NORTH CAROLINA
_____ COUNTY

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO. _____

STATE OF NORTH CAROLINA

vs.

MOTION TO SUPPRESS

_____,
Defendant.

NOW COMES the Defendant, by and through his attorney, Marcus E. Hill, and moves to dismiss this case based on the following arguments:

1. The State did not have reasonable and articulable suspicion to stop the defendant.
2. The State did not have probable cause to arrest the defendant,
3. Without reasonable suspicion to stop nor reasonable cause to arrest, the State had no right to request a breath test from him, and therefore
4. Since the State had no right to request the breath test, the defendant could not have refused it.

FACTS

1. On November 17, 2012, at approximately 12:05 a.m., while being assigned to a checking station on University Road near West Forest Hills Blvd. in Durham, North Carolina, Trooper _____ observed a car. The car had backed out of a driveway at _____ University Dr., (Trooper _____ did not see that) made a 3 point turn and proceeded toward Durham Highway 147 and Raleigh.
2. Trooper _____ followed the car approximately 1/10 of a mile, during which he observed the car cross the fog line once before he turned on his blue lights. The grey car immediately and appropriately pulled into a BP gas station and parked at the middle gas pump.

3. Other than crossing the fog line once, Trooper _____ saw no other signs of improvement. There was no indication of a high or low speed, no weaving, no improper turns, no inappropriate use of signals, and no other evidence of any type of improper or erratic driving by the defendant.

4. Once the vehicle stopped, Trooper _____ approached and noticed that the defendant's eyes were red and glassy, his speech was slurred, and there was a strong odor of alcohol coming from the car, in which there also was a passenger.

5. Trooper _____ had never met the defendant, whose native language is Spanish.

6. Trooper _____ asked the defendant to get out of the car. After he had done so, the trooper noticed that the defendant was unsteady on his feet.

7. Trooper _____ asked the defendant to perform field sobriety tests. The defendant refused, and said that he is a scientist and that those tests are not accurate.

8. Thereupon, Trooper _____ decided to arrest the defendant.

BASED ON THE FOREGOING FACTS, THE DEFENDANT ARGUES THAT THE STATE HAD NO REASONABLE ARTICULABLE SUSPICION TO STOP DEFENDANT

In support of that argument, the Defendant says:

1. A three point turn is legal.

2. The defendant was never within the perimeter of the checking station, did not see it, never turned or pulled away from the checkpoint and in no way approached it. Therefore, a checkpoint analysis does not apply.

3. Defendant's crossing the fog line once as observed by the trooper is insufficient to create reasonable suspicion for the stop.

4. A fog line is defined by Section 3B.06 of the Uniform Traffic Control Devices Manual as an edge line marking that has a unique value as a visual reference to guide road users during adverse weather.

5. An "edge line marking" guiding road users in bad weather is not a mandatory boundary which one is forbidden to cross as would be a solid center line between two traffic lanes.

6. However, even if crossing a fog line once could be classified as weaving outside the travel lane, our courts have consistently held that crossing such a line once does not amount to reasonable suspicion for a stop.

7. In State v. Kochuk, --- S.E.2d ----, 2012 WL 5392352 (2012), the North Carolina Court of Appeals concluded that the following behavior, clearly worse behavior than that of the present case, did not amount to enough reasonable suspicion to stop a defendant. Trooper Ellerbe witnessed defendant's "vehicle cross over the dotted white line" causing "both of the wheels on the passenger side" to enter "into the right lane for about three to four seconds" and later he observed defendant's vehicle "drift over to the right-hand side of the right lane where its wheels were riding on top of the white line ... twice for a period of three to four seconds each time." Id., page 2. The court ruled that there was not Reasonable Suspicion to stop.

8. In State v. Fields, 195 N.C.App. 740, 673 S.E.2d 765 (2009)., the defendant was stopped after the officer observed the defendant's car swerve to the white line on the right side of the traffic lane on three separate occasions. Id. at 741, 673 S.E.2d at 766. In Fields the Court of Appeals reversed the trial court's decision finding reasonable suspicion based on the above facts but noted that "[the] defendant's weaving within his lane, standing alone, [was] insufficient to support a reasonable suspicion that

defendant was driving under the influence of alcohol." Id. at 746, 673 S.E.2d 765, 673 S.E.2d at 769.

9. The Fields court also noted that it had previously held that "weaving can contribute to a reasonable suspicion of driving while impaired[,]" but that the weaving must be "coupled with additional specific articulable facts, which also indicate[ ] that the defendant was driving while impaired." Id. at 744, 673 S.E.2d at 768.

BASED ON THE FOREGOING FACTS AND LAW, THE DEFENDANT ARGUES THAT THE STATE HAD NO PROBABLE CAUSE TO ARREST THE DEFENDANT.

