

IN THE COUNTY COURT OF THE FIFTEENTH JUDICIAL CIRCUIT  
IN AND FOR PALM BEACH COUNTY, STATE OF FLORIDA

STATE OF FLORIDA,  
Plaintiff,

CRIMINAL DIVISION: "L"

CASE NO.: 2007CT019495AXX

vs.

\*\*\*\*\*,  
Defendant.

\_\_\_\_\_ /

**DEFENDANT'S MOTION TO SUPPRESS EVIDENCE**  
**IN UNLAWFUL SEARCH AND MOTION TO SUPPRESS A CONFESSION OR**  
**ADMISSION ILLEGALLY OBTAINED**

Pursuant to Fla. R. Crim. P. 3.190 (h) (i), article I, sections 9 and 12 of the Florida Constitution, the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, all applicable state and federal case law, and argument of counsel upon the hearing of this motion, \*\*\*\*\* through undersigned counsel, requests that this Court grant this motion and in support thereof states the following:

1. Mr. \*\*\*\*\* is charged by information with one count of driving under the influence and one count of willfully refusing to sign and accept summons or citation.
2. Mr. \*\*\*\*\* is requesting that the following evidence be suppressed:
  - a. Any and all testing and results of the DUI Standardized Field Sobriety Tasks administered to Mr. \*\*\*\*\* on July 8, 2007;
  - b. Any and all videotapes of Mr. \*\*\*\*\*'s vehicle being driven on or about July 8, 2007 and any and all videotapes of Mr. \*\*\*\*\* outside his vehicle on July 8, 2007;
  - c. Any and all statements allegedly made by Mr. \*\*\*\*\* to law enforcement officers on July 8, 2007 including his refusal to provide law enforcement with two adequate breath samples; and

d. All other evidence of intoxication observed by law enforcement officers or seized by law enforcement officers following the stop of Mr. \*\*\*\*\*'s vehicle on July 8, 2007.

### **STATEMENT OF FACTS**

1. On Sunday, July 8, 2007, at about 2:15 a.m., Mr. \*\*\*\*\* was driving his wife, mother, and father home from a friend's house. He was driving southbound on South Military Trail, West Palm Beach, Florida.

2. Palm Beach County Deputy Sheriff Sussman (hereafter, "Deputy Sussman" or "deputy") alleged in the Offense Report that, while driving in the seven hundred (700) block of South Military Trail, he observed Mr. \*\*\*\*\*'s vehicle traveling directly in front of him in the right-hand lane.

3. Deputy Sussman stated in the Offense Report that his attention was caught when Mr. \*\*\*\*\*'s vehicle failed to maintain a single lane of travel. He reported that the vehicle crossed over to the lane designated for a bicycle lane on two separate occasions. At that point, Deputy Sussman activated his vehicle's in-car video recording system, and he observed Mr. \*\*\*\*\*'s vehicle cross over the lane marker divider line on a third occasion.

4. As Mr. \*\*\*\*\*'s vehicle approached the intersection of Military Trail and Summit Boulevard, the deputy reported that the vehicle slowed to a stop before making a right turn at the intersection. (At Mr. \*\*\*\*\*'s formal review hearing, the deputy did not testify that Mr. \*\*\*\*\*'s vehicle actually came to a stop before the turn. Instead, he testified that Mr. \*\*\*\*\* braked to slow down to make the right turn for a longer distance than he thought normal.). Once the vehicle made its turn, Deputy Sussman activated his emergency lights in order to conduct a police traffic stop.

5. The Offense Report states that Mr. \*\*\*\*\* did not stop his vehicle immediately but continued westbound and pulled off Summit Boulevard onto a side street, where his vehicle came to a complete stop.

6. Deputy Sussman reported that Mr. \*\*\*\*\* exited his vehicle and he then instructed Mr. \*\*\*\*\* *to stay in his vehicle*.

7. Observing Mr. \*\*\*\*\* rummaging in the center console of the vehicle where he could not see his hands, Deputy Sussman then reports that he approached the vehicle and told Mr. \*\*\*\*\* *to exit the vehicle*.

8. In Deputy Sussman's observations, Mr. \*\*\*\*\* appeared to be confused and slow in response to his commands. The deputy approached Mr. \*\*\*\*\* and observed red, watery eyes and smelled the strong odor of alcohol coming from his person and emanating from his breath.

9. When requested to provide his driver's license, registration, and proof of vehicle insurance, Mr. \*\*\*\*\* provided all of those documents to Deputy Sussman.

10. Deputy Sussman noted that Mr. \*\*\*\*\* spoke English with a Spanish accent and that although he answered the deputy's questions in English, Mr. \*\*\*\*\* kept saying that he only spoke Spanish.

