

2004 OCT -4 A 10:10

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

EMILIANO W. ALVARADO,

Defendant.

**MEMORANDUM DECISION AND
ORDER**

Case No. 2:04 CR 134 DAK

This matter is before the court on defendant's Motion to Suppress. Defendant, Emiliano W. Alvarado, seeks to suppress all evidence seized from him and the automobile he was driving on February 17, 2004. An evidentiary hearing on the motion was conducted on June 15, 2004. Defendant was present with his counsel, Stephen R. McCaughey. The government was represented by Robert A. Lund. Following the hearing, the court ordered a transcript as well as briefing from the parties. After briefing was completed, closing arguments were held on September 7, 2004. Since taking the matter under advisement, the court has further considered the law and facts relating to the motion. Now being fully advised, the court renders the following Memorandum Decision and Order.

27

I. BACKGROUND

The court finds the relevant facts as follows. On February 19, 2004, Trooper Nick Bowles of the Utah Highway Patrol conducted a traffic stop on Interstate 70 of a Jeep Cherokee driven by the defendant, Emiliano Alvarado. Trooper Bowles observed the car being driven by the defendant cross approximately one foot over the right fog line for a few seconds and then re-enter the lane of travel. The incident was a single occurrence. It was a clear and sunny day with no wind or other adverse weather conditions. The portion of Interstate 70 in which the defendant crossed the fog line was straight and flat. The road was dry at the time and there were no pot holes, debris, or other obstructions in the roadway.

Due to the ideal driving conditions, Trooper Bowles was concerned that crossing the fog line might indicate that the defendant was driving while impaired or fatigued. Trooper Bowles testified that the majority of accidents he has witnessed on Interstate 70 are single vehicle rollovers, most of which are caused by a vehicle crossing the fog line and either never properly correcting or over-correcting causing the vehicle to roll over.

After observing the vehicle cross the fog line, Trooper Bowles immediately turned on his emergency lights and pulled over the defendant. As Trooper Bowles approached the vehicle on foot, the defendant rolled down both the front driver side and passenger side windows of the car. Trooper Bowles requested the defendant's license, insurance, and registration. Trooper Bowles also asked the defendant if he owned the vehicle and was told it was a friend's car. Trooper Bowles informed the defendant that he had been pulled over for crossing the fog line and asked the defendant how long he had been driving and if he had been drinking.

Trooper Bowles then asked the defendant to have a seat in the front passenger seat of the patrol car. While in the patrol car, Trooper Bowles requested that dispatch run a check on defendant's license, registration, and criminal history including warrants. Trooper Bowles informed the defendant he would get a warning for crossing the fog line and instructed the defendant that if he was tired he needed to take a break from driving. Trooper Bowles also asked the defendant several questions about why he was traveling and where he was going. The defendant said that he was driving from California to North Carolina, that he had been working in North Carolina for the past six months, but that he had borrowed a car and driven to California to try to convince his family to come to North Carolina with him. The defendant stated that it had taken him three days to travel from North Carolina to California, that he spent two weeks in California with his family, and now he was on the second day of his trip back to North Carolina.

Trooper Bowles felt that the defendant was being deceitful about the dates of his travel because the vehicle had only been registered thirteen days earlier on February 6, 2004. Trooper Bowles also thought it suspicious that the defendant could obtain two weeks of vacation at a job he had only held for six months and that the owner of the newly registered car would allow the defendant to borrow the car for two weeks to travel cross-country. In addition, Trooper Bowles observed the defendant become more nervous as the stop progressed.

After discussing the defendant's travel plans in the patrol car, the trooper asked the defendant to return to the Jeep Cherokee. Upon receiving the requested information from dispatch, Trooper Bowles once again approached the Jeep Cherokee and asked the defendant to exit the vehicle. Trooper Bowles returned the defendant's documents and issued the defendant a written warning.

Trooper Bowles then told the defendant "you're free to leave, drive safely." The defendant's initial detention took no longer than was necessary to issue a written warning and receive the results of the background check from dispatch. According to the timer displayed on the videotape of the stop, approximately fourteen minutes passed from the time the defendant was pulled over until he was informed he was free to leave.

