

STATE'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AND MOTION FOR ORDER EXCLUDING ANALYSIS OF BLOOD ALCOHOL CONTENT AND MOTION TO DISMISS

Officers made a valid traffic stop and observed signs of alcohol impairment. The defendant did badly on field sobriety tests, giving then probable cause to arrest him. Police did not keep the defendant from calling an attorney – they gave the defendant access to telephone books and a telephone; the fact that he did not call an attorney did not mean that the test results should be suppressed.

The State of Arizona, by and through undersigned counsel, respectfully requests this Court to deny the defendant's Motions, for the reasons set forth in the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

On April 19, 1996, at approximately 1:00 a.m., Officer Trier #6541 from the Glendale Police Department was traveling southbound on 59th Avenue on his marked police motorcycle. The officer noticed a vehicle ahead of him traveling in the inside traffic lane, weaving severely side to side. The vehicle was crossing the lane marking by about two feet on each side. As the officer got directly behind the vehicle, the vehicle was still weaving back and forth across the lane markings. The officer paced the vehicle at 58 M.P.H. in 35 and 40 M.P.H. zones. The officer turned on his red and blue lights to initiate a traffic stop, but the defendant's vehicle neither stopped nor slowed down. The defendant's vehicle continued to weave back and forth for about another mile. The defendant's vehicle moved into the outside lane to pass several vehicles and then moved back into the inside lane. The officer continued to follow the defendant with his lights on, but the defendant's vehicle never gave any indication that the vehicle was going to pull over, so the officer activated his siren. The defendant's vehicle still was

weaving back and forth. Finally, as they approached Camelback Road, the defendant turned westbound and began to slow, coming to a stop after a few hundred feet.

As the officer walked up to the defendant's vehicle, he saw that the defendant was the sole occupant. The defendant's radio was very loud and the defendant first fumbled with the radio knobs, then, finally, turned off the vehicle's ignition. The officer asked the defendant for his driver's license, proof of insurance, and registration. The defendant opened his wallet and the officer saw his license right away in the see-through display on one side. After the defendant fumbled through the credit cards, etc., on the other side of his wallet, the defendant finally saw his license and gave it to the officer. The defendant then got his proof of insurance card out of a stack of papers in the glove box. The officer reminded him he needed his registration as well, and the defendant then handed the officer a yellow auto repair receipt.

By this time, the officer had smelled a very strong odor of intoxicating liquor on the defendant's breath and noticed that the defendant's eyes were watery and very bloodshot. The officer also observed that the defendant was swaying in a circular motion in his seat. The officer asked him to step out of the vehicle, and the defendant began to sway even more while standing. The officer asked the defendant how much he had to drink that night, and the defendant said, "probably too much." The defendant's speech was slurred and "thick-tongued." The officer told the defendant he could turn his car's headlights off so as to not run the battery down. The defendant leaned inside his car and fumbled with the ignition switch again, but the vehicle had already been turned off, so the defendant gave up. The officer leaned in and turned the lights off for the defendant.

The officer then asked the defendant if he would take Field Sobriety Tests, and the defendant said that he would. The officer also asked the defendant if he had any physical disabilities and he said he did not. The officer first administered the HGN test and readily observed all six cues as well as a distinct vertical nystagmus. The officer then noticed that the defendant had a wet stain in the crotch of his pants, but did not ask him the nature of this stain. Then the officer started to explain the "walk and turn" test. The defendant tried to assume the initial instruction position four times and each time he began to walk before the officer told him to. When the officer finally got him to stand still, the defendant could only maintain this position for two seconds before losing balance and stepping off the line. The defendant said, "I probably can't do that." When the officer asked why, he said again, "I probably can't."

Next, the officer explained the "one leg stand," and as he demonstrated it, the defendant said, "I don't think I can do that either." The officer then placed the defendant under arrest. The officer locked up the defendant's car to leave it there and saw the defendant's registration on top of the papers lying on the passenger's seat.

