2011 IL App (2d) 100806-U
No. 2—10—0806
Order filed August 3, 2011



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court of Boone County. |
| Plaintiff-Appellant, | ) | |
| v. | ) | No. 09—CF—210 |
| CALVIN L. HOARDE, | ) | Honorable John H. Young, |
| Defendant-Appellee. | ) | Judge, Presiding. |

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Burke and Hudson concurred in the judgment.

**ORDER**

*Held*: The State failed to show *prima facie* reversible error in the trial court's grant of defendant's motion to quash and suppress, as the State did not address, with pertinent authority, the precise issue of whether, in the absence of any unusual driving conditions, the police were justified in stopping defendant's vehicle for a violation of section 11—709(a) of the Vehicle Code when the vehicle momentarily touched (but did not cross) the fog line.

¶ 1 The State appeals from an order of the circuit court of Boone County granting the motion of defendant, Calvin L. Hoarde, to quash his arrest and suppress evidence in a prosecution for aggravated driving while his license was revoked (625 ILCS 5/6—303(d) (West 2008)). We affirm.

¶ 2 At the hearing on defendant's motion, Boone County Deputy Sheriff Austin Schmitt testified that, on May 9, 2009, at approximately 2:22 a.m., he observed a light blue Chevrolet truck "strike" the fog line as it traveled west on Bypass 20. According to Schmitt, the truck's tires "drove onto" the fog line, but did not cross it, and the vehicle did not veer onto the shoulder of the road. The truck remained on the fog line "[f]or a few seconds." After observing this, Schmitt effected a traffic stop. Although defendant and a passenger in the truck testified that the truck never struck or drove on the fog line, it is evident from the record that the trial court did not consider that testimony to be credible. The prosecutor argued that the stop was proper because, by "striking" the fog line, defendant "[was] not driving as nearly as practicable within his own lane" as required by section 11—709(a) of the Illinois Vehicle Code (Code) (625 ILCS 5/11—709(a) (West 2008)). The prosecutor expressed her understanding that a motorist's lane of travel "is from *** the edge of the center line to the edge of the fog line, not the outside edges but the inside edges."

¶ 3 At the conclusion of the hearing, the trial court continued the matter so that it could review our decision in *People v. Leyendecker*, 337 Ill. App. 3d 678 (2003), and its own prior rulings concerning section 11—709(a). In granting defendant's motion, the trial court reasoned that "a momentary strike of the fog line and even one that is driving on a fog line for a few seconds, that alone is not sufficient probable cause to believe that there is a violation of [section 11—709(a) of the Code]." The State unsuccessfully moved for reconsideration of the trial court's order, and this appeal followed.

¶ 4 Defendant has not filed an appellee's brief. Accordingly, our review is governed by *First Capitol Mortgage Corp. v. Talandis Construction Co.*, 63 Ill. 2d 128, 133 (1976), which held that "if the record is simple and the claimed errors are such that the court can easily decide them without

the aid of an appellee's brief, the court of review should decide the merits of the appeal. In other cases if the appellant's brief demonstrates *prima facie* reversible error and the contentions of the brief find support in the record the judgment of the trial court may be reversed." Because, as will be explained, there is at least an arguable distinction between this case and any other heretofore decided in Illinois, we do not believe that a disposition on the merits is appropriate without defendant's participation. We affirm, however, because the State has not made a *prima facie* case for reversal.

¶ 5 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.*

¶ 6 Section 11—709(a) of the Code provides:

> "Whenever any roadway has been divided into 2 or more clearly marked lanes for traffic the following rules *** shall apply.
>
> (a) 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." 625 ILCS 5/11—709(a) (West 2008).

¶ 7 In *Leyendecker*, a divided panel of this court held that a police officer lacked a reasonable suspicion that the defendant violated section 11—709(a), and the officer therefore had no basis for conducting a traffic stop. The *Leyendecker* majority reasoned that the defendant'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 defendant was not driving 'as nearly as practicable' within her lane." *Leyendecker*, 337 Ill. App. 3d at 683.

