NO. 523A11 THREE-A DISTRICT

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Pitt County
	)	No. 08 CRS 52165
MEGAN SUE OTTO,	)	No. COA11-189
Defendant/Appellee.	)	

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NEW BRIEF FOR DEFENDANT/APPELLEE

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NEW BRIEF FOR DEFENDANT/APPELLEE

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QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT'S FINDING OF FACT NO. 5 THAT TROOPER SMITH KNEW THAT ROCK SPRINGS SERVED ALCOHOL IS SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE WHERE: (a) HE DID NOT KNOW IF ALCOHOL WAS BEING SERVED AT THE DUCKS UNLIMITED BANQUET; (b) HE HAS NEVER BEEN INSIDE OF ROCK SPRINGS; AND (c) HE HAS NEVER WITNESSED ANYONE DRINKING ALCOHOL AT ROCK SPRINGS?

II. WHETHER THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT THERE WAS A REASONABLE AND ARTICULABLE SUSPICION TO STOP DEFENDANT'S VEHICLE WHEN IT WEAVED IN ITS LANE OF TRAVEL WHILE NEGOTIATING TWO CURVES BUT OTHERWISE OPERATED AT THE POSTED SPEED LIMIT AND IN ACCORDANCE WITH ALL MOTOR VEHICLE LAWS?

STATEMENT OF THE FACTS

Trooper Smith's Observations Before He Got Behind The Explorer.

On 29 February 2008, Ashley Smith was employed with the North Carolina State Highway Patrol; he had been employed for approximately six(6) years. (T pp. 3-4) Trooper Smith was on preventive patrol on N.C. Highway 43[1] north in the Greenville area; he was not targeting any vehicles and had not received any information about the Explorer. (T p. 4) N.C. 43 is a very busy highway with heavy traffic into and out of Greenville. (T p.13) He was travelling in a southerly direction towards Greenville when he received a phone call[2] from his wife. (T pp. 4,13) Trooper Smith pulled into the entrance of Ironwood subdivision[3] on Golf Club Wynd, made a u-turn, and stopped his vehicle on the Golf Club Wynd exit to speak to his wife. (T pp. 4,13, *Defendant's Exhibit 1*[4]) The time was 10:59 o'clock p.m. (T p.4)

While speaking to his wife on the phone, he observed a 1998 Ford Explorer, burgundy in color, travelling south on N.C. 43 towards Greenville. (T p. 4) The vehicle approached from

Trooper Smith's right and crossed in front of him as he sat in the exit. (T p.15) The vehicle was travelling at the posted speed limit of 55 mph. (T pp. 4,10-11,15-16) There was nothing

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[1] N.C. 43, along with N.C. 11, N.C. 13, N.C. 33, and HWY. 264 are the major roadways into and out of Greenville.

[2] The testimony did not describe the phone call as a cell phone communication, but the implication is that it was a cell phone call.

[3] Ironwood subdivision consists of the Ironwood Golf and Country Club and Ironwood Realty, with homes built around the golf course. Ironwood is on N.C. Highway 43, approximately 4 miles from Pitt County Memorial Hospital. See, http://www.ironwoodgolf.com/location.htm for specific location.

[4] A true and accurate copy of *Defendant's Exhibit 1* is attached hereto in the Appendix.

unusual about the operation of the Explorer as it approached from his right, crossed in front of him, and continued south on N.C. 43 towards Greenville. (T pp.15-16) The state did not offer any evidence that Trooper Smith pulled in behind the Explorer because of any concern he had for the driver, or the way in which the Explorer was being operated as it approach from his right and passed in front of him. (T pp. 1-49)

Trooper Smith's Observations After He Got Behind The Explorer.

After the vehicle passed his location, Trooper Smith pulled back onto N.C. 43 behind the Explorer, and also began travelling south towards Greenville. (T p. 4) When he pulled to within 100 feet of the Explorer, Trooper Smith then started to notice that the Explorer was weaving in its travel lane. (T pp. 4,6) Trooper Smith testified that he was behind the Explorer for five to ten seconds making these observations. (T p. 5) Trooper Smith never obtained a radar clock because he felt the vehicle was travelling at the posted speed limit of 55 mph. (T p. 5) The state offered no evidence that the Explorer crossed or even touched the centerline or the fog line or came close to doing so. (T pp.9-10)

Trooper Smith advised his wife "[t]here's a vehicle in front of me I might need to stop—-and [he] hung up the phone". (T p.5) He ended the phone conversation with his wife in the

area of the Trade Mart gas station on N.C. 43, near MacGregor Downs Road[5]. (T p. 6, *Defendant's Exhibit 1*) When specifically asked by the presiding assistant district attorney about his observations, Trooper Smith testified that other than the weaving in its travel lane, there was nothing else he noticed about the operation of the Explorer before activating his blue lights. (T p.10) Trooper Smith was asked and replied as follows:

> Q. Is there anything else that you noticed about the vehicle before activating your blue lights?
>
> A. No, ma'am. (T p.10)

The operation of the Explorer did not affect any motor vehicle or pedestrian traffic. (T p. 17) Trooper Smith did not observe any unusual actions inside the interior of the Explorer. (T p.17) Trooper Smith also did not notice any problems with the Explorer's lighting equipment, tags, or inspection certificate. (T p. 17) Trooper Smith testified that at the time he stopped the Explorer he had only a suspicion or hunch. (T pp.21-22) Trooper Smith was asked and replied as follows:

> Q. Based upon your observations of this motor vehicle that you made, is it fair to say that you had a hunch or suspicion about this vehicle?
>
> A. Yes, sir. Based upon its driving. (T pp. 21-22)

[5] In the transcript, the road is referred to as "McGregors Down Road"; the correct spelling is as noted above. See also, *Defendant's Exhibit 1* attached hereto in the Appendix.