1. Trooper _____ lacked probable cause to arrest the defendant. The North Carolina Supreme Court has held that an odor, standing alone, is no evidence that a defendant is under the influence of an intoxicant, and the mere fact that one has had a drink will not support such a finding. Atkins v. Moye, N.C. 106, 161 S.E.2d 568 (1970).

2. According to the DWI Detection and Standardized Field Sobriety Testing Instructor Manual, March 2005, the three phases of detection to which an officer must rigorously apply himself in a suspected driving while impaired case are vehicle in motion, personal contact and pre-arrest screening. In the "vehicle in motion" phase 1, as set forth above, the trooper lacked reasonable suspicion to stop the defendant. In phase 2, the trooper thought he had sufficient clues (car's alcohol odor, red and glassy eyes, slurred speech and unsteady balance) to instruct the defendant to step from the vehicle for further investigation. However, defendant's polite refusal to perform any field sobriety tests, based on his scientific assessment that such tests are inaccurate, precluded the trooper's developing probable cause at that time to arrest the defendant.

The trooper would not have asked the defendant to complete the tests if he had had probable cause to arrest him.

3. The North Carolina Courts and the Department of Motor Vehicles have been held to be in comity.

WHEREFORE, BASED ON THE TOTALITY OF THE CIRCUMSTANCES, THE DEFENDANT PRAYS THAT THE DMV:

1. Find that there was neither Probable Cause to arrest, nor Reasonable Suspicion to stop the defendant.
2. Find that without Probable Cause to arrest or Reasonable Suspicion to stop, no request for a breath sample is allowed.
3. Take no action on the Defendant's alleged refusal.
4. For such other and further relief as is just and proper.

This the 25th day of May, 2015.

Marcus E. Hill
Attorney for Defendant
311 E. Main Street
Durham, North Carolina 27701
(919) 688-1941

NO. COA12-525

NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2012

STATE OF NORTH CAROLINA

v. Durham County
No. 10 CRS 56388

JAMES R. KOCHUK

Appeal by the State from order entered 3 October 2011 by Judge Carl R. Fox in Durham County Superior Court. Heard in the Court of Appeals 10 October 2012.

Attorney General Roy Cooper by Assistant Attorney General Joseph L. Hyde, for the State.

Russell Joseph Hollers, attorney for defendant.

ELMORE, Judge.

The State appeals from an order granting James R. Kochuk's (defendant) motion to suppress evidence obtained following a stop of his vehicle. We affirm.

On 3 July 2010, Trooper Ellerbe of the North Carolina State Highway Patrol was on duty and traveling eastbound on Interstate 40. Around 1:00 AM, Trooper Ellerbe began traveling 1-2 car lengths behind defendant's vehicle in the middle lane. He then observed defendant's vehicle cross over the dotted white line,

causing both wheels on the passenger side of the vehicle to cross into the right lane for about 3-4 seconds, and then move back into the middle lane. Trooper Ellerbe then observed defendant lawfully merge into the right-hand lane. There, he observed defendant's vehicle drift over to the right-hand side of the right lane, with both wheels riding on top of the solid white line, twice for a period of 3-4 seconds each time.

Based on these observations, Trooper Ellerbe conducted a stop of defendant's vehicle, and defendant was cited for driving while impaired (DWI). On 25 January 2011, defendant was convicted of DWI and appealed to superior court. On 19 September 2011, defendant filed a motion to suppress. On 20 September 2011, a hearing was held on the motion, and on 3 October 2011 the trial court entered an order granting defendant's motion and suppressing all evidence obtained as a result of the stop. The State now appeals.

The State argues that the trial court erred in granting defendant's motion to suppress because Trooper Ellerbe had reasonable suspicion for the stop based on defendant's failure to maintain lane control. We disagree.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial

judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000). "Where, however, the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal." *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735-36 (2004) (citation omitted).

Here, the State does not challenge any of the trial court's findings. Thus, they are binding on appeal. However, the State argues that the trial court erred in concluding that Trooper Ellerbe lacked reasonable and articulable suspicion to support a stop of defendant's vehicle.

This determination actually appears as a finding of fact in the trial court's order, and not as a conclusion of law. Finding of fact 22 reads "when all of the facts and factors in this case were taken into account . . . [they] did not amount to reasonable and articulable suspicion and as such [the]

subsequent stop . . . [was] invalid and illegal." Regardless, we conclude that this finding of fact is more appropriately classified as a conclusion of law, *see N.C. State Bar v. Key*, 189 N.C. App. 80, 88, 658 S.E.2d 493, 499 (2008) ("any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law."), and we will review accordingly, *see id.* ("classification of an item within the order is not determinative, and, when necessary, the appellate court can reclassify an item before applying the appropriate standard of review.").