11. Deputy Sussman further noted in his Offense Report that the front zipper to Mr. \*\*\*\*\*'s pants had been undone. (At the formal review hearing, the deputy testified that actually Mr. \*\*\*\*\*'s pants' zipper was only half-way down.). Observing that Mr. \*\*\*\*\* was either slow to respond to his questions or slow to comprehend the conversation and that he smelled alcohol on Mr. \*\*\*\*\*'s breath, Deputy Sussman asked

Mr. \*\*\*\*\* to perform the Field Standardized Road Sobriety Tasks in order to determine if he was impaired.

12. Once Mr. \*\*\*\*\* completed the roadside tests, Deputy Sussman reported that he believed probable cause existed to place Mr. \*\*\*\*\* under arrest for operating a motor vehicle while under the influence of an unknown alcoholic beverage.

13. Mr. \*\*\*\*\* was then placed into handcuffs and secured in the rear of Deputy Sussman's marked police vehicle. Mr. \*\*\*\*\*'s vehicle was towed from the scene because his passengers did not possess driver's licenses. Mr. \*\*\*\*\*'s wife, mother, and father walked home.

14. Deputy Sussman transported Mr. \*\*\*\*\* to the Palm Beach County Sheriff's Office main jail where the breath alcohol-testing center is located.

15. The implied consent warnings were given to Mr. \*\*\*\*\* to read and he was offered the opportunity to have these warnings translated. Mr. \*\*\*\*\* continued to state that he did not speak English. He was then read the implied consent warnings. Mr. \*\*\*\*\* reportedly declined to provide a sample of his breath.

16. Deputy Sussman reports that Mr. \*\*\*\*\* was then given *Miranda* warnings.

17. After completing the required DUI paperwork, Deputy Sussman reports that he issued Mr. \*\*\*\*\* traffic citations for failing to drive in a single lane of travel and for DUI as well as for refusing to sign or accept traffic citations.

18. At Mr. \*\*\*\*\*'s formal review hearing on September 20, 2007, Deputy Sussman testified as follows:

Q. When you originally stopped him, were you stopping him simply because for (sic) his driving pattern or did you suspect anything further?

A. No. I was ensuring his safety. After watching the vehicle cross over a lane marker and divider line into the bike lane on three separate occasions I wanted to make sure the driver is not suffering from any kind of fatigue or unknown medical condition.

Q. Did you have any suspicion he was driving under the influence of alcohol?

A. Not at that time with my contact with him.

Page 17, lines 10-20, Transcript of Formal Review Hearing, September 20, 2007.

19. Neither the DUI Probable Cause Affidavit nor the Offense Report filed by Deputy Sussman within a few days after Mr. \*\*\*\*\*'s arrest contain any reference whatsoever of any concern on the part of Deputy Sussman for driver fatigue or driver medical condition as the basis for the traffic stop of Mr. \*\*\*\*\*.

20. The Offense Report filed by Deputy Sussman fails to describe the degree of observed erratic driving he observed (how far he claims Mr. \*\*\*\*\* deviated into the bike lane) or to describe the length of time Mr. \*\*\*\*\*'s vehicle remained in the bike lane each time he allegedly crossed the bike lane.

21. The videotape made by Deputy Sussman on July 8, 2007 only shows a very minor deviation into the adjoining bike lane.

### **BURDEN OF PROOF**

22. Stopping an automobile and detaining its occupants constitute a "seizure" within the meaning of the Fourth and Fourteenth Amendments. *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 1396 (1979). When a search or seizure is conducted without a warrant, the government bears the burden of demonstrating that the search or seizure was objectively reasonable. *Hilton v. State*, 961 So. 2d 284, 296 (Fla. 2007).

## **LEGAL ARGUMENT**

### **THE STOP WAS ILLEGAL: The stop of Mr. \*\*\*\*\*'s vehicle was unconstitutional under the Fourth Amendment because the stop was not based on a reasonable or founded suspicion.**

23. Florida law provides:

Whenever any law enforcement officer of this state encounters any person under circumstances which reasonably indicate that such person has committed, is committing, or is about to commit a violation of the criminal laws of this state or the criminal ordinances of any municipality or county, the officer may temporarily detain such person for the purpose of ascertaining the identity of the person temporarily detained and the circumstances surrounding the person's presence abroad which led the officer to believe that the person had committed, was committing, or was about to commit a criminal offense.

§901.151(2), Florida Statutes (2006).

24. An investigatory stop must be based on reasonable suspicion. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1863 (1968). For reasonable suspicion justifying a detention to exist, "the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S.Ct. 690 (1981). An officer making an investigatory stop "must be able to articulate something more than an 'inchoate and unparticularized suspicion' or hunch". *Terry* at 27.

