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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 120

PARRIS J. RUFUS,

Appellant.

20 Eagle Street
Albany, New York
November 20, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

EDWARD L. FIANDACH, ESQ.
FIANDACH & FIANDACH
Attorney for Appellant
160 Allens Creek Road
Suite 110,
Rochester, NY 14618

AMY N. WALENDZIAK
MONROE COUNTY DISTRICT ATTORNEY'S OFFICE
Attorney for Respondent
47 Fitzhugh Street South
Rochester, NY 14614

Chrishanda Sassman-Reynolds
Official Court Transcriber



1 CHIEF JUDGE WILSON: People v. Parris Rufus.

2 MR. FIANDACH: Good afternoon. May it please the
3 court. Edward Fiandach for the defendant - - - for the
4 appellant here, Parris Rufus.

5 To be quite clear, I don't think this case
6 presents a legitimate pretextual stop as we would have seen
7 under Robinson. To be legitimate, there has to be probable
8 cause of a traffic violation. This isn't the case here.
9 There's no - - - there can be no probable cause of a
10 traffic violation because there was no traffic violation.

11 All that was observed, in this case, was the
12 right front tire touching the fog line on approximately
13 three occasions over one-tenth of a mile.

14 JUDGE RIVERA: Is there - - - is there any
15 scenario under which an - - - a driver, an individual,
16 would cross the line, perhaps multiple times, perhaps in a
17 short distance, perhaps in a way that swerves, that you
18 would say, ah, that now, gives you probable cause? And if
19 so, how is this case to be distinguished - - -

20 MR. FIANDACH: Well, there would - - -

21 JUDGE RIVERA: - - - from where you would agree
22 that - - - that is enough for probable cause?

23 MR. FIANDACH: Your Honor, that - - - that
24 situation may occur. But I think I would differentiate
25 that situation from the situation at hand where we only

1 have the right front tire touching the - - - touching the
2 fog line. Obviously, if the car moves over the fog line
3 extensively for a period of time, over several - - - over -
4 - - over - - - over - - -

5 JUDGE GARCIA: So the Appellate Division decision
6 that says, "it crossed over the white fog - - - crossed
7 over the white fog line three times," that's not accurate?

8 MR. FIANDACH: It's not accurate. It's not - - -
9 it's not supported by the testimony. The testimony of Tpr.
10 Tiwana basically said that he touched the fog line on
11 approximately three times over a - - - about approximately
12 one-tenth of a mile - - -

13 JUDGE GARCIA: There is a safety issue with
14 driving over or on the fog line, right?

15 MR. FIANDACH: I'm sorry?

16 JUDGE GARCIA: There is a safety issue when you
17 drive on the fog line, right?

18 MR. FIANDACH: Well, driving on the fog line,
19 yes. I mean, if the vehicle crosses the fog line he's
20 driving down the shoulder of the road.

21 CHIEF JUDGE WILSON: I don't - - - I don't think
22 you're - - -

23 MR. FIANDACH: It's a tremendous safety issue.

24 CHIEF JUDGE WILSON: - - - you're characterizing
25 the record properly. The trooper says, "I observed the

1 vehicle swerve across the solid white line, shoulder line,
2 on the right hand side on three separate occasions within
3 approximately a few hundred feet." Then, question: "When
4 you observed that, did the entirety of the tire pass over
5 the line? Yes, it did."

6 It's not touched the line. It crossed the line.

7 MR. FIANDACH: The entirety of the tire may have
8 crossed the fog line.

9 JUDGE GARCIA: And that's not unsafe?

10 MR. FIANDACH: I - - - I don't believe so. No.

11 JUDGE GARCIA: But what if there's a person
12 there?

13 MR. FIANDACH: Pardon?

14 JUDGE GARCIA: What if there's a person or a
15 bike?

16 MR. FIANDACH: I wouldn't expect that there would
17 be a person on the fog line or immediately over the other
18 side of the fog line, particularly on a super highway.

