FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MARCH 8, 2010
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA,	)	
	)	
Plaintiff/Appellee,	)	
	)	
v.	)	Supreme Court No. 20090323
	)	
CHRISTIAN WOLFER,	)	
	)	Burleigh Co. No. 08-09-K-798
Defendant/Appellant.	)	

REPLY BRIEF OF APPELLANT

Appeal from Amended Criminal Judgment

dated and filed January 4, 2010

and the adverse determination within the August 31, 2009, Order

denying the Defendant's Motion to Suppress Evidence

Burleigh County District Court

South Central Judicial District

The Honorable Bruce A. Romanick

Dan Herbel
ND State Bar ID # 05769
Attorney for Appellant Christian Wolfer

Herbel Law Firm
The Regency Business Center
3333 East Broadway Avenue, Suite 1205
Bismarck, ND 58501
Phone: (701) 323-0123

TABLE OF CONTENTS

Table of Authorities ……...…….…… ¶1

Law and Argument ……...…….…… ¶2

Conclusion ……....…….…….. ¶17

Certificate of Service ……...…….…….. ¶19

[¶1] TABLE OF AUTHORITIES

Constitutional provisions

U.S. CONST. amend. IV. ……..…….. ¶16

N.D. CONST. of 1889, art. I, § 8 ……..…… ¶16

North Dakota statutes

N.D.C.C. § 39-10-17 …… ¶¶3, 5, 15-16

North Dakota cases

Fisher v. Suko, 111 N.W.2d 360 (1961) ……... ¶5

U.S. District Court cases

U.S. v. Ochoa, 4 F.Supp.2d 1007 (D.Kan. 1998) …… ¶14

State Supreme Court cases; other jurisdictions

State v. Tague, 676 N.W.2d 197 (Iowa 2004) …… ¶¶6-11

State v. Lafferty, 967 P.2d 363 (Mont. 1998) ……. ¶12

State appellate court cases; other jurisdictions

Crooks v. State, 710 So.2d 1041 (Fla.App.2Dist. 1998) ……. ¶11

State v. Bello, 871 P.2d 584 (Utah App. 1994) …….. ¶15

[¶2] LAW AND ARGUMENT

[¶3] The State argues that N.D.C.C. § 39-10-17 strictly and solely requires a driver "to remain entirely within his lane" of travel without qualification. *See* Brief of Appellee at 3-4. This however ignores the plain language of the statute that states a vehicle must be driven "as nearly as practicable" entirely within a single lane. *See* N.D.C.C. § 39-10-17 (emphasis added). What is practicable under the circumstances requires a review of the totality of the circumstances.

[¶4] The State's argument also ignores case law that is on point. The State asserts that even though other courts have analyzed practicable lane statutes in other jurisdictions with uniform and identical language to that of North Dakota that somehow these other decisions should carry no weight and provide no guidance to this Court because North Dakota has a different set of rules. The State asserts that "[c]rossing the fog line, even if only once, and even if considered minor, constitutes a traffic violation for which an officer may conduct a stop." *See* Brief of Appellee at 5. Yet, the State cites no case law in support of this unqualified sweeping assertion.

[¶5] Indeed, there really is no case law in North Dakota analyzing the practicable lane statute. *See* N.D.C.C. § 39-10-17 (showing one civil matter dealing with the statute, *Fisher v. Suko*, 111 N.W.2d 360 (1961)). That is why we must look to other jurisdictions to guide us in analyzing our statute which has language identical to statutes in other jurisdictions.

[¶6] The Iowa Supreme Court is another court that has recently analyzed its practicable/practical lane statute in *State v. Tague*, 676 N.W.2d 197 (Iowa 2004). In *Tague*, a Le Claire police officer "observed a vehicle driven by Tague enter" a four-lane

roadway with two lanes of one-way traffic heading north and two lanes of one-way traffic heading south shortly before 2 a.m. *See Tague*, 676 N.W.2d at 200. The lanes of one-way traffic heading in opposite directions were divided by a painted median. *See id*. After following Tague's vehicle for about a mile, the officer "observed the left tires of Tague's vehicle cross over the left edge line of" the road and return to the roadway, and then the officer initiated a traffic stop. *See id*. Tague subsequently provided a breath sample which "showed Tague had a .201 blood alcohol content" and he was charged with his third offense of operating a motor vehicle while intoxicated. *See id*.

