

2011 IL App (2d) 110014-U
No. 2-11-0014
Order filed December 27, 2011

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of De Kalb County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 08-DT-313
)	
)	Honorable
THOMAS M. WILLAN,)	Edward C. Schreiber and
)	Melissa S. Barnhart,
Defendant-Appellant.)	Judges, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Burke and Birkett concurred in the judgment.

ORDER

Held: Because defendant did not provide an official record of the evidence at the hearing on his renewed motion to quash and suppress, instead relying on the evidence at the original hearing, we could not hold that the trial court erred in denying the renewed motion.

¶ 1 Following a bench trial in the circuit court of De Kalb County, defendant, Thomas M. Willan, was found guilty of driving under the influence of alcohol (625 ILCS 5/11-501(a)(1) (West 2008)) and was placed on court supervision for a 12-month period. On appeal, defendant argues that the trial court erred in denying his motion to quash his arrest and suppress evidence. We affirm.

¶ 2 Defendant's motion was initially heard and denied by Judge Edward C. Schreiber on July 17, 2008. On that same date, Judge Schreiber also heard and denied defendant's petition to rescind the statutory summary suspension of his driving privileges. See 625 ILCS 5/11-501.1 (West 2008). De Kalb County sheriff's deputy Paul Delisio was the only witness who testified at the hearing. His testimony indicates that, on May 7, 2008, at about 1:30 a.m., he was on patrol in a squad car equipped with a video camera and was driving north on Dewey Street in Somonauk. When he pulled up to the intersection with Market Street, he observed a white Ford pickup truck proceeding east on Dewey Street. The truck was moving at about 25 miles per hour. The speed limit was 35 miles per hour. After the truck crossed the intersection, Delisio observed the truck touch the fog line along a curve in the road. Delisio activated the video camera,¹ turned right on Market Street, and followed the truck. The truck touched the fog line a second time along a straight, downhill stretch of road near the Sannauk Forest Preserve. Delisio followed the truck into Sandwich. As they entered Sandwich, the condition of the road deteriorated. Delisio had to negotiate "slight curves" in the road and maneuver around potholes. As they came to a slight bend in the road, the truck briefly crossed over the fog line. Delisio then pulled the truck over. Delisio identified defendant as the truck's driver. Although Delisio initially testified that there were only two occasions when the truck touched the fog line without crossing it, on cross-examination by the State, Delisio testified that the truck did so a third time in the vicinity of the Star Restaurant.

¹Delisio's testimony indicates that, before he activated the camera, it was operating in a mode in which it continuously recorded and stored a one-minute "loop" of footage, so that it captured events beginning one minute before activation.

¶ 3 The recording produced by Delisio's squad car's video camera was played at the hearing and admitted into evidence. The video, which is "time-stamped," shows a truck passing through the intersection at which the squad car is stopped at 1:28 a.m. The squad car then turns right to follow the truck. From roughly 1:29 a.m. to 1:30 a.m. the truck's right rear tire appears to closely approach the fog line, although it is not clear whether the tire actually touches the line at any point. At approximately 1:32 a.m., the right rear tire clearly rolls onto the fog line for about 2 seconds. This occurs on a section of road that is straight and appears to be fairly smooth. The sign for the Star Restaurant is visible in the foreground. At about 1:34 a.m., the same tire rolls onto the fog line again as the road curves slightly to the left. It is not clear whether the tire completely crosses the fog line. At that point the squad car's emergency lights come on and the truck pulls over.

¶ 4 In denying defendant's motion, Judge Schreiber stated that the recording showed that defendant's truck touched the fog line "on at least seven occasions" and crossed over the fog line "a couple of times." Although Judge Schreiber noted that defendant did not otherwise drive erratically or exceed the speed limit, he concluded that Delisio had a valid basis for conducting a traffic stop.

¶ 5 On August 20, 2008, defendant filed a notice of appeal seeking review of the rulings on the motion to quash and suppress and on the rescission petition. However, on October 2, 2009, we granted defendant's motion to voluntarily dismiss the appeal.

¶ 6 An order entered by Judge Melissa S. Barnhart on August 17, 2010, states, "This matter before the court for bench trial, Defendant renews motion to quash and stipulates to the foundation of the video as evidence. Video entered into evidence as State's ex[hibit] #1 with no objection." A docket entry dated August 19, 2010, states, "defense attorney to provide judge with transcript of hearing on motion to quash." Nothing in the record indicates whether defense counsel did in fact

tender a transcript to Judge Barnhart.² On September 9, 2010, Judge Barnhart entered an order stating, “[Defendant’s] renewed motion to quash and suppress denied[. At bench trial], [a]fter police report and breath test results proffered [*sic*], [defendant] is found guilty.” On December 2, 2010, Judge Barnhart ordered defendant placed on court supervision. This appeal followed.