19 JUDGE HALLIGAN: So when this happens three - - -

20 JUDGE GARCIA: Even if - - -

21 JUDGE HALLIGAN: - - - times in ten minutes?

22 That - - - that's not - - - at three times in - - - in a
23 tenth of a mile? That's not something that suggests
24 there's a problem?

25 MR. FIANDACH: The right front tire crossing the

1 fog line three times over - - - over the - - - over three
2 times - - -

3 CHIEF JUDGE WILSON: I still don't see where
4 you're getting "right front tire"? Those words are not in
5 the testimony at all.

6 MR. FIANDACH: He - - - he uses the term right
7 front tire. I would - - -

8 JUDGE SINGAS: I believe he uses the - - - the
9 plural, two tires. The right tires which indicate that the
10 car swerved - - - you know, and he used the word swerved
11 too, correct?

12 MR. FIANDACH: I believe the word swerved
13 basically came in when he characterized the - - -

14 JUDGE SINGAS: I - - - I think that's true. When
15 he characterized what the defendant said.

16 MR. FIANDACH: Right.

17 JUDGE SINGAS: But I think the second officer
18 also said swerve. That's - - - that was my recollection of
19 the testimony. The - - - the first officer definitely said
20 tires, indicating that both tires crossed that line. Not
21 that it was just one tire that touched, but that the car -
22 - - if both tires are crossing the fog line, that car is
23 moving into the shoulder.

24 MR. FIANDACH: Where I think the testimony was
25 inconsistent, is that Tpr. Tiwana at - - - at certain

1 points said the right front tire, and then the term tires
2 was used. So I mean, the testimony was somewhat
3 inconsistent back and forth.

4 JUDGE CANNATARO: Even if it's one tire, what
5 more is required for - - - for probable cause for this 1192
6 violation?

7 MR. FIANDACH: First of all, Guthrie says that we
8 have to have a traffic violation. Okay? And is this a
9 traffic - - - is this a violation of 1128(a)? 1128(a) says
10 that he has to unsafely leave the lane to travel - - -

11 JUDGE HALLIGAN: Does say that he has - - -

12 JUDGE SINGAS: Well, doesn't that apply to
13 changing lanes, you have to - - - if you're going to change
14 lanes, you have to make sure that you can do so safely. So
15 do you think that this is different if you're floating into
16 the shoulder, is that different than changing lanes?

17 MR. FIANDACH: Well, first of all, the fog line
18 doesn't - - - doesn't delineate a lane, okay. And again,
19 there was really no testimony that he drifted into the
20 shoulder of the highway.

21 JUDGE SINGAS: All right. Well, we're going to
22 disagree on that, right? Because - - - you know, whether
23 the tires crossed over or not. My point is - - - and I
24 think you're correct that when you're changing lanes, you
25 have to demonstrate that it could be done safely.

1 MR. FIANDACH: Right.

2 JUDGE SINGAS: I'm saying that this is not a
3 lane. When you're going into the end of the road and
4 heading into a shoulder, that those rules are no longer
5 applicable. There are other rules that say you can't drive
6 on the shoulder of a highway, right?

7 MR. FIANDACH: Correct.

8 JUDGE SINGAS: Regardless of whether it's safe or
9 not.

10 MR. FIANDACH: That's very correct. But there's
11 no testimony here that he was actually driving on the
12 shoulder of the highway.

13 JUDGE CANNATARO: Well, isn't crossing the line -
14 - - I don't know if you would call it driving on the
15 shoulder, but you can certainly call it not driving in the
16 lane - - - in the traffic lane?

17 MR. FIANDACH: Well, no. I would say that the
18 vehicle was still being operated in the traffic lane, but
19 he had simply went over this - - - this - - - this line
20 which is basically placed there as - - - as basically
21 guidance to assist motorists. As - - - as 3B.07 says.

22 JUDGE CANNATARO: But that seems to describe, in
23 and of itself, failure to maintain lane?

24 MR. FIANDACH: I don't necessarily believe so. I
25 believe that the vehicle was being operated within the

1 lane. It merely touched - - - it touched or remotely
2 crossed the fog line.

