PD-1380-16
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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ABEL ACOSTA
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No. PD-1380-16

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

THE STATE OF TEXAS, Appellant

v.

GEOVANY HERNANDEZ, Appellee

Appeal from Gillespie County

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

FILED IN
COURT OF CRIMINAL APPEALS

December 8, 2016

ABEL ACOSTA, CLERK

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellee, Geovany Hernandez.

* The trial Judge was the Honorable N. Keith Williams, 216th Judicial District Court.

* Trial counsel for the State at trial and on appeal was John Hoover, 200 Earl Garrett Street, Suite 201, Kerrville, Texas 78028.

* Counsel for the State before the Court of Criminal Appeals is Stacey M. Soule, Assistant State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

* Counsel for Appellee at trial and on appeal was Cheryl Crenwelge Sione, 520 W. Main Street, Fredericksburg, Texas 78624.

INDEX OF AUTHORITIES

Cases

Statute

No. PD-1380-16

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

THE STATE OF TEXAS, Appellant

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GEOVANY HERNANDEZ, Appellee

Appeal from Gillespie County

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The State Prosecuting Attorney respectfully urges this Court to grant discretionary review.

STATEMENT REGARDING ORAL ARGUMENT

The State does not request oral argument.

STATEMENT OF THE CASE

The court of appeals affirmed the trial court's ruling granting Appellee's motion to suppress, which challenged the legality of the traffic stop of a car in which he was

a passenger for driving on the improved shoulder. The court of appeals held that the improved shoulder does not include the "fog line," so driving on the line without crossing over its outer edge is lawful. The court also held that the second act of driving on the improved shoulder was "necessary" "to avoid a collision" because it was night and there was an oncoming vehicle traveling in the opposite direction on the highway.

STATEMENT OF PROCEDURAL HISTORY

The court of appeals affirmed the trial court's order granting Appellee's motion to suppress. *State v. Hernandez*, No. 04-16-00110-CR, 2016 Tex. App. LEXIS 12058 (Tex. App.—San Antonio Nov. 9, 2016) (not designated for publication). The State did not file a motion for rehearing.

GROUNDS FOR REVIEW

1. **Does the improved shoulder of a road include the "fog line?"**

2. **Alternatively, because the issue whether the improved shoulder includes the "fog line" is unsettled, is there reasonable suspicion of a violation of driving on the improved shoulder when a driver drives on the "fog line" but does not cross its outer edge?**

3. **Is driving on an improved shoulder "necessary" "to avoid a collision" under TEX. TRANSP. CODE § 545.058(a)(7) simply because the driver is on a two-lane highway at night with a vehicle traveling in the opposite direction?**

ARGUMENT

I. Law

Driving on Improved Shoulder, defined in Transportation Code Section 545.058(a), states:

> An operator may drive on an improved shoulder to the right of the main traveled portion of a roadway if that operation is necessary and may be done safely, but only:
> (1) to stop, stand, or park;
> (2) to accelerate before entering the main traveled lane of traffic;
> (3) to decelerate before making a right turn;
> (4) to pass another vehicle that is slowing or stopped on the main traveled portion of the highway, disabled, or preparing to make a left turn;
> (5) to allow another vehicle traveling faster to pass;
> (6) as permitted or required by an official traffic-control device; or
> (7) to avoid a collision.

In *Lothrop v. State*, this Court held that the seven subsections are not defensive issues but, instead, are circumstances under which a driver is authorized to use the improved shoulder. 372 S.W.3d 187, 191 (Tex. Crim. App. 2012). The Court therefore interpreted "necessary" to exclude "absolutely necessary" and held "illegally driving on an improved shoulder can be proved in one of two ways: either driving on the improved shoulder was not a necessary part of achieving one of the seven approved purposes, or driving on the improved shoulder could not have been done safely." *Id*.

