IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA V. JESSE LEE RICHTER

Appeal No. 30679

Appeal from Circuit Court,
Seventh Judicial Circuit,
Fall River County, South Dakota
The Honorable Jeffery R. Connolly, Presiding

BRIEF OF APPELLANT JESSE LEE RICHTER

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PRELIMINARY STATEMENT

This brief is made on behalf of Petitioner-Appellant who will be referred as "Richter." Respondent-Appellee State of South Dakota will be referred to as "State" or "the State." References to the record are designated as "CR," followed by the appropriate page number assigned by the Clerk.

JURISDICTIONAL STATEMENT

The Court has jurisdiction to consider this appeal under SDCL 23A-32-2 as this is an appeal from a final judgment of conviction by the circuit court entered April 5, 2024, and the notice of appeal was timely filed under SDCL 23A-32-15 on April 10, 2024.

STATEMENT OF THE LEGAL ISSUES

Appellant Richter elects to present the legal issue for the Court's consideration as follows:

I. **Whether the circuit court erred when it held Trooper Griffith had reasonable suspicion to stop the vehicle.**

The circuit court erred in denying Richter's motion to suppress:

SDCL § 32-26-6
State v. Hett, 2013 S.D. 47, 834 N.W.2d 317
Idaho v. Neal, 362 P.3d 514, 522 (ID 2015)

II. **Whether the circuit court's factual findings concerning the arresting Trooper's testimony were clearly erroneous?**

The circuit court clearly erred in its factual findings of Trooper Griffith's testimony:

Evens v. Evens, 2020 S.D. 62, ¶ 20, 951 N.W.2d 268, 276

STATEMENT OF THE CASE

Richter rode through the southwest corner of Fall River County as a passenger in the back seat of a "large" black Ford Expedition (SUV) in March of 2021. The SUV had California license plates and was moving slightly under the speed limit of 65 miles per hour in a northeasterly direction on South Dakota Highway 18. The road was clear and straight, and the weather was slightly cloudy, but otherwise it was dry conditions. According to testimony, the SUV crossed the fog-line of the road after a South Dakota Highway Patrol officer Stuart Griffith ("Trooper Griffith" or "Trooper") passed going in the opposite direction. Trooper Griffith claims he saw the SUV cross onto the fog line—and what he and the circuit court, the Honorable Stacy Vinberg Wickre, considered a traffic law infraction—as he observed the SUV in his driver's side mirror. The Trooper immediately turned around to initiate a stop of the SUV. During the stop, Trooper Griffith discovered a large amount of methamphetamine in the vehicle's spare tire. Subsequently, a jury convicted Richter of possession with intent to distribute methamphetamine (a class 3 felony in violation of SDCL 22-42-4.3), possession of a controlled drug of substance (a class 5 felony in violation of SDCL 22-42-5), and possession of drug paraphernalia (a class 2 misdemeanor in violation of SDCL 22-42A-3). On April 5th, 2024, the circuit court, the Honorable Jeffrey Connolly, sentenced Richter to the South Dakota State Penitentiary, and Richter timely filed a notice of appeal. Judge Connolly also presided over the trial portion of the case.

STATEMENT OF THE FACTS

Richter was travelling as a passenger through South Dakota on his way back to Minnesota on March 23, 2021. CR 3. *See also State's Video of Stop* (hereinafter "Video"). Richter was not authorized to drive the vehicle, nor was he the individual who had rented the vehicle. CR 249. Trooper Griffith was on patrol travelling westbound (or somewhat southwest) on Highway 18, and he drove past the vehicle when it was approximately 2 miles past Edgemont, South Dakota. CR 220-21; *see also Video*. At this time, it was a little after noon on an overcast day. CR202; *see also Video.* The vehicle was moving within the speed limit, if not slightly under, on a medium, uphill grade where the eastbound traffic has an extra lane for slower traffic to be passed. CR 222; *see also Video.*

Trooper Griffith testified at the evidentiary hearing that he had reasonable suspicion for the stop of the SUV Richter was riding in because it was a "large out-of-state rental vehicle . . ." and that it was driving between 60 to 65 miles per hour in a 65 miles per hour speed zone. CR 222. Trooper Griffith does not identify how he knew the vehicle was a rental from his first view of it from the highway, nor does he ever explain why a vehicle's size gave him reasonable suspicion. CR 246-47. It appears that Trooper Griffith attributed a vehicle going the speed limit as a *cause* to suspect that criminal activity was afoot. CR 222. A short time after the SUV passed Trooper Griffith, he claimed to have seen it cross onto the fog line of the road, while looking across three lanes of traffic. CR 221 ("There's additional lanes. . ."). The Trooper managed to do this while observing

the SUV in his driver's side rearview mirror with the assistance of a "blind spot mirror." CR 226.