3 JUDGE HALLIGAN: Doesn't - - - doesn't the
4 statute also say, "shall not be moved from such lane until
5 the driver has first ascertained that the movement can be
6 made with safety?"

7 MR. FIANDACH: Correct.

8 JUDGE HALLIGAN: And so - - - so couldn't one
9 assume that if you see someone go across the line three
10 times within a tenth of a mile, that they could not
11 possibly be ascertaining whether the movement can be done
12 safely? That - - - that's pretty erratic driving.

13 MR. FIANDACH: See, again, I disagree. I don't
14 see that as pretty erratic driving. In fact, I - - - I
15 see that as - - - as - - - as essentially nominal driving.
16 It would - - -

17 JUDGE RIVERA: Essentially what, I'm sorry?

18 MR. FIANDACH: Nominal driving.

19 JUDGE RIVERA: Oh, nominal.

20 MR. FIANDACH: That - - - that line is - - - is
21 touched - - -

22 JUDGE CANNATARO: So everybody does that?

23 MR. FIANDACH: It - - - Your Honor, yes. That's
24 what happens. People touch the fog line.

25 JUDGE RIVERA: Okay, but - - - that's what I

1 started out asking you where - - - I didn't ask it this
2 way, but I'll ask it now. Where is the rule, then, for
3 you? Because I might very well be persuaded that if you
4 just cross over just with your front wheel just a moment
5 and you come right back, that perhaps that's not probable
6 cause for a stop. But if you do it, as has already been
7 said, three times within a very short period of time,
8 within a very short distance, that might indeed raise a red
9 flag. But where is your rule then?

10 MR. FIANDACH: Well, my rule - - - I mean, I've
11 had cases where - - - you know, a vehicle crosses halfway
12 over the fog line. I mean, obviously, that indicates a
13 problem with the motorist. It indicates that the vehicle
14 is not being operated properly. But again, I do not
15 believe that the testimony at this hearing establishes that
16 - - - that - - - that level.

17 JUDGE RIVERA: But does the - - - I'll go with
18 you. Does the de minimus, right, crossing over - - - we'll
19 call it that - - - does that get outweighed by the fact
20 that it's several times within a very short period of time
21 and within a very short distance?

22 MR. FIANDACH: I - - - I don't know that - - -
23 you know, with three - - - three times within a tenth of a
24 mile is really all that short of a distance. That's - - -
25 you know, three times over 500 feet. This trooper

1 apparently had been following the - - - the motorist for a
2 period of time and this was all that was observed. So I -
3 - - I just don't see a sign of unsafe driving. I don't see
4 - - - to - - - to reiterate what I said earlier, I just
5 don't see operation which in any way deviates from nominal
6 driving of a perfectly normal motorist.

7 JUDGE HALLIGAN: What does nominal driving mean?

8 MR. FIANDACH: Well, nominal driving means the
9 way people drive a car. The way people drive cars. People
10 do touch that line. It - - - it's - - -

11 JUDGE GARCIA: If this had happened in the
12 centerline, same testimony that we heard. What would your
13 answer be?

14 MR. FIANDACH: Well, my answer would be far
15 different - - -

16 JUDGE GARCIA: Why?

17 MR. FIANDACH: - - - because at that point in
18 time, at the centerline he would actually be moving into
19 another lane of travel and would have to demonstrate that
20 that was being done safely.

21 JUDGE GARCIA: So - - - but I think we were
22 agreeing that crossing the fog line unsafely, if you drift
23 over a certain amount, that would qualify. Right?

24 MR. FIANDACH: Qualify?

25 JUDGE GARCIA: Under the statute as a violation?

1 MR. FIANDACH: Of 1128(a)? I think if the - - -
2 if the - - - the vehicle crosses say - - - half of the
3 vehicle crossed the fog line, that - - - it would probably
4 - - - yes.

5 JUDGE GARCIA: But it has to be half on the fog
6 line, but it could be what the testimony was here, in the
7 centerline? That would be unsafe?

