

**IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL  
CIRCUIT, IN AND FOR SARASOTA, COUNTY, FLORIDA  
(Felony Division)**

**STATE OF FLORIDA**

**VS.**

**Case No. 2003-CF-3554**

**MACK MCKINLEY,  
DEFENDANT.**

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**ORDER GRANTING MOTION TO SUPPRESS**

Defendant challenges the legality of a traffic stop that resulted in his arrest for possession of cocaine, marijuana, and drug paraphernalia. On July 16, 2003, the court received testimony from the arresting officer and defendant, and viewed a video tape of the stop. The relevant facts are these.

Shortly after 2 p.m. on Saturday, March 8, 2003, a clear and sunny day, Officer Buehler of the Longboat Key Police Department was southbound on Gulf of Mexico Drive. Directly ahead of him in the same lane was a brown van owned by defendant. It was being driven by a friend and Mr. McKinley was a passenger.

Gulf of Mexico Drive is a two lane road where the incident in question occurred. One lane is northbound and one lane southbound. An area of the paved road on the right hand side of each lane has been reserved and marked for bicycle traffic. The bike path runs parallel to and is contiguous with the vehicular traffic lanes. The bike path is paved like the rest of the thoroughfare but is separated from the vehicle lane by a white line with symbols indicating its use for bicycles.

As he followed the van Officer Buehler observed the right hand side of defendant's vehicle occasionally drift to the right into the bicycle lane. He ran a license plate check and found no warrants or other impropriety with the vehicle or its tag. He turned on a video camera which recorded his actions immediately preceding the stop.

The video tape indicates three brief instances where the van moved into the bike lane. According to the officer, at no time, either before or after the camera was activated were there bicyclists or pedestrians in the area marked as a bike bath. The video tape confirms this and shows no human beings or other obstacles in or reasonably near the bicycle lane. There are some people

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2003-07-16 10:00 AM

waiting at a bus stop on a sidewalk at the beginning of the tape but they are not close enough to be in any reasonable zone of danger presented by short incursions into the bike lane.

The police officer gave two reasons for the stop. First, he believed moving into the bike lane established grounds for a traffic stop as it constituted a violation of Section 316.089(1), Florida Statutes (2002). Second, he says he saw the driver flick a cigarette out of the window which violates state statutes and Longboat Key ordinances against littering.

Although he recalls the littering occurring before the stop, the court's review of the video tape indicates that he is likely mistaken on that point. The video tape (14:20:17 hrs) shows the cigarette flip occurring about the same time the officer would have activated his lights, which is consistent with the defendant's testimony that the cigarette was discarded simultaneous with an expletive when the driver discovered he was being pulled over.<sup>1</sup>

As the littering offense occurred after the officer indicated his intent to detain, it can not be used to support the officer's actions. The arrest and search are sustainable only if the officer had reasonable suspicion to effect a traffic stop based on a violation of Section 316.089 (1). This statute says:

316.089. Driving on roadways laned for traffic

Whenever any roadway has been divided into two or more clearly marked lanes for traffic, the following rules, in addition to all others consistent herewith, shall apply:

- (1) 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.

While there are no Florida appellate cases at the district court level interpreting this statute in connection with a bicycle lane, there are two cases closely on point involving a driver transgressing into other lanes. *Crooks v.*

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<sup>1</sup> There is evidence that the officer may have formed an intent to stop the van well before the cigarette was ejected. At the beginning of the video, at 14:18 hrs, when he was in the 3200 block of Gulf of Mexico Drive, there is a transmission between the officer and his dispatcher which can be interpreted as a decision to stop the van when it reached the 2500 block. The stop ultimately occurred at that location about two minutes later. In any event, the court has concluded the littering infraction formed no part of the justification for the stop.