At the moment that the vehicle passed Trooper Griffith, his attention was diverted as he looked to his digital LED display located between his two sun visors so that he may monitor the speed of the vehicle in order to see if it sped up—because speeding up after a highway patrol officer passed is a typical practice of drivers, according to Trooper Griffith. CR 223, 98. Trooper Griffith testified that he "checked the speed again as it passed me." CR 98. He added, "[s]o I may have turned it off and then looked at and watched the vehicle, or turned it on, seeing that it's not speeding." CR 231. However, Trooper Griffith also testified that he was also looking to his driver's side mirror to monitor the vehicle. CR 248. Trooper Griffith could confirm that the vehicle did not speed up after he passed it because there was no audio cue from his equipment. CR 230.

At the time Trooper Griffith and the vehicle passed each other, Trooper Griffith acknowledged that they were travelling away from each other at approximately 120 miles-per-hour. CR 226-27. According to his testimony, it takes up to 29 seconds after Trooper Griffith passed the vehicle for him to see any alleged traffic infraction. CR 248.[1]

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[1] A formula for calculating distance is equal to velocity multiplied by time [$d = rt$]. Here, two objects travelling 120 mph away from each other are approximately .97 miles apart at the end of 29 seconds, while the objects are .20 miles apart at the end of 6 seconds. Here, Trooper Griffith testified that, although he was only a couple hundred yards apart when he saw the traffic infraction, when asked "how far were you from the vehicle?", Trooper Griffith responded, ***"Just guessing***, probably a couple hundred yards." CR 202

Regarding the actual crossing, Trooper Griffith testified that he was "not looking at simply a tire" and that he was "not simply focused on one tire and the line" regarding the SUV in his driver's side rearview mirror. CR 266-67. Trooper Griffith testified that he observed the vehicle "crossing over the fog line," but then clarified that he saw "the line is obstructed by the tire and the vehicle." CR 72. Trooper Griffith's Affidavit, which was prepared near the time he observed this, specifically mentioned that the "driver cross[ed] onto the fog line." CR 3.

At the preliminary hearing, Trooper Griffith did not testify that the vehicle crossed over the fog line, but rather that he stopped the vehicle "for crossing the fog line. . . ." CR 120. The Trooper later testified that "[s]o for clarity, I mean, when I say cross over, if it is onto the line, I guess that's crossing the line." CR 247. Trooper Griffith acknowledged that he did not use the same language in his affidavit as he did during his testimony at the evidentiary hearing. CR 230. The violation was not caught on video, and the SUV never crossed or touched the fog line in the video of the Trooper's pursuit and stop of the SUV. *See Video*

On June 15, 2022, Richter filed a motion to suppress evidence gained from the stop due to law enforcement lacking reasonable suspicion for the stop. CR 2, 278. An evidentiary hearing was held on June 21, 2022, wherein Trooper Griffith testified. CR 198. The circuit court issued an order denying the motion to

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(Emphasis added). For context, the vehicles were moving apart at 59 yards per second. This would allow Trooper Griffith only 4 seconds to see the alleged traffic violation from the time the vehicles passed. He did this while driving and looking away at his radar.

suppress, and Richter proceeded to a jury trial wherein he was convicted of all counts by a unanimous jury verdict.

STANDARD OF REVIEW

The South Dakota Supreme Court's well-known standard of review in cases such as these is as follows:

> A motion to suppress based on an alleged violation of a constitutionally protected right is a question of law reviewed de novo. The trial court's factual findings are reviewed under the clearly erroneous standard. Once the facts have been determined, however, the application of a legal standard to those facts is a question of law reviewed de novo. This Court will not be restricted by the trial court's legal rationale.

State v. Hett, 2013 S.D. 47, ¶ 6, n.2, 834 N.W.2d 317, 319 (citation omitted). "It is the trial court's function to evaluate credibility and resolve conflicts in the evidence at a suppression hearing." *State v. Smith*, 1998 S.D. 6, ¶ 13, 573 N.W.2d 515, 519 (citation omitted).

ARGUMENT AND AUTHORITIES

The circuit court erred in expanding the bounds of the "practicable lane statute" in South Dakota found in SDCL 32-26-6 as applied to the facts here where it is alleged that a vehicle briefly and singularly crossed *onto* the fog line as opposed to over it. Secondly, the circuit court committed a clear error when it determined that the vehicle Richter was riding in had indeed "cross[ed] *over* the fog line" especially so when the circuit court found concomitantly that the Trooper "was uncertain as to whether the vehicle's tires entirely crossed the fog line." CR 224, 294 (Emphasis added).

