendant's motion to suppress, Sergeant Steven Johnson, a ten-year veteran trooper for the Missouri State Highway Patrol who had been trained in "looking for indicators of criminal activity," testified that he observed Defendant's vehicle cross the "fog line" and travel onto the shoulder. (Tr. 4-5). Sgt. Johnson described the "fog line" as "the white line that's painted on the right edge of the roadway differentiating between the right lane, which is the traveled portion of the roadway, and the . . . shoulder, which is intended to be the untraveled portion of the roadway." (Tr. 6). The alleged violation occurred on Interstate 70, a four-lane highway. (Tr. 5-6). Sgt. Johnson testified that he observed the rear passenger-side tire of Defendant's vehicle completely cross over the "fog line" onto the shoulder, that he could see pavement between the "fog line" and the tire, and that the tire was "no longer within the lane of traffic." (Tr. 5). Sgt. Johnson testified that he stopped the vehicle "pretty soon after that" because it had left the roadway. (Tr. 7, 12).

After stopping the vehicle, Sgt. Johnson asked Defendant about driving off the roadway, and Defendant never denied doing so. (Tr. 8-9). A recording of the

incident and resulting stop, as captured by Sgt. Johnson's in-car camera, was admitted into evidence. (Tr. 3, 9-10, 12-13; State's Ex. 1). Sgt. Johnson can be heard during the recording orally noting the perceived violation, and he testified that he manually activated the camera in order to preserve a video recording of the violation. (Tr. 13; State's Ex. 1).

When asked if there was anything else that he had noticed about the way Defendant was driving, Sgt. Johnson answered that "prior to observing the fog line violation [he] saw [Defendant] change lanes several times, during which [Defendant] would only briefly activate his turn signal . . . and it would always turn off prior to completion of the lane change." (Tr. 6). Sgt. Johnson conceded that, "in and of itself," he did not consider such conduct a violation of state law, but he thought that it was "odd" and that it was "potentially" an indicator of "some inattention in [Defendant's] driving," "especially with [Defendant] driving on the shoulder." (Tr. 6-7, 10).

Defendant filed a memorandum in support of his motion to suppress. (D6, p. 8; D8). Defendant's memorandum argued that "[m]erely crossing the fog line is insufficient probable cause to initiate a traffic stop in Missouri," citing *State v. Beck*, 436 S.W.3d 566 (Mo. App. S.D. 2013), and *Jefferson County v. Dennis*, 441 S.W.3d 152 (Mo. App. E.D. 2014) (mem.). (D8, p. 1). It further argued that "[l]egally signaling an intention to change lanes creates no reasonable suspicion or probable cause for a detention of any kind." (D8, p. 1). Defendant

asked the trial court to suppress "all evidence obtained as a result of the unlawful traffic stop of the Defendant." (D8, p. 2).

The trial court denied Defendant's motion to suppress without written findings "after hearing argument, reviewing the DVD of the stop, and reviewing the Defendant's Memo." (D6, p. 8).

At trial, the State began by offering a copy of the lab report regarding the recovered marijuana, and defense counsel objected on the basis that it was "fruit of the poisonous tree," citing the pretrial motion to suppress. (Tr. 21). The trial court admitted the lab report over Defendant's objection. (Tr. 22). Defense counsel further asked for a "running objection to further testimony and evidence that would also be the fruit of the poisonous tree of the alleged illegal stop," which was granted by the trial court. (Tr. 22-23). Sgt. Johnson testified consistently with his earlier testimony at the suppression hearing in regard to the basis for the stop. (Tr. 25-26). After the close of evidence, defense counsel "renew[ed]" the motion to suppress. (Tr. 35).

Defendant included this claim of error in his motion for a new trial. (Supp. L.F.).

B. Standard of review.

"A trial court's ruling on a motion to suppress will be reversed only if it is clearly erroneous." *State v. Sund*, 215 S.W.3d 719, 723 (Mo. banc 2007). "The trial court's ruling will be deemed clearly erroneous if, after review of the entire

record, this Court is left with the definite and firm impression that a mistake has been made." *State v. Lammers*, 479 S.W.3d 624, 630 (Mo. banc 2016). "When reviewing the trial court's overruling of a motion to suppress, this Court considers the evidence presented at both the suppression hearing and at trial to determine whether sufficient evidence exists in the record to support the trial court's ruling." *State v. Pike*, 162 S.W.3d 464, 472 (Mo. banc 2005). "This Court defers to the trial court's factual findings and credibility determinations and considers all evidence and reasonable inferences in the light most favorable to the trial court's ruling." *Lammers*, 479 S.W.3d at 630. "Whether conduct violates the Fourth Amendment is an issue of law that this Court reviews *de novo*." *Sund*, 215 S.W.3d at 723.