¶ 7 Under *Terry v. Ohio*, 392 U.S. 1 (1968), a police officer may effect a limited investigatory stop where there exists a reasonable suspicion, based upon specific and articulable facts, that the person detained has committed or is about to commit a crime. *Id.* at 21-22. “A traffic violation generally provides a sufficient basis for a traffic stop.” *People v. Cole*, 369 Ill. App. 3d 960, 966 (2007). The parties’ arguments in this case focus principally on whether Delisio observed defendant violate section 11-709(a) of the Illinois Vehicle Code (Code) (625 ILCS 5/11-709(a) (West 2008)), which provides that, when a road has been divided into multiple lanes that are clearly marked, “[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.”

¶ 8 On appeal from a trial court’s ruling on a motion to quash and suppress, the reviewing court “will accord great deference to the trial court’s factual findings and will reverse those findings only if they are against the manifest weight of the evidence.” *People v. Close*, 238 Ill. 2d 497, 504 (2010). However, the trial court’s ultimate decision to grant or deny the motion is subject to *de novo* review. *Id.* Defendant argues that “the trial court” made certain findings that are contrary to the only evidence presented at the hearing on the motion to quash and suppress—Delisio’s testimony

²We note that the record does not reflect an objection by the State to the request for review by Judge Barnhart. Further, it is not clear from this record if this was a reconsideration or a rehearing. See *People v. Gilliam*, 172 Ill. 2d 484, 506 (1996).

and the recording from his squad car's video camera. Defendant evidently refers to Judge Schreiber's findings. In our view, however, any error in those findings is of purely academic interest given that defendant renewed his motion before a different judge, Judge Barnhart, who again denied the motion. With his renewed motion to quash and suppress, defendant invited Judge Barnhart to issue a ruling that superseded Judge Schreiber's. Thus, we review Judge Barnhart's ruling, not Judge Schreiber's.

¶ 9 Defendant argues that the facts known to Delisio did not give rise to a reasonable suspicion that defendant violated section 11-709 of the Code. In support of his argument, defendant relies heavily on the decision of a divided panel of this court in *People v. Leyendecker*, 337 Ill. App. 3d 678 (2003). In *Leyendecker*, the majority held that a motorist's "momentary one-foot crossing of the fog line as she maneuvered her vehicle through a left-hand curve on a hilly road with poor visibility would not cause a reasonable person to suspect that [she] was not driving 'as nearly as practicable' within her lane." *Id.* at 683. Justice Callum dissented, disagreeing with the majority's conclusion that, because of the road's hills and curves, it was not "practicable" for the motorist to keep her vehicle entirely within its lane. *Id.* at 684 (Callum, J., dissenting). Justice Callum reasoned that "practicable" refers to that which is possible or feasible, not merely that which can be accomplished without difficulty. In Justice Callum's view, had there been an obstruction in the roadway, it might not have been practicable for the defendant to drive entirely within her lane, but the hills and curves, at most, only increased the difficulty of doing so.

¶ 10 Precisely how far the majority's reasoning in *Leyendecker* extends is not yet clearly settled. In *People v. Geier*, 407 Ill. App. 3d 553 (2011), we upheld a traffic stop based on section 11-709(a), where, in contrast to the "one-foot crossing of the fog line" in *Leyendecker* (*Leyendecker*, 337 Ill. App. 3d at 683), all four of the vehicles' tires passed over the fog line at one point. *Geier*, 407 Ill.

App 3d at 554. In *People v. Hackett*, 406 Ill. App. 3d 209 (2010), *appeal allowed*, No. 111781 (Ill. Mar. 30, 2011), a divided panel of the Third District essentially held that a vehicle that physically occupies more than one lane will be deemed to be “entirely within a single lane” (625 ILCS 5/11-709(a) (West 2008)) for purposes of section 11-709(a), unless “the driver of the vehicle actually drives for some reasonably appreciable distance in more than one lane of traffic.” *Hackett*, 406 Ill. App. 3d at 214. It is not clear that this gloss on section 11-709(a) has any foundation in the actual language of the statute, and it is of course a fundamental principle of statutory construction that “[a] court may not supply omissions, remedy defects, substitute different provisions, add exceptions, limitations, or conditions, or otherwise change the law so as to depart from the plain meaning of the language employed in the statute.” *Bailey v. Illinois Liquor Control Comm’n*, 405 Ill. App. 3d 550, 554 (2010). Arguably, the *Hackett* majority did just that by adding a time element that the General Assembly omitted from the statute. The dissent in *Hackett* made this point far less charitably, imagining that a certain fictional attorney from a popular comedy film “would undoubtedly ask whether the law of physics cease to exist on highways in the Third District allowing a vehicle to travel for four seconds with its tires in two separate lanes and yet not be ‘actually driving in more than one lane of traffic.’ ” *Hackett*, 406 Ill. App. 3d at 221 (Schmidt, J., dissenting).