I. THE TROOPER LACKED REASONABLE SUSPICION FOR THE STOP.

Richter asks this Court to further clarify South Dakota's practicable lane statute on facts distinguishable from *State v. Hett* and adopt the holding that, on the specific facts here, the Trooper had no reasonable suspicion for the stop. The prerequisite for law enforcement's reasonable suspicion to stop a vehicle is as follows:

> The Fourth Amendment to the United States Constitution and Article VI, section 11, of the South Dakota Constitution guarantee a person's right to be free from unreasonable searches and seizures. [T]he Fourth Amendment's textual reference to the issuance of '[w]arrants' has been interpreted to state a general principle that police officers must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure[.] However, courts have long recognized certain exceptions to the warrant requirement. . . . A police officer need only have a reasonable suspicion to stop a vehicle. While the stop may not be the product of mere whim, caprice or idle curiosity, it is enough that the stop is based upon specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant [the] intrusion.

State v. Grassrope, 2022 S.D. 10, ¶ 8 970 N.W.2d 558, 561 (internal quotations and citations omitted) (alterations in original) (cleaned up). "[A] traffic violation, however minor, is sufficient to justify the stop of a vehicle." *State v. Lockstedt*, 2005 S.D. 47, ¶ 17, 695 N.W.2d 718, 723 (citation omitted).

The traffic violation that the Trooper relied upon to justify the stop is found in S.D. Codified Laws § 32-26-6, and it provides:

> On a roadway divided into lanes, a vehicle shall be driven *as nearly as practicable* entirely *within* a single lane and may not be moved from such lane until the driver has first ascertained that such movement can be made with safety. A violation of this section is a Class 2 misdemeanor.

(Emphasis added). This Court has previously analyzed this statute and adopted the *Wolfer* framework from the North Dakota Supreme Court in determining the "practicability of [a defendant] remaining entirely within his lane." *See Hett,* 2013 SD 47, ¶¶ 14-17, 834 N.W.2d at 322-23 (citing *North Dakota v. Wolfer,* 2010 ND 63, 780 N.W.2d 650).

By way of *Wolfer*, the *Hett* Court adopted the following factors:

> [T]he length and duration of the crossing and distance traveled outside the lane of traffic; the design of the highway, such as the existence of curves in the road; traffic conditions, such as highway congestion or vehicles braking in front of the suspect vehicle; and road conditions, such as whether the road was dry and obstruction free.

Id. ¶ 13, 834 N.W.2d at 322 (citing *Wolfer,* 2010 ND 63, 780 N.W.2d at 652).

Here, the circuit court essentially held that it is a per se (or a bright line, no pun intended) violation of the practicable lane statute when a vehicle touches the fog line under relatively ideal driving conditions as presented in the facts here. That is error. Here, the facts show that the Trooper observed the vehicle Richter was a passenger in briefly cross *onto* the fog line, not over it, one time. Although the road had no curves, no congestion, no precipitation, and no obstructions, the road had two lanes (what some call a "super-two" highway, which has an extra lane for passing slower vehicles in certain stretches) and uphill. Additionally, it was a large, 2021 Ford Expedition. Under the circuit court's view, these were somewhat ideal driving conditions, and because of those conditions, it was practicable to stay off the fog line at all times. Therefore, the circuit court

concluded a crime had been committed or at least reasonable suspicion for a traffic stop. That overbroad reading of *Hett* renders the facts and law of that case irrelevant and replaces it with a new bright line rule for motorists under ideal driving conditions—contrary to precedent and the plain meaning of the statute.

For example, in the facts in *Hett*, the Court reviewed the video that showed a Ford pickup at night crossing "*over* the fog line by at least a tire width[]" *and* the center line. *Id.* at ¶¶ 16, 19. (Emphasis added). Here the facts are distinguishable. The circuit court acknowledged that the Trooper's testimony did not demonstrate that he observed the vehicle cross over the fog line, and he did not look at the SUV's tires in his rearview mirror, but rather, he wrote in his affidavit that it only crossed onto the fog line. That is relevant to the analysis and distinguishable from the facts in *Hett*.

