THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SOUTH CAROLINA
DIVISION OF MOTOR VEHICLES

The Honorable Shirley C. Robinson
Appellate Case No. 2013-002225

Tracy Lynn Adams, ... Appellant,

v

South Carolina Department of Motor Vehicles, and South Carolina Department of Public Safety, ... Respondents.

FINAL BRIEF OF APPELLANT

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SC Court of Appeals

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Statement of Issues on Appeal

I. Did the hearing Officer err in finding that the stop of Tracy Adams was lawful and based upon probable cause?

II. Did the hearing officer err in failing to declare the implied consent law unconstitutional because it punished an individual for refusing to give the state evidence that would lessen the burden of proof by the state if they charged the defendant with a per se violation?

Statement of the Case

Tracy Lynn Adams was arrested on April 12, 2012 and charged with driving under the influence. The basis for the arrest was the testimony of the arresting officer that Ms. Adams touched the yellow line on a couple of occasions and touched the white line once. Ms. Adams subsequently refused to blow into the breath testing devise.

A hearing was held before Tracy Holland, OMVH Hearing Officer on April 12, 2012. At the hearing, the officer testified and a video recording from his in car camera was introduced. Ms. Adams raised two issues. The first was whether the arrest of Ms. Adams was lawful. The second was whether the suspension of the driver's license for Ms. Adams violated the due process clause of the constitution because she was being punished for making the state prove that she was materially and appreciably impaired when if she had blown and the reading was .08 or greater, the state would only have to prove the accuracy of the reading, an obligation the state had in a regular driving under the influence case.

After taking the testimony the hearing officer by order dated July 30, 2012 ruled against Tracy Lynn Adams and upheld the suspension. Ms. Adams filed a timely notice of appeal on August 16, 2012.

On September 20, 2013, the administrative law judge affirmed the decision of the hearing officer. The Appellant filed her notice of intent to appeal on October 14, 2013. An amended Notice of Appeal was filed on December 20. 2013 to correct a technical deficiency in the original notice.

Argument

I. Did the hearing Officer err in finding that the stop of Tracy Adams was lawful and based upon probable cause?

> *"Indeed, if failure to follow a perfect vector down the highway or keeping one's eyes on the road were sufficient reasons to suspect a person of driving while impaired, a substantial portion of the public would be subject each day to an invasion of their privacy."*
>
> *United States v. Lyons,* 7 F.3d 973, 976 (10th Cir. 1993)

The hearing officer erred in finding that the stop of Tracy Adams's vehicle was lawful based a purported violation of S.C. Code § 56-5-1900. The record in this case shows that Trooper F. O'Dell stopped Ms. Adams because her wheel touched the yellow dividing line and may have touched the white line to her right.[1] The pertinent portion of S.C. Code Ann. § 56-5-1900 which formed the basis for its ruling states the following:

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

As set forth more fully below, the conduct of Ms. Adams did not rise to level of a traffic violation. As such, Ms. Adams was arrested as a result of an illegal stop and the hearing officer should have found there was no probable cause and rescinded the suspension.

The Fourth Amendment provides that:

---

[1] While the officer testified that Ms. Adams touched the white line to her right, this is not seen on the video. As the video camera captured the previous 30 seconds before the blue light was turned on, if Ms. Adams touched the white line it should have been on the video.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
>
> U.S. Const. Amend. IV.

Like the Federal Constitution, the South Carolina Constitution protects against unreasonable searches and seizures. Specifically, Article I, § 10 of the South Carolina Constitution states, in pertinent part, "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures *and unreasonable invasions of privacy* shall not be violated[.]" (emphasis added). *See also State v. Forrester*, 343 S.C. 637, 644, 541 S.E.2d 837, 841 (2001) (stating "the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution resulting in the exclusion of the discovered evidence"); *State v. Austin*, 306 S.C. 9, 16, 409 S.E.2d 811, 815 (Ct. App. 1991) ("It is firmly established that state courts may interpret their own constitutions in such a way as to expand rights conferred by the Federal Constitution.").

"Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of persons within the meaning of the Fourth Amendment." *State v. Pichardo*, 367 S.C. 84, 97, 623 S.E.2d 840, 847 (Ct. App. 2005). Thus, the stop of an automobile "'must be justified by probable cause or a reasonable suspicion, based upon specific and articulable facts, of unlawful conduct.'" *United States v. Wilson*, 205 F.3d 720, 723 (4th Cir. 2000) (quoting *United States v. Hassan El*, 5 F.3d 726, 729 (4th Cir. 1993)). In South Carolina, "an officer may stop and briefly detain the occupants of a car without treading on Fourth Amendment rights, even without probable cause to arrest, if he has reasonable

suspicion that the occupants are engaged in criminal activity. *State v. Rogers*, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006). Reasonable suspicion is something more than an inchoate and unparticularized suspicion or hunch. *Id.*

In the present case, Trooper F. O'Dell contends he had reasonable suspicion or probable cause to stop Ms. Adams because Ms. Adams touched the yellow line and the white line dividing her lane of travel with the right hand lane of travel. Neither the testimony nor the video establishes Ms. Adams crossed the yellow line or the white line. As noted above, South Carolina law only requires that the vehicle be driven as nearly as practicable entirely within a single lane. The appellate courts of South Carolina have addressed the meaning of the "as nearly as practicable" language in only one case, *State v. Vinson,* 400 S.C. 5, 734 S.E.2d 182 (Ct. App. 2012) Op. № 5044 (S. C. Ct. App. filed October 331, 2012) (Shearhouse Adv. Sh. № 39 at 17)

Ms. Adams contends that the *Vinson* case is not applicable to this case. In *Vinson,* the Court specifically found that the driver completely crossed the yellow line and that created probable cause to stop the driver. Here Ms. Adams did not cross the line but only touched it. In *Vinson*, the court held that crossing a yellow line is a violation of the statute. The Court did not rule that touching the line is a violation of the statute.

Recently, the Kansas Supreme Court reversed the Kansas Court of Appeals in finding that minor lane line crossings do not constitute reasonable suspicion for an investigatory stop. In *State v. Marx*, 215 P.3d 601, 604 (Kn. 2009), a deputy observed the driver of a motor home cross the fog line which is a solid white line, overcorrect and cross the center line. After detecting the odor of marijuana, a subsequent search led to the discovery of a substantial amount of illegal drugs in the motor home. The trial court held that the deputy lacked reasonable suspicion to stop the motor home

in spite of the fact that the motor home **crossed** both the white fog line and the center line. The language of the statute reviewed in *Marx*, Kan. Stat. Ann. § 8-1522(a) (1974), is identical to that of S.C. Code Ann. § 56-5-1900(a) (2006). *Id.* at 607.

In reversing the Kansas Court of Appeals and affirming the trial court's decision, the *Marx* court stated:

> K.S.A. 8-1522(a) is not a strict liability offense. . . .The express language employed - "as nearly as practicable" – contradicts the notion that any and all intrusions upon the marker lines of the chosen travel lane constitute a violation. . . .It only requires compliance with the single lane requirement as *nearly* as practicable, *i.e.*, compliance that is *close* to that which is feasible. That statutory language tells us that a violation of K.S.A. 8-1522(a) requires more than an incidental and minimal lane breach.
>
> Accordingly, contrary to the *Marx* panel's suggestion that the deputy's testimony that he observed the motor home cross the fog line, overcorrect, and cross the centerline ended the reasonable suspicion inquiry in the State's favor, a detaining officer must articulate something more than an observation of one instance of a momentary lane breach. *Id.* at 612 (emphasis in original)

Unlike, the defendant in *Marx*, Ms. Adams did not completely cross over the lane line but touched the yellow dividing line.

In *United States v. Sugar*, 322 F.Supp.2d 85 (D. Mass. 2004), a Massachusetts Federal District Court construed a similar Missouri statute in determining the legality of a traffic stop. In *Sugar*, the defendants were stopped when the right rear double wheels of the RV they were driving crossed over the right shoulder line three times. The applicable Missouri statue, Mo. Rev. Stat. § 304.015.5 (2001), also has identical language to that of S.C. Code Ann. § 56-5-1900: "[a] vehicle shall be driven as nearly as practicable entirely within a single lane. . ."

In ruling that the stop was unlawful, the *Sugar* court stated that "[t]he phrase 'as nearly as practicable' indicates that the statute was not intended to comprehend minor swerving." *Sugar*, 322

F.Supp.2d at 91. Unlike the defendants in *Sugar*, Ms. Adams only touched the center line as opposed to crossing over the line which was found not to be a reasonable basis for the stop

Similarly, in *United States v. Gregory*, 79 F.3d 973 (10th Cir. 1996), the United States Court of Appeals for the Tenth Circuit addressed the meaning of Utah Code Ann. § 41-6-61(1). In *Gregory*, a county sheriff's officer observed Gregory's "U-Haul truck cross two feet into the right shoulder emergency lane of the interstate." The officer then stopped Gregory, and during a search of the vehicle, the officer found marijuana and approximately ten kilograms of cocaine.

