STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Rockingham, ss.

STATE OF NEW HAMPSHIRE

v.

TYLER J. THURSTON

218-2016-CR-874

ORDER

The matter before the court is defendant Tyler J. Thurston's motion to suppress (Docket Document 15). Mr. Thurston seeks to suppress evidence obtained during a motor vehicle stop. He raises state and federal constitutional claims regarding (a) the stop itself, (b) an alleged search of his person prior to his arrest, (c) a subsequent search of his person incident to arrest, (d) an inventory search of his vehicle, and (e) a subsequent search of his vehicle and its contents pursuant to a search warrant.

The court held an evidentiary hearing on Mr. Thurston's motion on March 13, 2017. Two witnesses testified. The State presented the Trooper who stopped Mr. Thurston's vehicle and who conducted the various searches. Mr. Thurston testified on his own behalf. The two witnesses gave very different accounts of what occurred after Mr. Thurston was pulled over. Both witnesses appeared to be credible. Yet the stark differences in their accounts cannot be explained away by innocent variances in perception and memory. Simply put, one of the witnesses gave an untruthful account.

Fortunately, the court need not reach the issue of witness credibility because both witnesses agree on the dispositive facts concerning the grounds for the motor vehicle stop. Based on these undisputed facts, the court concludes that the stop was

not supported by reasonable suspicion and, therefore, violated Part 1, Article 19 of the New Hampshire Constitution and the Fourth Amendment to the United States Constitution. Everything that followed was fruit of the poisonous tree.

The motion to suppress is GRANTED.

Facts

New Hampshire State Trooper Matthew Locke was assigned to a targeted DUI/DRE detail on Interstate 95 during the late afternoon and early evening hours on March 27, 2016. At approximately 6:00 pm that day, he pulled into the Greenland crossover (i.e. the strip of pavement that crosses the median). At that location, both the northbound and southbound roadways on I-95 are four lanes wide. As Trooper Locke entered the crossover he noticed a silver Honda Accord in the northbound roadway approaching his position from the south.

The Honda Accord was traveling at a normal highway speed. It was in the extreme left lane. What drew the Trooper's attention was the fact that the vehicle's left turn signal was on. Momentarily thereafter, the Honda Accord passed in front of the Trooper. He noticed that the only occupant was a long-haired male driver. The Trooper then pulled out of the crossover and got behind the Honda Accord.

According to the Trooper's testimony, he followed the Honda Accord for just two tenths of a mile before pulling it over. (Audio of hearing at 3:07:47). Because the Honda was traveling in the high speed lane at normal highway speed, the court infers that it was traveling at approximately 60 to 65 mph. At 60 mph, it takes twelve seconds to travel 0.2 miles. During most of those twelve seconds, the Honda's left turn signal

was on. The vehicle momentarily drifted further left, partially crossing the left fog line, then turned on its right blinker and made a signaled lane change to the right.

At this point, the Trooper turned on his blue lights and signaled for the Honda to stop. The Honda responded appropriately and made signaled lane changes until it reached the breakdown lane where it came to rest.

Analysis

Governing Principles: Stopping and detaining an automobile and its occupants constitutes a seizure within the meaning of Part 1, Article 19 of the New Hampshire Constitution and the Fourth Amendment. State v. Hunt, 155 N.H. 465, 470 (2007); Delaware v. Prouse, 440 U.S. 648, 653 (1979). Thus, Mr. Thurston was seized when Trooper Locke turned on his blue lights and Mr. Thurston pulled over. See e.g. State v. Beauschesne, 151 N.H. 803 (2005); California v. Hodari D., 499 U.S. 621 (1991).

In order to survive constitutional scrutiny, a roadside detention such as the one in this case, must be supported by "reasonable suspicion—based on specific, articulable facts taken together with rational inferences from those facts—that the particular person stopped has been, is, or is about to be, engaged in criminal activity." State v. Hight, 146 N.H. 746, 748 (2001); see also, State v. McKinnon-Andrews, 151 N.H. 19, 25–26 (2004); Terry v. Ohio, 392 U.S. 1, 21 (1968).