As the defendant was returning to the car, but before he entered the vehicle, Trooper Bowles asked "sir, can I talk with you for just another minute?" Trooper Bowles then told the defendant that he thought he seemed really nervous and asked the defendant if he was doing anything illegal. The defendant denied doing anything illegal. The trooper then asked if there was anything illegal in the car. The defendant said no and volunteered to the trooper that "you can check." Trooper Bowles then asked if there were any firearms in the car. Once again, the defendant said no and volunteered that the trooper could check. Trooper Bowles responded by asking whether there were any drugs in the vehicle. The defendant answered that he was not aware of any. Trooper Bowles then asked "I can search the vehicle?" The defendant responded "sure." Trooper Bowles then searched the car. The defendant did not place any limitations on the scope of the search and never objected to the search at any time. The trooper's search eventually uncovered illegal narcotics concealed in the rear of the vehicle.

II DISCUSSION

A. The Initial Stop

The court must first determine whether the initial traffic stop was valid. A routine traffic stop is a seizure under the Fourth Amendment. *See United States v. Botero-Ospina*, 71 F.3d 783, 786 (10th Cir. 1995)(en banc). However, a routine traffic stop is analyzed under the standards applicable to an investigative detention rather than a custodial arrest. *Id.* “Whether a traffic stop is valid under the Fourth Amendment turns on whether ‘this particular officer had reasonable suspicion that this particular motorist violated any one of the multitude of applicable traffic and equipment regulations of the jurisdiction.’” *United States v. Vercher*, 358 F.3d 1257, 1261 (10th Cir. 2004) (quoting *Botero-Ospina*, 71 F.3d at 787).

The government asserts that the initial stop was justified because the trooper observed the defendant cross the fog line during ideal driving conditions. The government relies upon a provision of the Utah Code that states “[a] vehicle shall be operated as nearly as practical entirely within a single lane” to argue that the defendant violated Utah law by crossing the fog line. Utah Code Ann. § 41-6-61(1)(1998).¹ The statute’s “as nearly as practical” language requires the court to undertake a fact-specific analysis to determine whether Trooper Bowles had reasonable suspicion sufficient to stop the defendant. *See United States v. Ozbirn*, 189 F.3d 1194, 1198 (10th Cir. 1999) (“The use of the phrase ‘as nearly as practicable’ in the statute precludes . . . absolute standards, and requires

¹ Some stylistic changes were made to Utah Code Ann. § 41-6-61(1) during the 2004 Utah Legislative Session. The amendments became effective May 3, 2004. The court has quoted the older version of the statute that was in effect when the defendant was stopped on February 17, 2004.

a fact-specific inquiry to assess whether an officer has probable cause to believe a violation has occurred.”). In other words, the mere fact that Trooper Bowles observed the defendant cross the fog line on one occasion is not dispositive of whether the initial traffic stop was valid. The court must consider the surrounding circumstances to determine whether one instance of swerving can provide a valid basis for stopping the defendant.

Courts have reached differing results when confronted with facts similar to this case. *See United States v. Gastellum*, 927 F. Supp. 1386, 1390 (D. Colo. 1996) (noting that “recent Tenth Circuit authority is conflicting as to whether the initial stop—under the facts presented here—was lawful.”). This is perhaps best illustrated by four cases chronicling Sevier County Sheriff Deputy Phil Barney’s stops on Interstate 70. *See State of Utah v. Bello*, 871 P.2d 584 (Utah Ct. App. 1994); *Botero-Ospina*, 71 F.3d 73; *United States v. Lee*, 73 F.3d 1034 (10th Cir. 1996), *overruled, in part, by United States v. Holt*, 264 F.3d 1215, 1226 n.6 (10th Cir. 2001); *United States v. Gregory*, 79 F.3d 973 (10th Cir. 1996).

In *Bello*, Deputy Barney pulled over a truck on Interstate 70 that “briefly crossed the center line of the eastbound lanes.” 871 P.2d at 587. The Utah Court of Appeals held that given the circumstances, a single instance of weaving did not provide a basis to stop the defendant for violating Utah Code Ann. § 41-6-61(1). The court reasoned:

With respect to the argument that [defendant] could be legitimately stopped for violating section 41-6-61(1), we note that the statute requires only that a vehicle remain entirely in a single lane “as nearly as practical.” It was extremely windy on the morning in question and [defendant’s] truck had a camper shell that caused it to catch the wind more easily than other vehicles. These facts, in combination with the fact in the two miles that Barney followed [defendant] he observed

no further weaving, lead us to conclude that the single instance of weaving seen by Barney could not constitute a violation of section 41-6-61(1) and therefore cannot serve as the constitutional basis for stopping [defendant's] truck.