As the trial court correctly determined, this case is analogous to *State v. Fields*, 195 N.C. App. 740, 673 S.E.2d 765 (2009). In *Fields*, the defendant argued on appeal that the trial court erred in denying his motion to suppress, in part, because the initial stop of his car was not based on a reasonable and articulable suspicion of criminal activity. 195 N.C. App. at 742, 673 S.E.2d at 767. There, the defendant was stopped after the officer observed the defendant's car swerve to the white line on the right side of the traffic lane on three separate occasions. *Id.* at 741, 673 S.E.2d at 766. This Court reversed the trial court's decision because "[the] defendant's

weaving within his lane, standing alone, [was] insufficient to support a reasonable suspicion that defendant was driving under the influence of alcohol." *Id.* at 746, 673 S.E.2d at 769. We also noted that this Court has previously held that "weaving can contribute to a reasonable suspicion of driving while impaired[,]" but that the weaving must be "coupled with additional specific articulable facts, which also indicate[] that the defendant was driving while impaired." *Id.* at 744, 673 S.E.2d at 768.

Here, the trial court's findings establish that Trooper Ellerbe witnessed defendant's "vehicle cross over the dotted white line" causing "both of the wheels on the passenger side" to enter "into the right lane for about three to four seconds" and that later he observed defendant's vehicle "drift over to the right-hand side of the right lane where its wheels were riding on top of the white line . . . twice for a period of three to four seconds each time." We conclude that these movements amount to nothing more than weaving. Further, the trial court found that "other than those movements," Trooper Ellerbe "saw no other signs of a high or low speed, no prolonged weaving, no improper turns, no inappropriate use of signals, and no other evidence of any type of improper or erratic driving."

Thus, consistent with our holding in *Fields*, we conclude that defendant's weaving alone was insufficient to establish reasonable suspicion. According, we affirm the trial court's order.

Affirmed.

Judge STROUD concurs.

Judge BEASLEY dissents by separate opinion.

NO. COA12-525

NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2012

STATE OF NORTH CAROLINA

v.

Durham County
No. 10 CRS 56388

JAMES R. KOCHUK

BEASLEY, Judge, dissenting.

Because I believe controlling precedent determines that Trooper Ellerbe had reasonable suspicion, I respectfully dissent from the majority's opinion and would reverse the trial court's order granting Defendant's motion to suppress and remand the case for trial.

This case is controlled by *State v. Otto*, __ N.C. __, 726 S.E.2d 824 (2012). In *Otto*, our Supreme Court focused on "'the totality of the circumstances.'" *Id.* at __, 726 S.E.2d at 828 (quoting *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 440 (2008)). Prior to the case reaching our Supreme Court, this Court focused on its precedent requiring weaving in one's own lane plus one additional factor to constitute reasonable suspicion. *State v. Otto*, ___ N.C. App. __, __, 718 S.E.2d 181, 184-85 (2011). The Supreme Court held that there was reasonable suspicion based on the findings of fact that the defendant was

continuously weaving at 11:00 p.m. on a Friday night. *Otto*, ___ N.C. at __, 726 S.E.2d at 828. We have held that 1:43 a.m. is an unusual hour. *State v. Jacobs*, 162 N.C. App. 251, 255, 590 S.E.2d 437, 441 (2004). Moreover, in *State v. Hudson*, 206 N.C. App. 482, 486, 696 S.E.2d 577, 581 (2010), we held that crossing the center lines and fog lines twice amounts to probable cause to conduct a traffic stop for violation of N.C. Gen. Stat. § 20-146.

Based on the totality of the circumstances as articulated by the majority opinion in *Otto* and our case law in *Hudson*, I would hold that there was reasonable suspicion to stop Defendant. Defendant in this case momentarily crossed the right dotted line once while in the middle lane. He then made a legal lane change to the right lane and later drove on the fog line twice. Defendant, thus, was weaving within his own lane. The trial court also found that Trooper Ellerbe stopped Defendant at 1:10 a.m. These two facts coupled together, under the totality of the circumstances analysis as outlined in *Otto*, constitute reasonable suspicion for the stop.

Further, the Supreme Court's rationale is consistent with our Court's decision in *Fields*. The majority here notes that in *Fields*, our Court held that to constitute reasonable suspicion,

weaving must be "coupled with additional specific articulable facts, which also indicate[] that the defendant was driving while impaired." *State v. Fields*, 195 N.C. App. 740, 744, 673 S.E.2d 765, 768 (2009). Here, in addition to weaving, the additional specific articulable fact is the time of driving - 1:10 a.m. - the time that Trooper Ellerbe stopped Defendant.

Our courts must provide clarity in this area so that law enforcement officers can effectively carry out their responsibilities for the public's safety, and motorists need some reasonable consistency for how their driving might be critiqued in driving while impaired investigations, as well as other traffic-related investigations. In *Otto*, our Supreme Court held that the court must consider the totality of the circumstances in determining whether reasonable suspicion existed in a traffic stop such as in the one *sub judice*.

For the reasons stated above, I would reverse the trial court's order granting the motion to suppress and remand the case for trial. Thus, I respectfully dissent.

176 S.E.2d 789 (1970)
277 N.C. 179

Thomas Sullivan ATKINS
v.
Eddie Lee MOYE and Barney Burke Transfer Company, Inc., a Corporation.