8 MR. FIANDACH: Well, it - - - the - - - the - - -
9 again, the centerline I would - - - would be different
10 because the centerline is in fact you're crossing into
11 another lane of travel.

12 JUDGE GARCIA: So - - -

13 MR. FIANDACH: That would be a whole other - - -
14 it would be a whole other situation than 1128(a).

15 JUDGE GARCIA: So it's the risk - - - it would be
16 the risk that there is a car in the other lane would make
17 it unsafe rather than - - -

18 MR. FIANDACH: Very possibly. That's a very good
19 point. There'd be a risk of the cars going up on the left
20 hand side.

21 JUDGE GARCIA: So it's the fact that it's
22 unlikely there's a pedestrian or a bicyclist or another
23 stopped car on the far - - - on the shoulder that makes
24 this not - - - that makes this safe?

25 MR. FIANDACH: That's correct. This was a super

1 highway.

2 JUDGE TROUTMAN: So it doesn't matter if he kept
3 moving in and out, twenty times?

4 MR. FIANDACH: Twenty times? I think that would
5 make a difference.

6 JUDGE TROUTMAN: Okay.

7 MR. FIANDACH: And that would be some indication
8 - - - in fact, that may - - - that would be, under Guthrie,
9 you'd have to show - - - you'd have to show a reasonable
10 suspicion of the - - - of a crime, and that might be an
11 indication that the motorist was intoxicated.

12 JUDGE TROUTMAN: But three is not enough?

13 MR. FIANDACH: Pardon?

14 JUDGE TROUTMAN: But three isn't - - -

15 MR. FIANDACH: Three is certainly not enough. At
16 least in my book.

17 There remains the - - - the - - - the issue of
18 the testimony at trial was whether or not it's established
19 that the motorist was in an intoxicated condition. And on
20 that score, I'd like to - - - to - - - to go to the portion
21 of Cruz wherein we talk about the ability to understand the
22 nature and effect of a contract or a - - - the - - - the
23 ability to testify truthfully.

24 I mean, clearly this particular motorist had very
25 strong cognitive abilities.

1 JUDGE SINGAS: Is this - - - didn't he give his -
2 - - the air freshener wrapper as his license?

3 MR. FIANDACH: He did. But as I noted in my
4 brief, it very - - - very closely resembled the - - - the
5 registration certificate. Just about - - -

6 JUDGE HALLIGAN: An air - - - I didn't understand
7 that. How does an air freshener wrapper - - - I assume
8 it's plastic of some sort? How could it resemble a
9 driver's license?

10 MR. FIANDACH: It's - - -

11 JUDGE CANNATARO: Registration.

12 MR. FIANDACH: - - - roughly the same shape - - -
13 shape.

14 JUDGE HALLIGAN: Sorry. The registration. The
15 registration? I mean, I have one in my glove compartment.
16 It's - - - it's -

17 JUDGE CANNATARO: I'm sorry. You said - - - was
18 your answer just that they were both rectangular?

19 MR. FIANDACH: The - - - that - - - yeah. The -
20 - - the air - - - it was this - - - it wasn't the air
21 freshener, it was - - -

22 JUDGE CANNATARO: It was the wrapper. But one -
23 - - as Judge Halligan just said, one is - - - correct us,
24 but one is probably made out of plastic - - -

25 JUDGE HALLIGAN: A plastic wrapper.

1 JUDGE CANNATARO: - - - the other one's made out
2 of paper. And one's got printing on it and the other one,
3 presumably, is clear?

4 MR. FIANDACH: In all candor, I understand this
5 is the weakest point of my argument. Okay. All right? If
6 we can just - - - if I can just be honest with you? And
7 that is the point that I would rather not elaborate on, all
8 right?

9 CHIEF JUDGE WILSON: Fair enough.

10 MR. FIANDACH: I would like to talk about the
11 nine-step walk-and-turn, however.

12 JUDGE RIVERA: Well, what - - - what - - - before
13 you get to the nine-step walk-and-turn. What about the
14 observations of the bloodshot eyes and also the smell of
15 alcohol and the slurred speech? What about that?

