SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

APPELLATE DIVISION

People of the State of California, Plaintiff and Appellant, v. Stephen John Golis Defendant and Respondent	Case No. 1280970 Decision on Appeal Judge Edward Bullard, Santa Barbara County Superior Court

Defendant and respondent Steven John Golis was charged by misdemeanor complaint with driving under the influence while having a .08 percent or higher blood alcohol content, with an allegation that he had a blood alcohol content of .15 percent or higher. (Veh. Code, §§ 23152, subds. (a), (b); 23578.) Respondent filed a motion to suppress (Pen. Code, § 1538.5), asserting police had neither probable cause nor reasonable suspicion to detain the vehicle, and, as a result, all evidence derived from the illegality should be excluded. The trial court, after hearing, granted the motion to suppress, and stayed the criminal proceeding pending resolution of this appeal initiated by the People. (Calif. Rules of Court, rules 8.852, 8.853; see also Pen. Code, § 1538.5, subd. (j).) After considering the parties' briefs, and in light of the trial court's factual findings, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Viewing the record in light most favorable to the trial court's ruling (*People v. Davis* (2005) 36 Cal.4th 510, 528-529), the following evidence was adduced at the January 6, 2009, hearing on the suppression motion. California Highway Patrol Officer Sean Stephens (Officer

Stephens) testified that on January 19, 2008, at approximately 11:00 p.m., he witnessed respondent's vehicle on Edison Avenue near Pine Street drift "approximately two feet" (for approximately a second and a half) across the right roadway "edge-line" (the "fog-line") and drift back into the lane. Officer Stephens followed for a short distance and again witnessed respondent "slightly" "drift across the right roadway line" approximately six (6) inches, again for a very short time. Officer Stephens followed respondent's vehicle for approximately five (5) minutes in total, testified that at no time was respondent speeding, and that respondent's movements were not "jerky. . . [just] very slow . . . ." He initiated a traffic stop based on respondent's "weaving," discovered respondent was possibly intoxicated, and placed him under arrest.

On cross-examination, counsel played a videotape[1] that apparently depicted the area where Officer Stephens witnessed respondent's vehicle. The videotape reveals the road was a single lane and in a residential neighborhood. Officer Stephens testified the video depiction was "similar" to respondent's driving pattern before respondent's arrest, and confirmed (as presented on the video) that at places there was no "fog-line" while at other locations the right side of the road morphed from asphalt to dirt. There was some uncertainty whether Officer Stephens actually followed respondent for five (5) minutes, and the trial court took judicial notice that the distance traveled was a mile. Officer Stephens acknowledged, based on his police report, that the "two-feet" drift was only an approximation and that the distance may not have been as great. Defense counsel asked Officer Stephens whether the "only irregular driving pattern that you saw . . . was on two brief occasions for a period of like maybe three or four seconds his right tires

[1] The trial court certified the reporter's transcript of the suppression hearings as part of the settled statement on appeal. The videotape is not part of the appellate record, and there was no request by any party for this court to consider the exhibit. (Calif. Rules of Court, rule 8.870.) We have nevertheless directed the clerk of the trial court to send the videotape to this court. (Calif. Rules of Court, rule 8.870(c).) This court, however, was unable to view the videotape, as it contains nothing but static.

went in non-jerking motion over an edge line"; and Officer Stephens confirmed that he witnessed respondent drift over the right line of the highway on two occasions, and that he did not recall any vehicles or other stationary objects in danger of being hit or damaged.

The trial court, after listening to the evidence, expressly found that ". . . the weaving in this particular matter was of a slight nature, didn't occur long enough [i.e., was momentary], the person was driving at the proper speed, was not jerky motions [*sic*]." It also concluded that there was no credible evidence that respondent's vehicle touched the unpaved portion of the road, and determined the evidence revealed that respondent's vehicle traversed the fog-line by no more than six (6) inches in both instances. It tentatively concluded that as a result Officer Stephens did not have reasonable suspicion to believe respondent was driving under the influence. The court narrowed the issue to whether crossing over the fog-line was a per se violation of Vehicle Code section 21650. More specifically, "[t]he question is, is the fog-line a delineation of the main travel portion of the highway, and [does] crossing over it create a violation of 21650." The court asked for further briefing and continued the matter to January 26, 2009.

