NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY APPELLATE DIVISION

STATE OF FLORIDA,

Appellant,

v.

RANDALL HICKS,

Appellee.

Appeal No. CRC 09-00058 APANO
UCN ~~522009CT085090XXXXXX~~
522009AP000058XXXXCR

Opinion filed 1/4/11.

Appeal from Order Granting Motion to Suppress
Entered by Pinellas County Court
County Judge John Carassas

Jacqueline Brown, Esquire
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Attorney for Appellant

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Attorney for Appellee

ORDER AND OPINION

DEMERS, Judge.

THIS MATTER is before the Court on Appellant, State of Florida's appeal from an order of the Pinellas County Court granting Appellee's Motion to Suppress. After reviewing the briefs and record, this Court reverses the order of the trial court.

At about 10:04 p.m. Friday night, a Largo police officer pulled behind Appellee's vehicle at Belcher and East Bay Drive in Pinellas County. The light at the intersection was red. The officer testified that while the light was still red, Appellee moved his vehicle past the stop bar

into the pedestrian crosswalk and into the intersection and stopped. According to the officer, once the light turned green, Appellee's vehicle jerked, bucked, and stalled. When Appellee restarted the vehicle and moved on, he went to the left rather than straight. And on the opposite side of the intersection he hit or touched the concrete median, corrected into the lane, swayed within the lane, and eventually came over to the lane line. According to the officer, this caused the vehicle behind him to slow down and move over one lane. The officer then stopped Appellee for a possible medical condition and an infraction. He cited him for an improper stop in violation of Florida Statutes, §316.154. (R 29-31) Additionally, the officer observed a violation of Florida Statutes, §316.075(c), which requires that drivers remain behind the stop bar or line and the pedestrian crosswalk. (R 32) As a result of the stop, the officer made observations and gathered evidence establishing probable cause for DUI.

Appellee moved to suppress all of the evidence on the grounds that there was no lawful basis for the traffic stop. At the evidentiary hearing on the motion, the trial judge heard only the officer's testimony, which was consistent with the description given above. Additionally, the DVD of the event from the officer's vehicle was introduced into evidence. (R 35) The trial judge watched the DVD as the officer commented on it in court. The officer described the video as depicting Appellee's back tires going over the stop bar and his front tires in the crosswalk while the light was red. (R 38-39)

Florida Statutes, §316.154, provides: "No person shall start a vehicle which is stopped, standing, or parked, unless and until such movement can be made with reasonable safety. A violation of this section is a noncriminal traffic infraction, punishable as a moving violation as provided in chapter 318." The officer testified that this occurred when Appellee restarted his engine, the vehicle bucked, went forward, and almost hit the median. It appeared to the officer

that it was unsafe for the vehicle to continue forward. (R 33). The officer felt that the driver did not have control of the vehicle. The tires did not rotate smoothly and the vehicle went to the left rather than straight and hit or touched the median. (R 40-41). The officer concluded that this was an unsafe driving pattern. (R 41). The officer believed Section 316.154 was the better charge, but acknowledged that he didn't know whether the driving was safe until he talked to the defendant. (R 34).

Based on the officer's testimony and the DVD, the trial judge granted the motion to suppress. The trial judge found that when the light turned green, Appellee's vehicle moved forward and stalled, but the judge saw nothing that was unreasonable or unsafe. Consequently, the judge found that Appellee acted reasonably and had the vehicle under control. (R 51-52) And the judge ruled that the stop was unlawful and the resulting evidence should be suppressed.

While this Court concludes that there was substantial evidence supporting the trial judge's finding that there was nothing unreasonable or unsafe about the movement of Appellee's vehicle, we nevertheless respectfully hold that the trial judge erred in granting the motion to suppress. We reach this conclusion for three reasons. First, the trial judge applied the wrong standard. Second, the trial judge incorrectly concluded that the stop could only be justified by proof as to the charge for which the citation was issued. Third, the trial judge incorrectly concluded that there was not reasonable suspicion independent of the infraction justifying the stop.

The first two reasons for reversal are based on the same point. In *Whren v. United States.*517 U.S. 806 (1996), the United States Supreme Court held that if an officer has probable cause[1] to stop a citizen for even a minor traffic violation, the stop is lawful and the evidence

[1] While the Court in *Whren* made a finding that facts objectively establishing probable cause are sufficient for a stop for an infraction, it did not reach the question of whether facts establishing only reasonable suspicion for an

secured as a result of the stop is admissible. This is true even if the officer would not have made the stop in the absence of some other reason, such as drug interdiction. This is based on an objective analysis and the subjective intent of the officer is not determinative. *Holland v. State*, 696 So. 2d 757 (Fla. 1997).

The trial judge in the instant case did not speak of probable cause, but rather seems to have made a determination as to whether the evidence was sufficient to prove commission of the charged infraction. More importantly, based on the officer's testimony and the DVD, the trial judge concluded that because the officer only wrote a citation for a violation of Florida Statutes, §316.154, the fact that he could have written a citation for §316.075(c) was irrelevant (R 32-34, 50-51). Nothing in *Whren* or any other case suggests that to justify the stop the State must show that a citation was issued. There is no such requirement. In fact, the law is to the contrary.