16 MR. FIANDACH: Well, as the testimony in the - -
17 - as the testimony at the trial established, the - - - the
18 - - - there is no - - - no direct correlation between the
19 intensity of smell of alcohol on one's breath and whether
20 or not an individual's intoxicated. The smell of alcohol
21 on his breath certainly didn't indicate that he was
22 intoxicated. In other words, that he - - -

23 JUDGE RIVERA: Slurred speech, having to hold
24 onto the car to be able to walk?

25 MR. FIANDACH: Well, let - - - let me deal with

1 both those issues separately. The - - - the slurred speech
2 issue, I think was somewhat questionable. Because if we
3 look at the way he performed the - - - the alphabet test,
4 the C through J, all he - - - all that Tpr. Tiwana
5 testified was that he did it somewhat slowly. In fact, I
6 believe he was specifically asked did you notice anything
7 about his speech as he did the C through J, and said yes,
8 he did it somewhat slowly. There was no talk about
9 slurring or mumbling or anything else.

10 And then there's the cognitive ability there,
11 okay? That's the important part about driving while
12 intoxicated, it's the cognitive ability. He did that C
13 through J flawlessly.

14 I go back to the nine-step walk-and-turn. Never
15 missed heel to toe. Never stepped off the line, to which
16 Tpr. - - - Tpr. Tiwana said, well, it's a - - - it's a
17 pretty wide line or something. Well, we're talking about
18 the fog line, okay.

19 He - - - the nine - - -

20 JUDGE RIVERA: But there were other parts that he
21 failed, correct?

22 MR. FIANDACH: Well, the one-leg stand, it looks
23 like he kept his foot elevated for the thirty-second period
24 that he was required to keep it and may have even kept the
25 foot elevated more than that thirty-second period. Then

1 there's the - - - the horizontal gaze nystagmus. I want to
2 comment about that, if I can?

3 The horizontal gaze nystagmus, Tpr. Tiwana
4 testified that it - - - that a - - - a positive indication
5 indicated the presence of a central nervous system
6 depressant. However, he never specified that the central
7 nervous system depressant he observed is alcohol. He
8 simply said it showed he was under the - - - the influence
9 of a central nervous system depressant, which doesn't
10 indicate that the results of the horizontal gaze nystagmus
11 examination indicated that he was under the influence of
12 alcohol.

13 JUDGE HALLIGAN: Am I right, in the - - -

14 JUDGE SINGAS: But he also said that he smelled
15 like alcohol?

16 MR. FIANDACH: Well, again - - - but like I said,
17 the smell of alcohol in and of itself does not indicate - -
18 -

19 CHIEF JUDGE WILSON: I guess these things aren't
20 in and of themselves. We've got a whole bunch of things
21 we're putting together and - - -

22 MR. FIANDACH: But - - -

23 CHIEF JUDGE WILSON: - - - the question is
24 whether you can draw an inference from that?

25 MR. FIANDACH: - - - it wasn't as though he - - -

1 whether he profoundly failed the nine-step walk-and-turn,
2 or profoundly failed the - - - the - - - the - - - the - -
3 - the one-leg stand, or - - - or failed to perform the
4 alphabet. All these things were kind of halfway. They
5 don't indicate that he was in an intoxicated condition. I
6 just don't see where - - - where the results of - - - where
7 the evidence in this trial indicated that he did not have
8 the nature to - - - the ability to understand the - - - the
9 nature and effect of a contract.

10 JUDGE HALLIGAN: Did he - - - didn't he say - - -

11 MR. FIANDACH: Or to form a specific intent.

12 Excuse me? Yeah.

13 JUDGE HALLIGAN: Pardon me.

14 MR. FIANDACH: Excuse me.

15 JUDGE HALLIGAN: Didn't he say on the ride that
16 he wouldn't have been drinking if he didn't get hit?
17 Referring to the accident?