*State*, 710 So. 2d 1041 (Fla. 2d DCA 1998) and *Jordan v. State*, 831 So. 2d 1241 (Fla. 5<sup>th</sup> DCA 2002).<sup>2</sup>

In *Jordan v. State*, 831 So. 2d 1241 (Fla. 5<sup>th</sup> DCA 2002), the defendant was observed moving from one lane into another and then swerving back into his own lane without any apparent reason. The arresting officer stopped the driver for a violation of Section 316.089(1), and a consent search of the vehicle led to a drug charge. The trial court's order denying the motion to suppress was reversed.

The Fifth District, quoting the second case pertinent to the issue, *Crooks v. State*, 710 So. 2d 1041 (Fla. 2d DCA 1998), said:

Because the record does not establish how far into the right-hand emergency lane Mr. Crooks drove on any of the three occasions, there is no basis to state that he was outside his "practicable" lane. Even if he was briefly outside this margin of error, there is no objective evidence suggesting that Mr. Crooks failed to ascertain that his movements could be made with safety. Section 316.089 is similar to section 316.155, Florida Statutes (1995), governing the use of turn signals, in that a violation cannot occur in isolation but requires evidence that the driving pattern created a reasonable safety concern. *See State v. Riley*, 638 So.2d 507 (Fla.1994). No such evidence exists in this case. *Id.* at 1242.

Because Section 316.089(1) requires drivers not to move into other lanes until the driver has "first ascertained that such movement can be made with safety," the court has imposed a requirement that, without additional suspicious facts, there must be some discernable element of danger presented to persons or property before such an infraction can occur or be a basis for a stop. This is made clear in *Jordan*:

In the instant case, we must agree with *Jordan* that the record is insufficient to establish that his vehicular movements, as testified to by the arresting officer, created any danger to himself or

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<sup>2</sup> Circuit courts in their appellate capacity have addressed the issue. See *Staley v. State*, 6 Fla. L. Weekly Supp. 761 (8/18/1999), 19<sup>th</sup> Judicial Circuit in and for Indian River County; and *State v. Townley*, 6 Fla. L. Weekly Supp. 531 (5/17/1999), 9<sup>th</sup> Judicial Circuit in and for Orange County, where lane changes were found insufficient to support DUI stop.

other traffic. Indeed, the testimony of the officer clearly established that other vehicles, including his own, were not in danger by Jordan's driving.

There was no testimony indicating that Jordan was intoxicated or otherwise impaired, nor was any erratic driving pattern established.

The applicable statute in this case recognizes that it is not practicable, perhaps not even possible, for a motorist to maintain a single lane at all times and that the crucial concern is safety rather than precision. *Id.* p. 1243.

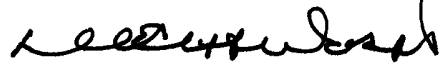
The video tape shows defendant McKinley to be in his "practicable" lane. There was no other suggestion of erratic or impaired driving. In sum, no safety concerns were implicated by the type of driving described by the officer or shown on the video tape and a stop based on such driving can not be sustained.

Under the rationale of *Jordan* and *Crooks*, this court finds that the evidence presented at the hearing fails to establish an objective, reasonable suspicion that Mr. McKinley had committed any traffic infraction. *Crooks* involved three encroachments into an emergency lane, and *Jordan* a series of intermittent lane breaches, with swerving. In neither case were there any safety issues. In this case there is no legal basis for treating the brief vehicular movements into an unoccupied bicycle lane any differently.

**NOW THEREFORE**, the court finds the vehicle in which defendant was a passenger was the subject of an illegal stop. The contraband obtained as a consequence is suppressed and may not be introduced in the state's case.

Defendant's motion is **GRANTED**.

DONE AND ORDERED IN SARASOTA, SARASOTA, FLORIDA, THIS 17<sup>th</sup> DAY OF JULY 2003.



Lee E. Haworth, Circuit Judge

cc: Jason Kelley, Esq., Office of the State Attorney  
Thomas S. Hudson, Esq., Counsel for Defendant