Additionally, simply touching a fog line is within the doctrine of de minimis non curat lex. "The law does not care for, or take notice of, very small or trifling matters." *State v. McCann*, 354 N.W.2d 202, 204 (S.D. 1984) (quoting Black's Law Dictionary 482 (REV. 4TH ED. 1968); citing *Fenske Printing v. Brinkman*, 349 N.W.2d 47, 48 (S.D. 1984) (Henderson, J., specially concurring)). Under the circuit court's view of SDCL 32-26-6, a motorist in South Dakota can be stopped and detained for any brief and slight touching the fog line with a tire during ideal driving conditions and charged with a class 2 misdemeanor. Such a

result is broad and penal.[2] Other courts have interpreted similar practicable lane statutes as South Dakota's statute to indicate a "legislative intent to avoid penalizing brief, momentary, and minor deviations outside the marked lines." *Arizona v. Livingston*, 75 P.3d 1103, 1106 (Ariz. Ct. App. 2003) (citation omitted).

More importantly, the circuit court reached its incorrect holding because it did not first declare the plain meaning of the practicable lane statute, SDCL 32-26-6, as to what it means to be "within" a single lane. The circuit court's holding presumes that "within" a single lane means inside the fog line and that any part of a vehicle on the fog line is necessarily outside of the single lane. That is incorrect.

Nowhere is the fog line defined as out of the lane of traffic under South Dakota law.[3] Conversely, SDCL 32-14-1(27) defines "Roadway" as "that portion of a highway improved, designed, or ordinarily used for vehicular travel, *exclusive of the berm or shoulder*." (Emphasis added). Here, the berm and shoulder are not part of the roadway, but a fog line demarcation is not within either statute or South Dakota caselaw as being outside of the lane of travel. Notably, SDCL 31-14-1(11)

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[2] *See, e.g., Idaho v. Neal*, 362 P.3d 514, 522 (ID 2015) ("We find that it would be an unnecessarily harsh interpretation of the statute to conclude that a driver can be pulled over, cited, and possibly then subject to intrusive searches, for merely touching the line at the edge of the roadway.").

[3] Except in Minnesota which has precedent that even merely touching or being on top of the fog line is a violation of its statute. *See generally, Soucie v. Comm'r of Pub. Safety*, 957 N.W.2d 461 (Minn. Ct. App. 2021). This Court should not adopt such a bright-line rule with its absurd results, as such would require broadening *Hett* (or rendering *Hett's* factor analysis fairly irrelevant in most ideal driving conditions) or any de minimus touching of the fog line automatically a crime. *But see Neal*, 362 P.3d 514 (ID 2015).

defines "Highway" as "the entire width *between* the boundary lines of every way publicly maintained when any part thereof is open to the use of the public as a matter of right for purposes of vehicular travel[.]" (Emphasis added). Here, "between" can be understood as inclusive of the boundary lines as open for vehicular travel.[4] Therefore, a fog line may be fairly considered part of the roadway vehicles drive upon, but outside of fog line can be considered outside of the roadway. In any event, the circuit court acknowledged in its order that courts in other jurisdictions "have held that brief crossings are an insufficient basis upon which to stop the driver of the vehicle." But the lower court placed less emphasis that fact here when the SUV touched the fog line once.

Other courts based its holdings on a "plain language" reading of the statute's text, which is the starting point under South Dakota law as clearly articulated by this Court:

> The purpose of statutory interpretation is to discover legislative intent. The starting point when interpreting a statute must always be

[4] Although "between" is somewhat of an odd word to define, "[a]s the Federal Circuit concluded in *Elektra*, the ordinary meaning of 'between' is 'in the time, space or interval that separates.' *Id.* at 1308 (quoting Webster's New World Dictionary 947 (3D ED. 1988)). The space or interval that separates 5 and 15 includes numbers greater than *or equal* to 5, and lesser than *or equal* to 15." *In re Fenofibrate Patent Litig.*, 910 F. Supp. 2d 708, 712 (S.D.N.Y. 2012) (citing *Elekta Instrument S.A. v. O.U.R. Sci. Int'l, Inc..*, 214 F.3d 1302, 1308 (Fed Cir. 2000)). Therefore, the word "between" is understood as inclusive of the endpoints. Idaho courts agree with this when looking at nearly identical definitions within statutes as South Dakota's statutes. *See Neal*, 362 P.3d at 521 ("if the fog line is not part of the lane of travel, then it must be part of whatever lies just beyond the roadway: the shoulder, the curb, or the sidewalk. Yet the relevant statutory definitions do not support this result."). However, the Minnesota court in *Soucie* used a sports analogy to define "between" lines as not including the lines without any reference to other case law or a dictionary—and therefore it is less helpful in this context. *See generally, Soucie v. Comm'r of Pub. Safety*, 957 N.W.2d 461 (Minn. Ct. App. 2021).