At the January 26, 2009, hearing, the court confirmed that "the driving of the vehicle was done in a safe manner[,]" that there was no credible evidence respondent's vehicle was weaving, and that he was driving safely at all times. It found the evidence established that respondent traversed the fog-line on two occasions, but expressly concluded that under the circumstances this did not constitute "weaving" or unsafe driving, and thus, was not "germane" to whether it supported the investigatory stop for driving under the influence. "The evidence only established that [respondent's] vehicle crossed the white painted line by approximately six inches. I realize there was testimony as much as two feet, but in looking back at the officer's testimony and upon cross-examination I don't think that it established more than six inches." The court also

detention is 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.' ' " (*People v. Dolly, supra*, at p. 463; *People v. Wells, supra*, at p. 1083.) " ' Reasonable suspicion is a lesser standard than probable cause, and can arise from less reliable information than required for probable cause . . . .' " (*People v. Dolly, supra*, at p. 463; *People v. Wells, supra,* at p. 1083.) To be reasonable, the officer's suspicion "must be supported by some specific, articulable facts that are reasonably consistent with criminal activity. (*People v. Wells, supra*, at p. 1083.) Reasonableness is measured by what the officer knew before he or she decided to detain the vehicle. (*People v. Hester* (2004) 119 Cal.App.4th 376, 386.) The constitutionality of a traffic stop does not depend on the subjective motivation of the officer, as long as the objective circumstances justify the stop. (*Whren v. United States* (1996) 517 U.S. 806, 813; *Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1044-1045.) While a traffic stop is unlawful if made by an officer who does not know the law and who based the stop on objective facts that cannot constitute a violation, " ' [i]f the facts are sufficient to lead an officer to reasonably believe that there was a violation, that will suffice, even if the officer is not certain about exactly what it takes to constitute a violation.' " (*In re Justin* K. (2002) 98 Cal.App.4th 695, 700.) And, of course, "[t]he possibility of an innocent explanation for [erratic driving] does not preclude an officer from effecting a stop to investigate the ambiguity. [Citations.]" (*People v. Saunders* (2006) 38 Cal.4th 1129, 1136-1137.)

2. Analysis

The People's first claim of error rests on Officer Stephens' testimony that respondent was "drifting," "weaving," "straddling or crossing over" the fog-line, twice, the first by as much as "two feet," and at some point, in the officer's opinion, respondent "may have touched the dirt."

This evidence, according to the People, could lead a well-trained police officer to reasonably suspect respondent was driving under the influence, and thus, justified the detention at issue.

This argument founders on the shoals of well-established rules of appellate review. "Drifting," "weaving," and "straddling" are not legal terms of art. (See, e.g., *People v. Griffin* (2004) 33 Cal.4th 1015, 1022 [duty to define terms that have particular meaning to the law].) These terms are essentially factual shorthands; that is, they are used as representations of certain suspicious conduct manifested by an individual driver under particular circumstances. If someone "weaves"; "drifts"; or "straddles," as perceived by a percipient witness, even within a single lane, reasonable suspicion to justify the stop would exist. (See, e.g., *People v. Bracken* (2000) 83 Cal.App.4th Supp. 1, 3-4; *People v. Perez* (1985) 175 Cal.App.3d Supp. 8, 10-11; *People v. Perkins* (1981) 126 Cal.App.3d Supp. 12, 14; see also *People v. Russell* (2000) 81 Cal.App.4th 96, 104 ["drifting around in his lane" justified an investigatory stop].) The trial court, however, expressly rejected Officer Stephens' testimony on these points, which the People impliedly concede was the only evidence presented on the matter. After listening to all evidence presented, and after reviewing the videotape, the trial court concluded that respondent was driving safely at all times, within the speed limit, was not moving in a desultory fashion (i.e., did not make "jerky" movements or act in an otherwise halting manner), and at worst, momentarily crossed over the fog-line twice, at night, within a one mile period, on a single lane residential roadway with intermittent fog-lines, and at no time endangered persons or stationary objects on the side of the road. The trial court concluded that respondent did *not* drive off the asphalt and onto any unpaved or dirt portion of the thoroughfare. These are all issues of fact and are supported by substantial evidence. (*Camacho, supra*, 23 Cal.4th at p. 830 [we will uphold factual findings of the trial court that are supported by substantial evidence].) When we independently

apply the appropriate legal standard to these facts, the trial court's decision that there was no reasonable suspicion to detain respondent for driving under the influence is sound.