¶ 8 We agree with the State that *Leyendecker* does not stand for the proposition that momentarily crossing a fog line is *never* a violation of section 11—709(a). Clearly, the majority's holding in *Leyendecker* was a function of specific driving conditions that, in the majority's view, negated any inference that it was practicable for the motorist to keep her vehicle from crossing the fog line. The record discloses no such driving conditions here, so if defendant had *crossed* the fog line, even for just a few seconds, *Leyendecker* would offer him no solace. We note that in *People v. Geier*, 407 Ill. App. 3d 553 (2011), we upheld a traffic stop where all four wheels of a vehicle crossed the fog line and "there were no special conditions such as the poor visibility in *Leyendecker* that would have accounted for the defendant's driving error." *Id.* at 559. But defendant did not actually cross the fog line in this case. Schmitt stopped defendant's vehicle after observing it merely "strike" or drive onto the fog line. The trial court's ruling was likewise framed in terms of whether striking or driving on the fog line—not crossing it—is grounds for a traffic stop. Indeed, it is not altogether clear what role *Leyendecker* played in the trial court's decision.

¶ 9 As positive support for its view that the stop in this case was permissible, the State relies exclusively on *People v. Rush*, 319 Ill. App. 3d 34 (2001), a decision even less apposite than *Leyendecker*. The *Rush* court upheld the stop of a motorist who was observed crossing (rather than "striking" or driving on) the center line (rather than the fog line). The decision was based not on the statutory requirement that "[a] vehicle shall be driven as nearly as practicable entirely within a single lane," but rather on the distinct statutory requirement that vehicles be driven "upon the right half of the roadway," except when overtaking and passing another vehicle, to avoid an obstruction in the

roadway, when the road is divided into three marked lanes for traffic, when the roadway is restricted to one-way traffic, or when two vehicles meet on a public highway with "a single track of paved road on one side" (625 ILCS 5/11—701(a) (West 2010)). Notably, when these exceptions do not apply, the statutory obligation to drive "upon the right half of the roadway" is, by its terms, more absolute than the obligation to drive entirely within a single lane. The latter obligation is qualified by the words "as nearly as practicable"; the former is not. Thus, even if the holding in *Rush* extends to cases where a motorist drives on, but does not cross, the center line, *Rush* would still be of meager value in deciding whether a motorist who strays onto the fog line fails to stay within his lane "as nearly as practicable." In our view, even *Talandis*'s *prima facie* error standard for reversal demands argument or authority closer to the mark than what the State has offered here.

¶ 10 The State's failure to address the precise question this appeal raises might have been excusable if the governing law were well settled, but the issue is one of first impression in Illinois. Moreover, the absence of Illinois case law does not excuse the State's failure to cite pertinent authority; courts in other jurisdictions considering nearly identical statutory language have addressed the question of whether merely touching the fog line is grounds for a traffic stop. See *United States v. Colin*, 314 F.3d 439, 444 (9th Cir. 2002) (traffic stop was invalid because "[t]ouching a dividing line, even if a small portion of the body of the car veers into a neighboring lane, satisfies the statute's requirement that a driver drive '*as nearly as practical* entirely within a single lane' " (emphasis in original)); *United States v. Bassols*, No. 10—cr—02077, 2011 WL 1343158 at *8 (D. N.M. Mar. 29, 2011) (determination of whether a motorist violates a New Mexico statute requiring a motorist to drive " 'as nearly as practicable within a single lane' " (N.M. Stat Ann. §66—7—317 (1978)) by making contact with the line dividing the road from the shoulder entails a fact-sensitive inquiry

requiring consideration of the weather, road features, and other circumstances bearing on the motorist's ability to keep the vehicle within its lane, and traffic stop was permissible where motorist was driving a normal-sized automobile on a straight, well-maintained stretch of interstate highway with no obstacles and at a time when there was no wind); see also *United States v. Lopez-Rojo*, No. 3:07—CR—00080—LHR—RAM, 2008 WL 2277495 at *5 (D. Nev. May 29, 2008) (distinguishing *Colin* because defendant crossed over the fog line rather than merely touching it).

¶ 11 Because the State has failed to make a *prima facie* case that the trial court erred in ruling that striking or driving on the fog line is not grounds for a traffic stop, we affirm its order granting defendant's motion to quash and suppress.

¶ 12 Affirmed.