871 P.2d at 587. The court also rejected the government's claim that a single instance of weaving could, under the totality of the circumstances, provide a reasonable suspicion that the defendant was driving while impaired. *Id.* The court quoted the Tenth Circuit's commentary that "if failure to follow a perfect vector down the highway . . . were sufficient reason[] to suspect a person of driving while impaired, a substantial portion of the public would be subject each day to an invasion of their privacy." *Id.* (quoting *United States v. Lyon*, 7 F.3d 973, 976 (10th Cir. 1993)).

One year later, the Tenth Circuit held that Deputy Barney did not violate the Fourth Amendment when he stopped a vehicle for "traveling well below the posted speed limit and straddling the lane as it traveled eastbound on Interstate 70." *Botero-Ospina*, 71 F.3d at 788. The court found lane straddling to be a violation of section 41-6-61. *Id.* Just one month later, the Tenth Circuit issued the *Lee* decision wherein the court noted that "Deputy Barney testified that straddling the line was not clearly a violation of the law [h]e did, however, consider this conduct to be indicative of a sleepy or intoxicated driver." *Lee*, 73 F.3d at 1036. The court held that "Deputy Barney's purported concern that the Defendant with out-of-state license plates might be sleepy or intoxicated because he had changed lanes is sufficient to justify the stop under *Botero-Ospina*." *Id.* at 1038.

Two months after the *Lee* decision, the Tenth Circuit issued its decision in *Gregory*. In *Gregory*, Deputy Barney stopped a U-haul rental truck driving on Interstate 70 for a single

occurrence of passing two feet into the right shoulder of the emergency lane. *Gregory*, 79 F.3d at 975-76. Once again, Deputy Barney “testified that crossing into the emergency lane of a roadway is a violation of Utah law” and “that such conduct could also be indicative of a sleepy or intoxicated driver.” *Id.* at 976. The Tenth Circuit relied upon the Utah Court of Appeals’ decision in *Bello* and held that under the totality of the circumstances, “the stop did not meet the reasonableness test of the Fourth Amendment.” *Id.* at 979. The court reasoned:

We do not find that an isolated incident of a vehicle crossing into the emergency lane of a roadway is a violation of Utah law. This interpretation of Utah law has been followed by the Utah courts. *See e.g., State of Utah v. Bello*, 871 P.2d 584, 586 (Utah App. 1994) (a single instance of weaving does not constitute a violation of Utah Code Ann. § 41-6-61(1)). We agree with the Utah court which noted that the statute requires only that the vehicle remain entirely in a single lane “as nearly as practical.” *Id.* The road was winding, the terrain mountainous and the weather condition was windy. Under these conditions any vehicle could be subject to an isolated incident of moving into the right shoulder of the roadway, without giving rise to suspicion of criminal activity. The driver may have decided to pull over to check his vehicle and then have a sudden change of mind and pulled back into the traffic lane. Since the movement of the vehicle occurred toward the right shoulder, other traffic was in no danger of collision. These facts lead us to conclude that the single occurrence of moving to the right shoulder of the roadway which was observed by Officer Barney could not constitute a violation of Utah law and therefore does not warrant the invasion of Fourth Amendment protection.

Id. at 978. As in *Bello*, the *Gregory* court rejected the government’s argument that one instance of swerving provides a basis for a reasonable suspicion that the defendant was driving while impaired from alcohol or fatigue. *Id.* The court noted that “driving while fatigued is not criminal activity and only if a driver is extremely fatigued can the condition constitute a danger to public safety.” *Id.*

A few years after the “Barney cases,” the Tenth Circuit was once again faced with deciding whether drifting onto the shoulder of the highway provided a reasonable basis for stopping a vehicle. *See Ozbirn*, 189 F.3d 1194. This time the stop took place in Osage County, Kansas. *Id.* at 1196. Kansas has a statute almost identical to Utah’s requiring a vehicle to “be driven as nearly as practicable entirely within a single lane.” *Id.* at 1198 (quoting Kan. Stat. Ann. § 8-1522). In *Ozbirn*, the officer observed a “motor home drift onto the shoulder twice within a quarter mile under optimal road, weather and traffic conditions.” *Id.* The court found that the absence of adverse weather and road conditions made the *Ozbirn* case distinguishable from the *Gregory* case and held that the officer was justified in stopping the defendant. *Id.*