18 MR. FIANDACH: He said he wouldn't have been
19 drinking if he'd been hit, but you - - - you - - - it is
20 legal. And I believe the question he was asked, the - - -
21 in - - - it - - - one of the - - - I believe, Tpr. Tiwana
22 was asked at trial was that, you know, it's not illegal - -
23 -

24 JUDGE HALLIGAN: Yes.

25 MR. FIANDACH: - - - to drink and drive.

1 JUDGE HALLIGAN: He - - - he also, if - - - if
2 I'm recalling the record, declined or refused to take a - -
3 - a chemical breath test; is that right?

4 MR. FIANDACH: He did. But remember that under
5 1194 they have to establish persistence for that to become
6 an operative inference. And the - - - as I discussed in my
7 brief, there was some question about the persistence in the
8 failure to take that. I did not see the testimony in the
9 trial where he - - - he refused to take the - - - the - - -
10 the evidentiary breath test on - - - on three mandated
11 occasions. There was even a question in - - - in the
12 vehicle, as to whether or not Tpr. Tiwana testified it was
13 done in the vehicle but Tpr. Statt seemed to think it was
14 not. I may have that reversed between Statt and Tiwana.
15 But there was a - - - a - - - a variance there as to
16 whether or not he had refused to submit to the - - - to the
17 evidentiary chemical test while he was in the vehicle.

18 CHIEF JUDGE WILSON: Thank you.

19 MS. WALENDZIAK: Good afternoon. May it please
20 the court. Amy Walendziak on behalf of the people.

21 In this case, the troopers had probable cause to
22 stop defendant's vehicle for a violation of Section
23 1128(a).

24 At risk of quoting the statute to the court, I'm
25 - - - I'm aware that Judge - - - or all of the panel is

1 aware of the wording. There are two components to that
2 particular subsection of the statute. First of all, "A
3 driver shall drive their vehicle as nearly as practicable
4 within a single lane" and "They shall not move the vehicle
5 unless it's safe to do so". And I think looking at the
6 first component of the statute, that shows us why, here,
7 defendant violated the statute. He did not drive his
8 vehicle as nearly as practicable within the single lane.

9 The testimony, I believe, on pages 186 - - -

10 JUDGE CANNATARO: Well, we all - - - we all do -
11 - - in - - - in an effort to try to maintain lane, we all
12 do touch lines when driving. At least, I know I did when I
13 drove up here on Monday. So is there something about the
14 frequency, the distance that adds to that discussion?

15 MS. WALENDZIAK: Respectfully, I didn't touch the
16 line when I drove here, but we can - - -

17 JUDGE CANNATARO: You're just a better driver
18 than me.

19 MS. WALENDZIAK: We can - - - we can agree to
20 disagree on that. But I would say that the degree to which
21 you cross the line and also, the - - -

22 JUDGE CANNATARO: And oh, by the way I had - - -
23 I didn't drink at all.

24 MS. WALENDZIAK: No, absolutely. But I think,
25 again, touching the line, I don't know that you've

1 necessarily left the lane. Once you have crossed over the
2 line you're on the shoulder. And I think if your vehicle
3 is partly on the shoulder of the road, you are not entirely
4 within the lane.

5 The fog line is - - -

6 CHIEF JUDGE WILSON: Also, is doing that once
7 sufficient to pull a car over?

8 MS. WALENDZIAK: I believe so, unless it is not
9 practicable to stay within the lane.

10 JUDGE RIVERA: So - - - so you think that we
11 should adopt, as the dissenters claim, this per se rule
12 that the department has adopted? Just one? Just go over
13 that - - - not even completely over. Just touch it once
14 and that's enough?

15 MS. WALENDZIAK: I would say under certain - - -
16 certain circumstances, going over the line. I would draw
17 this court's attention to its decision in Schoonmaker, I
18 believe is how you pronounce it? It - - - while it's not a
19 criminal case, I recognize that. It was cited in Chief
20 Judge Wilson's decision in People v. Hinson in footnote 4,
21 I believe. And in Schoonmaker it was a single movement
22 across the white fog line onto the shoulder and then back
23 onto the road.