Trooper Smith's ***hunch or suspicion*** was based solely on his observations; it was not based on the time of day/night or the proximity of the vehicle in relation to any establishment at the time of the observations. (T pp.21-22)(emphasis added)

Trooper Smith activated his blue lights right before the Explorer reached the overpass at the intersection of U.S. Highway 264 and N.C. 43; just a couple of hundred feet from the intersection of U.S. 264. (T pp. 10,18) The Explorer immediately stopped in response to the blue lights and assertion of authority of Trooper Smith, turned right onto the on-ramp for U.S. 264, and then safely onto the shoulder of the on-ramp. (T pp.10,18) The right turn onto the on-ramp was done in a safe manner, and the area to which the Explorer pulled to was a safe area. (T p. 19)

When the Explorer initially stopped in response to the blue lights, it had three options as to where to pull out of the travelled portion of N.C. 43. (T p. 18) The Explorer could have continued on N.C. 43 and immediately stopped on the overpass, but that would not have been safe for either Trooper Smith or

defendant. (T p. 18) To safely stop on N.C. 43, the Explorer would have to travel a good distance, several hundred feet, further across the overpass. (T p.18) The Explorer made an immediate right onto the on-ramp, and safely pulled over to the

shoulder of the on-ramp, off the traveled portion of the roadway. (T p.19)

Trooper Smith's Representations To Magistrate.

When Trooper Smith appeared in front of the magistrate after defendant's arrest, he made specific representations under oath about defendant's driving. (T pp. 11-12, R p. 27) Trooper Smith indicated to the magistrate under oath on 29 February 2008, that defendant "was weaving in her travel lane". (T p.12, R p.27) Trooper Smith did not make any other representations to the magistrate about the Explorer's operation or the basis for his stop. (R p.27) Trooper Smith made the same documentation about defendant's driving in his notes. (T p. 12)

Trooper Smith's Characterization of N.C. 43.

Trooper Smith indicated that N.C. 43 is a very busy highway into and out of Greenville, with more heavy traffic later in the evening after 7:30 and early in the morning. (T p.13)

Trooper Smith Was Not Familiar With NHTSA's DWI Clues.

The state specifically asked Trooper Smith whether he was familiar with the *National Highway Traffic Safety*

Administration's Visual Detection of DWI Motorists[6]. Trooper Smith testified that he was not. (T p. 24)

Description Of Rock Springs Facility.

[6] The same *National Highway Traffic Safety Administration's Visual Detection of DWI Motorists* referred to in the *Brief for Amici Curiae*

Trooper Smith testified that he was aware there was a Ducks Unlimited banquet being held at Rock Springs[7]. (T pp.7-8,13-14) Rock Springs is approximately one-half mile north from Ironwood on N.C. 43. (T p. 8) He did not know if alcohol was being served at the banquet. (T p.8) Trooper Smith testified that he had never been inside of Rock Springs, and had never witnessed anybody drinking alcohol at Rock Springs, but he had heard that they do serve alcohol. (T p. 8)

Although the Explorer was travelling south on N.C. 43, Trooper Smith had no idea where it was coming from, and was not specifically targeting any vehicle coming from Rock Springs. (T pp. 9-10)

Trooper Smith indicated that he was familiar with the downtown area of Greenville that has bars that serve alcohol and play dance music where all the college kids go. (T p. 15) Trooper Smith testified that he would not consider the area of

Rock Springs and Ironwood the same as downtown Greenville. (T p.15) Trooper Smith was asked and answered as follows:

Q. I guess, Trooper Smith, what I'm asking is: The downtown area of Greenville where all the college kids go to and there's multiple bars that serve alcohol and play dance music, you would not consider the

[7] Trooper Smith was referring to the Rock Springs Center and The Jockey Club. According to its website, it caters to multiple functions including anniversary parties, bat and bar mitzvahs, birthday parties, black tie affairs, bridal showers, business expos, business retreats, corporate functions, fashion shows, fund raisers, holiday parties, luncheons, meetings, musical festivals, receptions, rehearsal dinners, theatrical productions, theme parties, weddings, and wedding receptions, and is not generally open to the public. See, http://rockspringscenter.com/index.html .

area you were in out there the same as that, would you?

A. No sir. Not specifically, no. (T p. 15)

Aerial View Map And Description of N.C. 43.

Defendant introduced, without objection, *Defendant's Exhibit No. 1* which is an aerial view map of the area where Trooper Smith was initially parked at Ironwood to the point where the Explorer pulled over in response to the blue lights. (T pp.20,22, *Defendant's Exhibit 1*) Trooper Smith put an "X" on the map to mark the area where he was initially parked on Golf Club Wynd. He put "TM" on the map to indicate the location of the Trade Mart at the intersection of N.C. 43 and MacGregor Downs Road. (T p.21) The roadway to the north of where Trooper Smith was initially sitting, before pulling out, is straight, without curves. (*Defendant's Exhibit 1*[8]) The evidence indicated that the Explorer operated in a normal fashion as it came from this direction of travel. (T pp. 15-16)

Once you pass the Trade Mart, N.C. 43 is a two lane road lane, approximately 20 to 22 feet across; the southbound lane occupied by the Explorer is approximately 10 feet from the