25. The totality of the circumstances determines whether reasonable suspicion exists. *Pantin v. State*, 872 So. 2d 1000 (Fla. 4<sup>th</sup> DCA 2004). When an investigatory stop is not based on reasonable suspicion, it violates the Fourth Amendment and is unlawful, making evidence obtained as a result of the stop inadmissible as "fruit of the poisonous tree." *Id.*

26. The correct test to be applied is whether the particular officer who initiated the traffic stop had an objectively reasonable basis for making the stop. *Dobrin v. Florida Department of Highway Safety and Motor Vehicles*, 874 So. 2d 1171, 1174 (Fla. 2004).

27. Deputy Sussman reports that his attention was first caught by Mr. \*\*\*\*\*'s vehicle in the 700 block of South Military Trail and that he activated his lights for a traffic stop just after Mr. \*\*\*\*\*'s vehicle turned right on Summit Boulevard. Thus, Deputy Sussman observed the \*\*\*\*\* vehicle was for less than one-half (1/2) mile before stopping it.

28. During this very brief observational period leading to up to Deputy Sussman's decision to stop Mr. \*\*\*\*\*'s vehicle as it completed a right-hand turn, Deputy Sussman reported observing Mr. \*\*\*\*\*'s vehicle cross into the bike lane on three occasions to an unreported degree and for an unreported length of time.

29. There is nothing in either Deputy Sussman's Offense Report in July 2007 or his testimony at the DHSMV formal review hearing in September 2007 indicating that Mr. \*\*\*\*\*'s driving actually endangered other drivers, bicyclists, or pedestrians. There is nothing on the videotape recorded by Deputy Sussman showing that Mr. \*\*\*\*\*'s driving actually endangered other drivers, bicyclists, or pedestrians. There is no evidence that Mr. \*\*\*\*\*'s driving affected or interfered with any other driver, any bicyclist, or a pedestrian.

30. Deputy Sussman cited Mr. \*\*\*\*\* , in relevant part, for failing to maintain a single lane. § 316.089(1), Fla. Stat. states: "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."

31. The failure to maintain a single lane alone cannot establish probable cause for a traffic stop when the action is done safely. *Hurd v. State*, 958 So. 2d 600, 603 (Fla. 4<sup>th</sup> DCA 2007); and *Crooks v. State*, 710 So. 2d 1041, 1043 (Fla. 2d DCA 1998).

32. There is no evidence that Mr. \*\*\*\*\*'s alleged failure to maintain a single lane was performed in an unsafe manner.

33. Nevertheless, the failure to maintain a single lane alone, may, under appropriate circumstances, establish probable cause. *See Roberts v. State*, 732 So. 2d 1127, 1128 (Fla. 4<sup>th</sup> DCA 1999) (continuous significant weaving within a single lane held sufficient to justify a stop where there was no evidence to show endangerment to others and where no traffic violation had occurred; during the time Roberts was being followed, the continuous weaving presented an objective basis for suspecting that Roberts was under the influence).

34. As the Fourth District Court of Appeal recognizes, cases such as *Roberts* are based on the principle that a stop is permitted even without a traffic violation so long as the stop is supported by a reasonable suspicion of impairment, unfitness, or vehicle defects. *Hurd* at 603. Notably, the officer in *Roberts* actually suspected that Roberts was committing the crime of DUI whereas in Mr. \*\*\*\*\*'s case the deputy testified at the formal review hearing that he did not suspect DUI at the time of the stop.

35. Significantly, the Fourth District Court of Appeal went on to distinguish *Roberts* in *Nicholas v. State*, 857 So. 2d 980 (Fla. 4<sup>th</sup> DCA 2003). In *Nicholas*, the issue was whether Nicholas' turn from the wrong lane (a left-hand turn from the right lane

without signaling) amounts to erratic driving. *Nicholas* at 982. The prosecution relied on *Roberts* but the Fourth District Court of Appeal stated that *Roberts* was procedurally distinguishable on the basis that it was a denial of a petition for certiorari (reviewed under a different standard) and ***unpersuasive as the opinion fails to note the length of time the defendant was observed or if the erratic driving interfered with any traffic.*** *Id.* (emphasis supplied). This indicates that a law enforcement officer must supply articulable facts, as well as conclusions from those facts, that rise to the level of reasonable suspicion. A mere hunch that some observed erratic driving might be a sign of driver impairment or driver fatigue is not sufficient to justify a stop.

36. The *Nicholas* court stated:

To conclude, we recognize that there is no statutory definition of erratic driving and it is necessarily determined on a case by case basis. However, in light of the case law on point discussed above, and the facts of this case, we hold that Nicholas's turn did not amount to erratic driving. As a result, officer Moore did not have a founded suspicion that Nicholas was under the influence. The stop was therefore improper as was the subsequent denial of the motion to suppress. The trial court's order is reversed.