The State's Argument: The State argues that Trooper Locke had reasonable suspicion to believe that:

A. Mr. Thurston violated RSA 265:45 by leaving his turn signal on for twelve to fifteen seconds, even though he was not actually signaling a lane change;

B. Mr. Thurston violated RSA 265:26 by momentarily and partially drifting over the left fog line; and

C. Mr. Thurston might have been impaired by alcohol or drugs.

There Was No Violation Of RSA 265:45: RSA 265:45 prohibits unsignaled turns and lane changes. A police officer who observes a violation of this statute may lawfully stop the motorist. State v. Smith, 163 N.H. 427 (2012). However, the statute does not apply when a motorist simply leaves a turn signal on for a brief period of time without turning. The full text of RSA 265:45 provides:

> Turning Movements and Required Signals
>
> I. No person shall turn a vehicle at an intersection unless the vehicle is in proper position upon the roadway as required in RSA 265:42, or turn a vehicle to enter a private road or driveway, or otherwise turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety. No person shall so turn any vehicle without giving an appropriate signal in the manner hereinafter provided.
>
> II. A signal of intention to turn right or left when required shall be given continuously during not less than the last 100 feet traveled by the vehicle before turning.
>
> III. No person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal in the manner provided herein to the driver of any vehicle immediately to the rear when there is opportunity to give such signal.
>
> IV. The signals provided for in RSA 265:46, II, shall be used to indicate an intention to turn, change lanes, or start from a parked position and shall not be flashed on one side only on a parked or disabled vehicle, or flashed as a courtesy or "do pass" signal to drivers of other vehicles approaching from the rear.

The first three paragraphs of the statute list the circumstances in which signals must be used. The last paragraph prohibits the use of turn signals in only two circumstances: (a) when flashed on one side of a parked or disabled vehicle and (b) as

a "courtesy or 'do pass' signal to drivers of other vehicles approaching from the rear." "[T]he purpose of the statute is clearly to prevent collisions with other vehicles as a result of a change in direction or speed without warning." Caldwell v. Drew, 109 N.H. 91, 94 (1968).

This New Hampshire statute was taken almost verbatim from Section 11-604 of the 1962 edition of the Uniform Vehicle Code ("UVC"). The last paragraph of the uniform statute (i.e. the paragraph that prohibits the use of turn signals on one side only of parked or disabled vehicles and as a "do pass" signal) was added to the UVC in that year. The balance of the 1962 UVC is largely the same as in previous editions of the UVC.

Although the New Hampshire Supreme Court has not yet addressed the issue, other courts construing their jurisdictions' codifications of the same UVC provision have found that it does not create an implied offense of 'leaving a turn signal on while driving.' See e.g. People v. Haywood, 944 N.E.2d 846, 852 (Ill. Ct. App. 2011):

> [T]he plain and ordinary meaning of the [Illinois codification of the UVC] does not prohibit a driver from activating one turn signal without intending to change direction—as long as the vehicle is not parked or disabled or the driver is not using his turn signal as a "do pass" signal. . . . Driving past opportunities to turn while a turn signal is activated is not among the turn-signal uses barred by [the Illinois statute]. If the legislature had intended defendant's conduct to be a traffic violation, it would have mentioned that conduct in [the statute].

See also United States v. McDonald, 453 F.3d 958, 960 (7th Cir. 2006) (reaching the same result under the Illinois statute); Killebrew v. State, 976 N.E.2d 775, 780 (Ind. Ct. App. 2012) (holding that Indiana's codification of the UVC did not prohibit the continued use of a turn signal while driving), *abrogated on other grounds* by M.O. v. State, 54 N.E.3d 428 (Ind. Ct. App. 2016); United States v. Perez-Madrigal, 2017 WL 2225221,

at *4 (D. Kan. 2017) (holding that the Kansas codification of the UVC does not prohibit a driver from "using a turn signal at an intersection and continuing to drive in a direction contrary to the direction of the signal."); United States v. Miller, 146 F.3d 274, 278 (5th Cir. 1998) (holding that having a turn signal on without turning or changing lanes is not an offense under the Texas codification of the UVC:

> Even more striking is the fact that [the Texas statute] . . . explicitly indicates two instances in which signaling is prohibited: when a vehicle is parked or disabled and when used as a "do pass" signal. It is hard to reconcile the legislature's view that these particular uses of signaling had to be identified as violations if it intended that any other uses not specifically authorized were to be considered violations.)

This court has not found any precedent that goes the other way.