The People's reliance on *Arburn v. Department of Motor Vehicles* (2007) 151 Cal.App.4th 1480, *Cornforth v. Dept. of Motor Vehicles* (1970) 3 Cal.App.3d 550; *Bracken, supra*, 83 Cal.App.4th Supp. 1, *Perez, supra,* 175 Cal.App.3d Supp. 8; and *People v. Perkins* (1981) 126 Cal.App.3d Supp 12, is misplaced. In each of these cases the officer credibly established facts justifying a lawful investigatory stop. In *Arburn,* the officer saw petitioner weaving within a single lane and almost hit the curb. (151 Cal.App.4th at pp. 1482-1483). In *Cornforth,* the officer saw respondent's car weaving from side to side and swerve to clear cars parked at the curb, which were narrowly missed. (3 Cal.App.3d at p.551.) In *Bracken*, the officer witnessed appellant's vehicle weave within its lane "for a considerable distance" – approximately one-half mile. (83 Cal.App.Supp. at pp. 3-4.) In *Perez*, the officer observed "pronounced weaving" within a single lane for three-quarters of a mile. (175 Cal.App.3d Supp. at p. 10.) And in *Perkins*, the officer observed driver driving 20 miles per hour below the posted speed limit, "weaving abruptly from one side of the lane to the other." (126 Cal.App.3d Supp at p. 14.) The facts here are dissimilar; these cases are therefore distinguishable.

The People also assert the trial court erred in granting the motion to suppress because the evidence unmistakably demonstrated that respondent crossed over the fog-line twice, even if by six (6) inches in each instance, and even though momentarily each time, because the transgressions amounted to a per se violation of Vehicle Code section 21650.[2] This provision reads in full as follows:

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[2] Respondent argues that Officer Stephens justified his "investigatory stop" based on respondent's violation of Vehicle Code section 21658, subdivision (a), which requires that a vehicle remain within a single lane as much as practicable when a roadway has been divided into two or more lanes in one direction. This provision is patently inapplicable because the roadway at issue here involved a single lane in each direction. There is no evidence in the

"Upon all highways, a vehicle shall be driven upon the right half of the roadway, except as follows: ¶ (a) When overtaking and passing another vehicle proceeding in the same direction under the rules governing that movement [;] ¶ (b) When placing a vehicle in lawful position for, and when the vehicle is lawfully making, a left turn [;] ¶ (c) When the right half of a roadway is closed to traffic under construction or repair [;] ¶ (d) Upon roadway restricted to one-way traffic [;] ¶ (e) When the roadway is not of sufficient width; ¶ (f) When the vehicle is necessarily traveling so slowly as to impede the normal movement of traffic, that portion of the highway adjacent to the right edge of the roadway may be utilized temporarily when in a condition permitting safe operation[;] ¶ (g) This section does not prohibit the operation of bicycles on any shoulder of a highway, where the operation is not otherwise prohibited by this code or local ordinance."

Pursuant to Vehicle Code section 530, the word "roadway" is defined as "that portion of a highway improved, designed, or ordinarily used for vehicle travel." The People argue that the portion of the highway right of the fog-line is not "improved, designed, or ordinarily used for vehicle travel," and thus, when respondent crossed the fog-line, he violated the statute, justifying the investigatory stop.

Vehicle Code section 21650 generally is viewed as precluding a driver from impermissibly crossing over *the center line* into opposing lane of traffic (i.e., by not staying on the right half of the roadway when no exception applies). (See, e.g. *People v. Garcia* (1995) 41 Cal.App.4th 1832, 1839, disapproved on other grounds in *People v. Sanchez* (2001) 24 Cal.4th 983, 991, fn. 3; see also *People v. Wren* (1969) 271 Cal.App.2d 788, 792 [Veh. Code, § 21650 provides that on all highways a vehicle shall be driven upon the right half of the roadway].) Put

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appellate record to indicate Officer Stephens subjectively relied on this provision, and in any event, the trial court *expressly* determined that the relevant provision at issue was Vehicle Code section 21650, not Vehicle Code section 21650. Nor do the People rely on Vehicle Code section 21658. It is worth observing that even if Officer Stephens did subjectively rely on this provision as a basis for respondent's detention, this reliance is not dispositive. An officer's subjective reasoning for a detention "need not be the [] offense as to which the known facts provide probable cause." (*Devenpeck v. Alford* (2004) 543 U.S. 146, 155; see also *In re Justin K., supra*, 98 Cal.App.4th at p. 700 [detention is nonetheless lawful even if based on officer's reliance on wrong statute, if objective circumstances preceding detention justify it].) For Fourth Amendment purposes, the officer's action is not invalidated by his subjectively mistaken state-of-mind as long as the circumstances, viewed objectively, justified the action. (*Devenpeck, supra.*)