At trial, Gregory moved to suppress the drugs on the ground that the alleged lane violation did not amount to probable cause to justify the officer stopping him. The district court denied Gregory's motion to suppress. On appeal, the Tenth Circuit found that Gregory's crossing into the emergency lane did not violate Utah's traffic laws, and accordingly, the court reversed Gregory's conviction.

The statute at issue in *Gregory* is Utah Code Ann. § 41-6-61, which states the following:

> On a roadway divided into two or more clearly marked lanes for traffic the following provisions apply:
>
> (1) A vehicle shall be operated as nearly as practical entirely within a single lane and may not be moved from the lane until the operator has determined the movement can be made safely.

Utah Code Ann. § 41-6-61(1) (1993).

Relying upon Utah law, the Tenth Circuit stated that, "[w]e do not find that an isolated incident of a vehicle crossing into the emergency lane of a roadway is a violation of Utah law." *Gregory*, 79 F.3d at 978 (citing *State v. Bello*, 871 P.2d 584, 586 (Utah Ct. App. 1994) (holding that a single instance of weaving does not violate section 41-6-61(1)). In arriving at this conclusion, the

court noted that the U-Haul truck could have crossed into the emergency lane for any number of reasons. The court also noted that there was no evidence that Gregory's action created any danger of a collision. Accordingly, the court concluded that the officer did not have probable cause to stop Gregory.

Another case that is instructive is *Rowe v. Maryland,* 769 A.2d 879 (Md. 2001), in which the court addressed the meaning of Md. Code Ann., Transp. § 21-309(b)(1999). In *Rowe*, Trooper Jones observed Rowe cross the white edge line onto the shoulder by about 8 inches onto the shoulder or rumble strips. After Rowe's vehicle hit the rumble strips, it swerved back into the slow lane. Trooper Jones later saw Rowe's vehicle swerve or weave onto the white shoulder edge line once again. Based upon these observations and the time of night (1:00 a.m.), Trooper Jones conducted a traffic stop on Rowe because he believed Rowe could have been intoxicated or falling asleep at the wheel.

After Trooper Jones stopped Rowe, Trooper Jones questioned Rowe about whether he had been drinking or was sleepy. During the stop, Trooper Jones's became suspicious of Rowe. Subsequently, Trooper Jones obtained Rowe's consent to search the car, and during the search, Trooper Jones found approximately 77 pounds of marijuana.

At trial, Rowe moved to suppress the drugs, claiming that Trooper Jones did not have probable cause to stop him. The trial court, however, denied Rowe's motion. On appeal, the Court of Appeals of Maryland held that Trooper Jones did not have probable cause to stop Rowe.

The court began its analysis of the probable cause issue by turning to whether Rowe failed to drive in a single lane in violation of Maryland's traffic laws. As in South Carolina, Maryland law requires that

> A vehicle shall be driven as nearly as practical entirely within a single lane and may not be moved from that lane or moved from a shoulder or bikeway into a lane until the driver has determined that it is safe to do so.

Md. Code Ann., Transp. § 21-309(b)(1999)

In interpreting the meaning of § 21-309(b), the court applied the plain meaning rule. The court stated that for one to comply with § 21-309(b), the "vehicle must be driven as much as possible in a single lane and movement into that lane from the shoulder or from that lane to another cannot be made until the driver has determined that it can be done safely." *Rowe*, 769 A.2d at 885. The court noted that its interpretation of § 21-309(b) was "consistent with that given essentially identical statutes by courts that have considered this issue." *Id.* at 886 (citing cases that require more than a momentary crossing or touching of an edge or lane line to constitute a violation of the traffic laws).

In *Rowe*, the court conducted a thorough analysis of cases finding where crossing a lane line constituted probable cause for the stopping of the driver and cases finding that the crossing of a lane line did not constitute probable cause. After analyzing the law and applying it to Rowe's actions, the court "conclude[d] that [Rowe's] momentary crossing of the edge of the roadway and later touching of that line did not amount to an unsafe lane change or unsafe entry onto the roadway, conduct prohibited by § 21-309, and thus, cannot support the traffic stop in this case." *Id.* at 889.