No. 16.

Supreme Court of North Carolina.

October 14, 1970.

792 *792 Bennett, Kelly & Long, Asheville, for plaintiff appellee.

Van Winkle, Buck, Wall, Starnes & Hyde, Asheville, for defendants appellants.

SHARP, Justice.

The trial judge instructed the jury that by statute, G.S. § 20-138, it is unlawful for any person who is under the influence of intoxicating liquor to drive any vehicle upon the highways within this State and that a violation of this statute is negligence per se. Watters v. Parrish, 252 N.C. 787, 115 S.E.2d 1. He explained that a person is under the influence of intoxicating liquor within the meaning of the statute when he has drunk a sufficient quantity of intoxicating beverage to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties. State v. Carroll, 226 N.C. 237, 37 S.E.2d 688. *Cf.* State v. Painter, 261 N.C. 332, 134 S.E.2d 638. After reciting defendants' contention that plaintiff was operating his vehicle while
793 under the influence of intoxicating liquor at the time of the collision, and after referring *793 to the evidence upon which defendants based this contention, the judge charged: "* * * [I]f the defendant has satisfied you by the greater weight of the evidence that on this occasion the plaintiff was operating his motor vehicle on this highway while he was under the influence of some intoxicating liquor, as I have defined that term to you, then that would be negligence on the part of the plaintiff. If you are further so satisfied that this contributed to the plaintiff's own injuries, then this would be contributory negligence upon the part of the plaintiff."

Plaintiff excepted to the foregoing charge on the grounds that (1) there was no evidence he was operating his automobile while under the influence of intoxicants; and (2) conceding, *arguendo*, there was such evidence, the judge did not, as then required by G.S. § 1-180, explain the application of G.S. § 20-138 to the evidence in the case. (G.S. § 1-180 is now applicable only to criminal cases. Civil cases are governed by N.C.R.C.P. 51(a), which incorporates the substance of the section.)

The Court of Appeals held that the evidence was not sufficient to warrant a finding by the jury that plaintiff was driving under the influence of an intoxicant. A new trial was ordered because it could not be known "whether the jury's answer to the second issue (contributory negligence) was based upon a finding, under the instructions of the court, that plaintiff was driving under the influence at the time of the accident." Defendants' appeal requires us to consider de novo plaintiff's assignments of error to the charge.

A defendant who asserts plaintiff's contributory negligence as a defense has the burden of proving it, and a contention that certain acts or conduct of the plaintiff constituted contributory negligence should not be submitted to the jury unless there is evidence from which such conduct might reasonably be inferred. A defendant, however, is entitled to have any evidence tending to establish contributory negligence considered in the light most favorable to him and, if diverse inferences can reasonably be drawn from it, the evidence must be submitted to the jury with appropriate instructions as to its bearing upon the issue. Jones v. Holt, 268 N.C. 381, 150 S.E.2d 759; Moore v. Hales, 266 N.C. 482, 146 S.E.2d 385; 6 N.C. Index 2d Negligence § 34 (1968).

The evidence upon which defendants base their contention that plaintiff was under the influence of an intoxicant at the time of the collision, taken as true and considered in the light most favorable to defendants, may be stated as follows: Plaintiff, traveling at 30 MPH upon a straight road, failed to see a tractor-trailer stopped in his lane of travel until he was ten feet from it although seven lights—two of them blinking "trouble lights"—were burning on the rear of the unit. He failed to see the two reflectors which Moye had placed in the highway, one at the rear of the trailer and the other twenty-five feet from it. He failed to see the "dialed" signal from Moye's flashlight, which he began to wave when he saw plaintiff's car approaching 400 feet away and continued to wave until he ran across the highway to avoid the collision. No westbound car passed. Plaintiff did not "break his speed" until he "rammed into the back of the trailer." Finally, Moye smelled the odor of alcohol on plaintiff's breath. Kincaid detected the odor of alcohol in plaintiff's automobile and on the floorboard under the front seat, there was a pint bottle containing a small amount of whiskey. The cap was on the bottle.

An odor of alcohol on the breath of the driver of an automobile is evidence that he has been drinking. Boehm v. St. Louis Public Service Co., 368 S.W.2d 361 (Mo.). However, an odor, *standing alone*, is no evidence that he is under the influence of an intoxicant, Baldwin v. Schipper, 155 Colo. 197, 393 P.2d 363, and the *mere* fact that one has had a drink
794 will not support such a finding. McCarty v. Purser, 373 S.W.2d 293 (Tex.Civ.App.). Notwithstanding, *794 the "[f]act that a motorist has been drinking, when considered in connection with faulty driving * * * or other conduct indicating an impairment of physical or mental faculties, is sufficient *prima facie* to show a violation of G.S. § 20-138." State v. Hewitt, 263 N.C. 759, 140 S.E.2d 241.