II. Background

Deputy Robert Blumrich, accompanied by field training officer Sergeant Nick Moellering, observed the car Appellee was a passenger in "abruptly turn off to the right like [he] was going to make a U-turn" but, instead, resume driving in the same direction. 1 RR 8, 13, 22, 26. Blumrich and Moellering found this suspicious and followed. 1 RR 8, 31. Blumrich stated that he stopped the car after the driver crossed the "fog line" onto the improved shoulder of the highway twice. 1 RR 11-12, 15, 26-27. The second time, Blumrich recalled, the car drove halfway over the improved shoulder.[1] 1 RR 18. Moellering estimated that it was six inches. 1 RR 34. At the suppression hearing, when Moellering was asked if he saw anything to indicate that the driver was trying to avoid a collision or make a right turn when he drove on the improved shoulder, Moellering stated:

> I did not see any obstructions in the roadway that would lead to a car swerving during drifting out of the main lane of travel, nor did I observe a turn signal which would indicate to me that they were slowing to make a turn from the improved shoulder into a private drive or one of the roadways that's along the way.
>
> And at that point our emergency lights were not activated to make the driver believe that we were going to pull over and they were supposed to

[1] According to Moellering, the highway at that point had three lanes: a southbound lane that the car was using, and two northbound lanes. 1 RR 32. However, a review of the video recording establishes that the highway was only two lanes when the car crossed the "fog line" the second time. *See* State's Exhibit 2.

yield to us for some reason.

1 RR 29. When the second cross-over occurred, Moellering testified that he had not been looking at oncoming traffic. 1 RR 31-32. He believed that the car did not create any danger when crossing the "fog line." 1 RR 34. Both officers smelled marijuana when they approached the car. 1 RR 12, 14, 28. They later arrested Appellee for tampering with evidence and possession of marijuana. 1 RR 14.

Despite finding both officers credible, the trial court granted Appellee's motion to suppress. 1 CR 9. As to the first cited "fog-line" cross-over, the trial court offered two remarks: first, "I can see he's on the fog line, but I can't – – it's not clear to me that he crossed over the fog line" and, second, "[w]hen it did go over the fog line it was very gradual." 1 RR 47, 49. As to the second infraction, the court concluded: "it was a prudent maneuver for him to move over just a little bit just to avoid – – there's nothing sudden, but I think that's what prudent drivers they'll veer over a little bit just to make sure it gives them a little cushion at nighttime, especially from another vehicle." 1 RR 48-49.

The court of appeals affirmed. *Hernandez*, 2016 Tex. App. LEXIS 12058, at *18. Addressing the first cross-over, the court held that it was required to defer to the trial court's finding that the car did not cross over the line and, as a consequence, it determined that this movement did not qualify as driving on the improved shoulder.

Id. at *10-11. Next, acknowledging that the car did cross over onto the improved shoulder the second time, the court agreed with the trial court's determination that the driver's movement was permissible—it was necessary to avoid a collision and not unsafe. *Id*. at *11-13.

III. Disputed Legal Issues

1. The "fog line" is part of the improved shoulder.

This Court granted the State Prosecuting Attorney's petition raising this issue in *State v. Cortez*, __ S.W.3d __, PD-1652-15, 2016 Tex. Crim. App. 1194 (Tex. Crim. App. 2015). However, the Court declined to address the merits because it remanded for the court of appeals to consider whether it was objectionably reasonable for the officers in that case to believe that the improved shoulder includes the fog line under *Heien v. North Carolina*, 135 S. Ct. 530 (2014). *Id*. at *7-8. This case presents the same issue concerning what constitutes the improved shoulder, and because traffic stops of this nature are an every-day occurrence, this Court should grant review to finally resolve it. The driver's act of driving on the "fog line" but not exceeding the outer edge is not contested. If the Court concludes that the improved shoulder includes the "fog line," then, as a matter of law, the court of appeals' decision affirming the trial court's suppression ruling should be reversed.

2. Reasonable suspicion of a violation justified the stop because the law is unsettled.

Alternatively, if the Court finds it unnecessary to decide the first issue, the stop was nevertheless justified by reasonable suspicion of a violation. Reasonable suspicion of a violation does not require proof of an actual violation. Because this Court has not yet decided whether the improved shoulder includes the "fog line," the issue is undecided and the officers acted lawfully. *See Jaganathan v. State*, 479 S.W.3d 244, 247 (Tex. Crim. App. 2015) ("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."). The court of appeals erred to conclude that the trial court's finding that the car did not cross the line is controlling. *See Hernandez*, 2016 Tex. App. LEXIS 12058, at *10. The trial court's determination constituted a legal conclusion subject to *de novo* review. *See Mahaffey v. State*, 316 S.W.3d 633, 637 (Tex. Crim. App. 2010) ("Statutory construction is a question of law; therefore our review is de novo.") Reasonable suspicion is a mixed question of law and fact, and with no definitive legal precedent, the officers reasonably believed that the "fog line" is part of the improved shoulder. So, even if the Court deems it unnecessary to decide where the improved shoulder begins, the stop was valid and both lower courts

erred to hold otherwise.[2]

3. "Necessary" "to avoid a collision" does not include all circumstances in which there is oncoming traffic on a two-lane road at night.