[8] *Defendant's Exhibit 1* is an aerial view of the location obtained from the website for the *City of Greenville, NC*, in its Online Mapping section. See, http://www.greenvillenc.gov/departments/info_tech_dept/information/default.aspx?id=1117

centerline to the fog line. (T p. 22) The Explorer is approximately 6 and one-half to seven feet wide; this would give the Explorer approximately 18 inches on each side before touching the centerline of fog line. (T p.23)

N.C. 43 curves to the left in two different areas between where Trooper Smith was initially parked and where the Explorer was stopped in response to the blue lights. (*Defendant's Exhibit 1*) There is a curve approximately two-thirds of the way between Golf Club Wynd and the Trade Mart, and a second curve beginning at the Trade Mart. (*Defendant's Exhibit 1*) The first curve is sharper and shorter than the second. (*Defendant's Exhibit 1*) The second curve is gradual in nature and longer than the first. (*Defendant's Exhibit 1*)

Contextual/Reputation Evidence Of Rock Springs/Ironwood Area.

The state did not offer any evidence nor suggest that the area around Rock Springs/Ironwood or N.C. 43 was targeted because of impaired drivers travelling this area. In the same vein, the state did not offer any evidence that drivers license/registration or DWI checkpoints had been conducted in this area and produced any results. Specifically, no evidence

was offered to support any alcohol violations being issue in this area. Likewise, the state did not offer any evidence of accidents, crashes or "Lane/Departure Crashes" in this area that

involved alcohol. No evidence was offered that Trooper Smith or any other law enforcement officer had ever issued any DWI or alcohol-related citation in this area. (T pp. 1-49)

ARGUMENT

Standards of Review: Findings of Fact and Conclusions of Law.

The trial court erred when it entered the order denying her motion to suppress the evidence obtained after the stop of her Explorer, seizure of her person, and subsequent arrest. When reviewing the trial court's order, this Court has stated that it must first determine if the trial court's findings of fact are supported by ***substantial competent evidence***. *State v. James, 321 N.C. 676, 365 S.E.2d 579 (1988);* and *State v. Rose, 170 N.C. App. 284, 612 S.E.2d 336, disc. rev. denied, 359 N.C. 641, 617 S.E.2d 656 (2005)*(emphasis added). If these findings are supported by substantial competent evidence, they are conclusive and binding on appeal. *State v. Gabriel. 192 N.C. App. 517, 665 S.E.2d 581 (2008).*

"Substantial evidence" means "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v.*

Perales, 402 U.S. 389,401, 91 S.Ct. 1420 (1971); and *Edison Co. v. Labor Board,* 305 U.S. 197,229, 59 S.Ct. 206 (1938)

Second, this Court must determine if those findings support the trial court's conclusions of law. *State v. Barden, 356 N.C. 316, 572 S.E.2d 108 (2002).* This Court's review of the conclusions of law is *de novo*. *State v. Yencer, 364 N.C. 441, 701 S.E.2d 680 (2011); State v. Biber, 365 N.C. 162, 712 S.E.2d 874 (2011); State v. Edwards, 185 N.C. App. 701, 649 S.E.2d 646, disc. rev. denied, 362 N.C. 89, 656 S.E.2d 281 (2007);* and *State v. Chadwick, 149 N.C. App. 200, 560 S.E.2d 207, disc. rev. denied, 355 N.C. 752, 565 S.E.2d 672 (2002).* "A trial court's conclusions of law regarding whether the officer had reasonable suspicion {or probable cause] to detain a defendant is reviewable *de novo*." *State v. Wilson, 155 N.C. App. 89,93-94, 574 S.E.2d 93,97 (2002).* The "conclusions of law must be legally correct, reflecting a correct application of the applicable principles to the facts found." *State v. McLamb, 186 N.C. App. 204, 649 S.E.2d 902,903 (2007), quoting State v. Buchanan, 353 N.C. 332, 336, 543 S.E.2d 823,826 (2001); See*

also, State v. Brown, __ N.C. App. __, __ S.E.2d __, 2011 WL 6369791 (2011)

The state has the burden to demonstrate the admissibility of the challenged evidence. *State v. Cheek, 307 N.C. 552, 299 S.E.2d 633 (1983); See also G.S. § 15A-977.* The state must convince the trial court, sitting as trier of fact, by a preponderance of the evidence, that the facts it relies on to sustain admissibility and which are at issue are true. *Cheek, supra.*

I. THE TRIAL COURT'S FINDING OF FACT NO. 5 THAT TROOPER SMITH KNEW THAT ROCK SPRINGS SERVED ALCOHOL IS NOT SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE WHERE: (a) HE DID NOT KNOW IF ALCOHOL WAS BEING SERVED AT THE DUCKS UNLIMITED BANQUET; (b) HE HAD NEVER BEEN INSIDE OF ROCK SPRINGS; AND (c) HE HAD NEVER WITNESSED ANYONE DRINKING ALCOHOL AT ROCK SPRINGS.

As noted above, there must be such substantial evidence that a reasonable mind might accept as adequate to support the finding of fact made by the trial court. *Richardson*; *Edison*; and *James*, *supra.* The state must produce that evidence which a reasonable mind would accept as true to support the conclusion. *Cheek*, *supra.* For the reasons that follow, this burden has not been met as it relates to the trial court's finding of fact that Trooper Smith knew that Rock Springs served alcohol.