This court agrees with the analysis in Miller and the other cases cited above. Therefore, the court finds that (a) Mr. Thurston did not violate RSA 265:43 by leaving his turn signal on for twelve seconds while he drove straight ahead and (b) Trooper Locke lacked reasonable suspicion to believe otherwise.

There Was No Violation Of RSA 265:26: RSA 265:26 prohibits (a) driving in the median strip between opposing lanes of traffic, (b) driving on the left hand roadway of a divided highway (i.e. going the wrong way on a divided highway) and (c) driving in the right breakdown lane and the left shoulder area beyond the fog lines: The full text of RSA 265:26 provides:

> Driving on Divided Ways
>
> I. Whenever any way has been divided into 2 or more roadways by leaving an intervening space or by a physical barrier or clearly indicated dividing section so constructed as to impede vehicular traffic, every vehicle shall be driven only upon the right-hand roadway unless directed or permitted to use another roadway by official traffic control devices or police officers. No vehicle shall be driven over, across or within any such dividing space, barrier or section, except through an opening in such

physical barrier or dividing section or space or at a crossover or intersection as established, unless specifically permitted by public authority.

II. With the exception of any state, federal, county or municipal vehicle or any agent thereof, operating in furtherance of their official duties or any vehicle in an emergency, no vehicle shall be driven to the right of the unbroken painted line marking the barrier between the travel portion of a divided way and the emergency breakdown lane, or to the left of the unbroken painted line marking the barrier between the travel portion of a divided way and the dividing space or barrier.

III. The fine for a violation of this section shall be $150.

Paragraph I of the statute does not apply to this case because Mr. Thurston did not drive in the median or on the left-hand roadway. Thus, the question presented is whether Paragraph II establishes a violation level offense for momentarily and partially drifting over the fog line.

Paragraphs I and II have different origins. Paragraph I was taken directly from Section 11-401 of the 1962 UVC. Paragraph II cannot be easily traced to the UVC or any other national model law. It appears, therefore, that the operative language in Paragraph II was written from scratch by the New Hampshire Legislature in 1963, see N.H. Laws 1963, 330:1.[1]

The interpretation of a statute is a matter of law. State v. Etienne, 163 N.H. 57, 71-72 (2011); State v. Breed, 159 N.H. 61, 64-65 (2009). The court's responsibility is to determine the intent of the legislature as expressed in the words of the statute

[1]Paragraph II of RSA 265:26 was amended in 1990. See N.H. Laws 1990, 62:22; N.H. Laws. The amendment related only to the first clause of the paragraph and is not relevant to the present case. Prior to 1987, the entirety of both Paragraph I and Paragraph II were included in a single paragraph. The two paragraph structure was created by N.H. Laws 1987, 62:22. Paragraph III was added in 2005.

considered as a whole. Etienne, 163 N.H. at 71-72; Breed, 159 N.H. at 64-65. In doing so, the court does not read statutory phrases and provisions in isolation, but rather "interpret[s] a statute in the context of the overall statutory scheme." State v. Kousounadis, 159 N.H. 413, 423 (2009).

RSA 265:26, II prohibits driving over the fog line in either the breakdown lane (along the right-hand border of the highway) or the space between the fog line and the barrier or median (along the left-hand border of the highway). It seems clear that the purpose of the statute is to prohibit the use of these areas as additional lanes. Thus, absent special permission, drivers cannot avoid traffic jams by using the shoulder lanes as travel lanes. This keeps the shoulders available for emergency vehicles and disabled vehicles.

Nothing in the text of the statute suggests that it was intended to make *de minimus* drifting over the fog line a violation level offense. Were that the case, the Legislature would have spoken as it did in RSA 625:22 with respect to the solid center line that separates opposing lanes of travel:

> When the single center line highway marking method is used, no driver of a vehicle shall . . . drive any part of such vehicle to the left of or across an unbroken painted line marked on the way . . .

