Small swerve looms large among traffic lawyers

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A state trooper had reasonable suspicion to pull over a driver for impaired driving where he observed her weaving, but only within her own lane for three-quarters of a mile, according to the North Carolina Supreme Court.

Defense attorneys fear that the court's ruling will likely give police officers much wider latitude to pull over drivers on suspicion of drunk driving.

On February 29, 2008, Trooper A.B. Smith was patrolling in Greenville when he pulled behind an SUV on NC 43, a main thoroughfare. Smith did not know where the car was coming from, but knew that a nearby equestrian center was hosting a banquet that night, and had heard that it sometimes served alcohol.

Once he caught up to the car, Smith immediately noticed it weaving within its own lane. The car was traveling at the speed limit and never left its lane, but Smith said the car consistently weaved from the center line to the lane's edge for about three-quarters of a mile, at which point he pulled over the driver. During the stop, he issued the driver, Megan Otto, a citation for DWI. She was not charged with any other driving offense.

Otto moved to suppress the evidence from the traffic stop, claiming that Smith did not have reasonable suspicion to pull her over. Superior Court Judge Rusty Duke denied that motion, and Otto pleaded guilty to DWI and appealed the denial of her motion.

The Court of Appeals then vacated the conviction. Looking at precedent, the court determined that in previous cases in which a car weaving in its own lane was stopped by police, the grounds for pulling over the driver was considered reasonable only if the weaving was accompanied by some other factor — such as driving late at night in the vicinity of bars.

On June 14, the Supreme Court reversed, and reinstated the conviction, finding the stop reasonable.

'Constant and continual'

"Unlike the Court of Appeals cases in which weaving within a lane was found to be insufficient to support reasonable suspicion, the weaving here was constant and continual," Justice Robin E. Hudson wrote for the court. "In contrast, defendant here was weaving 'constantly and continuously' over the course of three quarters of a mile. In addition, defendant was stopped around 11:00 p.m. on a Friday night. These factors are sufficient to create reasonable suspicion."

Justice Paul M. Newby concurred in the decision, but would have found that constant and continuous weaving, even within one's own lane, is by itself sufficient to support reasonable suspicion of impaired driving.

Les Robinson, Otto's attorney, said that the court focused only on the facts that were advantageous to the police. Robinson said that Otto was negotiating two curves during the time she was weaving, operating a large vehicle, and never strayed outside her lane. He described her driving as 'normal driving behavior' and said the decision gives police almost unlimited latitude to make traffic stops.

"Now, what is not a basis for a stop?" Robinson said. "Their ruling basically makes it so that any driver who's driving in normal driving behavior can now be stopped. Officers are now going to learn the magic words 'continual weaving' [to justify stops]."

In his findings of fact at the trial level, Duke found that Smith "knew" there was a facility nearby that served alcohol, even though he testified that he had never actually been to the equestrian center. The Court of Appeals overruled him, saying that the fact Smith had heard the facility served alcohol did not support a finding that he actually knew that to be true. The Supreme Court agreed with that part of the decision, but still found that Smith had enough reasonable suspicion to justify a stop.

Weaving, plus something else

Robinson said the decision was inconsistent with previous decisions where a car was weaving within its own lane.

The existing rule that weaving must be accompanied by some other grounds for suspicion in order to justify a stop is sometimes referred to by attorneys as "weaving plus." While the Otto decision nominally holds to that rule, some criminal defense attorneys felt that the "plus" in this case was so minor that the practical difference between the majority opinion and the concurrence wasn't very large.

"They apparently have followed along the lines of weaving plus, what they're allowing as the plus is something like a hunch," said Preston Nelson, a criminal defense attorney in Greensboro. "The officer used stuff that he didn't really know, and the court is using 'know' in a broad sense to allow the stop under the totality of the circumstances. Weaving is not enough but it needs something else, but what they're talking about is pretty much anything else that raises suspicion."

Nelson said the ruling would raise the bar, which he said was already high, that defense attorneys need to clear in order to suppress evidence on the grounds that an officer lacked reasonable suspicion to detain the driver.

Durham criminal defense attorney Marcus Hill agreed, and sharply criticized the court's reasoning.

"Weaving in your lane late at night is now a good enough reason to stop," Hill said. "In every court, we sort of count on maintaining a certain continuity. But I don't think society has agreed that we no longer have a right to be free from intrusion by the police, and that's what this does. Weaving in your lane is staying in your lane."

The 10-page opinion is *State v. Otto* (Lawyers Weekly No. 12-06-0643). The full text of the opinion can be found online at nclawyersweekly.com.