Additionally, "[s]tatutory interpretation is an issue of law that this Court reviews *de novo*." *State v. Richey*, 569 S.W.3d 420, 423 (Mo. banc 2019). "When interpreting a statute, 'each word, clause, sentence, and section of a statute should be given meaning.'" *Id.* (quoting *Middleton v. Mo. Dept. of Corrections*, 278 S.W.3d 193, 196 (Mo. banc 2009)).

C. The stop of Defendant's vehicle was lawful because Defendant committed a traffic violation by driving over the "fog line" and onto the shoulder.

"The Fourth Amendment of the United States Constitution guarantees citizens the right to be free from 'unreasonable searches and seizures.'" *Pike*,

162 S.W.3d at 472. "[T]he same analysis applies to cases under the Missouri Constitution as under the United States Constitution." *Id.* "Stopping [Defendant's] car was a 'seizure' for purposes of the Fourth Amendment." *Id.*

"A routine traffic stop based on the violation of state traffic laws is a justifiable seizure under the Fourth Amendment." *State v. Barks*, 128 S.W.3d 513, 516 (Mo. banc 2004); *see also State v. Mendoza*, 75 S.W.3d 842, 845 (Mo. App. S.D. 2002) (quoting *Whren v. United States*, 517 U.S. 806, 810 (1996)) ("As 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."). "[A]ny traffic violation, even a minor one, gives an officer probable cause to stop the violator." *United States v. Bell*, 86 F.3d 820, 822 (8th Cir. 1996); *see also Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."); *State v. Abeln*, 136 S.W.3d 803, 815 (Mo. App. W.D. 2004) (Lowenstein, J., dissenting) ("An investigatory stop is . . . valid if there was probable cause to believe a traffic violation, however[ ] minor, has been committed."). Furthermore, in response to the argument that "virtually everyone is guilty of [a traffic] violation," the United States Supreme Court held, "[W]e are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that

infraction itself can no longer be the ordinary measure of the lawfulness of enforcement." *Whren*, 517 U.S. at 818.

Sgt. Johnson had reasonable suspicion that Defendant committed a traffic violation when he drove his vehicle off of the roadway by crossing over the "fog line" and onto the shoulder of Interstate 70. (Tr. 5-6). Section 304.015.2 provided, subject to four exceptions not applicable in this case: "Upon all public roads or highways of sufficient width a vehicle shall be driven upon the right half of the *roadway*[.]" § 304.015.2, RSMo 2016 (emphasis added)[1]; *see also* § 304.015.6, RSMo 2016 ("All vehicles in motion upon a highway having two or more lanes of traffic proceeding in the same direction shall be driven in the right-hand lane[.]"). Section 304.001 defined "[r]oadway," as used in chapter 304, as "that portion of a state highway ordinarily used for vehicular travel, exclusive of the berm or shoulder." § 304.001(12), RSMo 2016. Moreover, section 227.221 provided, "The state transportation department shall mark all

[1] "Violation of this section shall be deemed a class C misdemeanor unless such violation causes an immediate threat of an accident, in which case such violation shall be deemed a class B misdemeanor, or unless an accident results from such violation, in which case such violation shall be deemed a class A misdemeanor." § 304.015.9, RSMo 2016.

primary roads and highways outside the city limits . . . with a white line along the outer or right-hand edge of such road or highway." § 227.221, RSMo 2016.

Neither the term "berm" nor "shoulder" are defined by statute. *See* § 304.001, RSMo 2016. "In the absence of a statutory definition, words will be given their plain and ordinary meaning as derived from the dictionary." *State v. Stewart*, 560 S.W.3d 531, 534 (Mo. banc 2018) (quoting *State v. Oliver*, 293 S.W.3d 437, 446 (Mo. banc 2009)). The dictionary defines "shoulder" as "either edge of a roadway; *specif* : the part of a roadway outside of the traveled way on which vehicles may be parked in an emergency." WEBSTER'S THIRD NEW INT'L DICTIONARY 2104 (1986); *see also* 2019 Missouri Driver Guide, p. 39 (March. 2019 Rev.) ("You can stop on the shoulder of the highway in an emergency."). Consistently, section 304.015.1 provided that "[a]ll vehicles *not in motion* shall be placed with their right side as near the right-hand side of the highway as practicable[.]" § 304.015.1, RSMo 2016 (emphasis added).

