IN THE STATE COURT OF CHATHAM COUNTY STATE OF GEORGIA

Accusation No. R11110317

STATE OF GEORGIA

versus

One Lucky Client

Brief in Support of Motion to Suppress

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Preliminary Statement

Thursday, June 14, 2012, the Court conducted an evidentiary hearing on Defendant's motion to suppress evidence from a traffic stop by the Georgia State Patrol for lack of reasonable suspicion to stop her. The State called a single witness, Trooper Big Gun, to testify to the facts related to the traffic stop, search, and seizure. Following the evidentiary hearing, Judge Coolidge asked Defense counsel to write a brief on this question: if an officer mistakenly believes a person committed a traffic violation even though there was no violation, does the officer have an objective reasonable suspicion to stop?

The controlling question for resolution by the Court is whether Trooper Gun was authorized to make a *Terry*-type investigative traffic stop. The Court must make an independent judicial determination as to whether Trooper Gun

established "an objective basis" for a "reasonable suspicion" to believe Defendant had committed a crime.

"The poorest man may, in his cottage, bid defense to all the force of the crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dare not cross the threshhold of this ruined tenement." William Pitt, the Elder (in Parliament circa 1763)

Argument and Citation to Authorities

Defendant's driving did not violate O.C.G.A. § 40-6-16 because she was going 55 m.p.h. around a curve, so it was impossible for her to move over. Trooper Gun did not have objective reasonable suspicion that Defendant violated O.C.G.A. § 40-6-16. The stop was an illegal seizure in violation of the Fourth Amendment.

A traffic stop must be justified by objective, specific, articulable facts that show reasonable suspicion of criminal conduct. *State v. Mincher*, A11A1906 Ga. App., 2012. In *Mincher*, the Court held there was no objective basis for a reasonable suspicion to stop because the Defendant did not commit a traffic violation even though the cop believed Defendant committed a traffic violation. By italicizing the word "***objective***" twice, the Court signaled that they recognize the mistake of law rule that the Federal Courts use.

In *State v. Goodman*, 220 Ga App. 169, 469 S.E. 2d 327 (1996) the Court found the stop was not justified by a reasonable suspicion or objective manifestation that Defendant committed a traffic in the officer's presence, even though the officer believed Defendant committed a traffic violation.

Georgia Courts have held "All citizens, including law enforcement officers, are presumed to know the law, and their ignorance of it is no excuse." [1]

The subjective belief of police in making detentions is not relevant. *Whren v. United States*, 517 U.S., 806 (1996) Good faith in a warrantless detention is not an exception to the requirement that the officer have an objectively reasonable suspicion of unlawful conduct. [2]

The law requiring "a particularized and objective basis" for a traffic stop has been well-settled law at least beginning with the decision in *U. S. v. Brignoni-Ponce*, 422 U.S.873, 95 S. Ct. 2574 (1975), decided more than 30 years ago. *U. S. v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir., 2000), held a traffic stop based on a mistaken understanding of the law regarding the placement of registration stickers on automobiles in California "was not

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[1] *Hameen v. State*, 246 Ga. App. 599, 600 (2000)

[2] *Whren v. United States*, 517 U.S., 806 (1996)

objectively grounded in the governing law" and was unconstitutional; the Court specifically rejected the government's argument the officer's traffic stop was made in "good faith" in referring to the decision in *U.S. v. Leon*, 468 U.S.897, 104 S. Ct. 3405 (1984). A trooper's incorrect belief that a motorist is in violation of state traffic laws is insufficient to justify a stop. *United States v. Lopez-Valdez*, 178 F.3d 282, 288 (5th Cir. 1999). A mistake of law cannot provide reasonable suspicion for a stop. *United States v. Chanthasouxat*, 342 F. 3d 1271 (11th Cir., 2003).

All three appellate decisions said the "good faith" exception to the exclusionary rule should not be extended to validate a vehicular search where the officer made a traffic stop based on a mistake of law. All three decisions said traffic stops based on officers' mistakes of law were not objectively reasonable.

While it is fair to recognize that the officer must make quick determinations based on the facts at hand, a misapplication of those facts does not then make the stop lawful. We acknowledge the sincere efforts by the officer, but the law must still be followed in the suppression motion in a dispassionate erudite manner.

