IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Appellant,

vs.

CHARLES ANTHONY YOUNG,

Appellee.

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APPELLATE CASE NO.: 2015-AP-38-A-O
Lower Case No.: 2015-CT-000146-A-E

Appeal from the County Court
for Orange County, Florida
Faye L. Allen, County Court Judge

Jeffrey L. Ashton, State Attorney, and
Carol L. Reiss, Assistant State Attorney
for Appellant

No Appearance for Appellee

Before G. ADAMS, MYERS, HIGBEE, J.J.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT

The State of Florida ("Appellant") appeals the trial court's final order granting Charles Young's ("Appellee") Motion to Suppress. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1). We reverse and remand.

On January 13, 2015, Appellee was arrested for driving under the influence ("DUI") pursuant to 316.193(1), Florida Statutes (2015). On February 26, 2015, Appellee, through counsel, filed a Motion to Suppress contesting the stop, detention, and arrest of Appellee. On August 14, 2015, the trial court conducted a suppression hearing and granted the motion finding

the stop was illegal and there was no reasonable suspicion to request field sobriety exercises ("FSE's"). The State appealed.

At the hearing on the Motion, Officer Elias El-Khoury ("El-Khoury") of the Maitland Police Department testified he was patrolling on January 13, 2015, when he observed Appellee's vehicle at 2:50 a.m. driving eastbound on State Road 414. Appellee's vehicle appeared to be travelling at a high rate of speed towards a steady red light. The vehicle stopped abruptly for the red light and the front nose of the vehicle dipped down suddenly. El-Khoury made a U-turn to further investigate the vehicle. When the light turned green, Appellee took off at a high rate of speed. After entering the middle of the intersection, the vehicle traveled directly towards the median and then abruptly changed course back towards the lane of travel. El-Khoury attempted to catch up to Appellee's vehicle, never losing sight of it, but two other vehicles traveling in front of him interfered with his ability to get directly behind Appellee's vehicle, or to be able to estimate the vehicle's speed.

At Maitland Avenue, El-Khoury was able to get directly behind Appellee's vehicle, which was located in the inside left turn lane. When the light turned green for traffic to turn northbound onto Maitland Avenue heading towards Altamonte, Appellee remained stationary at the green light for approximately four seconds. Once Appellee began to drive, he made the left turn and the vehicle's tires went over the white line into the right outside turn lane, leaving the lane of travel, and then cut back into the left turn lane. At that point, while still in Orange County, El-Khoury activated his lights and attempted a traffic stop, but the vehicle did not stop for approximately an eighth of a mile while passing intersections and driveways that were sufficient for stopping. Instead, Appellee initiated his turn signal, changed lanes multiple times, and finally pulled over on East Faith Terrance in Seminole County.

Once stopped, El-Khoury approached the vehicle and asked for Appellee's license, registration, and insurance. Appellee provided only his Florida driver's license. El-Khoury asked multiple times for the registration and insurance paperwork, but instead Appellee handed him service receipts from BMW and indicated they were the vehicle's registration. Ultimately, El-Khoury had to locate the requested documents for Appellee. Appellee's speech was slow and lethargic. El-Khoury was standing approximately two feet from Appellee's vehicle, but he was unable to see Appellee's eyes because the vehicle was a convertible, sat very low, and had a low sloping roof. El-Khoury asked Appellee to exit the vehicle and advised he had concerns Appellee may be impaired due to the consumption of alcohol and he wanted to evaluate him to alleviate those concerns.

Once outside of the vehicle, Appellee advised he was coming from club Stardust in downtown Orlando. At first, Appellee denied drinking any alcohol, but later advised he had consumed three drinks. El-Khoury smelled a very strong distinct odor of an alcoholic beverage coming from Appellee's breath, his eyes were bloodshot and glassy, his face appeared droopy, and his speech was lethargic and slow. El-Khoury requested Appellee perform FSE's. Based on El-Khoury's testimony, Appellee performed poorly on the FSE's and was arrested for DUI. El-Khoury testified that Appellee did not commit a traffic infraction prior to being stopped.