The court of appeals also erred to embrace the trial court's legal determination and hold that the act of driving on the improved shoulder was "necessary" "to avoid a collision." Though this Court rejected interpreting "necessary" as being "absolutely necessary," *Lothrop*, 372 S.W.3d at 191, the meaning applied in this case strips "necessary" of its significance and therefore impermissibly alters the text of the statute. Both courts improperly imposed a meaning consistent with: "reasonable," "preferable," "prudent"—the term specifically used by the trial court—or "extra-precautionary." Taken to its logical end, that interpretation means that it would be permissible for all drivers to continuously hurdle the main traffic lane and fog line or drive entirely on the improved shoulder when traveling at night on a two-lane country road so long as there is oncoming traffic. Such circumstances would necessarily establish a *per se* need "to avoid a collision." This cannot be the Legislature's intent. Further, the clear consequence—that other drivers may be prevented from using the improved shoulder for a permissible purpose—demonstrates the trouble with the

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[2] Mistake of law, recognized in *Heien v. North Carolina*, is not advanced here because the law remains unsettled under this theory and the *Heien* issue was not preserved. There can be no mistake about how an officer interpreted the law until a meaning is assigned to it.

lower courts' interpretation. Use by another could not be done safely. *Lothrop*, 372 S.W.3d at 191.

This Court should take this opportunity to declare that the meaning of "necessary" is a legal question. "Necessary," when used in conjunction with "to avoid a collision" in subsection 545.058(a)(7), should require some showing of real endangerment, not a mere hypothetical risk of danger. *Cf. Cates v. State*, 102 S.W.3d 735, 738 (Tex. Crim. App. 2003) (for a vehicle to be "used or exhibited" as a deadly weapon, there must be more than a hypothetical potential for endangerment). In other words, there should be some evidence of endangerment beyond: (1) driving, (2) on a two-lane country road, (3) at night, with (4) oncoming traffic. Some objectively, demonstrable facts evidencing dangerous or reckless driving by another should be shown before "necessary" "to avoid a collision" can reasonably support an officer's determination that a driver is not violating subsection 545.058(a)(7). *Cf. Sierra v. State*, 280 S.W.3d 250, 255 (Tex. Crim. App. 2009) (assessing manner of use of a vehicle as a deadly weapon finding to require a capability of causing death or serious bodily injury, which is usually evidenced by reckless and dangerous driving). Such a requirement would fit neatly between no real necessity (*i.e.*, "reasonable," "preferable," "prudent," or "extra-precautionary")—the court of appeals' standard—and absolutely necessary.

As applied here, there was no evidence that the car Appellee was in was endangered by the mere presence of an oncoming car traveling in the opposite direction. Though Moellering was not focusing on the oncoming traffic, he saw nothing to indicate that the driver was trying to avoid a collision. 1 RR 29, 33 ("We were traveling close enough that I would have been able to see a cat, dog, deer, cross . . . ."). Because the trial court found Moellering credible, there was no factual basis supporting the legal determination that driving on the improved shoulder was "necessary" "to avoid a collision." Further, there is no other objective evidence showing that the movement was "necessary." As the prosecutor argued at the hearing, "I would think if there was a real possibility the deputies would have made evasive action too." 1 RR 37. Based on the record, the officers were justified in having a reasonable belief that the driver committed a traffic violation.

IV. Conclusion

The legal conclusions underlying the court of appeals' decision affirming the suppression ruling are incorrect. This Court should reverse because the stop was supported by reasonable suspicion that the driver unlawfully drove on the improved shoulder. First, he drove on the improved shoulder when he drove on the "fog line." Second, it was reasonable for the officers to conclude that the shoulder includes the "fog line" because a final determination on the issue has never been made. Finally,

driving at night on a two-lane country highway with oncoming traffic does not, in and of itself, make it "necessary" to drive on the shoulder "to avoid a collision."