Accordingly, this Court and the Court of Appeals have repeatedly and consistently found that the white "fog line" separates the roadway from the shoulder. *See Riche v. Dir. of Revenue*, 987 S.W.2d 331, 333 (Mo. banc 1999) (referring to the "fog line" as "the white line that demarcates the shoulder from the road); *State v. Pike*, 162 S.W.3d 464, 473 (Mo. banc 2005) (stating that the "fog line" "divid[es] the travel lane from the shoulder"); *Abeln*, 136 S.W.3d at 809 n. 4 (quoting *Riche*); *State v. Kempa*, 235 S.W.3d 54, 58 n. 2 (Mo. App. W.D.

2007) ("The fog line is the white line on the right-hand side of the highway that separates the driving lane from the shoulder."); *State v. Roark*, 229 S.W.3d 216, 217 (Mo. App. W.D. 2007) (stating that "[the defendant's] passenger-side tires cross[ed] the fog line twice, onto the paved shoulder of the highway); *State v. Beck*, 436 S.W.3d 566, 568 (Mo. App. S.D. 2013) (stating that "the pickup truck was driving over the fog line separating the shoulder of the road from the driving lane"); *State v. Atkinson*, 543 S.W.3d 656, 658 n. 3 (Mo. App. S.D. 2018) ("The term 'fog line' refers to the 'white line' painted on a roadway that marks the edge of the legally drivable portion of the roadway.").

Therefore, the trial court did not clearly err in denying Defendant's motion to suppress because there was sufficient evidence to establish that the trooper had reasonable suspicion to believe that Defendant violated section 304.015.2 when he observed Defendant's vehicle cross the "fog line," thereby driving off the roadway and onto the shoulder. (Tr. 5-6). Indeed, the trooper testified that he stopped Defendant's vehicle because it had left the roadway. (Tr. 7). Because the trooper observed Defendant violate a state traffic law, the resulting stop of Defendant's vehicle was lawful.[2] *See Pike*, 162 S.W.3d at 473 ("[I]t is clear that the trooper could point to specific facts— . . . the transgressions over the fog

[2] Defendant makes no claim of error on appeal beyond challenging the initial justification for the traffic stop. (Def's Br. 2).

line—that provided a reasonable suspicion that [the defendant] had committed at least one traffic violation," making "[t]he stop . . . constitutionally permissible.").

The Court of Appeals' opinion in *Atkinson* supports this conclusion. In *Atkinson*, officers observed the defendant drive "over to the right onto the shoulder past the fog line[.]" *Atkinson*, 543 S.W.3d at 658. The Court of Appeals cited sections 304.015.2 and 304.001 and held that "[the defendant's] (admitted) rightward deviation is thus comprehended by section 304.015, per the definition of 'roadway' applicable to that section." *Id.* at 662. The court held that there was sufficient evidence to support the defendant's conviction under section 304.015. *Id.*

Defendant nevertheless relies on several Missouri cases that predate *Atkinson* for the proposition 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," including *Beck*, 436 S.W.3d at 568; *Roark*, 229 S.W.3d at 220; *Abeln*, 136 S.W.3d at 812; *Mendoza*, 75 S.W.3d at 845-46; and *Dennis*, 441 S.W.3d at 153. (Def's Br. 4-5). But none of these cases specifically addressed whether driving over the "fog line" and onto the shoulder could constitute a traffic violation under section 304.015.2. *See Abeln*, 136 S.W.3d at 817 (Lowenstein, J., dissenting) ("The Southern District did not opine [in *Mendoza*] on whether a car's crossing the . . . fog line[ ] gives an officer

probable cause or reasonable suspicion to make a traffic stop."); *Roark*, 229 S.W.3d at 222 ("The State properly points out that . . . the outcome in *Abeln* was dictated by the standard of review, rather than the underlying facts."); *State v. Jackson*, 436 S.W.3d 576, 580 (Mo. App. S.D. 2013) ("*Roark* . . . did not address whether a violation of state law would have justified a stop of the vehicle."); *Beck*, 436 S.W.3d at 568 ("Based on . . . the result in *Roark*, *Abeln*, and *Mendoza*, it cannot be said the trial court clearly erred in granting the motion to suppress."); *Dennis*, 441 S.W.3d at 153 (rejecting the County's argument that crossing the "fog line" "constitut[ed] probable cause in violation of Jefferson County Revised Ordinance § 315.070."). It is therefore necessary for this Court to correct the misleading holdings of these cases by declaring a bright-line rule that crossing the "fog line" can constitute a traffic violation under section 304.015.2 and that an officer's observation of such a violation can justify a resulting traffic stop.