After the hearing, the trial court entered an Order granting the Motion finding that the stop was unlawful. Additionally, the trial court found there was no reasonable suspicion for El-Khoury to request that Appellee perform FSE's. Subsequently, on August 20, 2015, *Nunc Pro Tunc*, the trial court entered a written "Order Granting Defendant's Motion to Suppress" finding "the stop was unlawful. All evidence subsequent is suppressed as fruit of the poisonous tree."

A trial court's ruling on a motion to suppress is subject to a mixed standard of review. The standard of review of the findings of fact is whether competent substantial evidence supports the trial court's factual findings. An appellate court reviewing a ruling on a motion to suppress presumes that a trial court's findings of fact are correct and reverses those findings only if they are not supported by competent substantial evidence. *Connor v. State*, 803 So. 2d 598, 608 (Fla. 2001). Whether a particular set of facts can justify a finding that a police officer had a reasonable suspicion to conduct an investigative detention is a question of law. *See Ornelas v. United States,* 517 U.S. 690, 697 (1996); *Ikner v. State,* 756 So. 2d 1116, 1118 (Fla. 1st DCA 2000). The court's application of the law to the facts is reviewed *de novo*. *Hawley v. State*, 913 So. 2d 98, 100 (Fla. 5th DCA 2005).

An officer need only have reasonable suspicion to stop a motor vehicle for a violation of the traffic laws. *State v. Frierson*, 926 So. 2d 1139, 1142 (Fla. 2006). *See also Hilton v. State*, 961 So. 2d 284, 296 (Fla. 2007); *Brown v. State*, 719 So. 2d 1243, 1245 (Fla. 5th DCA 1998); and *Lacombe v. State*, 14 Fla. L. Weekly Supp. 1083a (Fla. 9th Cir. Ct. Sept. 12, 2007). In reviewing the lawfulness of an officer's stop for a violation of the traffic laws, a court must determine whether the evidence indicates "an objectively reasonable basis for making the stop." *Dobrin v. Fla. Dep't of Highway Safety & Motor Vehicles*, 874 So. 2d 1171, 1174 (Fla. 2004). "If the facts 'provide any objective basis to justify the stop . . . the stop is constitutional.'" *Lacombe*, 14 Fla. L. Weekly Supp. 1083a (citing to *Dep't of Highway Safety & Motor Vehicles v. Utley*, 930 So. 2d 698 (Fla. 1st DCA 2006)). Any objective basis for the traffic stop, even if it is not the same basis stated by the officer, the stop is constitutional and thus, the subjective knowledge, motivation, or intention of the officer, if any, is wholly irrelevant. *Dep't of Highway Safety & Motor Vehicles v. Jones*, 935 So. 2d 532 (Fla. 3d DCA 2006).

However, a person's driving pattern does not have to rise to the level of a traffic infraction to justify a stop. *See State v. Carrillo*, 506 So. 2d 495 (Fla. 5th DCA 1987). Further, "[t]he 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." *Dep't of Highway Safety & Motor Vehicles v. DeShong*, 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992); *see also Ndow v. State*, 864 So. 2d 1248, 1250 (Fla. 5th DCA 2004)(holding that a police officer who observes a motor vehicle operating in an unusual manner may be justified to make a stop even when there is no violation of vehicular regulations and no citation is issued); *see also Ortiz v. State*, 24 So. 3d 596, 600 (Fla. 5th DCA 2009)(addressing a law enforcement officer's community caretaking duties). Furthermore, the Florida Supreme Court has recognized that an officer is justified in stopping a vehicle to determine the reason for the vehicle's unusual operation. *Bailey v. State,* 319 So. 2d 22, 26 (Fla. 1975). In determining whether such an investigatory stop was justified, courts must look to the totality of the circumstances. *Ndow,* 864 So. 2d at 1250.

First, despite El-Khoury's own belief that Appellee had not committed a traffic infraction, there was reasonable suspicion to stop the Appellee's vehicle for a traffic violation when he turned onto Maitland Avenue and entered into the second turning lane and then changed back into the lane from which he began the turn. The evidence of the Appellee's driving pattern established he violated §316.089(3), Fla. Stat. (2015), which states "[o]fficial traffic control devices may be erected directing specified traffic to use a designated lane or designating those lanes to be used by traffic moving in a particular direction regardless of the center of the roadway; and drivers of vehicles shall obey the directions of every such device." *See also*

Jarrett v. State, 12 Fla. L. Weekly Supp. 31a (Fla. 9th Cir. Ct. June 21, 2004). The evidence of Appellee's driving pattern established he failed to obey the directions of an "official traffic control device," which is defined by §316.003(23), Fla. Stat. (2015) as "all signs, signals, markings, and devices . . . placed or erected . . . for the purpose of regulating, warning, or guiding traffic."

