

STATE OF VERMONT

SUPERIOR COURT
Bennington Unit

CRIMINAL DIVISION
Docket Nos.

State of Vermont

v.

DECISION ON MOTIONS

~~D. B. S.~~ Defendant

Defendant is charged with driving under the influence of alcohol contrary to 23 V.S.A. § 1201(a)(2). The criminal matter and related civil-suspension proceedings are before the court on motions to suppress the evidence against him, which he maintains was obtained in violation of the Fourth Amendment to the U.S. Constitution and Chapter I, Article 11 of the Vermont Constitution. argues that the arresting officer lacked reasonable suspicion to stop him for failing to drive on the right of the road because he touched the center lines but did not "cross" them as the term has been interpreted by the Vermont Supreme Court. A hearing was held on May 10, 2019, during which the officer and testified. A video of the stop was also introduced as evidence. For the reasons that follow, the motions to suppress in the criminal and civil-suspension matters are GRANTED.

FINDINGS OF FACT

On December 15, 2018, at about 10:17 PM, Vermont State Trooper Raymond Witkowski was on patrol near the town of Winhall. Trooper Witkowski's cruiser was stationary on a driveway perpendicular to Route 30 when he saw a vehicle drive along Route 30 and commit what the trooper believed to be a violation of 23 V.S.A. § 1031, which obliges drivers to drive on the right half of the roadway. The trooper's affidavit states—but the court does not find—that the vehicle "appeared to have crossed over the double yellow center lines." This observation was not captured on the cruiser's video camera due to the camera's range of view and the perpendicular position of the cruiser to the roadway. At the hearing, the officer testified—but the court does not find—that he stopped the vehicle because he "observed that it crossed over the double yellow center line of the roadway with its driver-side tires."

The trooper proceeded to follow the vehicle. The affidavit states, the officer testified, the video shows, and the court finds that while the trooper was following, the left tires of the vehicle drove on the double yellow center lines. In the affidavit, the trooper affirmed: "I observed that the driver's side tires of the vehicle appeared to be on the double yellow lines on at least two occasions as I was catching up to the vehicle. This is a violation of Title 23 VSA Section 1031, Driving to the Right."

VERMONT SUPERIOR COURT
BENNINGTON UNIT

SEP -5 2019

The trooper then stopped the vehicle. Upon making contact, [redacted] asked the trooper why he had stopped him. Trooper Witkowski answered, “the reason I stopped you is—as you were going down Route 30, your driver’s-side tires were on the double yellow center line.”

Upon further contact, the trooper noticed indicia of intoxication on [redacted]. After the performance of field sobriety exercises and the results of a preliminary breath test, the trooper arrested [redacted] for driving under the influence of alcohol contrary to 23 V.S.A. § 1201(a)(2).

Based on the trooper’s affidavit, his hearing testimony, the video footage, and the following conclusions of law regarding the meaning of the word “cross,” the court finds that the trooper’s initial observation—uncaptured in the video—was that [redacted] vehicle drove on, but did not cross, the double yellow center lines.

CONCLUSIONS OF LAW

The Fourth Amendment to the United States Constitution and Chapter I, Article 11 of the Vermont Constitution protect the people in this state from unreasonable searches and seizures. *State v. Tetreault*, 2017 VT 119, ¶ 20, 206 Vt. 366. A traffic stop is a seizure under both constitutional provisions and must accordingly be supported by reasonable suspicion that a motor vehicle violation or other crime is taking place. *Id.* In DUI cases, specifically, “evidence gathered from a stop may be admitted so long as the officer had a reasonable and articulable suspicion that the driver (1) committed a specified traffic violation, such as crossing the center line, or (2) that—based on the totality of the circumstances—the driver was under the influence of alcohol.” *State v. Howard*, 2016 VT 49, ¶ 9, 202 Vt. 51. The standard is satisfied if the officer has a reasonable suspicion of even a minor traffic violation. *State v. Marshall*, 2010 VT 81, ¶ 5, 188 Vt. 640. “The officer must have more than an unparticularized suspicion or hunch of criminal activity, but needs considerably less than proof of wrongdoing by a preponderance of the evidence.” *State v. Simoneau*, 2003 VT 83, ¶ 14, 176 Vt. 15. The State need not prove that the driver actually committed a traffic violation. *State v. Rutter*, 2011 VT 13, ¶ 10, 189 Vt. 574. “The relevant question is whether the officer had a reasonable basis to *suspect* that a motor vehicle violation was taking place.” *Id.* Evidence obtained as the result of constitutional violations is inadmissible because admitting it “eviscerates our most sacred rights, impinges on individual privacy, perverts our judicial process, distorts any notion of fairness, and encourages official misconduct.” *State v. Lussier*, 171 Vt. 19, 30 (2000) (quoting *State v. Badger*, 141 Vt. 430, 452–53 (1982)).