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals grant this Petition and reverse the court of appeals' decision affirming Appellee's suppression motion.

Respectfully submitted,

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/s/ Stacey M. Soule
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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 2,004 words, exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

/s/ Stacey M. Soule
Assistant State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the State's Petition for Discretionary Review has been served on December 6, 2016 *via* email or certified electronic service provider to:

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APPENDIX

(Court of Appeals' Opinion)

State v. Hernandez

Court of Appeals of Texas, Fourth District, San Antonio

November 9, 2016, Delivered; November 9, 2016, Filed

No. 04-16-00110-CR

Reporter
2016 Tex. App. LEXIS 12058 *

The STATE of Texas, Appellant v. Geovany HERNANDEZ, Appellee

Notice: PLEASE CONSULT THE TEXAS RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: **[*1]** From the 216th Judicial District Court, Gillespie County, Texas. Trial Court No. 5716. Honorable N. Keith Williams, Judge Presiding.

Disposition: AFFIRMED.

Core Terms

trial court, driving, reasonable suspicion, shoulder, training, improved, video, white line, collision, solid, suppress, traffic, appeals, traffic violation, weaving, driver, historical fact, approaching, activated, distance, offenses, oncoming, swerving, traveled, safely, second time, highway, defer, fog, intoxicated driver

Counsel: For APPELLANT: Cheryl Crenwelge Sione, Cheryl Crenwelge Sione PC, Fredericksburg, TX .

For APPELLEE: E. Bruce Curry, John Hoover, Kerrville, TX.

Judges: Opinion by: Sandee Bryan Marion, Chief Justice. Sitting: Sandee Bryan Marion, Chief Justice. Rebeca C. Martinez, Justice. Luz Elena D. Chapa, Justice.

Opinion by: Sandee Bryan Marion

Opinion

MEMORANDUM OPINION

The State of Texas appeals the trial court's order granting a motion to suppress filed by Geovany Hernandez. The State asserts the trial court erred in misapplying the law regarding reasonable suspicion for a traffic stop to the historical facts. We affirm the trial court's order.

FACTUAL BACKGROUND

On December 22, 2014, Hernandez was a passenger in a vehicle stopped by Deputy Robert Blumrich and Sergeant Nick Moellering. Based on their investigation after the stop, Hernandez was arrested and was subsequently indicted for tampering with evidence by attempting to alter, destroy, or conceal marijuana. Hernandez filed a motion to suppress, alleging the officers did not have reasonable suspicion to stop the vehicle in which he **[*2]** was a passenger.

At the suppression hearing, Deputy Blumrich and Sergeant Moellering were the only witnesses who testified. Deputy Blumrich was on field training at the time of the stop which is the training undertaken when an officer first starts out on patrol. Sergeant Moellering was

Deputy Blumrich's field training officer and was riding as a passenger in the patrol vehicle being driven by Deputy Blumrich. Deputy Blumrich observed a vehicle make an abrupt turn to the right as if it was going to make a U-turn to the left but instead continued straight down the road. After observing the abrupt turn, Deputy Blumrich followed the vehicle onto a highway and later activated his patrol car video. Deputy Blumrich testified he observed the vehicle cross the solid white line and go off onto the right shoulder of the road on two occasions. He also testified that driving on an improved shoulder is a traffic violation. Deputy Blumrich testified he initiated a traffic stop and noticed a strong odor of marijuana when he approached the vehicle. The videotape was played for the trial court, and Deputy Blumrich pointed out the two times he observed the vehicle cross the solid white line.

On cross-examination, **[*3]** Deputy Blumrich agreed a car was approaching from the opposite direction the second time the vehicle crossed the solid white line onto the shoulder of the road. Deputy Blumrich stated the highway was only two lanes, it was 9:00 p.m. and dark outside, and the speed limit was 55 mph. Deputy Blumrich agreed the vehicle did not cause any danger when it crossed the solid white line. Deputy Blumrich estimated he was 100 to 150 feet behind the vehicle the first time it crossed the solid white line and was closer the second time.