The government correctly notes that the Tenth Circuit has also issued several unpublished decisions since *Gregory* that make it clear “*Gregory* did not establish a bright-line rule that a single instance of swerving could *never* constitute a violation of the statute, but rather held that under the *particular circumstances of that case*, the motorist’s single swerve did not provide sufficient justification for a stop.” *United States v. Dunn*, No. 97-3028, 1998 WL 8227, *2 (10th Cir. Jan. 12, 1998) (emphasis in original). In *Dunn*, the court upheld a stop where the trooper observed a car swerve once over the right edge of the lane on a portion of Interstate 70 that was straight with a slight grade and winds of less than twenty miles per hour. *Id.* at *1. Just last year, the Tenth Circuit upheld the stop of a vehicle that crossed approximately six inches over the right-side fog line because it occurred during “optimal road, weather, and traffic conditions.” *United States v. Landshof*, 77 Fed. Appx. 482, 484 (10th Cir. 2003).

In the instant case, Trooper Bowles observed a passenger vehicle driven by defendant cross the right fog line during ideal weather conditions on a straight portion of Interstate 70. Unlike

Gregory, the record in this case does not contain evidence of other conditions or circumstances that would make it impractical for the defendant to drive the vehicle entirely within a single lane. Based upon the totality of the circumstances, the court finds that Trooper Bowles had an objectively reasonable, articulable suspicion that the defendant was operating the vehicle in violation of Utah Code Ann. § 41-6-61(1). Accordingly, the court concludes that Trooper Bowles' initial stop of the defendant was reasonable under the Fourth Amendment.

B. The Search

It is well established that “an officer conducting a routine traffic stop may request a driver’s license and vehicle registration, run a computer check, and issue a citation.” *United States v. Caro*, 248 F.3d 1240, 1244 (10th Cir. 2001). An officer may also ask questions about travel plans during a legal traffic stop while awaiting the results of a background check. *See United States v. Oliver*, 363 F.3d 1061, 1067 (10th Cir. 2004). Once an officer has completed a routine background check and the driver has provided a valid driver’s license and verification that he is authorized to drive the car, the driver “must be allowed to proceed on his way, without being subject to further delay by police for additional questioning.” *Caro*, 248 F.3d at 1244 (quoting *United States v. Gonzalez-Lerma*, 14 F.3d 1479, 1483 (10th Cir. 1994)). However, there are two circumstances in which further questioning is permissible.

First, if the officer has an objectively reasonable and articulable suspicion that illegal activity has occurred or is occurring, the officer may detain the driver for questioning unrelated to the purpose of the initial traffic stop. Second, if the traffic stop has become a consensual encounter, the officer may continue to question the driver.

Id. at 1244.

As previously noted, the defendant’s initial detention took no longer than was necessary to

issue a written warning and receive the results of the background check from dispatch. During the initial detention, Trooper Bowles informed the defendant that so long as everything checked out with dispatch, all he would receive was a written warning and he would be allowed to continue his travels. After dispatch reported the results of the background check, Trooper Bowles returned all of the defendant's documents to the defendant and told him that he was free to leave. The defendant apparently understood he was free to leave because he began to return to his vehicle. Trooper Bowles then asked the defendant if he could speak with him some more. There was no display of force or other tactics used to intimidate the defendant. Having considered the totality of the circumstances, the court finds that the traffic stop became a consensual encounter after the defendant's documents were returned and he was informed that he was free to leave.

The court finds that after the stop became a consensual encounter, the defendant voluntarily consented to a search of the vehicle. Given the public setting, the clear nature of the request to search, the lack of any threats or intimidation, the clear responses by the defendant, the consent was voluntary and valid under the totality of the circumstances. Contrary to defendant's argument, the defendant consented to more than just a "check" of the vehicle. The conversation between the trooper and defendant made clear that the trooper wanted to search the vehicle for drugs, guns or other illegal contraband. The defendant consented to the search and never voiced any objections while the search was being performed. The search did not exceed the scope of the consent.

CONCLUSION

Based upon the foregoing, IT IS HEREBY ORDERED that defendant's Motion to Suppress is DENIED.

DATED this 30th day of September, 2004.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Dale A. Kimball", written over a horizontal line.

DALE A. KIMBALL
United States District Judge

United States District Court
for the
District of Utah
October 4, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:04-cr-00134

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Robert A. Lund, Esq.
US ATTORNEY'S OFFICE

,
EMAIL

Mr. Stephen R McCaughey, Esq.
10 W BROADWAY STE 650
SALT LAKE CITY, UT 84101
EMAIL

United States Marshal Service
DISTRICT OF UTAH

,
EMAIL

US Probation
DISTRICT OF UTAH

,
EMAIL