24 JUDGE SINGAS: In Schoonmaker we - - - we also
25 said the driving was erratic. And - - - and that testimony

1 is not present here.

2 MS. WALENDZIAK: Well, I think driving over the
3 fog line three times within a tenth of a mile on a highway,
4 does tend to establish some erratic driving.

5 JUDGE HALLIGAN: So since there's three
6 incidents, though, we don't need to decide whether one time
7 would be enough, do we?

8 MS. WALENDZIAK: I suppose not. At risk of
9 issuing an advisory opinion, because those aren't the facts
10 of this case. However - - -

11 JUDGE HALLIGAN: In other words, if - - - if we -
12 - - if we have a concern about whether driving over once
13 might not provide sufficient basis on a regular day
14 outside, absent something else to pull somebody over, that
15 - - - that isn't presented here, right?

16 MS. WALENDZIAK: No, it's not. Here, it was
17 three complete crossings of both tires; I believe both of
18 the troopers testified to.

19 JUDGE RIVERA: But would you get behind a rule
20 that says, there's no per se rule about the number of
21 times, distance; it is fact-specific?

22 MS. WALENDZIAK: I would say it is fact-specific,
23 and I would - - -

24 JUDGE RIVERA: So that one time might, under the
25 circumstances, be enough to provide probable cause of a

1 violation of 1128(a)?

2 MS. WALENDZIAK: Yes. One time might and one
3 time might not. For example, I believe it was in
4 Schoonmaker. The - - - I believe this court drew attention
5 to the fact that there was nothing that necessitated the
6 movement from the lane. So for example, if there was one
7 movement and the troopers had observed, say a deer run
8 across the road, I think that does necessitate your
9 departure from the lane. Because at that point staying in
10 the lane if there is a deer in the road, it's not
11 practicable to continue driving entirely within that lane.
12 You would want to leave to not hit the deer, and you can do
13 so provided that you do it in a safe manner. I don't - - -

14 JUDGE SINGAS: Do you think there's a difference
15 between crossing a lane - - - a lane of traffic versus the
16 fog line? Is there a difference there?

17 MS. WALENDZIAK: Not in this particular statute.
18 It says that you have to drive entirely within one lane.
19 So it does not say that leaving the lane to - - - to the
20 right across the fog line is okay, but leaving the lane
21 across the yellow, perhaps, double solid line or one of the
22 dashed lines that would delineate the middle from the right
23 lane of traffic - - -

24 JUDGE SINGAS: Are you aware of any other VTL
25 violations for crossing into the shoulder?

1 MS. WALENDZIAK: There is a prohibition against
2 driving on the shoulder.

3 JUDGE SINGAS: And does that have anything to do
4 with whether you can do it safely or not?

5 MS. WALENDZIAK: I believe that says that you
6 cannot drive onto the shoulder unless you are doing so in
7 one of the circumstances provided there. So that would be
8 1131. And you can stop on the shoulder if there's a tow
9 truck attending to a disabled vehicle, or if you're being
10 directed to do so by a law enforcement officer effectuating
11 a traffic stop. That's okay to drive onto the shoulder.

12 But here, at the time that we observed these
13 three crossings over the fog line, he was not being
14 directed to pull over by the police officer yet.

15 JUDGE RIVERA: Can I just ask you? You mentioned
16 the first part of 1128(a) and your - - - your view that
17 that's - - - that - - - there was probable cause of a
18 violation of that part. Is it your position that there's
19 not probable cause of a violation on the second part? Or
20 that there also is, but the first one, perhaps, is much
21 more obvious?

22 MS. WALENDZIAK: I would say that it is much more
23 obvious of the first one. Again, because of the number of
24 crossings that we have here. And I think also, it matters
25 that they were relatively close in time to one another.