Another case that is instructive is *Hernandez v. State*, 983 S.W.2d 867 (Tex. Ct. App. 1998), in which the court construed the meaning of Tex. Transp. Code § 545.060 (West 1997). Section 545.060 is similar to S.C. Code Ann. § 56-5-1900, and it states the following:

> An operator on a roadway divided into two or more clearly marked lanes for traffic: (1) shall drive as nearly as practical entirely within a single lane; and (2) may not move from the lane unless that movement can be made safely.

Tex. Transp. Code § 545.060 (a) (West 1997).

In *Hernandez*, Officer Combs was traveling behind Hernandez and observed Hernandez swerve left and saw his left wheels cross into the second lane by about 18 to 24 inches. After stopping Hernandez, Officer Combs conducted a series of field sobriety tests on Hernandez. Subsequently, Officer Combs arrested Hernandez for driving while intoxicated because he failed the field sobriety tests.

During the trial, Hernandez filed a motion to suppress on the ground that Officer Combs did not have proper grounds to stop him. In addressing the issue of whether Hernandez violated section 545.060, the court reviewed the legislative history of the section. After reviewing the legislative history, the court stated that "the statutory language shows a legislative intent that a violation of section 545.060 occurs only when a vehicle fails to stay within its lane *and* such movement is not safe or is not made safely." *Hernandez*, 983 S.W.2d at 871. After reviewing the facts of Hernandez's driving, the court held that Officer Combs had no authority to stop Hernandez because there was no evidence that his crossing the lane line was unsafe. Therefore, the court reversed Hernandez's conviction.

In addition to the cases discussed above, many other courts have held that a driver's minor crossing of a lane line or a fog line do not amount to traffic infractions. *See, e.g.*, *United States v. Colin*, 314 F.3d 439 (9th Cir. 2002)(touching fog line and solid yellow painted line for approximately 10 seconds on two occasions did not violate Cal. Veh. Code § 21658 (West 2000) which requires vehicles remain as nearly as practical within a single lane); *United States v. Freeman*, 209 F.3d 464, 466 (6th Cir. 2000)("[w]e cannot . . . agree that one isolated incident of a large motor home partially weaving into the emergency lane for a few feet and an instant in time constitutes a failure to keep the vehicle within a single lane 'as nearly as practicable'"); *United States v. Smith,* 799 F.2d 704 (11th

Cir. 1986) (stop invalid under Florida law where car's right wheels crossed over white line about six inches into emergency lane and where car wove slightly within its own lane); *United States v. Gastellum,* 927 F.Supp.1386 (D.Colo. 1996) (invalid stop where officers had observed vehicle weave once approximately one to three feet over right-hand shoulder white solid line for only a moment); *State v. Livingston*, 75 P.3d 1103, 1106 (Ariz. Ct. App. 2003) (holding that identical statutory language found in S.C. Code Ann. § 56-5-1900(a) (2006) demonstrates an express legislative intent to avoid penalizing brief, momentary, and minor deviations outside the marked lines); *Crooks v. Florida*, 710 So.2d 1041, 1042 – 43 (Fla. Dist. Ct. App. 1998) (no violation of statute when driver crossed edge line three times); *State v. Caron*, 534 A.2d 978 (Me. 1987) ("A vehicle's brief, one time straddling of the center line of an undivided highway is a common occurrence and, in the absence of oncoming or passing traffic, without erratic operation or other unusual circumstances, does not justify an intrusive stop by a police officer. Otherwise, we would sanction stops on mere hunch or speculation. The fourth amendment to the United States Constitution and article I, section 5 of the Maine Constitution require more."); *State v. Lafferty*, 967 P.2d 363 (Mont. 1998) (stating that the defendant did not violate Montana's traffic laws when the evidence showed that "[s]he merely crossed onto and barely over the fog line on the far right side of the right traffic lane in which she was traveling"); *Salter v. North Dakota Dept. of Transportation,* 505 N.W.2d 111, 113 (1993) (driver wove slightly within own lane while traveling 30-35 in a 50 zone; "The facts in this record suggest a mere hunch of illegal activity . . ."). Finally, in the case of *State v. Tarvin*, 972 S.W. 2d 910 (Tex. Ct. App. 1998), the same language requiring safe lane travel was reviewed by the Texas Court of Appeals. A police officer observed Tarvin drift to the right side of his lane and "go over" the solid white fog line on two or three occasions. *Id.* at 911. Officer Hill activated overhead lights and initiated a traffic stop for a

lane travel violation. The trial court found that Tarvin did not violate the statute. The appellate court approved the lower court's ruling, finding there was no evidence that the defendant's driving was unsafe as he did not enter another lane of traffic and his driving was not otherwise accompanied by any other traffic infractions such as speeding. The appellate court stated "[w]e do not find that Tarvin's driving provided a reasonable suspicion of criminal activity." *Id.* at 912.