> the language itself. We therefore defer to the text where possible. When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed. In conducting statutory interpretation, we give words their plain meaning and effect, and read statutes as a whole.

Blazer v. S.D. Dep't of Pub. Safety, 2024 S.D. 74 ¶ 18 (citing *State v. Bettelyoun,* 2022 S.D. 14, ¶ 24, 972 N.W.2d 124, 131) (internal citations and quotations omitted) (cleaned up). Indeed, other courts have employed statutory interpretation in this context:

> In determining the ordinary meaning of the phrase "as nearly as practicable," we observe that "nearly" is defined as "[a]lmost but not quite[; i]n a close manner." The American Heritage Dictionary of the English Language 1177 (5th ed. 2011). "Practicable" means "[c]apable of being effected, done, or put into practice; feasible." Id. at 1383. Thus, expressing the phrase in its ordinary terms, the statute requires a driver to maintain his or her vehicle in a single lane—as closely as feasible—by utilizing good judgment and taking into account the safety considerations of a particular situation. . . . To construe the statute otherwise, in the strict "bright line" manner the State argued to the district court—that a driver always violates the statute when, absent a legal lane change, he or she fails to maintain the vehicle inside the single lane lines on a multi-lane road—would render the "as nearly as practicable" language mere surplusage, which we are generally unwilling to do.

New Mexico v. Siqueiros-Valenzuela, 2017-NMCA-074, ¶¶ 18-19, 404 P.3d 782, 787 (N.M. Ct. App. 2017) (internal citations and quotations omitted) (cleaned up).

Likewise, this Court should hold that touching or once driving upon a fog line in ideal driving conditions once is, by itself, not a violation of SDCL 32-26-6 that would give reasonable suspicion for a stop. Especially so here where a fog line is at issue rather than the center line in two-way traffic. *See, e.g., Hett*, ¶ 19,

834 N.W.2d at 324; *see also Neal*, 362 P.3d at 521 ("driving onto the right edge marker would not seem to be a safety concern.").

II. THE CIRCUIT COURT MADE A CLEAR ERROR IN FINDING THE VEHICLE CROSSED *OVER* OR *ONTO* THE FOG LINE.

The circuit court committed clear error in determining that the vehicle crossed over or onto the fog line in its order. The circuit court's holding that Trooper Griffith "observed the vehicle, at minimum, breach the highway's fog line . . ." does not have enough support in the record. CR 294. Unlike in *Hett*, unfortunately, neither this Court nor the circuit court has the corroborating evidence of the video. Trooper Griffith testified as follows on the subject:

> **Q:** So Trooper, you were -- you testified now a few times about this, so I just want to make sure that my question is fair to you. So when you're looking at this in your rearview mirror, how clearly are you able to see the tire from the distance you were from the vehicle?
>
> **A:** Well, I guess to try to be more clear, if I was to draw on what you've given me, I would probably draw the whole vehicle, because that's what I can remember. I mean, *I'm not looking at simply a tire*. I mean, I am, as we said, driving. And I'm trying to remember over a year later of exactly what I saw. All I can offer, I guess -- and I'm not trying to be disrespectful to you or anyone else here -- is that I clearly saw what I believe to be the violation of the law, which was the vehicle crossing the fog line, you know. I'm not saying the vehicle was almost into the ditch or anything like that, like you discussed earlier, with debris or anything like that. I'm trying to remember what I can see, in my mind, the vehicle. I can see the fog line, *but I'm not simply focused on one tire and the line*. But I can simply see that the continuous line is broken by the vehicle and its tires. Is that fair?
>
> **Q:** It is. But I have to, you know, follow-up on the question.
>
> **A:** Absolutely, yep.

Q: So I mean, you're stating that the tire is breaking the plane of the fog line?

A: I'm saying the line is obstructed by the tire and the vehicle. So, I can clearly see that.

Q: Okay. So is it -- at this time, as you're testifying, is it -- is it more or less impossible for you to tell us whether it broke the exterior plane of the fog line, what I'm calling the shoulder side --

A: Yeah.

Q: -- boundary?

A: I understand what you are saying. I'm saying, like I said earlier when you asked me how many inches or something like that, like, it's difficult to quantify it because I'm not looking at a matter of inches. It's over the line or whatever. I'm saying I'm looking from a hundred yards or couple hundreds yards, whatever I said, something like that, at the vehicle. I can see the continuous line. I can see the tires on the road. I can see the line. I can see the vehicle go over and interrupt that line. So at that moment in time, *I don't know how many -- how far over B the edge of the tire is.*

Q: And you can't testify that it broke the exterior, the shoulder side of the line?