another way, driving on the left side of the road is unlawful except under circumstances designated by Vehicle Code section 21650 (or its predecessor, Vehicle Code section 525). (See, e.g., *People v. Lewis* (1983) 147 Cal.App.3d 1135, 1141-1142 [construing Veh. Code, § 21650]; *People v. Kiss* (1954) 125 Cal.App.2d 138, 141 [construing former Veh. Code, § 525]; *People v. Abbott* (1950) 101 Cal.App.2d 200, 203-204 [same]; *People v. Tucker* (1948) 88 Cal.App.2d 333, 340-341 [same].) The People would expand this customary application. They assert that Vehicle Code section 21650 applies even when the driver remains on the right side of the roadway but traverses the fog-line incrementally and momentarily. This is true, they argue, because the driver, by crossing over the fog-line, drives off the "roadway" (i.e., the traveled portion of the highway), relying for this interpretation on Vehicle Code section 21650, subdivision (f) [when the vehicle is necessarily traveling so slowly as to impede the normal movement of traffic, that portion of the highway adjacent to the right edge of the roadway may be utilized temporarily when in a condition permitting safe operation], *People v. Smylie* (1963) 217 Cal.App.2d 118, and *Drummond v. City of Redondo Beach* (1967) 255 Cal.App.2d 715.

In *Smylie*, defendant was convicted of felony drunk driving, and on appeal claimed that he was not doing any act forbidden by law (a necessary element of the felony drunk driving), in this case violating Vehicle Code section 21650 as charged. The facts showed without substantial conflict that the victim was walking entirely off the paved portion of the highway, also off the shoulder; she was, in fact, in an area, dirt covered, between the shoulder and ditch, when defendant, with car weaving, struck her. Defendant claimed that he could not violate Vehicle Code section 21650 because it only prohibited driving on the left side of the highway. The appellate court rejected this argument, observing that "roadway" means traveled portion of the highway, and further, observing that Vehicle Code section 21650 subdivision (f) "clearly

prohibits traveling on or adjacent to the edge of the pavement except when it can be done safely." The appellate court affirmed the conviction under this rationale, concluding there was substantial evidence that the victim at all times was walking off the pavement, was hit by defendant, and that in order to accomplish this, defendant's car "had to leave the traveled portion of the highway and go onto the portion 'adjacent to the right edge of the roadway.' Obviously, when he did so said area was not 'in a condition permitting safe operation.' He, therefore, violated Vehicle Code section 21650." (*Id.* at p. 121.)

Drummond was a civil action. Plaintiff suffered personal injuries when her car struck a washout at the edge of the pavement and went into a ditch, and sued the City of Redondo Beach. The trial court granted a judgment notwithstanding the verdict in favor of defendant, concluding plaintiff failed to demonstrate a viable cause of action. The appellate court affirmed. It observed that just few hours before the accident, the City had inspected the area where plaintiff's car "left the roadway," and at that time found no undue risk of injury. Defendant had no duty to rectify any problem in the interim without notice of any defect, particularly without any evidence that the traveled path was cracked or undermined in any way at the time of the accident. As relevant for our purposes, and in dictum, the court observed: "On the contrary, the inference clearly appears that plaintiff was contributorily negligent in undertaking to drive on the asphalt shoulder, which is not customary and prudent driving practice [,]", citing *Smylie*. "Be that as it may, the judgment notwithstanding the verdict was clearly proper. (255 Cal.App.2d at p. 720.)

Smylie and *Drummond,* and their interpretation of Vehicle Code section 21650 subdivision (f), provide very slim reeds upon which to lean. At best, they support the proposition that a driver may violate Vehicle Code section 21650 when he or she veers off the paved portion of the road entirely, or alternatively, when he or she purposely drives onto the