In this case, Trooper O'Dell's testimony and video show that he observed Ms. Adams drive on but not cross the yellow line or enter the lane of oncoming traffic. Significantly, the testimony and video do not show that Ms. Adam's alleged lane violation interfered with any other traffic or caused any safety problems for other drivers. Further, as discussed above and in accord with holdings in other jurisdiction, the mere driving on the center line should not be deemed a *per se* violation of S.C. Code Ann. § 56-5-1900(a). Therefore, the Court should find that Trooper O'Dell did not have reasonable suspicion to stop Ms. Adams because she did not violate S.C. Code Ann. § 56-5-1900(a) (2006).

II. Did the hearing officer err in failing to declare the implied consent law unconstitutional because it punished an individual for refusing to give the state evidence that would lessen the burden of proof by the state if they charged the defendant with a per se violation?

South Carolina has two charges that can be made for a person driving under the influence. One is a violation of S. C. Code § 54-5-2930 which requires that the state prove " the person's faculties to drive a motor vehicle are materially and appreciably impaired." A person may also be charged under S. C. Code § 56-5-2933. Under that section, the state is only required to prove that a defendant

had a blood alcohol reading at .08 or above. The state is not required to prove a driver is impaired in the slightest degree.

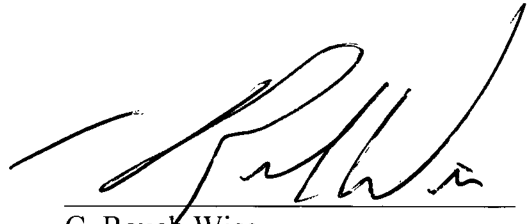
South Carolina requires that a person submit to a test of his blood under the threat of taking the driver's license for six months. S. C. Code § 56-5-2950. At the time the person is offered the breath test, that person is informed that they could be charged under either 56-5-2930 or 56-5-2933. See, Rec. on App. at 41. Thus, a driver being informed of this has a dilemma. He can blow into the breath testing device and not lose his license. If he blows above .08 he could then be charged with a violation of § 56-5-2933 which would lessen the burden on the state as they would not have to prove he was materially and appreciably impaired. If he refuses to blow into the breath testing devise, then the state is held to a higher standard and is required to prove that he was materially and appreciably impaired. Thus, the driver who refuses is effectively being punished for making the state's degree of proof more difficult. As such the law violates the due process clause of Article I, § 3 of the Constitution of the State of South Carolina and the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

This case is not unlike *Schumpert v. South Carolina Department of Highways and Public Transportation,* 306 S.C. 64, 409 S.E.2d 771 (1991). In *Schumpert* the South Carolina Supreme Court held that in keeping with due process the state could not infringe upon a person's decision to plead guilty by lifting the 90 day suspension period if the person plead guilty within 30 days of his arrest. Here Ms. Adams is being punished by suspending her license because she elected to require the state to have a higher burden of proof in her case than if she had blown into the breath testing devise and she registered .08 or greater. In keeping with the constitution, the state simply cannot punish a citizen for making their burden more difficult.

CONCLUSION

Based upon the foregoing, this Court should reverse the decision of the hearing officer and order that the Notice of Suspension be rescinded.

June 28, 2013



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The Honorable Shirley C. Robinson
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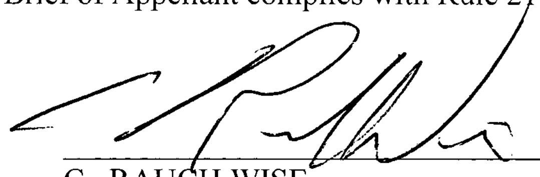
South Carolina Department of Motor Vehicles, and South Carolina Department of Public Safety, ... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

July 3rd, 2014



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