

"Nebraska Supreme Court Further Defines Legal Probable Cause for Traffic Stops in Nebraska v Au"

**CASE NAME:** Nebraska v Doan Q. Au (No. S-12-040, May 3, 2013)

**ISSUE:**

Does evidence that a vehicle momentarily touches or crosses a lane divider, without more, establish a statutory violation and thereby provide legal probable cause for a traffic stop?

**FACTS:**

On September 22, 2010, Officer Peterson of the Douglas County Nebraska Sheriff's Department pulled over a vehicle with an out of state license plate headed eastbound on Interstate 80. He stopped the vehicle because it momentarily crossed over the divider line between the two eastbound lanes. The defendant was a passenger in the vehicle. Peterson issued a warning ticket for the traffic violation and deployed a drug detection dog which searched the vehicle and ultimately discovered many packets of cocaine in a hidden compartment in the trunk.

Au was charged with "unlawful possession with intent to deliver a controlled substance" and entered a plea of not guilty.

**PROCEDURAL HISTORY:**

Prior to trial, Au filed a motion to suppress any and all evidence that resulted from the traffic stop and subsequent search of the vehicle. Officer Peterson testified at the hearing that he initiated the traffic stop after he observed that most of the vehicle's "left, or driver's side, tires briefly, very briefly crossed over the white divider line, crossing into the inside lane for several hundred feet." Officer Peterson further testified that he later observed the vehicle cross a "seam" or "break" in the road on an uneven stretch of the road that curved slightly to the left. Officer Peterson did admit that it was "more difficult" for a driver to maintain their lane under such conditions. The district court received as evidence video footage from Peterson's police vehicle showing the traffic stop and the alleged traffic offenses that gave rise to the stop. Critically, Peterson testified that crossing briefly into another lane "happens all the time." And that it "happens commonly." While Peterson did reference that this type of driving sometimes happens with tired or drunk drivers, that it "happens all the time with people who are driving and who aren't drunk driving or driving fatigued."

Based upon Peterson's testimony, the district court denied Au's motion to suppress. The case then proceeded to a bench trial where Au was convicted and received a 10 to 12 year sentence in prison. This appeal followed.

**HOLDING:**

The facts in this case did not provide legal probable cause for a traffic stop. The controlling statute requires that a vehicle remain in a single lane only "as nearly as practicable." Second, because the arresting officer admitted that this "happens all the time" and failed to distinguish how this case differed from normal traffic behavior, there was no reasonable suspicion of criminal activity sufficient to support and investigatory stop.

The statute in question reads as follows, "A vehicle shall be driven as nearly as practicable 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." Au correctly pointed out that the language of the statute in question is significantly different from similar statutes and that it merely requires that a vehicle be driven within a

single lane "as nearly as practicable." The words "as nearly as practicable" invoke a standard inconsistent with the district court's interpretation. "Practicable" generally means capable of being done; the words "as nearly as" convey that the statutory standard does not require absolute adherence to a requirement, but, something less rigorous.

Officer Peterson's testimony failed to establish that the vehicle was not driven "as nearly as practicable" in the right hand lane. Moreover, Peterson's testimony showed that touching or crossing lane divider lines was a common occurrence on that part of the interstate. It is the opinion of this court that touching or crossing the divider line does not violate the statute.

In cases involving drunk drivers, this court has long held that observations of a vehicle weaving in its own lane of traffic does provide an articulable basis or reasonable suspicion for stopping a vehicle to investigate the driver's condition. It was sufficient where the officer observed the motorist to weave only twice, once sharply from right to left within the lane and a second time a little over one mile later to justify a drunk driving traffic stop (State v Thomte, 413 N.W.2d 1916 (1987)). In drunk driving cases, this court upheld another investigatory stop where the driver gradually moved to the left toward a center island then to the right and onto the right hand lane line, then back to the left toward the center island and finally back to the right lane divider line, even though the vehicle never touched the center island or crossed the lane divider line (State v Dail, 424 N.W.2d 99 (1998)). However; critically, in each of those cases involving weaving vehicles, we were not confronted to testimony admitting that the observed behavior "happens all the time" with unimpaired drivers. The court went on to emphasize that this was not the typical case (the one at bar) where law enforcement officer testifies to evidence of impairment sufficient to establish a reasonable suspicion of criminal activity. Here, unlike the usual case, Officer Peterson both admitted that the driver's conduct "happens all the time" by unimpaired drives and failed to testify to any circumstances distinguishing this stop from the norm. Accordingly, we conclude that the record does not establish a reasonable suspicion of criminal activity sufficient to justify the traffic stop. **Accordingly, the judgment of the district court is reversed.** The state failed to establish the violation of the statute and it failed to establish probable cause to justify the stop. The lower court conviction of Mr. Au is hereby reversed and the case is remanded.