asphalt shoulder, and in the latter situation, only when the action is not customary or prudent. They do not (and cannot) stand for the broader proposition that gently traversing the fog-line by no more than six (6) inches, momentarily, on a single lane highway, even twice, constitutes a per se violation. Indeed, Vehicle Code section 21650, subdivision (f) – the provision cited by the People in support of its position – actually contemplates traveling "adjacent to the right edge of the roadway" temporarily when it can be done safely. Such conditional language simply does not suggest the Legislature contemplated a per se violation whenever a driver crosses over the fog-line. (*People v. Lopez* (1987) 197 Cal.App.3d 93, 99 [the words of a statute must be interpreted in accord with their usual, natural and ordinary meaning].) Notably, and significantly, the trial court expressly determined that respondent was driving safely at all times (i.e., without endangering person or thing). The People's argument is further undermined by cases that treat the area right of the fog-line, under some circumstances, as part of the "roadway." (See, e.g., *Willis v. Gordon* (1978) 20 Cal.3d 629, [the court permitted plaintiff to prove as a factual matter, in a wrongful death lawsuit, that the area where defendant parked his vehicle -- to the right of the fog-line -- was in fact a traveled part of the highway, and thus, part of the "roadway" within the meaning of Vehicle Code section 22504, which precludes stopping or parking a vehicle on the "roadway"];[3] *Victor v. Hedges* (1999) 77 Cal.App.4th 229, 237 [in general usage, a city street is a "roadway" from curb to curb]; *Shachunazarian v. Widmer* (1958)

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[3] Respondent cites *United States v. Colin* (2002) 314 F.3d 439, for the proposition that he did not violate Vehicle Code section 21650 by crossing over the fog-line. *Colin* is inapposite as it involved a violation of Vehicle Code section 21658, which is inapplicable to single-lane highways. (See footnote 2, *ante*.) *Colin* is also factually distinguishable. The driver there *touched*, but did not cross over, the fog-line. The Ninth Circuit concluded that police lacked reasonable suspicion to stop the driver for both "lane straddling" and driving under the influence, reasoning that *touching* the fog line for approximately 10 seconds did not constitute "lane straddling" because it does not violate Vehicle Code section 21658 subdivision (a)'s requirement that drivers drive "as nearly as practical" within a single lane. Here, respondent crossed *over* the fog-line. And in the end, the two provisions contain different language, making comparisons difficult, if not impossible. (Compare Veh. Code, § 21658 [a vehicle shall be driven as nearly as practical entirely within a single lane and shall not be moved from the lane until such movement can be made with reasonable safety] with Veh. Code, § 21650 [a car shall be driven upon the right half of the roadway – no mention of staying within a single lane].)

159 Cal.App.2d 180, 182-184 [same].) Under the circumstances, the trial court properly determined that respondent did not violate Vehicle Code section 21650.

In summary, the trial court's factual and credibility determinations were clear, precise, and supported by substantial evidence. By contrast, Vehicle Section 21650 does not sanction a per se violation whenever a driver traverses the fog-line, as the People contend. Consequently, Officer Stephens had neither probable cause nor reasonable suspicion to detain respondent, either for driving under the influence or for violating Vehicle Code section 21650. The People have articulated no other basis upon which to justify respondent's detention. They have not challenged the trial court's factual findings, asking this court simply to adopt Officer's Stephens unadorned testimony as given. This is contrary to existing standards of appellate review. As a result, the trial court properly determined the investigatory detention was unjustified under the Fourth Amendment, and appropriately excluded all evidence derived from that illegality as result. The order granting respondent's motion to suppress is affirmed.

DATED: October 28, 2009

NOV 04 2009

Thomas Anderle
Presiding Judge of the Appellate Division

10/28/09

Timothy Stanley
Judge of the Appellate Division

NOV 02 2009

James Herman
Judge of the Appellate Division

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA BARBARA STREET ADDRESS: 1100 Anacapa Street MAILING ADDRESS: CITY AND ZIP CODE: Santa Barbara, 93101 BRANCH NAME: Appeals	*FOR COURT USE ONLY* FILED SUPERIOR COURT of CALIFORNIA COUNTY of SANTA BARBARA NOV 04 2009 GARY M. BLAIR, Executive Officer BY Patricia Frutos PATRICIA FRUTOS, Deputy Clerk
THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Appellant,** **vs.** **STEPHEN JOHN GOLIS,** **Defendant and Respondent.**	
CLERK'S CERTIFICATE OF MAILING	CASE NUMBER: 1280970

I hereby certify that I am not a party to this cause, and that true copy of the document(s) listed as follows:

DECISION ON APPEAL

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Were served to each person or entity named below, by placing a copy thereof in a sealed enveloped addressed to each of them as shown with postage thereon fully prepaid, and on the date shown below depositing it in the US mail at Santa Barbara, California

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Dated: November 04, 2009

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