IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. PD-0228-17

THE STATE OF TEXAS

v.

JOSE LUIS CORTEZ, Appellee

ON STATE'S PETITION FOR DISCRETIONARY REVIEW
FROM THE SEVENTH COURT OF APPEALS
POTTER COUNTY

KELLER, P.J., filed a dissenting opinion which KEASLER, J., joined.

At issue in this case is whether an officer had a sufficient basis to stop a vehicle when he suspected that the vehicle had touched the solid white line on the edge of the roadway (the "fog line"). The Court gives three reasons for holding that the officer did not have a sufficient basis for the stop: (1) it is not clear that appellee's vehicle touched the fog line, (2) touching the fog line does not constitute "driving on the improved shoulder," and (3) driving on the improved shoulder was lawful here to allow another vehicle to pass or for appellee's vehicle to decelerate before making a

right turn. The first reason, even if correct, does not support the Court's resolution, the second reason is incorrect, and the third reason was not addressed by the court of appeals and has not been raised as a ground for discretionary review. The Court's decision to rely on its third reason is especially troubling, because the State was not put on notice that it needed to brief the issue before this Court. Before deciding this third issue adversely to the State, the Court should have at least granted review of that issue on its own motion and ordered briefing.

A. Whether Appellee's Vehicle Touched the Fog Line

No court has ever held that Appellee's vehicle did *not* touch the fog line. Three courts have now held that it was unclear whether the vehicle touched the fog line. Specifically, the trial court found that the traffic-stop video showed Appellee's vehicle's "right rear tire (or its shadow) . . . to come in the proximity to and possibly touch the inside portion or more of the white line delineating the roadway from the improved shoulder . . . but not to extend past the . . . outermost edge of the fog line." So what does that mean? It means that the officer had reason to suspect that the vehicle touched the fog line. A traffic stop need only be supported by "reasonable suspicion."[1] "Reasonable suspicion exists if the officer has 'specific articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably suspect that a particular person has engaged or is (or soon will be) engaging in criminal activity.'"[2] The officer does not need proof beyond a reasonable doubt that a traffic violation has occurred to conduct a traffic stop.[3] The officer

---

[1] *Jaganathan v. State*, 479 S.W.3d 244, 247 (Tex. Crim. App. 2015).

[2] *Id.*

[3] *Id.* ("The question in this case is not whether appellant was guilty of the traffic offense but whether the trooper had a reasonable suspicion that she was.").

does not even need proof by a preponderance of the evidence.[4] In fact, an officer does not even need probable cause.[5] All the officer needed in order to conduct a stop was to be aware of circumstances that establish reasonable suspicion of a traffic violation. If touching the fog line constituted driving on the improved shoulder in violation of the law, then the officer needed only reasonable suspicion that Appellee's vehicle touched the fog line. By saying it is unclear whether the vehicle touched the fog line, the Court is essentially conceding that there was reasonable suspicion to believe that it had.

B. Whether Touching the Fog Line is Driving on the Improved Shoulder

The State's ground for review asks where the improved shoulder begins in relation to the fog line: "Does the improved shoulder of a highway begin at the inside edge of the 'fog line,' the outside edge, or somewhere in between?" We have some leeway to address the State's grounds without being restricted to its characterization of what is at issue. We can ask whether the fog line is part of the roadway, part of the shoulder, or a no-man's land in between. We can also ask whether touching the fog line constitutes "driving" on it. Both of these issues were addressed by the court of appeals.

The State contends that the fog line is part of the improved shoulder, so that driving on the fog line is tantamount to driving on the improved shoulder. The Court does not address this question. Because the Court does not, I only briefly address why I agree with the State on this issue. Under the Transportation Code, the improved shoulder is defined as being "adjacent" to the roadway, is distinguished by, among other things, a different "marking" than the roadway, and is not intended

---

[4] *Baldwin v. State*, 278 S.W.3d 367, 371 (Tex. Crim. App. 2009) ("'Probable cause' is a greater level of suspicion than 'reasonable suspicion' and requires information that is more substantial in quality or content and a greater reliability with respect to the source of information. . . . Probable cause is a relatively high level of suspicion, though it falls far short of a preponderance of the evidence standard.")

[5] *Id.*

for normal vehicular travel.[6] Because the fog line may sometimes be the only thing that distinguishes the shoulder from the roadway and a boundary marking is not something that is normally supposed to be driven upon, I would conclude that the fog line must be part of the shoulder.

The Court sidesteps this question and instead decides that touching the fog line does not constitute driving upon it. But nothing in the statute that proscribes driving on an improved shoulder suggests that a certain amount of time must pass before a vehicle's contact with the shoulder constitutes driving on it. Some of the allowable purposes for driving on a shoulder can involve a short duration, such as "decelerat[ing] before making a right turn" or "avoid[ing] a collision."[7] How much time must a police officer let pass before a vehicle's contact with the fog line becomes driving on it? Must the officer count to three? Must he wait for a minute to pass? A time requirement would be arbitrary, but the failure to specify a time requirement will leave officers without guidance on when a stop is justified. The solution to this quandary, however, is simply: any amount of time in which a moving vehicle is in contact with the fog line constitutes driving on the fog line.

C. Whether Driving on the Improved Shoulder was Justified

The trial court found that driving on the improved shoulder was justified to allow another vehicle to pass or for appellee's vehicle to decelerate before making a right turn. The court of appeals never addressed whether this holding was correct. The Court decides to address the issue because it concludes that one remand in this case is enough and that we should now review any issue the court of appeals could have reviewed, whether or not it actually did so. Ordinarily,"in our capacity as a discretionary review court, we review 'decisions' of the courts of appeals," and deviate

---

[6] TEX. TRANSP. CODE § 541.302(15).

[7] *See* TEX. TRANSP. CODE § 545.058(2), (7).

from that practice only in an exceptional case in the name of judicial economy when the proper resolution of a "remaining issue" (after resolving the issue on which review was granted) is clear.[8] While we can be mindful of the danger of leaving a case in "appellate orbit," it is not clear why one prior remand would constitute an extraordinary circumstance sufficient to allow us to resolve an issue never before addressed by the court of appeals. The Court also does not explain why the resolution of this issue is so obvious that we should forego briefing by the party adversely affected by the Court's holding.[9] Before the Court decides an issue raised on its own motion, it ought to explicitly grant a ground for review on its own motion and order briefing on the matter.[10]

I respectfully dissent.

Filed: January 24, 2018

Publish

---

[8] *Davison v. State*, 405 S.W.3d 682, 691-92 (Tex. Crim. App. 2013).

[9] Moreover, the issue the Court addresses is not a "remaining issue" to be resolved after resolving whether touching the fog line constituted driving on the improved shoulder. Perhaps it would be if the Court had resolved the fog-line issue in favor of the State. Instead, the Court has articulated an alternate ground for upholding the judgment of the court of appeals that the court of appeals never addressed.

[10] *See Ex parte Doster*, 303 S.W.3d 720, 721 & n.2 (Tex. Crim. App. 2010) (recognizing threshold issue, granting review on our own motion, and ordering briefing).