We hold that the evidence of the "broken pint" and the odor of alcohol on plaintiff's breath and in his automobile, when taken in conjunction with his failure to take any action to avoid a collision with the truck, was sufficient to support a finding that plaintiff's faculties had been appreciably impaired by the consumption of an alcoholic beverage. It is quite true, as pointed out in the majority opinion of the Court of Appeals, that the only testimony of any odor of alcohol on plaintiff's breath came from defendant Moye. We also note that plaintiff testified he had consumed no alcoholic beverages all day and that he failed to see the truck because the lights of an approaching car, reflected on the wet, blacktop pavement, blinded him. The credibility of the witnesses and conflicts in the evidence, however, are for the jury, not the court. G.S. § 1-180, N.C.R.C.P. 51(a).

The vice of the instruction of which plaintiff complained in his appeal to the Court of Appeals is not that it permitted the jury to consider the question whether plaintiff was under the influence of alcohol at the time of the collision but that it failed to explain as required by G.S. § 1-180, what bearing such a finding, if made, would have upon the issue of plaintiff's contributory negligence.

Unquestionably a motorist is guilty of negligence if he operates a motor vehicle on the highway while under the influence of intoxicating liquor. Such conduct, however, will not constitute either actionable negligence or contributory negligence unless—like any other negligence— it is causally related to the accident. Shaw v. Phillips, 193 So.2d 717 (Miss.); Lynn v. Stinnette, 147 Or. 105, 31 P.2d 764. Mere proof that a motorist involved in a collision was under the influence of an intoxicant at the time does not establish a causal relation between his condition and the collision. His condition must have caused him to violate a rule of the road and to operate his vehicle in a manner which was a proximate cause of the collision. State v. Lowery, 223 N.C. 598, 27 S.E.2d 638. In Anderson v. Morgan, 73 Ariz. 344, 241 P.2d 786, a truck, being operated in its proper lane by a defendant, who was under the influence of liquor, was struck by an automobile which crossed the center line of the highway to collide with it. In dismissing a wrongful death action against the defendant the court said: "[A]lthough appellant was found to be intoxicated, there is no substantial evidence in the record to support the finding that his operation of his truck at the time and place of the accident proximately caused the injury or death of appellee's intestate." *Id.* at 789. In other words, the cause of the collision was totally unrelated to the defendant's intoxication.

Here, in resolving the issue of plaintiff's contributory negligence, the crucial question is not whether he was under the influence of an intoxicant but whether he was exercising due care in the operation of his automobile. The rationale of Hoke v. Atlantic Greyhound Corp., 227 N. C. 412, 422, 42 S.E.2d 593, 600, is applicable. In that case the operator of a defendant's car was a child under 16. The court said: "The question is not as to her competency to drive, but whether she were operating the car at the time in accordance with the duty imposed by law upon operators of automobiles, that

is, whether she were exercising that degree of care which an ordinarily prudent person would exercise under similar circumstances." *See also* Watters v. Parrish, *supra*.

Evidence tending to show that the operator of a motor vehicle was under the influence of liquor is a pertinent
795 circumstance for the jury to consider, not as conclusively *795 establishing his negligence as a proximate cause of the collision if he was under the influence, but in determining whether he was capable of keeping a proper lookout, of maintaining proper control over his automobile, and of coping with highway and weather conditions in the manner of the reasonably prudent person. Boehm v. St. Louis Public Service Co., *supra*; Lynn v. Stinnette, *supra*; Bohlmann v. Booth, 196 So.2d 507 (Fla.App.); Rhoades v. Atchison, T. & S. F. Ry. Co., 121 Kan. 324, 246 P. 994; Kirby v. Turner-Day & Woolworth Handle Co., D.C., 50 F.Supp. 469; *see* Annot., 26 A.L.R.2d 359, 364; 8 Am.Jur.2d Automobiles and Highway Traffic § 939 (1963).

In Rick v. Murphy, 251 N.C. 162, 110 S.E.2d 815, plaintiff sued for personal injuries sustained in a collision between his automobile and a vehicle operated by the defendant Froneberger. Although plaintiff had not alleged a violation of G.S. § 20-138, the court held evidence of Froneberger's intoxication to be competent: "A physical condition which may cause a person to act in a given manner is merely evidentiary, not the ultimate fact on which liability must rest." *Id.* at 164, 110 S.E.2d at 817.

We hold that plaintiff is entitled to a new trial, but not because the judge submitted to the jury the question whether plaintiff was operating his automobile while under the influence of an intoxicant. The prejudicial error was the judge's failure to instruct that if the jury found plaintiff to have been under the influence such condition would merely be evidence to be considered along with all the other evidence in determining whether he was chargeable with contributory negligence; that for a finding that plaintiff was under the influence to be conclusive of the issue it must be accompanied by the further finding that such condition caused him to operate his automobile in a manner which constituted a proximate cause of the collision. Thus, we approve the decision of the Court of Appeals ordering a new trial but not the reasoning upon which it was based.