When the officer stopped Defendant, he did so based upon a mistaken

belief that she violated O.C.G.A. § 40-6-16. The statute says a person must change lanes "... *if* possible in the existing safety and traffic conditions...[3]" I-16 curves just before the spot where Trooper Gun was sitting. (Defendant's exhibit #3; Motion Transcript - p.12) He parked just past a curve on I-16. Going 55 miles per hour, these existing safety and traffic conditions made it impossible for Defendant to see Trooper Gun until she was right on top of him. For Defendant to have moved over when she saw Trooper Gun at 55 m.p.h. coming around a blind curve, while she's merging onto I-16 from Lynes Parkway she would have had to have swerved hard to the left, and risk slamming into other drivers who were already on I-16 before she merged, and she'd risk losing control of her car and killing herself along with her three passengers. Unreasonable.

Defendant testified as follows: *"Well, we were coming off on Sixteen around the curve and 'cause we were lost, none of us had ever been to Savannah before. And we came around the corner and as soon as we did I... I saw Officer Gun's lights flashing. And I looked over and there was a car to the left of me and so it was actually just so quickly that I didn't even have time. By the time I realized I was already passing him. I did slow down, sorry if it wasn't enough.*

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[3] O.C.G.A. § 40-6-16 (emphasis added)

And I did maintain my lane, I never crossed over the center line. And the only time I crossed over the right line was when I realized that he was pulling me and I put on my right blinker and stopped." (MT-29)

During the Motion Hearing (MT-15), Defense Counsel asked Trooper Gun:

Q. Another car was in the lefthand lane next to my client?
A. That's a negative.
Q. I'm sorry?
A. That's a negative. That was clear as day that there was nothin' else out there 'til she come by me and passed the other car, then another car came by which gave her ample amount of time to get over.

Then after we watched the video in open court Defense Counsel continued:

Q. Okay, Officer, so did you see that there was another car that passed right before her car on the left?
A. Uh-huh.

Then Defense counsel admitted into evidence Defendant's exhibit #4 showing another car passing before Defendant. (MT-19, 20) Then Defense counsel admitted into evidence Defendant's exhibit #5 showing Defendant's car passing the officer and you can see the third car just in front of Defendant. (MT-21) The State failed to prove or even mention how many seconds Defendant had to move over when she came around that curve and saw the

officer parked. They did not give you reaction times, nor stopping times of an ordinary driver, nor how much distance a driver would need to switch lanes when they are traveling at 55 m.p.h. (which would be 80.6 feet per second). The State has failed to prove the elements of the Move over statute that they claim Defendant violated.

Defendant's driving did not violate O.C.G.A. § 40-6-48 because she drove in her lane and there were no other cars around her or any other extenuating circumstances that caused any other drivers to take diversionary or emergency action from her driving. Trooper Gun did not have objective reasonable suspicion that Defendant violated O.C.G.A. § 40-6-48. The stop was an illegal seizure in violation of the Fourth Amendment.

The failure to maintain lane statute, O.C.G.A. 40-6-48, has counterparts in every state, and every statute reviewed by the undersigned employs identical or nearly identical language. One of the cases that reviewed a plethora of case law is *Rowe v. State*, 363 Md. 424, 769 A. 2d 879 (2001). In that case the arresting officer noticed the Appellant's van cross the "white edge line" by about eight inches, return to the slow lane of I-95, and later touch the white line again. In reversing the Appellant's conviction for a drug offense, the Court held that more than the integrity of lane markings, the purpose of the statute is to promote

safety on laned roadways. *Id*. In other words, the statute is not violated unless a vehicle fails to stay within its lane and such movement is not safe or not made safely.

As the *Rowe* court noted, the cases in which courts have upheld traffic stops based on violations of this statute involve conduct much more egregious than that in the instant case. Specifically, they distinguished *Sledge v. State*, 239 Ga. App. 301 (1999) (trying to change lanes without signaling, straddling middle and slow lanes, straddling middle and left lanes); *Maddox v. State*, 227 Ga. App. 602 (1997) (weaving across lanes of traffic onto the shoulder); *State v. Holcomb*, 219 Ga. App. 231 (1995) (weaving from shoulder of roadway to left lane). Other courts have interpreted language identical to that in the Georgia statute as requiring more for a violation than a momentary crossing or touching of an edge or lane line. *Frasier v. Driver and Motor Vehicle Services Branch* (DMV), 172 Ore. App. 215 (2001); *State v. Livingston*, 75 P. 3d 1103 (Ariz. App. 2003); *State v. Tague*, 676 N.W. 2d 197 (Iowa 2004); *State v. Prado*, 145 Wn. App. 646, 186 P. 3d 1186 (2008). These courts are not alone. In interpreting Utah's counterpart to O.C.G.A. 40-6-48, the Tenth Circuit Court of Appeals held that an isolated incident of a vehicle crossing two feet into the emergency lane on an