The officer then transported the defendant to the Glendale Police Station. Officer Trier then read him the Administrative Per Se/Implied Consent Admonitions. The defendant said he understood each of them and that he would submit to breath tests. The officer then read the defendant his *Miranda* warnings and he said that he understood them and would answer the officer's questions.

After a fifteen-minute deprivation period, the officer administered duplicate breath tests. The first test was administered at 1:30 a.m., with a result of .223 BAC, and the second test was administered at 1:37 a.m., with a result of .214 BAC.

The officer moved the defendant into a holding cell that contained a telephone and some telephone books for a few minutes while he completed some paperwork. When he returned, the defendant was asleep. The officer had to call him loudly several times to wake him up. The officer asked the defendant if he had been convicted of two prior DUIs and he said he had. The defendant also told the officer he felt the effects of the alcohol at the time of the stop and rated it a “five” on a scale of 0 to 100.

The officer asked the defendant if he wanted to call a lawyer, family member or any other person, and he said, “I don’t know anybody to call, thank you.” The officer again left the defendant in the holding cell for about five minutes. When the officer returned the defendant was asleep again, but this time the officer could not wake him.

The defendant is charged with two counts of Aggravated Driving or Actual Physical Control while Under the Influence of Intoxicating Liquor or Drugs (Aggravated DUI), each a Class 4 felony.

LAW AND ARGUMENT:

I. The stop and arrest of the defendant were legal.

To make an investigatory stop, the police need only have “reasonable suspicion” that the suspect is engaged in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Rogers*, 186 Ariz. 508, 924 P.2d 1027 (1996); *State v. Weinstein*, 190 Ariz. 306, 310, 947 P.2d 880, 884 (App. 1997); *State v. Graciano*, 134 Ariz. 35, 653 P.2d 683 (1982). There is no “bright line” rule to determine when a stop becomes an arrest; rather, courts must take “the approach of reason and common sense applied to the totality of the particular circumstances.” *State v. Romero*, 178 Ariz. 45, 49, 870 P.2d 1141, 1145 (App. 1993), citing *Florida v. Royer*, 460 U.S. 491, 501-03,

103 S.Ct. 1319, 1326-27, 75 L.Ed.2d 229 (1983) (plurality opinion). The assessment necessitates a two-pronged analysis. *Graciano*, 134 Ariz. at 37, 653 P.2d 685. The first requires the court to assess the totality of the circumstances. *Id.* This assessment should consider both the subjective nature of the trained officer's exercise of authority and any number of objective factors including information received from other officers. *Id.* Second, the assessment must raise a justifiable suspicion that the particular individual to be detained is involved in criminal activity. *Id.*

In *Graciano*, the Court held that the information on which the officer based his stop was insufficient to meet the standard enunciated above. However, the facts in *Graciano* differ substantially from the case at bar. There, the officer justified his stop on extremely vague information that "some dark skinned person, male or female, old or young, was driving toward the Mexican border in a lawful or unremarkable manner, in a vehicle of a type most desired by thieves, with license plates from farther north in Arizona." *Id.* at 38, 653 P.2d at 686. In this case, the officer himself observed the defendant's vehicle weaving and his failure to stop for the officer's lights. This was clearly sufficient information to uphold the stop here.

In light of *Terry* and *Graciano*, investigatory stops have been routinely upheld in cases containing facts similar to those in the case at bar. In *State v. Stabler*, 162 Ariz. 370, 783 P.2d 816 (App. 1989), police received an anonymous tip that a pickup truck with the same license plate as the one stolen by John Stabler was involved in a drug transaction. The police stopped the defendant based on this information and issued him a citation for driving without a license. They did not know at the time of the stop that just the day before, Stabler had murdered the police deputy who owned the truck. Stabler

was later found and charged and convicted of murder and various other counts. In discussing the initial stop, the Court stated, “the officer did not have probable cause to arrest the appellant, but probable cause is not required for an investigatory stop.” *Id.* at 372, 783 P.2d at 818. In support of its holding, the Court discussed the difference between reasonable suspicion and probable cause as follows:

The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. . . . A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

Id. (citing *Adams v. Williams*, 407 U.S. 143, 145-46, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612, 616, 617 (1972)). Similarly, in *State v. Romero*, 178 Ariz. 45, 870 P.2d 1141 (App. 1993), officers detained two individuals who were standing next to a pickup that matched a broadcast description of a similar truck involved in a drive-by shooting. The information given over the radio indicated to the officers that two Mexican males with long hair were driving in an easterly direction in a light gold or yellow truck with large black toolboxes in the back. Witnesses had seen the two men driving slowly past the place where the officer saw the two men standing. It was 1:00 a.m. when the gunfire erupted, and the witnesses could only guess that it was coming from the truck, since the truck was in the vicinity of the shots. Shortly after the initial detention, officers confirmed the suspects’ identity through the witnesses. The Court held, “[T]he stop in this case was within the confines of the *Terry* standard.” *Romero*, 178 Ariz. at 49, 870 P.2d at 1145.

It is well-settled law that a traffic violation satisfies the standard set forth by *Terry*, *Graciano*, and their progeny. *State v. Superior Court [Blake, Real Party in Interest]*, 149 Ariz. 269, 718 P.2d 171 (1986); *State v. Acosta*, 166 Ariz. 254, 801 P.2d 489 (App. 1990). In *Blake*, an officer observed the defendant's vehicle meandering in its lane and suspected him of driving under the influence, so he pulled him over. The Court held that roadside sobriety tests that do not involve long delay or unreasonable intrusion, although they are searches under the Fourth Amendment, may be justified by an officer's reasonable suspicion, based on specific, articulable facts, that the driver is intoxicated. The Court also held that "Blake's erratic driving, appearance and smell of alcohol were specific, articulable facts which gave the officer sufficient grounds to administer roadside sobriety tests, including HGN." *Blake, id.* at 269, 718 P.2d 171.

The case at hand represents a classic example of a police officer employing reasonable, articulable suspicion to justify a traffic stop. The information provided to an officer initially does not have to meet the standard of probable cause in order for the officer to respond. At that point, the officer is required to formulate a reasonable, articulable suspicion that criminal conduct has occurred or is going to occur. In the present case, the officer followed the defendant's vehicle for a short distance to make some observations for himself. The officer's observations of the defendant's driving behavior clearly indicated a possibly impaired driver. At that point, without more, the officer had articulable suspicion to pull the defendant over. Therefore, the stop was justified and the results of the tests should be admissible.

II. The state did not interfere with the defendant's right to obtain a lawyer or obtain independent evidence.

The defendant was read his *Miranda* rights and he answered that he understood them. He was then given an opportunity to call a lawyer, family member, or any other person, and he said, "I don't know anybody to call, thank you." The police then left the defendant in the holding cell, which contained telephones and phone books if he changed his mind. The defendant did not in fact contact an attorney, but the State did not prevent him from doing so.

As discussed before in the State's Response to Defendant's Motion to Suppress Replicate Breath Tests, the State does not have to explain that the defendant has a right to obtain independent testing. In *State v. Superior Court [Norris, Real Party in Interest]*, 179 Ariz. 343, 878 P.2d 1381 (App. 1994), the Court held that police are not obliged to inform DUI suspects of their right to independent testing. In the instant case the defendant was advised that he could arrange for an independent breath, blood, or urine test. In fact, the defendant signed the advisory. The defendant was also read the Implied Consent Affidavit. The defendant answered "Yes, sir" to each admonition. The State was not required to inform the defendant further of his right to seek an independent alcohol test.

CONCLUSION:

The defendant has failed to show any grounds to suppress the evidence against him and has not shown any grounds for dismissal. Therefore, the State respectfully requests that this Court deny the defendant's motions.