[¶7] After Tague moved the district court to suppress evidence because of the unlawful stop, the district court granted his motion. *See Tague*, 676 N.W.2d at 200-01. The State then appealed to the Iowa Supreme Court. *See id* at 201.

[¶8] In affirming the district court's decision, the Iowa Supreme Court analyzed its practical lane statute. *See Tague*, 676 N.W.2d at 203. The high court remarked:

> "[t]he plain language of the statute requires that the driver of a vehicle must drive his or her vehicle as much as possible in a single lane, and that the driver cannot move from that lane to the shoulder or to another lane until the operator of the vehicle has ascertained whether he or she can move the vehicle safely. The dual purpose of the statute is to promote the integrity of the lane markings on the highway and to ensure the safe movement of vehicles on laned roadways. A violation does not occur unless the driver changes lanes before the driver ascertains that he or she could make such movement with safety. This interpretation is consistent with interpretations of identical statutes by courts that have considered the issue under similar facts as we have in the present case."

See Tague, 676 N.W.2d at 203. The *Tague* court found that "[d]espite the fact Tague's vehicle just barely crossed the left edge line for a brief period, the State failed to prove by a preponderance of evidence any objective basis to believe Tague's movement was done

without first ascertaining that he could make such movement with safety." *See id* at 203-04.

[¶9] The *Tague* court noted that there was "no other traffic on the roadway at the time Tague's vehicle crossed the edge line" and that he "was not driving his vehicle in an erratic manner, violating any speed restrictions, or weaving his vehicle from side to side on the roadway." *See Tague*, 676 N.W.2d at 203. The Court held that "under these circumstances" Tague's "single incident of crossing the edge line for a brief moment" did not provide police a basis to stop Tague's vehicle under the practical lane statute. *See id* at 204.

[¶10] In our case, like *Tague*, Mr. Wolfer was not driving his vehicle in an erratic manner, was not violating any speed restrictions, and was not weaving his vehicle from side to side on the Expressway; a four-lane roadway with two lanes of one-way traffic heading in opposite directions and clearly divided. *See Tague*, 676 N.W.2d at 203. Like *Tague*, "under these circumstances" Wolfer's alleged single incident of crossing the fog line "for a brief moment" did not provide law enforcement a basis to stop his vehicle under the practicable lane statute. *See id* at 204.

[¶11] Also like *Tague*, "the State failed to prove by a preponderance of evidence any objective basis to believe" Wolfer's alleged "movement was done without first ascertaining that he could make such movement with safety." *See Tague*, 676 N.W.2d at 203-04. "Even if he was briefly outside this margin of error, there is no objective evidence suggesting that [Wolfer] failed to ascertain that his movement could be made with safety." *See Crooks v. State*, 710 So.2d 1041, 1043 (Fla.App.2Dist. 1998) (analyzing Florida's practicable lane statute).

[¶12] The State dismisses *State v. Lafferty*, 967 P.2d 363 (Mont. 1998) and the Montana Supreme Court's review of its own "practicable lane" which is identical to that of North Dakota. *See* Brief of Appellee at 6. However, *Lafferty* is persuasive and should be considered by this Court. Indeed, the observed driving in *Lafferty* was more egregious than in our case and it followed an anonymous report of a drunk driver. Yet, the Montana Supreme Court determined that Lafferty did not violate the "practicable lane" statute by crossing the fog line without ascertaining that she could do so safely because "the statute relates to moving from a marked traffic lane to another marked traffic lane," not crossing onto or barely over the fog line . *See Lafferty*, 967 P.2d at 366.

