IN THE COUNTY COURT, IN AND FOR PUTNAM COUNTY, FLORIDA

CASE NO.: 2014-1924-CT

STATE OF FLORIDA

VS.

NICHOLAS B. JOHNSON

MOTION TO SUPPRESS

Defendant, NICHOLAS JOHNSON, by and through the undersigned attorneys, pursuant to Fla. R. Crim. P. 3.190(g) and 3.190(h), and the Fourth Amendment to the United States Constitution, respectfully requests this Honorable Court to suppress the following evidence:

1. Any and all statements made by Defendant after FWC officers stopped Defendant;
2. Any and all evidence of Defendant's performance on field sobriety exercises; and
3. All subsequent evidence obtained as a result of the arrest made, including Defendant's breath samples.

As grounds for this motion, Defendant states the evidence mentioned above was the product of an unlawful search and seizure, in violation of Defendant's rights guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 12, of the Florida Constitution, and in violation of Defendant's right to privacy guaranteed by Article I, Section 23 of the Florida Constitution. In support of this Motion, Defendant would state as follows:

FACTS

1. On August 2, 2014, FWC Bonds and FWC Roberson were traveling south on Old Mateo Road in San Mateo and observed Defendant's vehicle activate its brake lights prior to coming to the intersection of North Boundary Road and Old San Mateo Road.

2. The intersection of North Boundary Road and Old San Mateo Road is a four-way stop.

3. In the probable cause affidavit, FWC Roberson states, "It appeared the vehicle had approached an intersection and had slowed but failed to stop."

4. The probable cause affidavit states that FWC officers were approximately 100 yards behind Defendant's vehicle at the time this alleged failure to stop occurred.

5. However, at deposition, FWC Bonds stated that they were 150 to 200 yards behind Defendant's vehicle.

6. At deposition, FWC Bonds noted that they were "straight behind" Defendant's vehicle when they observed the brake lights illuminate.

7. Both FWC officers testified at deposition that there were no cars at the intersection at the time Defendant braked at the stop sign.

8. At deposition, FWC Bonds estimated that Defendant's vehicle moved at approximately five miles per hour through the intersection.

9. At deposition, FWC Bonds also stated that it would be impossible to perform a proper speed estimation from his location and for the amount of time he observed the vehicle.

10. After observing Defendant's vehicle allegedly fail to stop at the intersection, FWC officers continued to follow Defendant as Defendant continued straight to travel south on State Road 100 and then merge onto East End Road.

11. FWC Roberson's probable cause affidavit further states, "I observed the SUV weaving in and out of the eastbound lane. The vehicle veered completely out of its lane three time and its left tires traveling over the double center lines."

12. The probable cause affidavit states that FWC officers observed an oncoming vehicle; to-wit: "met the silver vehicle in a curve and the silver car swerve[d] back into the road after it passed the truck."

13. However, at deposition, both FWC officers had difficulty articulating what they meant by swerve, as the vehicle was coming around a curve at the time of observation.

14. There was no statement that the silver vehicle was effected by, or that the officers believed the silver vehicle was effected by, Defendant's truck.

15. During his deposition, FWC Roberson was unable to articulate how far Defendant's vehicle swerved out of the lanes and over the double line, how long Defendant's tires made contact with the double line or over what distance it swerved.

16. During the deposition, Officer Roberson could not clearly articulate how much of the vehicle went over the line.

17. FWC officers did not note any erratic driving pattern.

18. Neither FWC officers's probable cause affidavits states that they effectuated the traffic stop because they believed Defendant's driving was a result of him being either ill, tired, or impaired.

19. FWC officers thereafter effectuated a traffic stop on East End Road.

20. Defendant estimates that Defendant was stopped by FWC officers approximately two (2) miles from the intersection where the alleged traffic infraction occurred.

21. Defendant was cited for a violation of Florida Statute 316.074(1) – Obedience to and Required Traffic Control Device.