Trooper Smith testified that he was aware there was a Ducks Unlimited banquet being held at Rock Springs. (T p.7) He did

not indicate when it had been brought to his attention, either before or after the stop of defendant's vehicle. (T pp. 3-24)

Trooper Smith specifically testified that he did not know if alcohol was being served that day or that night. (T p. 8) When he was questioned by the prosecutor about this, he replied as follows:

> Q. And do you know whether or not alcohol was being served at that function?
>
> A. I do know—-I didn't specifically at that day or that night if alcohol was being served. (T p.8)

His answer can be interpreted one of two ways. First, that he did not know if alcohol was being served at the Ducks Unlimited banquet, or that he did not know that night if alcohol was being served. The later interpretation implies that he was informed after the event about the issue. Either interpretation fails to support the trial court's finding that Trooper Smith knew that Rock Springs served alcohol.

Trooper Smith testified that he personally had never been inside of Rock Springs, and that he had never witnessed anybody drinking alcohol in Rock Springs. (T p.8) The state did not offer any evidence to suggest, either by direct or indirect means, that Trooper Smith or any other law enforcement officer had ever taken any enforcement action against a driver who had

been at Rock Springs, consumed alcohol, and thereafter, left the facility operating a motor vehicle. (T pp. 3-24)

There was no evidence offered to support that Trooper Smith knew from his own knowledge or from any source he deemed reliable that alcohol was served at Rock Springs. To the contrary, he said he had heard that Rock Springs sometimes serves alcohol. (T p.8) He did not say when he heard that information, from who he heard it, or whether he considered the source reliable. In fact, Trooper Smith never testified that "he knew" that Rock Springs served alcohol. To the contrary, his testimony clearly indicated that he did not have the basis of information to know whether or not Rock Springs served alcohol.

The contextual character or reputation of Rock Springs can be a factor when this Court considers the "totality of the circumstances" set forth below. Proximity to bars/nightclubs can be a factor when undertaking such consideration. *See, State v. Watson, 122 N.C. App. 596, 472 S.E.2d 28 (1996); State v. Jacobs, 162 N.C. App. 251, 590 S.E.2d 437 (2004); and State v. Roberson, 163 N.C. App. 129, 592 S.E.2d 733 (2004).* It is this reason that the state tries in vain to characterize Rock Springs as such. The evidence offered to the trial court expressly contradicts such a characterization and reliance; the Court of

Appeals acknowledged this point in their opinion. (*Slip at pp.5-6)*

Trooper Smith acknowledged that he was familiar with areas in Greenville that would be considered home to bars/nightclubs, and that he did not consider Rock Springs in such fashion. (T p.15) This distinction is important because "unlike an establishment which regularly serves alcohol such as a bar or restaurant, there [is] no basis upon which Trooper Smith could presume that alcohol was served that evening at an equestrian club." *Id.*

For these reasons, the trial court erred in making this finding of fact and this Court should affirm the Court of Appeals decision that so indicates.

II. THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT THERE WAS A REASONABLE AND ARTICULABLE SUSPICION TO STOP DEFENDANT'S VEHICLE WHEN IT WEAVED IN ITS LANE OF TRAVEL WHILE NEGOTIATING TWO CURVES BUT OTHERWISE OPERATED AT THE POSTED SPEED LIMIT AND IN ACCORDANCE WITH ALL MOTOR VEHICLE LAWS.

Standards of Review: Investigatory Stop.

Under the Fourth Amendment and Article I, § 20 of the North Carolina Constitution, police may conduct a brief investigatory stop where they have a reasonable and articuable suspicion of criminal activity. *State v. Peele, 196 N.C. App. 668, 675 S.E.2d 682 (2009), disc. review denied 365 N.C. 587, 683 S.E.2d*

383 (2009); and *State v. Hughes, 353 N.C. 200,539 S.E.2d 625 (2000).* "Traffic stops have 'been historically reviewed under

the investigatory detention framework first articulated in *Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).'" State v. Styles,* 362 *N.C. 412,414, 665 S.E.2d 438,439 (2008). Styles* also held that an investigatory stop must be supported by a "reasonable, articulable suspicion that criminal activity is afoot." *Styles* at 414.

"The requisite degree of suspicion must be high enough to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." *State v. Fields, 195 N.C. App. 740,744,673 S.E.2d 765,767 (2009)* ***The police officer must have more than an "unparticularized suspicion or hunch" before he is justified in conducting an investigatory stop***. *Terry, supra*(emphasis added). This Court has specifically stated that there must be "a minimum level of objective justification, ***something more than an 'unparticularized suspicion or hunch.'***" *State v. Watkins, 337 N.C. 437, 442,446 S.E.2d 67,70 (1994)* (emphasis added) This Court should consider the totality of circumstances in determining whether a reasonable and articulable suspicion existed. *State v. Barnard, 362 N.C. 244, 658 S.E.2d 643, cert. denied 129 U.S. 264, 172 L.Ed.2d 198*

(2008). However, "[t]he reasonable suspicion must arise from the officer's knowledge prior to the time of the stop." *State v.*

Hudgins, 195 N.C. App. 430,433, 672 S.E.2d 717,719(2009); Florida v. J.L., 529 U.S. 266 (2000).