Although the New Hampshire Supreme Court has not opined on whether an ephemeral transgression over the fog line violates RSA 264:26, II, many other jurisdictions have construed similar statutes narrowly. See e.g. State v. Tague, 676 N.W.2d 197, 203-04 (Iowa 2004) ("[The defendant's] single incident of crossing the edge line for a brief moment under these circumstances did not give the police probable cause to stop [him] for a traffic violation under [the applicable statute]); Commonwealth

v. Gleason, 785 A.2d 983 (Pa. 2001) (finding no statutory violation because defendant did not create a "safety hazard" when a police officer observed his vehicle cross six to eight inches over the fog line two times over the span of a quarter mile."); State v. Marx, 215 P.3d 601, 612 (Kan. 2009) (holding that "a detaining officer must articulate something more than an observation of one instance of a momentary lane breach."); United States v. Freeman, 209 F.3d 464, 466 (6th Cir. 2000) (finding no violation for "one isolated incident of a large motor home partially weaving into the emergency lane for a few feet and an instant in time"); State v. Bello, 871 P.2d 584, 587 (Utah Ct. App. 1994) (a single instance of going over a lane line held not to be a violation); United States v. Delgado-Hernandez, 283 F. Appx 493, 499 (9th Cir. 2008) (no violation when vehicle crossed over the fog line for "a brief instant"); State v. Livingston, 75 P.3d 1103, 1106 (Ariz. Ct. App. 2003) (discerning a "legislative intent to avoid penalizing brief, momentary, and minor deviations outside the marked lines."); State v. Prado, 186 P.3d 1186, 1187-88 (Wash. Ct. App. 2008) ("A vehicle crossing over the line for one second by two tire widths on an exit lane does not justify a belief that the vehicle was operated unlawfully. This stop was unlawful."); Rowe v. State, 769 A.2d 879 (Md. Ct. App. 2001) (finding no statutory violation when a van crossed the edge-line separating the shoulder from the travel lane by about eight inches, returned to the travel lane and, a short time later, touched the white edge line.); but see State v. Regis, 32 A.3d 1109 (N.J. 2011) (even a momentary and slight deviation over a dotted lane line is a moving violation for which an officer may stop a vehicle); Dods v. State, 240 P.3d 1208, 1212 (Wyo. 2010) (same); State v. Wolfer, 780 N.W.2d 650, 652 (N.D. 2010) (same).

To be sure, the persuasive value of these out-of-state cases is reduced because they are grounded on statutes that that do not use the same language as RSA 265:26. Moreover, many of the out-of-state cases were decided under statutes that are identical to or derived from Section 11-309(a) of the UVC. That UVC provision relates to driving on laned roadways. New Hampshire has adopted UVC 11-309(a) and codified it as RSA 265:24,I:

> Driving on Roadways Laned for Traffic
>
> Whenever any roadway has been divided into 2 or more lanes clearly marked for traffic, the following rules in addition to all others consistent herewith shall apply:
>
> 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.

There is at least a plausible argument that the out-of-state cases are inapposite to the extent they were decided under the UVC's laned roadway provision (i.e. §11-309(a)). This argument depends on the supposition that the "as nearly as practicable" language in that UVC provision (and, by extension, RSA 265:24,I) is more forgiving than the categorical language in RSA 265:26,II. Thus, one could read RSA 265:26,II as prohibiting even the slightest incursion onto a divided highway shoulder, while construing RSA 265:24,II as allowing *de minimus* drifting outside of one's lane in other circumstances.

However, the court believes the better reading of the two statutes is that RSA 265:26,II prohibits using the shoulders as travel lanes while RSA 265:24,I requires drivers to keep inside their lanes as much as practicable. Under this reading, it is RSA 265:26,II that is more forgiving because it simply doesn't apply to the situation where a

vehicle momentarily and partially drifts over the fog line. Drifting is governed exclusively by RSA 265:26,II and must be more than *de minimus* to constitute an offense.

Accordingly, the court finds that:

(a) Mr. Thurston did not violate RSA 265:26,II because he was not using the shoulder as a travel lane for even a brief period of time;

(b) Mr. Thurston's momentary and partial drifting over the fog line did not violate either RSA 265:26,II or RSA 265:24,I (and the State does not rely on the latter statute to justify the stop); and,

(c) Trooper Locke had no reasonable grounds to believe otherwise.

<u>There Was No Reasonable And Articulable Suspicion Of Impaired Driving</u>: Trooper Locke's observations did not give him a reasonable and articulable suspicion of impairment by drugs or alcohol. The Trooper observed questionable driving for approximately 18 seconds. The court infers this short time period from Trooper Locke's testimony as follows:

(a) The Trooper testified that Mr. Thurston was travelling at a normal highway speed. On Interstate 95 this would be at least 60 miles per hour.

(b) The Trooper testified that traffic was heavy.