A: I just said that I can't testify how far over B it is.

CR 265-67 (Emphasis added.)

Here, the Trooper was not directly behind the SUV when he allegedly observed that it broke the fog line boundary. He was behind it at an angle travelling approximately 59 yards-per-second away from it. Although for every second that passed, the angle improved to see the tire on the fog line for Trooper Griffith, it is also true that the distance became greater. At a severe enough angle, it is common sense and physics to know that the Trooper cannot with any certainty

know that the tire touched the fog line due to the natural restrictions in depth perception. Likewise, at greater distance, it is also difficult to see a tire cross a fog line, especially if distracted or if using a blind spot mirror to spot it. Moreover, the Trooper's testimony tends to demonstrate that he gauged whether the tire crossed the fog line by estimating the position of the entire vehicle and not by looking directly at the tire in comparison to its position near the fog line.

Therefore, the Trooper's testimony does demonstrate that Richter's vehicle crossed the fog line or even touched it. "Clear error is shown only when, after a review of all the evidence, [this Court] [is] left with the definite and firm conviction that a mistake has been made." *Evens v. Evens*, 2020 S.D. 62, ¶ 20, 951 N.W.2d 268, 276 (citations omitted). Here, the Trooper could not say how far the tire crossed onto the fog line or that he was even looking at the tire when it did. He did all of this in four seconds or less while distracted and looking across three lanes of traffic.

CONCLUSION

For all these reasons, Appellant respectfully requests that the Court reverse the circuit court's decision and dismiss the State's complaint.

Respectfully submitted this 15th day of January 2025.

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CERTIFICATE OF COMPLIANCE

This Brief is compliant with the length requirements of SDCL § 15-26A66(b). Proportionally spaced font Times New Roman 13 point has been used. Excluding the cover page, Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance, Appellee's Brief contains 4546 words as counted by Microsoft Word and this Brief is 18 pages inclusive.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 15th day of January 2025, he electronically filed the foregoing document on Odyssey File and Serve and with the Clerk of the Supreme Court via e-mail at SCClerkBriefs@ujs.state.sd.us, and further certifies that the foregoing document was also e-mailed to:

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The undersigned further certifies that the original of the foregoing brief in the above-entitled action will be mailed by United States mail, postage prepaid to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501 on the January 16, 2025, date.

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William R. Hustead

APPENDIX

Order Of the Court Denying Motion To Suppress…………………………….19-25

Judgment of Conviction ………………………………………………………26-28

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS.	
COUNTY OF FALL RIVER	)	SEVENTH JUDICIAL CIRCUIT
	)	
STATE OF SOUTH DAKOTA,	)	FILE NO.: 23CRI21-141
	)	
Plaintiff,	)	
vs.	)	
	)	ORDER ON DEFENDANT'S MOTION TO SUPPRESS
JESSE LEE RICHTER,	)	
Defendant.	)	
	)	
	)	

This matter came before the Court on June 21, 2022 for an evidentiary hearing on Defendant's Amended Motion to Suppress. The State was represented by State's Attorney Lance Russell. Attorney William R. Hustead appeared with and on behalf of Defendant Jesse Lee Richter. After the evidentiary portion of the hearing concluded, both counsel submitted briefs. Briefs were received by the Court on July 27, 2022, at which time the Court took the matter under advisement.

The Court being familiar with the entire file, and having considered the briefs, testimony, evidence, and arguments of the parties, it is hereby

ORDERED, that the Defendant's Motion to Suppress is **DENIED**.

BACKGROUND

The challenged traffic stop took place on March 23, 2021, at approximately 12:30 p.m. in Fall River County, South Dakota, a few miles outside of the town of Edgemont. Defendants Andrew Minnick and Jesse Richter, the vehicle's driver and back passenger, respectively, were separately charged with counts of possession of a controlled substance and paraphernalia. A suppression hearing was held on June 21, 2022, wherein each Defendant moved to suppress evidence collected following a search of the vehicle conducted after the traffic stop.

Defendant Minnick was driving the vehicle, described as a black van, and Defendant Richter was a rear passenger. Trooper Griffith described the portion of Highway 18 where he encountered Defendants' vehicle as two lanes of east-west traffic and not entirely level, but on a medium grade. The road was free from traffic and other obstructions, and his visibility was

unimpaired as it was a clear afternoon. Trooper Griffith testified Defendants' vehicle was travelling between 60 and 65 miles per hour and that it otherwise drew his attention because it was a "large out-of-state rental vehicle." The speed limit in that area is marked as 65 miles per hour. Trooper Griffith additionally noted that out-of-state rental vehicles are less common during that time of year when there are not many tourists in the area.