A. No Evidence That The Explorer Was Operated In High-Crime/Drug Area; Near Bars/Nightclubs; Or Late Hour Of The Night.

Proximity to areas known for drug or criminal activity can be a factor for determining reasonable suspicion. *See, Brown v. Texas, 443 U.S. 47 (1979); State v. Fleming, 106 N.C. App. 165, 415 S.E.2d 782 (1992); State v. Butler, 331 N.C. 227, 415 S.E.2d 719 (1992);* and *State v. Cornelius, 104 N.C. App. 583, 410 S.E.2d 504(1991*). In a like fashion, proximity near bars/nightclubs and operating late at night are appropriate factors for consideration by the trial court in its determination of reasonable suspicion. *State v. Fields, 195 N.C. App. 740, 673 S.E. 2d 765 (2009), disc. review denied 363 N.C. 376, 679 S.E.2d 390 (2009);* and *State v. Peele, 196 N.C. App. 668, 675 S.E.2d 682(2009), disc. review denied 365 N.C. 587, 683 S.E.2d 383 (2009).* There is no evidence in this case that any of these factors existed.

Trooper Smith indicated that he did not consider the Rock Springs area similar to other areas known to him to be occupied by bars/nightclubs.(T p. 15) Likewise, his observations began

at approximately 10:59 p.m., a time historically not considered late. The state did not offer any evidence that this area was

targeted for impaired drivers, had been the subject of any checkpoints for DWI, or any other criminal offenses. The state did not offer any evidence of accidents, crashes or "Lane/Departure Crashes in this area. The record is barren of evidence that any law enforcement officer had ever issued any DWI or alcohol-related charge in this area.

The absence of these factors is a consideration that shines just as bright a beacon on the absence of reasonable suspicion as their presence would do to the contrary.

B. The Explorer Operated In Accordance With All Motor Vehicle Laws That Applied To Its Operation And Specifically, Did Not Violate *G.S. § 20-146* While Operating On N.C. 43.

The evidence reflects that there was nothing unusual about the operation of the Explorer as it approached from Trooper's Smith right, crossed in front of him, and continued south on N.C. 43 towards Greenville; this section of N.C. 43 is straight. Trooper Smith did not pull out behind the Explorer because of any concern he had for the driver, or the way in which the Explorer operated . (T pp. 15-16, 1-49) While the Explorer was negotiating two curves, Trooper Smith observed it weave within its lane of travel for 5 to 10 seconds. (T p. 5,

Defendant's Exhibit 1) The state offered no evidence that it crossed or even touched the centerline or the fog line, or came close to doing so.

The *Supreme Court of Iowa* affirmed the trial court's grant of a defendant's motion to suppress under similar circumstances when analyzing their statute which is virtually identical to *G.S. § 20-146. State v. Tague, 676 N.W.2d 197 (2004); See also, Rowe v. Maryland, 363 Md. 424, 769 A.2d 879 (2001).* Another court also observed that "[a]ll vehicles and drivers weave within their lanes to some extent. This is why we have ten to twelve foot lanes to accommodate [vehicles] which are usually only five to eight feet wide." *State v. Spikes, 1995 WL 407357.* The "statute presumes a certain degree of common sense will be applied to the review of a driver's actions by requiring that a driver shall drive 'as nearly as practical within a single lane…' *and* that he may not move from the lane unless the movement can be made safely." *State v. Rowe, 363 Md. 424,436, 769 A.2d 879,886 (2001) quoting Corbin v. State, 33 S.W.3d 90 (Tex. App. 2000)*

C. Summary Of North Carolina Weaving Cases.

Our appellate courts have had numerous opportunities to consider "weaving cases". ***Weaving can contribute*** to a reasonable and articulable suspicion of driving while impaired

(emphasis added). "However, in each instance, the defendant's weaving was coupled with ***additional specific articulable facts***, which also indicated that the defendant was driving while impaired."(emphasis added) *Fields at 744; See also, State v. Tarvin, 972 S.W.2d 910 (1998)* This is consistent with this Court's statement that the "totality of circumstances" must be taken into account when determining whether there is a reasonable and articulable suspicion. *Roberson and Barnard, supra.* This analysis is also consistent with the overwhelming majority of jurisdictions that have considered "weaving" cases as noted hereinafter.

When this case is compared to the "weaving" cases in our appellate courts, it is clear that the stop of defendant's Explorer was not based upon a reasonable suspicion. Defendant specifically contends that there is not one case in our appellate case law that would support a reasonable suspicion for the stop of a vehicle that is traveling at the speed limit; operates in a normal fashion on the straight section of the highway; weaves in its travel lane for 5 to 10 seconds while negotiating two curves and never touching the centerline or fog line, but otherwise operates in a normal fashion; and is not operating late at night or near any bars or areas known for criminal activity.

The representative "weaving" cases that upheld the stop are as follows: *State v. Adkerson, 90 N.C. App. 333,368 S.E.2d 434 (1988)*(At 2:00 a.m. defendant weaved in his lane 5/6 times and ran off road); *State v. Aubin, 100 N.C. App. 628,397 S.E.2d 653 (1990)*(Defendant driving 20 mph below speed limit on interstate and weaving); *State v. Jones, 96 N.C. App. 389, 386 S.E.2d 217 (1989), disc. review denied, 326 N.C. 366,389 S.E.2d 809 (1990)* (Defendant driving 20 mph below speed limit on interstate and weaving, Trooper made several 1000 arrests for DWI); *State v. Watson, 122 N.C. App. 596,472 S.E.2d 28 (1996)*(Defendant driving at 2:30 a.m., weaving and driving on lane divider in curb, weaving for 15 seconds, next to bar); *State v. Thompson, 154 N.C. App. 194, 571 S.E.2d 673 (2002)*(Defendant driving 55mph in 35 mph zone, weaving, and touching centerline twice); *State v. Jacobs, 162 N.C. App. 251, 590 S.E.2d 437 (2004)*(Defendant driving at 1:43 a.m., weaving for 3/4 of mile near several bars, touching designated lane markers on each side, and information that a murder suspect operating a vehicle with Tennessee tags was in Burlington area and vehicle tags were Tennessee); *State v. Baublitz, 172 N.C. App. 801, 616 S.E.2d 615 (2005)*(Defendant left known drug dealer's residence and crossed centerline); *Mercer v. Howard, 174 N.C. App. 839, 622 S.E.2d 522(2005)*(Driver speeding 8 mph above speed limit and weaving in his lane);*State*