(c) The Trooper first observed Mr. Thurston when the Trooper was in the Greenland crossover and Mr. Thurston was approaching from the south. This suggests that he observed Mr. Thurston driving for approximately a tenth of mile or so before Mr. Thurston crossed his field of vision. Indeed, this is the precise distance that Trooper Locke claimed:

-The Trooper testified that he observed Mr. Thurston's vehicle for a total of about 0.3 miles starting at the point where the vehicle was when the Trooper observed it from the crossover and ending at the point where the Trooper stopped the vehicle. See, Audio of hearing at 3:07:

> Q: So I understand you followed this vehicle for, what, 3/10ths of a mile or so?
>
> A: I observed the vehicle total distance from where I could see it, my line of sight south to the point which it was stopped, was probably that distance.

-The Trooper observed Mr. Thurston's vehicle travelling 0.2 miles of this 0.3 distance during the time that the Trooper was following behind Mr. Thurston's vehicle. (Audio of hearing at 3:07:43).

-Simple subtraction suggests that the Trooper was only able to observe Mr. Thurston coming from the south, before Mr. Thurston crossed his field of vision, for 0.1 miles.

(d) At 60 miles per hour, it would have taken Mr. Thurston approximately six seconds to travel that 0.1 mile (i.e from the point where the Trooper first noticed his vehicle to the point where he crossed in front of the Trooper's cruiser).

(e) Trooper Locke immediately pulled out of the crossover and followed Mr. Thurston's vehicle for .2 miles (another twelve seconds). The Trooper testified to this distance on the record. (Audio of hearing 3:07:47)

(f) Trooper Locke then turned on his blue lights and Mr. Thurston dutifully pulled over.

Trooper Locke's 18 second investigation revealed only that (a) Mr. Thurston had his left blinker on for part of the 18 seconds, before turning it off and signaling a change

to one of the center lanes and (b) Mr. Thurston's tires momentary crossed the fog line. There was no evidence of multiple or prolonged drifting over either lane boundary. There was no evidence of significant weaving within the lane. There were no sudden or inappropriate changes in speed. Thus, there was no "erratic driving" which could support an investigative detention. See e.g, State v. Brodeur, 126 N.H. 411, 416, 493 A.2d 1134, 1138 (1985) (valid "erratic driving" stop when vehicle first slowed down, then pulled over to the right hand side of a two lane road and finally crossed into the oncoming lane); State v. Landry, 116 N.H. 288, 358 A.2d 661 (1976) (stop valid when the officer observed "jerky motions" and "abrupt changes within the…lane" followed by the driver's abrupt left turn, from the right hand lane, across the passing lane).

It is true that inadvertently leaving a turn signal is a sign of inattentiveness and, therefore, a possible clue of impairment. However, this is not true of leaving the signal on for a few seconds after switching lanes. The Trooper's 18 second investigation took less time than the 24 second shot clock in NBA Basketball and much less time than the famous 42 second last chord of the Beatles' song *A Day In The Life.*[2] Is it truly inconsistent with sobriety to leave a turn signal on for such a short period of time before correcting it?

It is also true that straying over the fog line may be a sign of weaving or drifting, both of which are clues of impairment. However, a single, isolated and nearly instantaneous transgression of the fog line is far too inchoate to support an inference of

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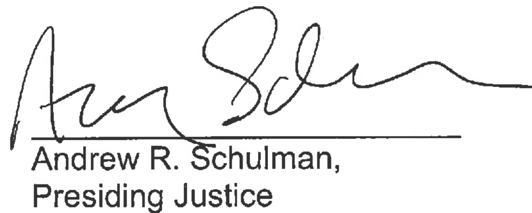
[2]See, A Day In The Life, Beatles Song facts, available at: www.songfacts.com/detail.php?id=129.

possible impairment. Had the Trooper followed the vehicle for some additional period of time, he would have seen for himself whether the driver was weaving, drifting or staying squarely in his lane. Instead, the Trooper insisted on playing "name that tune" with benefit of just one note. While there is no mathematical quanta of the degree of suspicion necessary to rise to the level of reasonableness, it is something more than the Trooper's speculation based on the anodyne and innocuous driving he observed.

Conclusion: Mr. Thurston was detained without reasonable suspicion. The motion to suppress is GRANTED.



June 13, 2017

Andrew R. Schulman,
Presiding Justice