Trooper Griffith testified that he made the traffic stop of Defendants' vehicle "for crossing over the fog line" on the road. He saw this in his patrol car's side mirror after Defendants' vehicle passed his going the opposite direction from a distance he estimated to be a couple hundred yards. Trooper Griffith was unable to quantify the distance by which the tires of Defendants' vehicle crossed the fog line. There is no indication, from either Trooper Griffith's narrative or his testimony at the suppression hearing, as to the distance travelled or amount of time Defendants' vehicle was driven on or outside the fog line. Trooper Griffith testified this type of traffic violation is one for which he would typically give the driver a warning and to ensure they are not impaired or fatigued.

Trooper Griffith informed the driver why he stopped the vehicle, and Defendant Minnick responded that low air in one of the tires may have pulled the vehicle to one side. After speaking with the vehicle's occupants, Trooper Griffith testified that he did not believe what they were telling him and he asked the occupants for consent to search their property in the vehicle, which they gave.

ISSUE

Whether an officer's observation of a vehicle driving on or across a highway fog line provides sufficient reasonable suspicion to effectuate a traffic stop of the vehicle. Although noted in the Amended Motion to Suppress, no additional issues were presented to this Court for consideration at the hearing, nor were they briefed by the parties.

LEGAL DISCUSSION

I. Standard

Police officers must have "specific and articulable suspicion of a violation" before a traffic stop is permissible. *State v. Vento*, 1999 SD 158, ¶ 8, 604 N.W.2d 468, 470 (citing *State v. Cuny*, 534 N.W.2d 52, 53 (S.D. 1995)). "An investigatory traffic stop must be 'based on objectively reasonable and articulable suspicion that criminal activity has occurred or is occurring.'" *State v. Herren*, 2010 S.D. 101, ¶ 7, 792 N.W.2d 551, 554 (quoting *Bergee*, 2008 S.D. 67, ¶ 10, 753 N.W.2d at 914).

> When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing. This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.' Although an officer's reliance on a mere "'hunch'" is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.

Id. (quoting *United States v. Arvizu*, 534 U.S. 266, 273-74 (2002)).

"Recognizing that the term 'reasonable suspicion' cannot be precisely defined, we have said that it 'is a common sense and non-technical concept dealing with the practical considerations of everyday life.'" *Id.* ¶ 8 (quoting *State v. Quartier*, 2008 S.D. 62, ¶ 10, 753 N.W.2d 885, 888). "Reasonable suspicion to stop must be based on 'specific and articulable facts which taken together with rational inferences from those facts, reasonably warrant [the] intrusion.'" *Id.* (quoting *State v. Akuba*, 2004 S.D. 94, ¶ 15, 686 N.W.2d 406, 413). "[I]n making a reasonable suspicion determination, we must [l]ook at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *Id.* (quoting *Bergee*, 2008 S.D. 67, ¶ 10, 753 N.W.2d at 914). "The stop may not be the product of mere whim, caprice or idle curiosity." *Id.*

Indeed, "the factual basis needed to support a traffic stop is minimal." *State v. Chavez*, 2003 S.D. 93, ¶ 15, 668 N.W.2d 89, 95. "All that is required is that the police officer has 'a reasonable suspicion to stop an automobile.'" *Id.* (quoting *State v. Barton*, 2001 S.D. 52, ¶ 13, 625 N.W.2d 275, 279). "While the stop may not be the product of mere whim, caprice or idle curiosity, it is enough that the stop is based upon 'specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant [the] intrusion.'" *Id.* ¶ 16, 668 N.W.2d at 95 (quoting *State v. Herrboldt*, 1999 S.D. 55, ¶ 7, 593 N.W.2d 805, 808). An officer's observation of "a traffic violation, however minor," provides reasonable suspicion of a violation of law sufficient to support a traffic stop. *See State v. Starkey*, 2011 S.D. 92, ¶ 6, 807 N.W.2d 125, 128 (citing *Akuba*, 2004 S.D. 94, ¶ 16, 686 N.W.2d at 414).

II. South Dakota

The statute relevant to Defendants' motions to suppress provides: "On a roadway divided into lanes, a vehicle shall be driven as nearly as practicable entirely within a single lane and may not be moved from such lane until the driver has first ascertained that such movement can be

made with safety." SDCL § 32-26-6. The South Dakota Supreme Court acknowledged in *State v. Hett* that, for the purposes of the traffic laws, the fog line is the "solid white line on the right hand side of the lane of travel that marks the edge of the legally drivable portion of highway." *State v. Hett*, 2013 S.D. 47, ¶ 2, n.1, 834 N.W.2d 317, 318. In *Hett*, the Court addressed SDCL § 32-26-6, the "practicable lane statute" and examined the following factors which had been recently considered by the North Dakota Supreme Court under its analogous statute:

> the length and duration of the crossing and distance traveled outside the lane of traffic; the design of the highway, such as the existence of curves in the road; traffic conditions, such as highway congestion or vehicles braking in front of the suspect vehicle; and road conditions, such as whether the road was dry and obstruction free.