v. Hiatt[9]*, *** N.C. App. ***,645 S.E.2d 902 (2007)*(Anonymous tip about impaired driver, defendant driving 15 mph below speed limit, and weaving for 3/4 of mile); *State v. Hudson, __ N.C. App.__, 696 S.E.2d 577 (2010)*(Defendant crossed center dividing line and weaved over fog line 2 times)*; State v. Simmons, __N.C. App. __, 698 S.E.2d 95 (2010)*(Defendant weaving within his lane and weaving across and outside of lanes, and off the road); *State v. Brown*[10]*, ***N.C. App. ***, 699 S.E.2d 685(2010)* (Defendant driving at 1:40 a.m. 10 mph below speed limit and weaving); and *State v. Durham*[11]*,*** N.C. App. ***, 711 S.E.2d 875(2011)(D*efendant drove around block 3 times, brief conversation with occupants in another vehicle and crossed double yellow line 2 times)

The representative "weaving" cases that held the stop invalid are as follows: *State v. Fields, 195 N.C. App. 740, 673 S.E.2d 765 (2009), disc. review denied 363 N.C. 376,679 S.E.2d 390 (2009)*(Defendant weaving over the course of 1 and 1/2 miles); and *State v. Peele, 196 N.C. App. 668,675 S.E.2d 682 (2009), disc. review denied 365 N.C. 587,683 S.E.2d 383*

[9] This is an unpublished opinion and is offered pursuant to Rule 30(e) of the North Carolina Rules of Appellate Procedure. A copy is attached to the Appendix to this Brief and served upon the state and the Court.

[10] This is an unpublished opinion and is offered pursuant to Rule 30(e) of the North Carolina Rules of Appellate Procedure. A copy is attached to the Appendix to this Brief and served upon the state and the Court.

[11] This is an unpublished opinion and is offered pursuant to Rule 30(e) of the North Carolina Rules of Appellate Procedure. A copy is attached to the Appendix to this Brief and served upon the state and the Court.

*(2009)(*anonymous tip about impaired driver and weaved over the course of 1/10 of mile).

D. Application Of Weaving Case Law To Defendant's Case.

"The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances….Anything less would invite intrusions upon constitutionally guaranteed rights." *Fields at* 745. "The facts and inferences [available to Trooper Smith] must yield the 'substantial possibility that criminal conduct has occurred, is occurring, or is about to occur' in order for an in investigatory stop to be valid." *State v. Battle, 109 N.C. App. 367,370,427 S.E.2d 156,158(1993).*

In this case, Trooper Smith never observed any conduct that constituted a traffic violation. Several states have recognized that where the officer cannot articulate a true traffic violation as the basis for the stop, then there is not a legal basis for the stop. *See, Rowe v. Maryland, 363 Md. 424,769 A.2d 879(Md. Ct. Spec. App. 2001)*(Citing cases from other jurisdictions) In this same reasoning, "if the failure to follow a perfect vector down the highway is a sufficient basis

to stop a motorist, then a substantial portion of the public would be subject each day to an invasion of their privacy." *United States v. Gregory,* 79 F.3d 973,979 (10th Cir. 1996)*; See also, United States v. Lyons, 7 F.3d 973 (10th Cir. 1993)* and *State v. Bello, 871 P.2d 584 (Utah 1994)*.

Trooper Smith testified the Explorer approached from his right and crossed in front of him as he sat in the exit. The vehicle was travelling at the posted speed limit. There was nothing unusual about the operation of the vehicle as it approached from his right, crossed in front of him, and continued south on N.C. 43 towards Greenville; this section of N.C. 43 is straight (T pp.15-16, *Defendant's Exhibit 1*)

When he got behind the vehicle, he observed it weave within its travel lane for approximately 5 to 10 seconds. During this time, the vehicle was negotiating two curves; the first, sharper and shorter than the second; and the second, a curve, gradual in nature and longer than the first. *See, Defendant's Exhibit 1(Aerial View)*. The vehicle was still travelling the posted speed limit while Trooper Smith was behind it. Defendant's vehicle never crossed, or even touched the centerline or the fog line. (T pp. 5-10) Other than the weaving that occurred within the vehicle's lane of travel, there was nothing else Trooper Smith noticed about its operation.

This Court should note that the weaving occurred within a lane that was approximately 10 feet wide from the centerline to the fog line, and that the vehicle was approximately 6 and 1/2 to 7 feet wide. (T p.23) Thus, the defendant's vehicle had approximately 18 inches on each side of it before touching either line, while negotiating two curves. *See, Spikes, supra.*

Defendant's vehicle did not affect any motor vehicle or pedestrian traffic. Further, Trooper Smith did not observe any unusual actions inside the vehicle, and the vehicle's lighting equipment, tags, and inspection certificates were in order.