Upon review of section 316.089(3), it appears that the reasoning courts have applied to subsection (1) of the statute does not apply to subsection (3). Section 316.089(1) states that "[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 proscribed conduct in subsection (3) is completely different from the conduct in subsection (1). Second, the language in subsection (1) has allowed courts to construe that a violation requires the driver's actions create a safety concern for other traffic. Although, in *Yanes v. State*, 877 So. 2d 25, 26-27 (Fla. 5th DCA 2004), the Fifth District found that deviating from a lane by more than what was practicable was "a violation of the statute, irrespective of whether anyone is endangered." Subsection (3) contains no such language. Therefore, by the plain language of the statute, it appears that a violation of subsection (3) does not require that there be a safety concern for other drivers. Thus, any argument that Appellee's actions must have affected other traffic or created a safety concern for the stop to be lawful is without merit.

Finally, in its totality, as to the factual findings recited above, the evidence of Appellee's unusual and erratic driving pattern established "a sufficiently objective basis upon which to have stopped" the vehicle. *Cantu v. Dep't of Highway Safety & Motor Vehicles,* 9 Fla. L. Weekly Supp. 421a (Fla. 9th Cir. Ct. Mar. 15, 2002); *DeShong*, 603 So. 2d at 1352; *Finizio v. State*, 800 So. 2d 347 (Fla. 4th DCA 2001); and *Ndow*, 864 So. 2d at 1250.

Additionally, the trial court's finding that El-Khoury did not have reasonable suspicion to request Appellee perform FSE's is not supported by the evidence. "To request that a driver submit to field sobriety tests, a police officer must have reasonable suspicion that the individual is driving under the influence." *State v. Ameqrane*, 39 So. 3d 339 (Fla. 2d DCA 2010) (citing to *State v. Taylor*, 648 So. 2d 701, 703-04 (Fla. 1995). In addition to the factual findings recited above, after the stop of Appellee's vehicle and during his encounter with El-Khoury, Appellee had slow lethargic speech. When asked for his driver's license, registration and proof of insurance, Appellee could not provide the registration or insurance information after repeated requests, and eventually El-Khoury had to locate the documents for Appellee. Appellee also exhibited bloodshot glassy eyes, a droopy face, and had a strong odor of an alcoholic beverage on his breath. Finally, Appellee admitted to drinking three alcoholic beverages at a nightclub.

The evidence here established El-Khoury had reasonable suspicion to request Appellee perform FSE's in order to determine whether there was probable cause for an arrest. *Origi v. State,* 912 So. 2d 69 (Fla. 2d DCA 2005) (high rate of speed, smell of alcohol and bloodshot eyes sufficient reasonable suspicion to detain for FSE's); *Carder v. Dep't of Highway Safety & Motor Vehicles,* 15 Fla. L. Weekly Supp. 547a n. 2 (Fla. 9th Cir. Ct. Sept. 4, 2007) (combination of bloodshot, glassy eyes and odor of alcohol provide reasonable suspicion to request driver submit to FSE's, even if speech not slurred); and *Fewell v. State,* 14 Fla. L. Weekly Supp. 704a (Fla. 9th Cir. Ct. May 14, 2007) (bloodshot eyes and strong odor of alcoholic beverage sufficient reasonable suspicion to request FSE's).

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the trial court's order granting the motion to suppress is **REVERSED** and this cause is **REMANDED** for further proceedings.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 17th day of March, 2016.

/S/ ____________________________
GAIL A. ADAMS
Presiding Circuit Judge

MYERS and HIGBEE, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing order was furnished to **The Honorable Faye L. Allen,** 425 N. Orange Avenue, Orlando, Florida 32801; **Carol L. Reiss, Assistant State Attorney,** 415 N. Orange Avenue, Orlando, Florida 32801; and to **Charles Young,** 616 Marshal Street, Altamonte Springs, Florida 32701, on this 17th day of March, 2016.

/S/ ________________________
Judicial Assistant