1 This was a tenth of a mile, and when you're driving on the
2 highway at fifty-five miles an hour, you're going to cross
3 that distance much quicker than, say, if you were only
4 driving thirty-five miles an hour. I think that matters
5 for where this was done and the speed at which - - -

6 JUDGE RIVERA: Is the record clear that he was
7 driving at fifty-five?

8 MS. WALENDZIAK: The - - -

9 JUDGE RIVERA: As opposed to less or more?

10 MS. WALENDZIAK: It could have been less. The
11 officer testified that he was driving within the speed
12 limit. So I would say, even if it was forty-five miles an
13 hour, I believe I did out the math - - - and apologies for
14 dragging the court back to high school algebra. But this
15 happened in a relatively quick amount of time. This wasn't
16 he crossed the fog line once and then ten minutes later he
17 did it again. So you know, he may have accidentally
18 drifted. This was within a tenth of a mile.

19 And again, I would say that doing so relatively
20 quickly is just not a safe movement. Swerving indicates a
21 lack of control of your vehicle, and I don't think that we
22 can agree that that's safe - - -

23 JUDGE RIVERA: Is the record clear that the
24 officer said he observed him swerve?

25 MS. WALENDZIAK: The officer didn't say swerving.

1 Defendant himself characterized it as swerving. However, I
2 would note that the officer testified to facts that I think
3 we can infer that it was swerving. I know this court
4 recently decided one of the excessive window tint cases.
5 And in that particular case, it was concluding that - - -
6 or the officer testifying that the window was excessively
7 tinted, didn't allow this court to determine what exactly
8 excessive was. Here we have the facts to reach the
9 conclusion that he was swerving because he crossed the fog
10 line three separate times within a tenth of a mile.

11 And if I may briefly touch upon the legal
12 sufficiency issue?

13 JUDGE HALLIGAN: Do we know - - -

14 MS. WALENDZIAK: Oh, sorry.

15 JUDGE HALLIGAN: Do we know from the record what
16 kind of car he was driving?

17 MS. WALENDZIAK: Yes. It was a black Camaro. So
18 I - - - I don't recall the other - - - I remember it was a
19 Camaro.

20 And then if I could briefly touch upon the legal
21 sufficiency issue? It would be our position that this
22 issue isn't even preserved for this court's review because
23 defendant made only a general motion for an order of - - -
24 a trial order of dismissal. But in any event, the evidence
25 was legally sufficient to establish that he was

1 intoxicated. While the particular instances identified by
2 defendant viewed on their own in isolation may not, we have
3 all of them together.

4 I would go back to the registration card which is
5 a completely different material from a plastic air
6 freshener wrapper. He had slow and slurred speech at
7 times. He also smelled of alcohol and had admitted to the
8 officer that he had been drinking earlier that evening. He
9 used the car door for balance. While he had the cognitive
10 abilities to recite the alphabet, there's - - - that's not
11 the only thing you need to - - - to operate a vehicle
12 safely. You have to physically be able to do so.

13 And I think the fact that he can't even step out
14 of the car on his own, and also he was swerving his car
15 three times before the stop, leads to the conclusion that
16 the defendant didn't have the ability to - - -

17 JUDGE CANNATARO: I'm sorry. What do you mean
18 when you say he couldn't step out of the car on his own?
19 That he had needed to use the door to brace himself?

20 MS. WALENDZIAK: Yes. I believe the testimony
21 was that he grabbed the upper door part to get out of the
22 vehicle.

23 JUDGE CANNATARO: Didn't some police officer
24 testify that they do the same thing in this case?

25 MS. WALENDZIAK: I think he testified that

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sometimes he uses the door, but he also opined that in this particular instance he saw defendant using the door to balance himself. Which I think is a little bit different when you require the door to balance yourself versus just using it at - - - you know, for - - - like easiness-sake.

And unless there are any further questions, I would rely on my brief and ask this court to affirm the Appellate Division's decision.

CHIEF JUDGE WILSON: Thank you.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Parris Rufus, No. 120 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020

Date: November 29, 2024