Sergeant Moellering had worked for the sheriff's office for eleven years and described his duties as "answering calls for service that range from civil disputes to thefts to conducting traffic enforcement, I have to supervise at least three people at any given time." Sergeant Moellering stated he was a field training officer which entailed "training up and coming deputies that don't have the experience" and "teach[ing] them policies, procedures and things like that." Sergeant Moellering also described the vehicle making an abrupt move to the right as if it was going to make a U-turn but then continued down the road. Sergeant Moellering testified the movement was not a traffic **[*4]** violation and was not captured on the video; however, the officers did not believe it was a normal movement. The officers followed the vehicle onto a highway and activated the video. The officers observed the vehicle drift over the solid white fog line two times. In response to whether he personally saw the vehicle actually cross the white line, Sergeant Moellering stated both passenger side tires crossed the line "specifically on the last time — or the last time before I think it was more evident." When asked whether he saw any indication the vehicle was trying to avoid a collision or make a turn when it went on the shoulder, Sergeant Moellering responded he did not see any obstructions on the roadway or the vehicle's turn signal indicating the vehicle was slowing to make a turn. Sergeant Moellering testified the vehicle was stopped to make sure there was not "some type of impairment going on that led to the operator making the driving movements that we did observe."

On cross-examination, Sergeant Moellering stated he was not looking for oncoming traffic when he saw the vehicle cross the solid white line the second time. Instead, he was only looking at the vehicle. Sergeant Moellering **[*5]** estimated the vehicle was six inches across the solid white line but stated the vehicle did not create any danger. With regard to whether the six-inch distance could be seen on the video, Sergeant Moellering responded the video was grainy and hard to see, but he thought the six-inch distance was evident.

During closing argument, Hernandez's attorney questioned whether the video showed the vehicle actually crossing the solid white line, noting driving on the line is not a violation. If the vehicle crossed the line on the second occasion, Hernandez's attorney argued the movement was prudent to avoid a collision with the car approaching from the opposite direction.

The prosecutor argued both officers testified a traffic violation was committed. The prosecutor also argued that even if the vehicle did not cross the solid white line, the officers reasonably believed the driver committed a traffic violation. Finally, the prosecutor argued even if no traffic violation was committed, the totality of the circumstances supported reasonable suspicion to stop the vehicle to investigate possible impairment or DWI.

During the hearing, the trial court watched the video several times. The trial court **[*6]** stated the vehicle was on the fog line but "it's not clear to me that he crossed over the fog line" the first time the officers testified the vehicle crossed over. With regard to the second time, the trial court first noted veering over as another car approaches with bright lights at nighttime is prudent to get a little bit further away out of concern for a head-on collision. The trial court then concluded, "The second one with the car oncoming, I believe it was a prudent maneuver for him to move over just a little bit just to avoid — there's nothing sudden, but I think that's what prudent drivers do, they'll veer over a little bit just to make sure it gives them a little cushion at nighttime, especially from another vehicle." The trial court stated he believed the officers were credible, but the video or "pictures don't lie" while an officer "could misperceive." Therefore, the trial court announced that he was granting the motion to suppress. The State appeals.

STANDARD OF REVIEW

We review a trial court's ruling on a motion to suppress for an abuse of discretion. *State v. Story, 445 S.W.3d 729, 732 (Tex. Crim. App. 2014)*. We review the record in the light most favorable to the trial court's determination, and because the trial court is the **[*7]** sole trier of fact, we give almost total deference to its determination of historical facts. *Id.* We review the trial court's application of the law to the historical facts de novo. *Id.* We also "may review *de novo* 'indisputable visual evidence' contained in a videotape;" however, we "must defer to the trial judge's factual finding on whether a witness actually saw what was depicted on a videotape." *State v. Duran, 396 S.W.3d 563, 570-71 (Tex. Crim. App. 2013)*.

REASONABLE SUSPICION

"An officer may make a warrantless traffic stop if the 'reasonable suspicion' standard is satisfied." *Jaganathan v. State, 479 S.W.3d 244, 247 (Tex. Crim. App. 2015)*. "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) engaged in criminal activity." *Id.* (internal citations omitted). "This is an objective standard that disregards the subjective intent of the officer and requires only some minimal level of justification for the stop." *Brodnex v. State, 485 S.W.3d 432, 437 (Tex. Crim. App. 2016)*. Stated differently, reasonable suspicion must be based on "an objective perception of events rather than the subjective feelings of the detaining officer." *Dickey v. State, 716 S.W.2d 499, 503 n.4 (Tex. Crim. App. 1986)*. An officer's mere "good faith perception, without

more, is insufficient **[*8]** to constitute cause to initiate an investigatory detention." *Domingo v. State, 82 S.W.3d 617, 621 (Tex. App.—Amarillo 2002, no pet.)*; *see also Hoag v. State, 728 S.W.2d 375, 380 (Tex. Crim. App. 1987)* (noting the "good faith of the investigating officer is never sufficient to justify a police officer to order a subject to stop his motor vehicle"). We review a reasonable suspicion determination by considering the totality of the circumstances. *Garcia v. State, 43 S.W.3d 527, 530 (Tex. Crim. App. 2001)*.