Affirmed.

HIGGINS, Justice (concurring in result).

In my opinion the plaintiff is entitled to a new trial. However, I am unable to agree that there is sufficient evidence in the record to warrant the court in permitting the jury to infer the plaintiff was driving under the influence of liquor, and upon that inference to draw the further inference he was guilty of contributory negligence. I concur in the result.

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675 S.E.2d 682 (2009)

STATE of North Carolina
v.
Lucian Jefferson PEELE, JR., Defendant.

No. COA08-713.

Court of Appeals of North Carolina.

May 5, 2009.

684 *684 Attorney General Roy Cooper, by Assistant Attorney General Kathryne E. Hathcock, for the State.

The Robinson Law Firm, P.A., by Leslie S. Robinson, Greenville, for defendant-appellant.

GEER, Judge.

Defendant Lucian Jefferson Peele, Jr. appeals from his conviction for driving while impaired ("DWI"). Defendant contends primarily that the trial court erred in denying his motion to suppress on the grounds that the police officer who stopped him lacked the necessary reasonable articulable suspicion. The State responds that an anonymous tip combined with the officer's own observations were sufficient to supply reasonable suspicion. We have concluded, however, that the State failed to demonstrate either that the tip was reliable or that it was corroborated by the police officer. In addition, the police officer's own observations of defendant—involving a single instance of weaving within his lane of travel over a tenth of a mile— were insufficient to provide reasonable suspicion. Finally, given the totality of the circumstances, we cannot conclude that the uncorroborated anonymous tip combined with the officer's observation of a single instance of weaving was sufficient to give rise to reasonable suspicion. Consequently, we hold that the trial court erred in denying defendant's motion to suppress. We, therefore, reverse and remand for a new trial.

Facts

At approximately 7:50 p.m. on 7 April 2007, Sergeant James Sullivan of the Williamston Police Department responded to a dispatch regarding "a possible careless and reckless, D.W.I., headed towards the Holiday Inn intersection." The vehicle was described as a burgundy Chevrolet pickup truck. Sergeant Sullivan arrived at the intersection "within a second" and observed a burgundy Chevrolet pickup truck. After following the truck for about a tenth of a mile and seeing the truck weave within his lane once, Sergeant Sullivan pulled defendant over for questioning. Defendant was subsequently transported to the Martin County Courthouse and administered an Intoxilyzer test. The test recorded an alcohol concentration of.08, and defendant was issued a DWI citation.

Defendant was found guilty of DWI in Martin County district court on 2 July 2007. He appealed to superior court for a trial by jury. On 2 November 2007, defendant filed a pretrial motion to suppress evidence obtained as a result of Sergeant Sullivan's stop and defendant's subsequent arrest. At trial, following voir dire of Sergeant Sullivan, the trial court denied defendant's motion to suppress, ruling:

> [T]he standard here is a reasonable grounds of suspicion based on the totality of the circumstances, and, based upon the testimony that I've heard, I'm satisfied that the State has produced sufficient evidence that there was a reasonable ground of suspicion based on the information communicated to the officer by radio, which was immediately corroborated by him as far as the location and description of the vehicle, and the subsequent operation of the vehicle and the weaving in its lane of travel; that that generated a reasonable ground of suspicion to stop the motor vehicle in question, and so I'm going to respectfully overrule and deny your motion.

After the jury found defendant guilty of DWI, the trial court sentenced defendant to 60 days imprisonment, suspended that sentence, and placed defendant on 12 months of supervised probation. Defendant timely appealed to this Court.

Discussion

Defendant contends that Sergeant Sullivan lacked reasonable suspicion to stop him and, therefore, the trial court erred in denying his motion to suppress. "The scope of review of the denial of a motion to suppress is 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.'" *State v. Bone*, 354 N.C. 1, 7, 550 S.E.2d 482, 486 (2001) (quoting *State v. Cooke*, 306 N.C. 132,
685 134, 291 S.E.2d 618, 619 (1982)), *cert. denied*, 535 U.S. 940, 122 S.Ct. 1323, 152 L.Ed.2d 231 (2002). "The trial *685 court's conclusions of law, however, are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

Under the Fourth Amendment, which prohibits unreasonable searches and seizures, a police officer is permitted to "conduct a brief investigatory stop of a vehicle and detain its occupants without a warrant." *State v. McArn*, 159 N.C.App. 209, 212, 582 S.E.2d 371, 374 (2003). "[I]n order to conduct a warrantless, investigatory stop, an officer must have reasonable and articulable suspicion of criminal activity." *Hughes*, 353 N.C. at 206-07, 539 S.E.2d at 630. "The reasonable suspicion must arise from the officer's knowledge prior to the time of the stop." *Id.* at 208, 539 S.E.2d at 631.