*Nicholas v. State*, 857 So. 2d 980, 982 (Fla. 4<sup>th</sup> DCA 2003).

37. In the *Hurd* case, the court found that there was nothing in the record to establish probable cause that the actions by Hurd were not done safely or that Hurd's actions would lead an officer to suspect impairment or which could be considered erratic driving. *Hurd* at 603.

38. Like *Hurd*, there is nothing in this case that would establish that Mr. \*\*\*\*\*'s actions were not done safely or that Mr. \*\*\*\*\*'s actions would lead an officer to suspect impairment or which could be considered sufficiently erratic driving.

39. Where a defendant swerved into a bike lane twice, the first time by two or three feet (in degree) for three seconds (time) and the second time for an undetermined degree for five or six seconds (time), a deputy testified that based on his training he suspected the defendant of being under the influence and he conducted a stop. *Jiles v. State*, 12 Fla. L. Weekly Supp. 120b (Fla. 12<sup>th</sup> Circuit Ct., October 29, 2004). Jiles' pretrial motion to suppress was denied and his renewed motion at trial was also denied. *Id.*

40. The Twelfth Circuit Court, relying on *Nicholas* and its distinguishing of *Roberts*, reversed and remanded and stated:

Here, there is no evidence as to the length of time Deputy Johnson observed (Jiles), it appears that it was a brief amount of time and there is nothing to indicate anyone was endangered by (Jiles') actions. Further, the Deputy's observation that (Jiles') vehicle went two or three feet over the line into the bicycle path does not constitute sufficient evidence that (Jiles) deviated from his lane by more than what was practicable, . . . . Additionally, the Deputy's testimony that generally a driver's second deviation outside the normal lane would constitute a founded suspicion of driving under the influence is not "an objectively reasonable basis for making the stop." *Dobrin v. Florida Department of Highway Safety and Motor Vehicles*, 874 So. 2d 1171, 1174 (Fla. 2004).

*Jiles v. State*, 12 Fla. L. Weekly Supp. 120b (Fla. 12<sup>th</sup> Circuit Ct., October 29, 2004).

41. Like *Jiles*, there is nothing in the record in Mr. \*\*\*\*\*'s case that would constitute sufficient evidence that Mr. \*\*\*\*\* deviated from his lane by more than what was practicable. Also, a second or third deviation from a normal lane would not objectively constitute a founded suspicion of driving under the influence or a founded suspicion of driving under some other type of impairment such as fatigue or illness. In fact, safe temporary deviation from a normal lane is equally consistent with innocent driving behavior. Although Mr. \*\*\*\*\* was not cited for braking early for the right-hand

turn onto Summit Boulevard, a slowing for a turn is also consistent with innocent driving behavior and some drivers slow for a turn before or to a greater degree than others.

42. Where Deputy Sussman failed to articulate any facts in either the Probable Cause Affidavit or the Offense Report supporting an initial stop of Mr. \*\*\*\*\*'s vehicle on the basis of the alleged need to determine whether Mr. \*\*\*\*\* was tired or ill, his belated testimony at the formal review hearing that the stop was based on possible driver fatigue or illness or driver safety reasons should be disregarded as a convenient resort to what one Palm Beach County judge has called the "key buzz words" that every prosecutor and every police officer have used since the holding in *Crooks* to justify stops where no other traffic has been affected. *See State v. Bahouth*, 12 Fla. L. Weekly Supp. 577c (Fla. 15<sup>th</sup> Circuit Ct. February 14, 2005).

43. Moreover, Mr. \*\*\*\*\*'s driving was not sufficiently erratic under the standards of *Hurd*, *Nicholas*, and *Jiles* to constitute an objective, reasonable suspicion of impairment that would justify stopping his vehicle.

44. Mr. \*\*\*\*\* was stopped on a mere hunch of impairment based on a very brief observation of alleged erratic driving that did not rise to a sufficient level to constitute reasonable suspicion for a stop. Deputy Sussman did not have an objectively reasonable basis for making the stop. The stop was illegal under the Fourth Amendment, and all evidence seized as the result of the stop should be suppressed.

Respectfully submitted,

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Ronald S. Chapman (Bar No. 898139)  
400 Clematis Street, Suite 206

West Palm Beach, FL 33401  
Tel (561) 832-4348  
Fax (561) 832-4346  
Email: [ronchapman@bellsouth.net](mailto:ronchapman@bellsouth.net)  
Attorney for Defendant

**Certificate of Service**

I certify that on October 18, 2007, I filed this document with the Clerk of Court, and I faxed a copy of same to the Office of the State Attorney, Division “L,” 401 North Dixie Highway, West Palm Beach, FL 33401.

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Ronald S. Chapman

Copy provided to:

County Court Judge Joseph Marx