REASONABLE SUSPICION OF TRAFFIC VIOLATION

When an officer stops a vehicle because he has reasonable suspicion that a traffic violation has been committed, the question is not whether a traffic offense was actually committed but whether the officer had a reasonable suspicion that a violation had occurred. *Jaganathan, 479 S.W.3d at 247*. Although the operator of a vehicle generally may not drive on an improved shoulder, "the legislature gave us a statute that lists several situations in which driving on the shoulder may be permitted" if undertaken safely. *Lothrop v. State, 372 S.W.3d 187, 190 (Tex. Crim. App. 2012)*. One of these situations is to avoid a collision. *See Id. at 189*; *Tex. Transp. Code Ann. § 545.058(a)* (West 2011).[1]"[I]f an officer sees a driver driving on an improved shoulder, and it appears that driving on the improved shoulder was necessary to achieving one of the seven approved purposes, and it is done safely, [the] officer does not have reasonable suspicion that an offense **[*9]** occurred." *Lothrop, 372 S.W.3d at 191*. Viewing the record in the light most favorable to the trial court, we examine each of the three requirements the Texas Court of Criminal Appeals has stated are necessary for an officer to have reasonable suspicion that an offense occurred under *section 545.058(a) of the Texas Transportation Code* ("Code"). *See Id.*

A. Whether the Vehicle was Driving on the Improved Shoulder

The trial court found the vehicle did not cross over the line on the first occasion testified to by the officers. *See State v. Cortez, 482 S.W.3d 176, 183-84 (Tex. App.—Amarillo 2015)*, *vacated on other grounds*, *No. PD-1652-15, 2016 Tex. Crim. App. LEXIS 1194, 2016 WL 59399477 (Tex. Crim. App. Oct. 12, 2016)* (holding driving on the line is insufficient); **[*10]** *State v. Rothrock, No. 03-09-00491-CR, 2010 Tex. App. LEXIS 6356, 2010 WL 3064303, at *3 (Tex. App.—Austin Aug. 5, 2010, no pet.)* (noting trial court could determine officer lacked reasonable suspicion where video did not establish vehicle crossed line with certainty). Because the videotape was not "indisputable visual evidence" that the vehicle crossed over the line, we must defer to the trial judge's determination of this historical

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[1] *Section 545.058* entitled "Driving on Improved Shoulder" provides:

> (a) An operator may drive on an improved shoulder to the right of the main traveled portion of a roadway if that operation is necessary and may be done safely, but only:
>
> (1) to stop, stand, or park;
>
> (2) to accelerate before entering the main traveled lane of traffic;
>
> (3) to decelerate before making a right turn;
>
> (4) to pass another vehicle that is slowing or stopped on the main traveled portion of the highway, disabled, or preparing to make a left turn;
>
> (5) to allow another vehicle traveling faster to pass;
>
> (6) as permitted or required by an official traffic-control device; or
>
> (7) to avoid a collision.

Tex. Transp. Code Ann. § 545.058(a) (West 2011).

fact. *See* *Story, 445 S.W.3d at 732*; *Duran, 396 S.W.3d at 570-71*. The trial court did, however, appear to agree the vehicle crossed the line on the second occasion observed by the officers.

B. Was Driving on the Improved Shoulder Necessary to Avoid a Collision?

Deputy Blumrich agreed a car was approaching from the opposite direction the second time the vehicle crossed the white line. Sergeant Moellering testified he was not looking at the oncoming traffic, and further testified as follows:

> Q. Okay. Did you see any indication that the vehicle was trying to avoid a collision or trying to make a turn when they went on the shoulder, or were your lights on at that time when they went on the shoulder?
>
> A. The — I did not see any obstructions in the roadway that could lead to a car swerving during drifting out of the main lane of travel, nor did I observe a turn signal which would indicate to me that **[*11]** they were slowing to make a turn from the improved shoulder into a private drive or one of the roadways that's along the way.
>
> And at that point our emergency lights were not activated to make the driver believe that we were going to pull over and they were supposed to yield to us for some reason.