"Reasonable suspicion is a 'less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.'" *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S.Ct. 673, 675-76, 145 L.Ed.2d 570, 576 (2000)). "The only requirement is a minimal level of objective justification, something more than an 'unparticularized suspicion or hunch.'" *State v. Watkins*, 337 N.C. 437, 442, 446 S.E.2d 67, 70 (1994) (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1, 10 (1989)). "[T]he overarching inquiry when assessing reasonable suspicion is always based on the *totality* of the circumstances." *State v. Maready*, 362 N.C. 614, 619, 669 S.E.2d 564, 567 (2008).

In this case, the trial court based its denial of the motion to dismiss on the dispatch and the court's finding that defendant had been "weaving in [his] lane of travel." Defendant, however, argues that this latter finding is not supported by competent evidence. To the extent that the trial court's finding can be read to indicate that defendant was continuously weaving in the lane, we agree with defendant that such a finding is not supported by the State's evidence.

Sergeant Sullivan testified that he "followed [defendant] a short distance and observed [him] weave into the center, bump the dotted line, and then fade to the other side and bump the fog line, and then pretty much go back into the middle of the lane." He did not testify to any other instance of weaving. This evidence only supports a finding that Sergeant Sullivan observed defendant weave once within his lane of travel. Accordingly, we must determine whether the dispatch when combined with the single instance of weaving is sufficient to warrant a determination that Sergeant Sullivan had reasonable suspicion to stop defendant.

We first note that Sergeant Sullivan's observation of a single instance of weaving within his lane was not sufficient to establish reasonable suspicion to stop defendant. In *State v. Fields*, ___ N.C.App. ___, ___, 673 S.E.2d 765, 769 (2009), this Court held "that defendant's weaving within his lane, standing alone, is insufficient to support a reasonable suspicion that defendant was driving under the influence of alcohol."

Sergeant Sullivan, however, also testified—and the trial court found—that he received a radio communication from dispatch. That communication stated: "Williamston cars be advised, report of a possible careless and reckless, D.W.I., headed towards the Holiday Inn intersection." The dispatch then described the vehicle as a burgundy Chevrolet pickup truck. Defendant contends that this dispatch reflected an anonymous tip. The State argues that the tip was not necessarily anonymous, but can point to no evidence that indicates that the report to the police came from an identified caller. Indeed, at trial, defense counsel specifically argued, without objection, that the caller was anonymous. On this

record, therefore, the tip regarding a careless and reckless driver must be considered anonymous.

"An anonymous tip can provide reasonable suspicion as long as it exhibits sufficient indicia of reliability." *Hughes*, 353 N.C. at 207, 539 S.E.2d at 630. On the other hand, "a tip that is somewhat lacking in reliability may still provide a basis for reasonable suspicion if it is buttressed by sufficient police corroboration." *Id.* In sum, to provide the justification for a warrantless stop, an anonymous tip "must have sufficient indicia of reliability, and if it does not, then there must be sufficient police corroboration of the tip before the stop may be made." *Id.*

686 Here, the State contends that the tip was sufficiently reliable either standing alone or *686 based on police corroboration "[b]ecause all information provided by the caller was correct in every detail" and "Sergeant Sullivan verified details provided by the informant through his independent observations." As our Supreme Court explained in *Hughes*, however, "reasonable suspicion does not arise merely from the fact that the individual met the description given to the officers." *Id.* at 209, 539 S.E.2d at 632. The Court explained:

> "An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: it will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person."

Id. (quoting *Florida v. J.L.*, 529 U.S. 266, 272, 120 S.Ct. 1375, 1379, 146 L.Ed.2d 254, 261 (2000)).

This Court applied this principle in *McArn*, in which an anonymous tip reported, without more, that a white Nissan on Franklin and Sessoms Street in Lumberton, North Carolina was involved in a drug deal:

> Here, the fact that the anonymous tipster provided the location and description of the vehicle may have offered some limited indicia of reliability in that it assisted the police in identifying the vehicle the tipster referenced. It has not gone unnoticed by this Court, however, that the tipster never identified or in any way described an individual. Therefore, the tip upon which Officer Hall relied did not possess the indicia of reliability necessary to provide reasonable suspicion to make an investigatory stop. The anonymous tipster in no way predicted defendant's actions. The police were thus unable to test the tipster's knowledge or credibility. Moreover, the tipster failed to explain on what basis he knew about the white Nissan vehicle and related drug activity.

159 N.C.App. at 214, 582 S.E.2d at 375. Because the sole basis for the officer's stop was the anonymous tip, this Court reversed the denial of the motion to suppress and remanded for a new trial. *Id.*

Similarly, in this case, the anonymous caller accurately described the car's physical characteristics and location, but did not give the police any way to test the caller's credibility. The record contains no information about who the caller was, no details about what the caller had seen, and no information even as to where the caller was located. The caller did not "predict defendant's specific future action," *Hughes*, 353 N.C. at 208, 539 S.E.2d at 631, other than that he was driving from one stoplight to the next. *Id.* at 210, 539 S.E.2d at 632 (holding that confirmation that defendant was heading in general direction indicated by tipster "is simply not enough detail in an anonymous tip situation").