¶ 11 We acknowledge that there is some authority from other jurisdictions indicating that similarly-worded statutes do not penalize minor deviations from the marked lanes. See, e.g., *State v. Prado*, 145 Wash. App. 646, 648, 186 P.3d 1186, 1187 (2008) (citing *State v. Livingston*, 206 Ariz. 145, 75 P.3d 1103 (Ariz. Ct. App. 2003) (agreeing with holding in *Livingston* that “language requiring a driver to remain exclusively in a single lane ‘as nearly as practicable’ indicated an express legislative intent to avoid penalizing brief, momentary and minor deviations of lane lines.”)). However, the thrust of the holding in *Leyendecker* is that the legality of a deviation from a marked

lane depends on whether identifiable road conditions or other specific circumstances might make it impracticable for a motorist to avoid straying from his or her lane. Accord *United States v. Bassols*, 775 F. Supp. 2d 1293, 1302 (D.N.M. 2011) (quoting *United States v. Alvarado*, 430 F.3d 1305, 1309 (10th Cir. 2005) (determination of whether a single instance of crossing a traffic line violates a New Mexico statute that is practically identical to section 11-709(a) “ ‘require[s] a fact-specific inquiry into the particular circumstances present during the incident in question in order to determine whether the driver could reasonably be expected to maintain a straight course at that time in that vehicle on that roadway.’ ”).

¶ 12 Defendant insists that the circumstances here were similar to those in *Leyendecker*. Defendant relies on the evidence presented at the hearing before Judge Schreiber. We note that that evidence shows *potentially* significant differences between the facts of this case and those of *Leyendecker*. Although in each case the vehicle crossed the fog line while proceeding around a curve, in this case the curve was quite gentle, and the roadway appeared to be smooth, level, and free of obstructions to forward travel or to visibility. Moreover, defendant’s vehicle touched the fog line between one and three times before actually crossing it. There is authority that the fog line itself is not part of the lane it demarcates. See *Bassols*, 775 F. Supp. 2d at 1300-01; *State v. Vanlom*, 232 Or. App. 492, 497, 222 P.3d 49, 51 (2009). Thus, it is at least arguable that defendant technically left his lane each time he drove onto the fog line. Ultimately, however, what the evidence presented to Judge Schreiber shows is not dispositive. As noted, we are concerned here with Judge Barnhart’s ruling, which superseded Judge Schreiber’s. Unfortunately, our review of the ruling is hampered by the lack of a complete record. The record contains no transcript, bystander’s report, or agreed statement of facts detailing the evidence that Judge Barnhart considered. The record does indicate that the footage recorded from the camera in Delisio’s squad car was admitted into evidence. There

is no indication of what testimony or other evidence was presented. Although a transcript of the hearing before Judge Schreiber was available when defendant renewed the motion to quash and suppress,³ the record does not indicate whether Judge Barnhart took notice of the testimony heard by Judge Schreiber.

¶ 13 As seen, even if we were to assume that Judge Barnhart considered precisely the same evidence that Judge Schreiber considered, it is not clear that *Leyendecker* would be on point. In any event, we simply cannot make such an assumption. It is well established that “an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis.” *Foutch v. O’Bryant*, 99 Ill. 2d 389, 391-92 (1984). Under *Foutch*, “[a]ny doubts which may arise from the incompleteness of the record will be resolved against the appellant.” *Id.* at 392. Because defendant has failed to present a complete record, and for all of the reasons stated above, we must presume that the evidence considered by Judge Barnhart established that Delisio had a reasonable suspicion that defendant had violated section 11-709(a).

¶ 14 For the foregoing reasons, the judgment of the circuit court of De Kalb County is affirmed.

¶ 15 Affirmed.

³The transcript was prepared in connection with defendant’s appeal from Judge Schreiber’s ruling. As noted, we granted defendant’s motion for voluntary dismissal of that appeal.