Sergeant Moellering did not respond to the question asking whether the vehicle was trying to avoid a collision likely because he previously stated he was not looking for on-coming traffic. Therefore, neither officer testified as to whether or not driving the vehicle on the improved shoulder was necessary to avoid a collision.

After reviewing the videotape, however, the trial court found the movement of the vehicle was a prudent effort to avoid a potential head-on collision given the vehicles were traveling on a two-lane highway at night when the on-coming headlights were bright. The trial court noted as soon as the car approaching from the opposite direction passed the vehicle, the vehicle re-crossed the white line onto the road. The trial court also noted, the movement of the vehicle was very gradual and was not erratic or unstable. Deferring to the trial court's determination of the historical **[*12]** facts, "it appears that driving on the improved shoulder was necessary to achieving one of the seven approved purposes," namely to avoid a collision. *Lothrop, 372 S.W.3d at 191*; *see also* *State v. Victoria, 09-13-00132-CR, 2013 Tex. App. LEXIS 7134, 2013 WL 2733015, at *2-3 (Tex. App.—Beaumont June 12, 2013, no pet.)* (holding trial court reasonably could have found appellant drove onto the improved shoulder out of necessity and in a safe manner to avoid a collision with two on-coming vehicles where appellant's tires crossed the white fog line as the two vehicles approached and returned to the proper lane of traffic after the vehicles passed) (not designated for publication).

C. Whether Driving on the Improved Shoulder was Done Safely

Both officers testified the movement of the vehicle did not create any danger.

D. Analysis and Conclusion

As previously noted, the Texas Court of Criminal Appeals has stated, "if an officer sees a driver driving on an improved shoulder, and it appears that driving on the improved shoulder was necessary to achieving one of the seven approved purposes, and it is done safely, [the] officer does not have reasonable suspicion that

an offense occurred." *Lothrop, 372 S.W.3d at 191*. In this case, the trial court found "it appear[ed] that driving on the improved shoulder was necessary **[*13]** to achieving one of the seven approved purposes," and the officers testified the movement onto the shoulder was done safely. *Id.*

The State argues the trial court erred in relying on its own perception of the video because the officers reasonably believed a traffic violation occurred. The Texas Court of Criminal Appeals, however, has instructed us regarding the three factors that must be present in order for an officer to have a reasonable suspicion that a violation under *section 545.058(a)* of the Code has occurred. *See Id.*; *see also Heien v. North Carolina, 135 S. Ct. 530, 539-40, 190 L. Ed. 2d 475 (2014)* (noting officer can gain no advantage through "sloppy study of the law" when statute has been construed by appellate court). In the absence of those factors, the officers' mere good faith perception, without more, is insufficient to establish reasonable suspicion. *See Hoag, 728 S.W.2d at 380*; *Domingo, 82 S.W.3d at 621*. Viewing the record in the light most favorable to the trial court and deferring to the trial court's determination of the historical facts, we hold the trial court did not abuse its discretion in finding the officers did not have reasonable suspicion that the vehicle committed a traffic offense under *section 545.058(a)* of the Code.

REASONABLE SUSPICION OF IMPAIRMENT

The State next argues the trial court erred in granting the **[*14]** motion to suppress because the officers had reasonable suspicion that the driver of the vehicle was impaired. In support of its argument, the State relies on *Curtis v. State, 238 S.W.3d 376 (Tex. Crim. App. 2007)* and *State v. Alderete, 314 S.W.3d 469 (Tex. App.—El Paso 2010, pet. ref'd)*.

In *Curtis*, Kyle David Curtis was driving on a four-lane highway around 1:00 a.m. when two troopers observed his vehicle weaving in and out of his lane over a short distance. *238 S.W.3d at 377*. Specifically, the vehicle weaved twice across the inside fog lane and once across the broken lane divider line in the span of several hundred yards as opposed to a quarter mile or so. *Id. at 377 n.2*. The trial court denied Curtis's motion to suppress; however, on appeal, the court of appeals reversed holding the officers lacked reasonable suspicion to stop Curtis's vehicle. *Id. at 377-78*.