22. It is notable that Defendant was not cited for Careless Driving or Improper Lane Change or Course.

23. Defendant was thereafter arrested for Driving Under the Influence

MEMORANDUM OF LAW

Under search and seizure law, there are only two bases in which a law enforcement officer can lawfully stop a motorist: (1) probable cause to believe a traffic violation has occurred, *Whren v. United States*, 517 U.S. 806, 810 (1996); *Petrel v. State*, 675 So. 2d 1049, 1050 (Fla. 4th DCA 1996); or (2) reasonable suspicion a crime is occurring or has occurred. *Terry v. Ohio*, 392 U.S. 1, (1968); *see also*, *Popple v. State*, 626 So. 2d 185, 186 (Fla. 1993).

Here, FWC officers did not have probable cause that a traffic violation occurred, nor did they have reasonable suspicion to believe a crime was occurring or had occurred. As a result, Defendant's Fourth Amendment Rights were violated by an unlawful stop. Thus, all evidence obtained following this illegal stop should be excluded as the "fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471, 484 (1963).

I. Officers Did Not Have Probable Cause of a Traffic Infraction Upon Which to Stop Defendant.

a. No Probable Cause That Defendant Failed to Stop at Stop Sign.

The test of probable cause is whether an officer could have stopped the vehicle for a traffic violation. *Whren*, 517 U.S. at 813. The constitutional validity of a traffic stop depends on purely objective criteria. *Id.* The objective test "asks only whether any probable cause for the stop existed," making the subjective knowledge, motivation, or intention of the individual officer involved wholly irrelevant. *Holland v. State*, 696 So. 2d 757, 759 (Fla. 1997).

Here, FWC officers did not have probable cause to stop Defendant. Although Defendant was cited for failure to stop at a traffic signal, it is objectively unreasonable that FWC officers actually witnessed such violation occur. The probable cause affidavit states that FWC officers were approximately 100 yards behind Defendant's vehicle at the time this alleged failure to stop

occurred. However, at deposition, FWC Bonds stated that they were 150 to 200 yards behind Defendant's vehicle. At deposition, both FWC officers testified that they saw Defendant's brake lights activate as he approached the intersection. At deposition, FWC Bonds estimated that Defendant's vehicle moved at approximately five miles per hour through the intersection. However, FWC Bonds also admitted at deposition that it would be impossible to perform a proper speed estimation at his distance and given the amount of time he observed the vehicle. Based on the testimony adduced at deposition, it is objectively unreasonable that FWC officers had probable cause to stop Defendant for failure to stop at a traffic signal.

b. No Probable Cause That Defendant Failed to Maintain a Lane of Travel.

When determining if there is probable cause, a valid arrest may occur although not for the offense stated. *State v. Carmody*, 553 So. 2d 1366 (Fla. 5th DCA 1989). However, the possible bases for which probable cause could exist in this case are not articulated in either FWC officer's probable cause affidavits. *See, e.g.*, §§ 316.0174(1), 316.123 and 316.089(1), Fla. Stat.; *see also Crooks v. State*, 710 So. 2d 1041 (Fla. 2d DCA 1998); *Jordan v. State*, 831 So. 2d 1241(Fla. 5th DCA 2002).

In *Crooks*, the defendant was stopped for violating section 316.089(1), Driving on Roadways Laned for Traffic. The defendant appealed his conviction and order of probation for possession of marijuana following the denial of his dispositive motion to suppress. The marijuana was found during an allegedly consensual search of the defendant's car, following a traffic stop for violating 316.089(1).

The defendant was driving on the highway when law enforcement officers observed the defendant drive his car over the right-hand line on the edge of the right lane of northbound traffic. This movement was away from the trooper's car, and the trooper did not claim that this movement

endangered him in any way. No testimony suggested that the defendant moved any great distance over the line into the emergency lane.

Later, the defendant's vehicle drifted over the right-hand line on two more occasions. No evidence was presented describing how far he drove over the line on these occasions, but it was clear that no other cars or pedestrians were near him on either occasion. The troopers did not think that the defendant was intoxicated or otherwise impaired.

Based on these actions, the troopers stopped the defendant for violation of section 316.089(1). Because the record did not establish how far into the right-hand emergency lane the defendant drove on any of the three occasions, there was no basis to state that he was outside the "practicable" lane. Even if he was briefly outside this margin of error, there was no objective evidence suggesting that the defendant failed to ascertain that his movements could be made with safety. As such, the district court reversed the trial court's denial of the defendant's motion to suppress due to the lack of objective basis to support the stop.