As one court has observed, operating a vehicle within your lane is "controlled weaving". *See, State v. Tarvin, 972 S.W. 2d 910 (1998).* Consistent with this opinion is the position that defendant's operation falls "within the broad range of what can be described as normal driving behavior". *See, State v. Roberson, 163 N.C. App. 129,133,592 S.E.2d 733,735 (2004); and State v. Emory, 119 Idaho 661, 809 P.2d 522 (1991).*

The state may posit that defendant was operating in an area of bars. This position is untenable for the reasons set forth under *Argument I.* and *Argument II.A.* above.

E. Consistent With *North Carolina*, The Overwhelming Majority Of Jurisdictions Require That Weaving Within One's Own Lane Must Be Coupled With Additional Specific Articulable Facts To Constitute Reasonable Suspicion.

Our courts have acknowledged that ***weaving can contribute*** to a reasonable and articulable suspicion.(emphasis added) "However, in each instance, the defendant's weaving was coupled with additional specific articulable facts." *Fields at 744*. The dissent points out "that the overwhelming weight of authority from other jurisdictions holds that repeated intra-lane weaving can create reasonable suspicion of impaired operation." *State v. Otto, No. COA11-189, Slip at 9.* The dissent quotes *State v. Pratt, 182 Vt. 165, 932 A.2d 1039 (2007)* to support this proposition. To the extent that this statement is offered or accepted by the dissent to support that weaving within one's lane alone is sufficient for reasonable suspicion, it is not correct. An examination of *Pratt* and other cases referenced in the opinion, confirms a position that is consistent with the North Carolina appellate cases cited above.

In *Pratt*, the court upheld the stop. The vehicle was not only weaving, but was also operating in the early morning hours and weaved in its lane for over five miles. Despite these additional facts, a dissenting opinion was filed. The collection of cases in *Pratt*, including numerous others cited in the collection of cases, 32 total, have been thoroughly reviewed and are summarized in the *Appendix under the topical heading* ***State v. Pratt, 182 Vt. 165, 932 A.2d 1039 (2007).***

In every case where the stop was upheld, there were additional fact(s) beyond the weaving. Those factors included early morning hours; extended distances; anonymous tips; information from other officers; headlamp violations; touching divider or fog line; driver slumped over at wheel; fail to stop for blue lights; grounds to believe driver impaired before getting into vehicle; crossed centerline or divider line; registration violation; slow speed; leaving known drug area; changing lanes without signal; and erratic driving. In several of the cases, dissenting opinions were filed. *See, Pratt; Boyea; Gaddis ex rel.;* and *Tompkins.*

Additionally, several of the cases held the stop improper where the weaving was within the lane or slight deviations across the line markers. *See, Freeman, Gregory, Manders, Hackett, Rush, Tague,* and *Caron, infra*. Instead of a "blanket statement" as noted in the dissent, these cases substantiate that the court in each instance examined the totality of circumstances before reaching its conclusion.

The dissent likewise states that "decisions from outside this jurisdiction have routinely held that weaving within one's lane for substantial distances are facts which give rise to a reasonable suspicion that one is driving under the influence."

State v. Otto, No. COA11-189, Slip at 9-10. The dissent quotes *People v. Perez, 175 Cal. App. 3d Supp. 8, 221 Cal. Rptr. 776 (1985)* to support this proposition. To the extent that this statement is offered or accepted by the dissent to support the blanket statement that weaving within one's lane alone is sufficient for reasonable suspicion, it too is not correct.

In *Perez*, the court upheld the stop where the vehicle was observed at 2:15 am with "pronounced" weaving on the interstate. The collection of cases in *Perez*,8 total, have been thoroughly reviewed and are summarized in the *Appendix* under the topical heading ***People v. Perez, 175 Cal. App. 3d Supp. 8, 221 Cal. Rptr. 776.*** Like the cases in *Pratt*, there were other factors that the courts considered: early morning hours; substantial distances; registered owner of vehicle was wanted; driver appeared impaired before entering vehicle; erratic driving; squealing tires; tip from other officers; leaving liquor store; crossing divider line; running other vehicle off road; and pulling onto shoulder. Again, this is consistent with the manner in which our courts have historically analyzed weaving cases. *See, Argument II.C.; See also, State v. Binette, 33 S.W.3d 215 (2000); Salter v. North Dakota DOT, 505 N.W.2d 111 (1993); Commonwealth v. Battaglia, 802 A.2d (2002); U.S. v. Freeman, 209 F.3d 464 (1999); State v. Montana, 291 Mont. 157,*

967 P.2d 363 (1998); Crooks v. State, 710 So.2d 1041 (1998); U.S. v. Conlin, 314 F.3d 439(9th Cir. 2002); Barrientos v. State, 39 S.W.3d 17 (Ark. Ct. App. 2001); and *State v. Caron, 534 A.2d 978 (Maine 1987)*

F. State's Brief And Brief For *Amici Curiae* Fail to Cite Any North Carolina Authority Or Authority From Outside Our Jurisdiction That Supports Their Contention That Defendant's Described Weaving Within Her Lane Is A Basis For Reasonable Suspicion.