The Texas Court of Criminal Appeals noted the court of appeals failed to consider: (1) the lateness of the hour; (2) the field training officer had been a state trooper for over 23 years and had received specialized training in detecting intoxicated drivers; (3) the specialized training taught that weaving in and out of a lane was a possible sign of intoxicated driving; and (4) Curtis weaved in and out of his lane at least three times over a relatively short distance of a few hundred yards. **[*15]** *Id. at 380-81*. The court asserted, "When viewed in light of the training officer's extensive experience in detecting intoxicated drivers, coupled with both officers' training to use the driver's weaving specifically as an indication of intoxicated driving, the trial court could have reasonably concluded that the articulated facts gave rise to enough suspicion to justify at least an investigation." *Id. at 381*. Therefore, the court held "the court of appeals erred in concluding that the trial court abused its discretion in overruling appellant's motion to suppress." *Id.*

In *Alderete*, two officers observed Ana Maria Alderete swerving inside her lane around 3:00 a.m. *314 S.W.3d at 471*. The first officer

testified that he had been an officer for a year and a half and had received training in the investigation of DWI offenses, including the traffic stops related to such offenses. *Id. at 471*. Based on his training and experience, the officer testified driving at nighttime and swerving within or outside a lane of traffic are common characteristics exhibited by an intoxicated driver. *Id.* The second officer testified he had been an officer for four years and also had received training in the investigation of DWI offenses. *Id.* Based on his training **[*16]** and experience, the second officer also found swerving within a lane of traffic and driving late at night to be common characteristics of a DWI offense. *Id.* The officers testified they observed Alderete swerving inside her lane as they followed her. *Id.* The officers could not recall how many times they saw the vehicle swerve; however, after following Alderete for half of a mile, they determined she was unable to drive in a straight manner and stay within the lane. *Id.* As a result, the officers initiated a traffic stop because they believed Alderete was intoxicated. *Id.* The trial court granted the motion to suppress concluding the officers lacked authority to initiate a stop. *Id.*

On appeal, the El Paso court reversed, noting the facts were "somewhat similar" to the facts in *Curtis*. *Id. at 474*. The court emphasized: (1) the stop occurred at 3:00 a.m.; (2) Alderete was unable to drive in a straight manner as she swerved within her lane for half of a mile on the interstate; (3) the officers testified they were trained to detect DWI offenses and weaving is a common characteristic of intoxicated drivers; and (4) the officers stated they received training in investigating DWI offenses and had investigated many **[*17]** such offenses. *Id.* The El Paso court held "the trial court's focus on the sole issue of weaving within the lane not giving rise to a reasonable suspicion that a traffic-code violation was committed, was error in that the court failed to consider whether the officers had reasonable suspicion, based on the totality of the circumstances, that Alderete was driving while intoxicated." *Id.*

The facts in the instant case are not similar to *Curtis* or *Alderete*. First, the officers began recording the vehicle at 9:00 p.m. as opposed to 1:00 a.m. or 3:00 a.m. Second, neither officer testified to having any specialized training or experience in detecting DWI offenses or any common characteristics an intoxicated driver displays. Third, the trial court found the vehicle had crossed over the solid white line on only one occasion, and the movement was necessary on that occasion to avoid a collision. Fourth, neither officer testified regarding the distance they followed the vehicle before or after activating the video. Finally, neither officer testified the vehicle was weaving back and forth. In addition, the video established the vehicle was being driven in a straight manner, and the trial court found **[*18]** the movement of the vehicle was gradual and not erratic or unstable.[2] The video also established that one minute elapsed from the time the officers activated the video to the time they activated their lights to initiate the stop. At 55 mph, the vehicle could have traveled a distance of almost one mile during the time period after the video was activated which did not encompass the entire distance the officers observed the vehicle. Having considered the totality of the circumstances and deferring to the trial court's determination of historical facts, we hold the

[2] The trial court stated, "When [the vehicle] did go over the fog line it was very gradual. The second time it was an oncoming vehicle, and it was very gradual, nothing erratic or unstable or in — you know, like you could infer from somebody who was under the influence for example."

trial court did not abuse its discretion in granting the motion to suppress because the officers did not have reasonable suspicion that the driver of the vehicle was intoxicated.

CONCLUSION

The trial court's order is affirmed.

Sandee Bryan Marion, Chief Justice

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