In *Jordan*, an officer testified that appellant crossed the traffic line demarcating lanes and swerved back into his own lane for no apparent reason. Appellant was stopped for violating section 316.089(1). Appellant argued that his failure to maintain a single lane did not create strict liability under the statute, as movement from a single lane was permitted when the driver ascertained that the movement could be made safely. In the absence of any testimony that his driving created a safety concern or any suspicion that he was impaired, appellant contended that the stop of his vehicle was unlawful and his subsequent consent to search was invalid pursuant the statute. On appeal, the court found that the record failed to establish that appellant's vehicular movements, as testified to by the arresting officer, created any danger to himself or other traffic. There was no testimony indicating that appellant was intoxicated or otherwise impaired, nor was any erratic

driving pattern established. Therefore, the arresting officer's testimony failed to establish probable cause to reasonably believe that appellant committed any traffic infraction justifying the stop of his vehicle.

While FWC Roberson's probable cause affidavit cites Defendant's "swerving," neither FWC officer definitively reported or testified at deposition as to the length of time Defendant was swerving, the amount Defendant's vehicle was swerving in or out of the lines, or that other vehicles on the road were endangered by Defendant's driving pattern. While the officer's affidavits note that the defendant's left tire made contact with the double yellow line, this was not consistently reported between the officers. Without these vital facts, there is no basis to argue that there was probable cause that a traffic violation for failure to maintain a lane of travel (or the like) occurred.

II. Officers Did Not Have Sufficient Articulable Reasonable Suspicion to Stop Defendant.

An officer may conduct an investigatory stop on less than probable cause if the officer has a reasonable, articulable suspicion that a person has committed, is committing, or is about to commit a crime. *Popple*, 626 So. 2d at 186; *Tamer*, 463 So. 2d at 1239. "In order not to violate a citizen's Fourth Amendment rights, an investigatory stop requires a well-founded, articulable suspicion of criminal activity. Mere suspicion is not enough to support a stop." *Popple*, 626 So. 2d at 186. A founded suspicion is a belief which has some factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer's knowledge. *Tamer*, 463 So. 2d at 1239; *see also, Donaldson v. State*, 803 So. 2d 856, 859-860 (Fla. 4th DCA 2002). Courts have held that an officer has reasonable suspicion if they have a belief that the driver is ill, tired, or impaired, **and** they observe a driving pattern that is sufficient to warrant such a belief. *Yanes v. State,* 877 So. 2d 25 (Fla. 5th DCA 2004) (emphasis added).

In *Yanes*, an officer had reasonable suspicion to stop a vehicle where he observed a vehicle cross the fog line with one half of the width of his vehicle on three occasions over a one mile period, coupled with a belief that the driver was possibly impaired. *Id.* at 26.

Unlike in *Yanes*, FWC officers here cannot articulate reasonable suspicion as a basis for this stop. While their probable cause affidavits state Defendant was weaving, neither FWC officer can articulate over what distance Defendant weaved or what portion of Defendant's vehicle crossed over the traffic lines. In the nearly two miles they observed Defendant, FWC officers were unable to articulate any other abnormal driving behavior. Both FWC officers' probable cause affidavits fail to state that they believed Defendant was ill, tired, or impaired prior to stopping him. When encountering Defendant for the first time, FWC Bonds told Defendant that the reason for the stop was that Defendant had run a stop sign. Although FWC officers later testified at deposition that at the time they had a suspicion that Defendant was impaired, this basis is absent from their sworn probable cause affidavits. Therefore, FWC officers lacked sufficient articulable reasonable suspicion to stop Defendant.

WHEREFORE, Defendant respectfully requests this Court suppress the above-mentioned evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2015, I electronically filed the foregoing with the Clerk of the Courts by using ECF system which will send a notice of electronic filing to the following: Scott Wesbrook, Esq. I further certify that I e-mailed the foregoing document to Scott Westrbook, Esq., on March 10, 2015 at westbrooks@sao7.org.

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