Moreover, Sergeant Sullivan "did not seek to establish the reliability of the assertion of illegality." *Id.* at 209, 539 S.E.2d at 632. He observed defendant at the stoplight and making the turn. He then followed him for no more than a tenth of a mile. During that time, he saw defendant one time "float[]" over to touch the dotted line and then move over to touch the fog line. The officer agreed that he "never saw any operation at all [of defendant's vehicle] that was consistent with careless or reckless operation of the vehicle[.]" The officer thus did not corroborate the caller's assertion of careless and reckless driving. We, therefore, do not believe that this case can be meaningfully distinguished from *McArn* and, consequently, the anonymous tip lacked sufficient reliability standing alone to provide reasonable suspicion for the stop.

The question remains whether the single instance of weaving combined with the uncorroborated anonymous tip is

enough to give rise to reasonable suspicion. This Court noted in *Fields* that "weaving can contribute to a reasonable suspicion of driving while impaired" if "coupled with additional specific articulable facts" that also indicate that the defendant was driving while impaired. ___ N.C.App. at ___, 673 S.E.2d at 768. Here, however, the trial court found none of the factors that have, in prior cases, led to a determination that reasonable suspicion existed. *See, e.g.*, *State v. Thompson*, 154 N.C.App. 194, 197, 571 S.E.2d 673, 675-76 (2002) (weaving within lane plus exceeding
687 *687 speed limit); *State v. Aubin*, 100 N.C.App. 628, 632, 397 S.E.2d 653, 655 (1990) (weaving within lane plus driving only 45 miles per hour on interstate), *appeal dismissed and disc. review denied*, 328 N.C. 334, 402 S.E.2d 433, *cert. denied*, 502 U.S. 842, 112 S.Ct. 134, 116 L.Ed.2d 101 (1991); *State v. Jones*, 96 N.C.App. 389, 395, 386 S.E.2d 217, 221 (1989) (weaving towards both sides of lane plus driving 20 miles per hour below speed limit), *appeal dismissed and disc. review denied*, 326 N.C. 366, 389 S.E.2d 809 (1990); *State v. Adkerson*, 90 N.C.App. 333, 336, 368 S.E.2d 434, 436 (1988) (weaving within lane five to six times plus driving off road).

In addition, defendant was not driving late at night, and the record contains no evidence, and the trial court did not find, that he was in proximity to any bars—which are other factors that have been considered. *See Fields*, ___ N.C.App. at ___, 673 S.E.2d at 768 ("When determining if reasonable suspicion exists under the totality of circumstances, a police officer may also evaluate factors such as traveling at an unusual hour or driving in an area with drinking establishments.").

The totality of the circumstances in this case are simply that the police received an anonymous call at 7:50 p.m. reporting that the driver of a burgundy Chevrolet pickup truck was driving carelessly and recklessly with no further details. The police officer, who responded to the dispatch, found a burgundy Chevrolet pickup truck at a stoplight, but did not observe any careless or reckless driving as defendant negotiated the intersection, turned, and drove down the road. At most, the officer saw defendant on a single occasion float to the dotted line and then float back to the fog line. The trial court did not identify and the State does not argue any other suspicious circumstances.

In short, all we have is a tip with no indicia of reliability, no corroboration, and "'conduct falling within the broad range of what can be described as normal driving behavior.'" *State v. Roberson*, 163 N.C.App. 129, 133-34, 592 S.E.2d 733, 736 (quoting *State v. Emory*, 119 Idaho 661, 664, 809 P.2d 522, 525 (Ct. App.1991)), *disc. review denied*, 358 N.C. 240, 594 S.E.2d 199 (2004). *Compare Maready*, 362 N.C. at 619-20, 669 S.E.2d at 567-68 (holding that reasonable suspicion existed based on (1) reliable tip by obviously distressed driver of minivan, who was traveling immediately in front of defendant's car, flagged down officers, and told them face-to-face that car behind her had been running stop signs and stop lights; and (2) officers had observed intoxicated man stumbling across road to enter defendant's car), *with Roberson*, 163 N.C.App. at 134, 592 S.E.2d at 737 (holding officer lacked reasonable suspicion that defendant was driving under the influence when officer observed defendant, at 4:30 a.m. in area with bars, waiting at green traffic light for eight to ten seconds because "[a] motorist waiting at a traffic light can have her attention diverted for any number of reasons"). If we were to uphold the trial court's decision, we would be, as the Court in *Fields* cautioned against, "extend[ing] the grounds for reasonable suspicion farther than our Courts ever have." *Fields*, ___ N.C.App. at ___, 673 S.E.2d at 769. We decline to do so and, therefore, reverse the trial court's order denying defendant's motion to suppress and remand for a new trial. Because of our disposition of this issue, we need not address defendant's remaining assignments of error.

Reversed and remanded.

Judges McGEE and BRYANT concur.

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