D. The stop of Defendant's vehicle was also supported by reasonable suspicion that Defendant was unusually and inattentively operating his vehicle.

Alternatively, the stop of Defendant's vehicle was justified by reasonable suspicion that Defendant was operating his vehicle in an unusual or erratic manner. "A traffic violation . . . is not required to create reasonable suspicion to justify a stop; justification may be based on erratic or unusual operation."

Pike, 162 S.W.3d at 473; *see also State v. Schroeder*, 330 S.W.3d 468, 472-73 (Mo. banc 2011) ("[N]othing in the Fourth Amendment requires the 'specific and articulable facts' to be limited to criminal activity[,]" and "a law enforcement officer may approach a vehicle for safety reasons . . ., so long as the officer can point to reasonable, articulable facts upon which to base his actions."). Therefore, even assuming that Defendant's deactivation of his turn signal before completing a lane change did not constitute a traffic violation under section 304.019,[3] it does not necessarily follow that the trial court clearly erred in relying on such evidence in its determination that the stop was lawful. (Def's Br. 4).

Sgt. Johnson testified that "prior to observing the fog line violation [he] saw [Defendant] change lanes several times, during which [Defendant] would only briefly activate his turn signal and . . . it would always turn off prior to completion of the lane change." (Tr. 6). Sgt. Johnson testified that he thought this conduct was "odd" and that it was "potentially" an indicator of "some inattention in [Defendant's] driving," "especially with [Defendant] driving on

[3] "No person shall . . . turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety and then only after the giving of an appropriate signal[.]" § 304.019, RSMo 2016.

the shoulder." (Tr. 6-7, 10). Given Sgt. Johnson's training and his 10 years of experience as a trooper for the Missouri State Highway Patrol, the trial court was entitled to credit the trooper's testimony that Defendant's driving was "odd" and indicative of inattention. (Tr. 4). *See Lammers*, 479 S.W.3d at 630; *State v. Peery*, 303 S.W.3d 150, 154 (Mo. App. W.D. 2010) (quoting *United States v. Arvizu*, 534 U.S. 266, 273 (2002)) ("This process [of determining whether reasonable suspicion exists] allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them 'that might well elude an untrained person.'"). Moreover, the trial court did not clearly err in determining that the trooper's resulting suspicion was reasonable, as both crossing the "fog line" and prematurely terminating a turn signal could reasonably indicate that the driver's attention was focused elsewhere. There was therefore sufficient evidence of unusual operation from the totality of the circumstances to justify a brief investigatory stop of Defendant's vehicle. *See Williams v. Dir. of Revenue*, 521 S.W.3d 658, 663 (Mo. App. E.D. 2017) (referring to crossing the "fog line" as "unusual operation of a motor vehicle"); *State v. Malaney*, 871 S.W.2d 634, 638 (Mo. App. S.D. 1994) ("The erratic movements of the [defendant's vehicle] [in weaving within the lane of traffic] justified the making of a stop" because they "could lead a reasonable officer to believe that the driver was drunk, asleep, or for some reason inattentive.");

Abeln, 136 S.W.3d at 817 (Lowenstein, J., dissenting) ("While inattentiveness may not rise to the level of careless and imprudent driving outlined in the statute, it could justify a stop and a warning by a law enforcement officer."); 2019 Missouri Driver Guide, p. 58 ("Driving is a skill that requires [one's] full attention to safely operate [one's] vehicle and respond to events happening around [one's self].").

Because there was sufficient evidence to establish reasonable suspicion that Defendant committed a traffic violation and that he was unusually operating his vehicle, the resulting stop was justified, and the trial court did not clearly err in denying Defendant's motion to suppress.

Defendant's point should be denied.

CONCLUSION

This Court should affirm Defendant's convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains 4,279 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word 2016 software; and that pursuant to Rule 103.08, the brief was served upon all other parties through the electronic filing system.

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