[¶13] Finally, in their reply brief, the State really does not devote much attention to the fact that there were obstructions or distractions on the Expressway. In fact, the State continues to rely on Trooper "Iverson's testimony that there were no obstructions" on the Expressway. *See* Brief of Appellee at 6. However, on cross examination, the trooper acknowledged that there was a law enforcement vehicle sitting stationary in the roadway with its flashing overheads lights on "[s]ignaling to traffic that they should halt or try to avoid obstruction with that patrol vehicle" (Tr. at 16, L. 3-14); that there was one "vehicle directly in front of" Wolfer's pickup in the non-passing traffic lane and there was another vehicle in the passing lane driving "neck and neck with" that vehicle (Tr. at 15, L. 13 – 16, L. 2); that those two neck-and-neck vehicles directly ahead of Wolfer suddenly began braking because of the patrol vehicle that was sitting stationary in the roadway (Tr. at 16, L. 3-14); and that Wolfer braked suddenly and decelerated "as a result of" the two vehicles ahead of him braking suddenly due to the stationary patrol vehicle. (Tr. at 18, L. 10-15).

[¶14] The distracting events on the roadway were likely significant factors in causing Mr. Wolfer's pickup to allegedly drift momentarily onto the shoulder of the Expressway. "A reasonable driver" in Wolfer's position "might have been distracted by the commotion" of what was transpiring on the roadway. *See U.S. v. Ochoa*, 4 F.Supp.2d 1007, 1012 (D.Kan. 1998). The traffic and road conditions on the Expressway "may have startled [Wolfer] into crossing onto the shoulder." *See id.* Since the alleged touching of the fog line was at the same time the vehicles ahead of Wolfer suddenly began braking, this would not provide objectively reasonable suspicion to stop Wolfer's large pickup. (Tr. at 15, L. 13-19).

[¶15] Crossing the fog line does not necessarily violate N.D.C.C. § 39-10-17, so long as the driver operates his vehicle as "as nearly as practicable" within a single lane and there is no unsafe lane change. *See* N.D.C.C. § 39-10-17. What is practicable under the circumstances requires a review of the totality of the circumstances, including conditions on the roadway, the curvature of the road, weather conditions, and whether there is evidence of erratic driving. *See State v. Bello*, 871 P.2d 584, 587 (Utah App. 1994) (the officer's "initial suspicion, triggered by a minor driving aberration, was not corroborated in any way during the ensuing pursuit").

[¶16] Assessing the totality of the surrounding circumstances in our case, including the distractions or obstructions on the roadway along with the curvature of the Expressway at the point of the alleged violation, it seems somewhat impractical for a driver to keep a large pickup entirely within a limited lane. Indeed, Wolfer seemed to stay as "nearly as practicable" within his lane despite the road and traffic conditions. Under these circumstances, the driving in this case satisfies the requirement of N.D.C.C.

§ 39-10-17 that a driver drive "as nearly as practicable" entirely within a single lane. Therefore, the stop of Mr. Wolfer's pickup was in contravention of the Fourth Amendment to the United States Constitution and Article I, Section 8 of the North Dakota Constitution.

[¶17] CONCLUSION

[¶18] For the foregoing reasons, Mr. Wolfer respectfully requests relief from this Court.

Respectfully submitted
this 8th day of March, 2010.

/s/ *Dan Herbel*

Dan Herbel
Attorney for Appellant Christian Wolfer
ND State Bar ID # 05769

Herbel Law Firm
The Regency Business Center
3333 East Broadway Avenue, Suite 1205
Bismarck, ND 58501
Phone: (701) 323-0123

[¶19] CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on March 8, 2010, the REPLY BRIEF OF APPELLANT was electronically filed with the Clerk of the North Dakota Supreme Court and were also electronically transmitted to Lloyd Suhr, counsel for Appellee, at the following:

Electronic filing TO: "Lloyd Suhr" < lsuhr@nd.gov >

Dated this 8th day of March, 2010.

/s/ *Dan Herbel*

Dan Herbel