The only issue to be decided is whether the trooper had a reasonable suspicion that [redacted] committed the traffic violation of failing to drive on the right of the roadway as required under 23 V.S.A. § 1031(a) (excluding specified exceptions, “[u]pon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway”). Crossing the center line of a road may constitute a violation of § 1031(a). *Howard*, 2016 VT 49, ¶ 7. Any crossing of the center line—no matter how slight or for how long—may constitute a violation. See *Marshall*, 2010 VT 81, ¶ 9. However, the Supreme Court has been clear that “touching the center line is not in itself a traffic violation; at least one wheel must actually cross the center line

into the opposite lane of traffic.” *State v. Howard*, 2016 VT 49, ¶ 7. It follows that merely driving on the center lines is not a violation of § 1031(a).

Here, Trooper Witkowski lacked a reasonable basis to suspect that _____ violated 23 V.S.A. § 1031(a) because the weight of the evidence shows that what he saw on the night of December 15, 2018 was _____ driving on, but not crossing, the double yellow center lines of Route 30. The combined weight of several pieces of evidence compels this conclusion.

First, the officer’s affidavit—written only three days after the stop, before “touching” versus “crossing” became an issue—states that the vehicle “*appeared* to have crossed over the double yellow-center lines.” The use of the word “*appeared*” indicates a measure of uncertainty about whether there was crossing. Poor choice of words or not, this is one piece of evidence not lost upon the court.

Second, in the affidavit and at the hearing, the officer used the words “crossed over” the lines. The phrase “crossed over” is ambiguous in this context, as it could mean “on” or “to the left of the lines.”

Third, the affidavit states, the officer testified, and the video shows that while the trooper was following the vehicle, the left tires of the vehicle drove on, but did not cross, the double yellow center lines. In the affidavit, the trooper affirmed: “I observed that the driver’s-side tires of the vehicle appeared to be on the double yellow lines on at least two occasions as I was catching up to the vehicle. This is a violation of Title 23 VSA Section 1031, Driving to the Right.” Upon speaking with _____, the trooper said, “the reason I stopped you is—as you were going down Route 30, your driver’s-side tires were on the double yellow center line.” Thus, the trooper was under the mistaken belief that driving on the center lines constitutes a violation of 23 V.S.A. § 1031. The trooper did not stop _____ after the initial observation—where the word “crossed” was use—but waited until the subsequent ones to do so. When speaking with _____, moreover, the trooper made no meaningful distinction between crossing and driving on the lines.

In sum, in the initial observation not captured in the video, as in the subsequent ones, the trooper saw _____ driving on the center lines, but not crossing them. This is not a violation of law and without more could not have provided the officer with reasonable suspicion that _____ violated 23 V.S.A. § 1031(a). Accordingly, the stop contravened the Fourth Amendment and Article 11 and all evidence derived therefrom must be suppressed. Because all the evidence against _____ stemmed from the unlawful stop, the criminal charge against him must be dismissed, *State v. Badger*, 141 Vt. 430, 452–53 (1982), and judgment must be entered for him in the civil suspension proceedings. *State v. Lussier*, 171 Vt. 19, 21 (2000) (Article 11’s exclusionary rule applies to civil license suspension proceedings).

To those concerned that excessive formalism is manifested on these pages, the following is offered: Though drunk driving is a nefarious problem in our society, this evil cannot be eradicated by subjecting law-abiding citizens to searches unsupported by reasonable suspicion.

Determining whether the latter is present inevitably involves dealing in subtleties. As Justice Frankfurter once remarked:

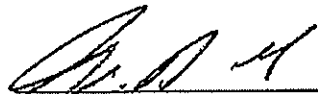
It is vital, no doubt, that criminals should be detected, and that all relevant evidence should be secured and used. On the other hand, it cannot be said too often that what is involved far transcends the fate of some sordid offender. Nothing less is involved than that which makes for an atmosphere of freedom as against a feeling of fear and repression for society as a whole. The dangers are not fanciful. We too readily forget them.

Harris v. United States, 331 U.S. 145, 173 (1947) (Frankfurter, J., dissenting), overruled in part by *Chimel v. California*, 395 U.S. 752 (1969).

ORDER

Consistent with the foregoing, the motions to suppress in docket numbers [redacted] are GRANTED; the charge in docket number [redacted] is DISMISSED; and judgment is entered for [redacted] in docket number [redacted]. These dispositions render moot all other outstanding motions in these matters.

Dated at Bennington, Vermont, this 30th day of August 2019.



William Cohen
Superior Court Judge