interstate highway was not a violation. [4] Time and again, appellate courts have held that touching or going over a fog line or edge line does not justify a stop unless the driver is operating the vehicle **erratically**. E.g., *State v. Lafferty*, 291 Mont. 157, 967 P. 2d 363 (1998); *State v. Binette*, 33 S.W. 3d 215 (Tenn. 2000); *Commonwealth v. Garcia*, 859 A. 2d 820 (Pa. Super. 2004); *U.S. v. Sugar*, 322 F. Supp. 2d 85 (D. Mass. 2004).

In *Crooks v. State*, 710 So. 2d 1041 (Fla. App. 1998), the court held that even if the driver was briefly outside the margin of error, there is no objective evidence suggesting that he failed to ascertain that his movements could be made safely. *Id*. At 1043. The *Crooks* court also observed that a violation does not occur in isolation, but requires evidence that the driver's conduct created a reasonable safety concern. *Id*. Once again, although weaving within a lane of traffic can justify a traffic stop, there must be something more than merely touching or even going over a fog line; there must be evidence of erratic or unsafe operation of the motor vehicle. *State v. Cerny*, 28 S.W. 3d 796 (Tex. App. 2000); *State v. Tarvin*, 972 S.W. 2d 910 (Tex. App. 1998).

In virtually every one of the persuasive precedents cited in this Motion

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[4] *United States v. Gregory*, 79 F. 3d 973 (10th Cir. 1996)

the driving that the various appellate courts held did not justify a stop was worse than the driving in this case. Perhaps no court has gone further than holding, "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." *State v. Caron*, 534 A. 2d 978 (Maine 1987) (straddled the center line for 25 to 50 yards). We do not ask this honorable court to "push the envelope" like your judicial brethren in Maine but to afford the statute a common sense interpretation and limit police intrusion to those cases involving erratic driving, which means more than merely touching a fog line under circumstances that offer no hint of danger to the safety of others or their property.

The statute does not criminalize the sole action of moving out of one's own lane. Two things must be present before one can violate the statute. First, the driver must move out of his or her lane of travel. Second, the driver must also move out of his or her lane of travel without first ascertaining that such movement can be made with safety. Thus, a driver crossing a lane line does not establish a prima facie violation of such law. The evidence must

address additional conditions of practicality and safety, for which the state bears the burden of proof.

In this case, Defendant testified that she never failed to maintain her lane. (MT-29) The video shows that Defendant never crossed any lane lines. (Defendant's Exhibit #6) After we played the video in open court showing that Defendant never even touched a lane line and she never failed to maintain lane, Defense counsel asked Trooper Gun "You saw her actual tire go over the line?" (MT-24) Trooper Gun replied, "Yes, sir, I seen it again. -- I think I even said she went over the right line; **I just put that in my report just to make sure to cover myself."** (MT-24) Trooper Gun testified that Defendant never caused any other car to take diversionary emergency action. (MT-25) Trooper Gun testified that there were no other cars around her. (MT-25) Defendant did not drive her car off the roadway and did not come close to striking another vehicle, an individual, or anything else.

The State cannot prove that each element of each statute was violated. If the officer's investigative traffic stop was not proven lawful, any evidence, observation or information obtained as the result of the unlawful traffic stop is

inadmissible.[5]

Therefore, Defendant moves this Court to suppress all evidence obtained after her unlawful detention, including but not limited to any statements made to the investigating officer(s), testimony regarding the performance or evaluation of any field sobriety tests, the reading of the implied consent advisement, and the results of any state administered test of the Defendant's breath.

Respectfully submitted this 29th day of June, 2012.

_____
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[5] *State v. Jones*, 214 Ga. App. 593 (1994)

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Certificate of Service

I certify that I handed and served a copy of the *Brief in Support of Motion to Suppress* in the above-styled case to Larry Chisolm, District Attorney of Chatham County (or one of his assistants), at 133 Montgomery Street, Savannah, Georgia, 31401 by hand delivery.

Respectfully submitted this 29th day of June, 2012.

_____
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