The fact that the officer does not detain an individual on a charge for which the officer clearly has probable cause, but rather charges another offense, does not affect the validity of the detention. *Gasset v. State*, 490 So. 2d 97 (Fla. 3d DCA 1986), *review denied*, 500 So.2d 544 (Fla. 1986); *Thomas v. State*, 395 So.2d 280 (Fla. 3d DCA 1981). The court may even make a finding of probable cause if the evidence supports it, notwithstanding an officer's erroneous conclusion that the facts only support reasonable suspicion. *McNeil v. State*, 512 So. 2d 1062 (Fla. 4th DCA 1987), *review denied*, 519 So.2d 987 (Fla. 1988).

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infraction would be sufficient. There is substantial authority that the lesser standard would be sufficient. *Hilton v. State*, 961 So. 2d 284, 295 (Fla. 2007); *State v. Frierson*, 926 So. 2d 1139, 1142 (Fla. 2006), *cert. denied, Frierson v. Florida*, 549 U.S. 1082 (2006). Both *Hilton* and *Frierson* contain language suggesting that the lower standard survived *Whren*, but those courts did not rule on the point. The case at bar, illustrates the potential significance of applying the reasonable suspicion standard. Here, it is arguable that the officer had reasonable suspicion but not probable cause to believe that the vehicle could not be moved with reasonable safety. This Court need not rule on these matters at this time.

Thus, in the case at bar, the stop stands if there was probable cause that Appellee committed any infraction whether or not the officer issued a citation. As the prosecutor argued, there was clearly probable cause for a violation of Florida Statutes, § 316.075. That statute provides, in pertinent part:

> 1. Vehicular traffic facing a steady red signal shall stop before entering the crosswalk on the near side of the intersection or, if none, then before entering the intersection and shall remain standing until a green indication is shown; however: a. The driver of a vehicle which is stopped at a clearly marked stop line, but if none, before entering the crosswalk on the near side of the intersection, or, if none then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering the intersection in obedience to a steady red signal may make a right turn, but shall yield the right-of-way to pedestrians and other traffic proceeding as directed by the signal at the intersection, except that municipal and county authorities may prohibit any such right turn against a steady red signal at any intersection, which prohibition shall be effective when a sign giving notice thereof is erected in a location visible to traffic approaching the intersection.

Florida Statutes, §316.1945(1)(a)4. also applies, although the prosecutor never brought this to the attention of the trial judge. This statute prohibits stopping on a crosswalk. See *State v. Zarem*, 11 Fla. L. Weekly Supp. 136 (Fla. Sarasota Cty. Ct. Nov. 20, 2003) (stop was lawful where defendant was detained for stopping on crosswalk in violation of Fla. Stat. §316.1945(1)(a)4. even though there was no evidence that the conduct created a reasonable safety concern).

Violation of either statute is an infraction. This Court has viewed the DVD in evidence and it clearly establishes probable cause that Appellee drove over the marked stop line and stopped on the crosswalk while the light was still red. Thus, the stop was lawful based on probable cause for a violation of Florida Statutes, §§316.075 and 316.1945(1)(a)4., regardless of whether a citation was issued.

The third reason this Court reverses is based on *Dep't of Highway Safety & Motor Vehicles v. DeShong,* 603 So. 2d 1349 (Fla. 2d DCA 1992). In *DeShong*, at 1352, the Court said:

> [e]rratic driving similar to that involved in this case has been held sufficient to establish a founded suspicion and to validate a DUI stop. . . . Driving behavior need not reach the level of a traffic violation in order to justify a DUI stop. . . . The courts of this state have recognized that 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 in situations less suspicious than that required for other types of criminal behavior.

In the case at bar, the officer observed, and the DVD corroborates, the following: (1) while stopped at a red light the Appellee crept forward so that his vehicle was over the stop bar and his front tires were in the crosswalk; (2) when the light turned green, the vehicle jerked forward partially into the intersection and stalled; (3) when Appellee got the vehicle started he did not drive in a straight path down the road, but instead, moved to the left towards the concrete median and almost hit the median; (4) Appellee adjusted by moving back to the right, but then his right front tire touched the lane divider. We find that these facts, which are unrebutted and clearly demonstrated by the DVD, are sufficient to establish reasonable suspicion that the driver of the vehicle was ill, tired, experiencing mechanical difficulty, or driving while under the influence.

ACCORDINGLY, this Court REVERSES the trial court's order granting the Motion To Suppress and remands this cause for action in accord with this order and opinion.

COVERT and HELINGER, C. JJ. Concur.

DONE AND ORDERED in at Pinellas County, Florida this 4th day of Jan, 2011.

Original order entered on January 4, 2011 by Circuit Judges David A. Demers, Thane B. Covert, and Chris Helinger.

Copies furnished to:

Office of the State Attorney

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