Defendant has cited essentially every weaving case in North Carolina and multiple cases from outside our jurisdiction as authority for her position that the Court of Appeals was correct in its decision. The *Brief For The State* fails to cite any case in support of its position. *See, Brief For State pp. 8-10.* In a similar fashion, the *Brief For Amici Curiae* fails likewise. *See, Brief For Amici Curiae pp. 7-21.* Instead, each brief makes an emotional appeal to this Court because of the nature of the charge against the defendant. Further evidence of this emotional appeal is the State's *Statement of Facts* that contain facts learned after Trooper Smith stopped defendant; a blatant and unprincipled plea for this Court to violate constitutional principles. Reasonable suspicion must arise from Trooper Smith's knowledge prior to the stop. *Hudgins, supra.* An illegal seizure cannot be justified by what it reveals. While

defendant concedes that removing impaired drivers from the highways is important, a "consensus that a particular law enforcement technique serves a legitimate purpose has never been the touchstone of constitutional anlaysis." *Michigan State Police v. Sitz, 469 U.S. 444, 459 (1990)*

G. Trooper Smith Was Not Familiar With NHTSA's DWI Clues Nor Lane/Departure Data; As Such, This Court Should Not Consider The Same As Set Forth In *Brief For Amici Curiae.*

The state specifically asked Trooper Smith whether he was familiar with the *National Highway Traffic Safety Administration's Visual Detection of DWI Motorists*[12]. Trooper Smith testified that he was not. (T p. 24) The state did not offer any evidence to document Trooper Smith's experience with DWI arrests or *Lane/Departure Crash Data*. The state also did not offer any evidence that Trooper Smith had made any DWI arrests in this area. When there is no evidence introduced at the suppression hearing in this regard, it is improper to consider such argument if made by the state. *See, Roberson at 135, footnote 2; State v. Bonds, 139 N.C. App. 627, 533 S.E.2d 855 (2000)*

H. Trooper Smith Conceded That He Had Only A Hunch Or Suspicion About The Explorer.

[12] The same *National Highway Traffic Safety Administration's Visual Detection of DWI Motorists* referred to in The *Brief for Amici Curiae*

Trooper Smith conceded that he had only a suspicion or hunch. (T pp. 21-22) This hunch or suspicion cannot be the basis for an investigatory stop. *See, Watkins and Terry, supra;* and *U.S. v. Sokolow, 490 U.S. 1 (1989).*

I. The Operation Of The Explorer Was In A Manner Consistent With The Broad Range Of What Can Be Described As Normal Driving Behavior.

Our appellate courts as well as others from across the country, have recognized and acknowledged that officers at times "attempt to cobble observations that do not amount to violations of the law into reasonable suspicion". *Crooks v. State, 710 So. 2d 1041 (Fla. App. Ct. 2d 1998); Roberson(8-10 second delay at stop light), supra.* The United States Court of Appeals for the Fourth Circuit recently expressed a similar concern, to wit: "We also note our concern about the inclination of the Government toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity." *U.S. v. Foster, 634 F.3d 243 (2011)*

In this same vein, our courts have stated that there is a broad range of what can be described as normal driving behavior. *Roberson, supra.* Driving conduct "must be evaluated against the backdrop of everyday driving experiences" *Roberson, supra, quoting State v. Emory, 119 Idaho 661,664, 809 P.2d 522,525 (1991)*

After an exhaustive and objective examination of weaving cases, it is clear that defendant's case is readily distinguishable from the "weaving" cases where the stop was upheld, and that defendant's conduct falls with the broad range of what can be described as normal driving behavior. To decide otherwise would subject a substantial portion of the motoring public to an unwarranted invasion of their privacy based on conduct that is considered normal driving behavior. Accordingly, the Court of Appeals was correct when it ruled that the trial court erred when it held that there was a reasonable and articulable suspicion to stop defendant's vehicle._____

CONCLUSION

For the foregoing reasons, Defendant respectfully contends that this Court should affirm the ruling of the Court of Appeals and remand this matter back to the trial court division, with instruction to enter an order granting the defendant's motion to suppress.

Respectfully submitted this the 2nd day of February, 2012.

THE ROBINSON LAW FIRM, P.A.

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LESLIE S. ROBINSON
Attorney for Defendant/Appellee
1510 East Arlington Boulevard
Greenville, North Carolina 27858
Telephone: 252.758.4100
Electronic Mail: les@therobinsonlawfirm.com

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of BRIEF FOR DEFENDANT/APPELLEE upon the State of North Carolina in accordance with the provisions of Rule 26 of the North Carolina Rules of Appellate Procedure by placing the same in the United States Mail, first class postage prepaid, addressed to the State's attorney as follows:

William P. Hart, Jr.
Assistant Attorney General
Department of Justice
Post Office Box 629
Raleigh, NC 27602

Tiffanie W. Sneed
President of NC Assoc. of Police Attorneys
828 Martin Luther King Jr. Blvd.
Chapel Hill, NC 27514

Isaac T. Avery, III
The Avery, P.C.
Post Office Box 10174
Raleigh, NC 27605

Edmond W. Caldwell, Jr.
Executive Vice President and General Counsel for NC Sheriff's Association
Post Office Box 20049
Raleigh, NC 27619

This the 2nd day of February, 2012.

THE ROBINSON LAW FIRM, P.A.

_____

LESLIE S. ROBINSON
Attorney for Defendant/Appellee
1510 East Arlington Boulevard
Greenville, North Carolina 27858
Telephone: 252.758.4100
Electronic Mail: les@therobinsonlawfirm.com

NO. 523A11 THREE-A DISTRICT

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Pitt County
	)	No. 08 CRS 52165
MEGAN SUE OTTO,	)	
Defendant/Appellant.	)	

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APPENDIX

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