Id. ¶ 13 (citing *State v. Wolfer*, 2010 ND 63, ¶ 7, 780 N.W.2d 650, 652).

In *Hett*, the defendant was traveling on a "long, straight stretch of smooth, dry highway with no significant curves or apparent obstructions or barriers in the pickup's lane of travel." *Id.* ¶ 16. The officer who performed the stop encountered the defendant's vehicle at night and testified that he observed it cross the fog line a single time. *Id.* ¶ 9. The Court concluded – weighing the "practicability of [the defendant] remaining entirely within his lane" – that the evidence was sufficient to support the officer's reasonable suspicion that the defendant had violated the practicable lane statute. *Id.* ¶ 16. The Court similarly held in *State v. Ballard*. 2000 S.D. 134, 617 N.W.2d 837. Although the driver there was stopped pursuant to SDCL § 32-26-1[1] after being observed driving partly on the shoulder of the road and crossing the centerline. *Ballard*, ¶ 2, 617 N.W.2d at 839.

Similar to other traffic offense statutes in South Dakota, the operative statute in this case "requires the officer to make a determination as to what is 'practicable' under the circumstances." *See State v. Dahl*, 2012 S.D. 8, ¶ 8, 809 N.W.2d 844, 846 (quoting SDCL § 32-26-17).[2] In *Dahl*, an officer initiated a traffic stop after witnessing the defendant partially cross over the dotted white line separating the two east-bound lanes of a four-lane street while making a right turn. *Id.* ¶ 2. The defendant argued the officer lacked reasonable suspicion to stop his vehicle. *Id.* While it was acknowledged that video established that the defendant's vehicle "clearly crossed over the line" while making the right-hand turn, the propriety of the stop did not

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[1] SDCL § 32-26-1 provides: "the driver of a vehicle shall drive the same upon the right half of the highway . . . except when overtaking and passing another vehicle . . ."

[2] SDCL § 32-26-17 requires the driver of a vehicle turning right at an intersection to "keep as closely as practicable to the right-hand curb or edge of the highway."

turn on whether the defendant actually violated the traffic law. *Id.* ¶ 8. "[E]ven if [the defendant] did not break any traffic laws, [the officer] still had reasonable suspicion to make the stop." *Id.* ¶ 9. Instead, the Court found that the officer "reasonably concluded that Dahl's vehicle did not stay as close as practicable to the curb while making the turn," therefore the traffic stop was "appropriate to investigate whether [the defendant] violated SDCL 32-26-17." *Id.* The Court recognized that the defendant's right-hand turn "appeared to be considerably wider than necessary under the circumstances and created the reasonable inference that the driver of the vehicle might be impaired" which was a specific and articulable fact identified by the officer. *Id.* ¶ 9.

III. Courts in other jurisdictions

Some courts construing similar statutes and "fog line" incidents have held that brief crossings are an insufficient basis upon which to stop the driver of the vehicle. *See United States v. Colin*, 314 F.3d 439, 446 (9th Cir. 2002) (Officers lacked reasonable suspicion to effectuate stop where driver's crossing of fog line was not pronounced and did not continue over a substantial distance); *United States v. Freeman*, 209 F.3d 464, 466 (6th Cir. 2000) ("We cannot, however, agree that one isolated incident of a large motor home partially weaving into the emergency lane for a few feet and an instant in time constitutes a failure to keep the vehicle within a single lane 'as nearly as practicable.'"); *United States v. Gregory*, 79 F.3d 973, 978 (10th Cir. 1996) ("[A]ny vehicle could be subject to an isolated incident of moving into the right shoulder of the roadway, without giving rise to a suspicion of criminal activity."); *State v. Neal*, 362 P.3d 514 (Idaho 2015) (No reasonable suspicion defendant was driving under the influence where vehicle was in the proper lane and moving in a straight line, without weaving or crossing the center dividing line but twice drove onto the fog line but not across it); *State v. Tague*, 676 N.W.2d 197 (Iowa 2004) (Officer lacked reasonable suspicion to conduct traffic stop based on single incident of defendant's vehicle briefly crossing edge line, there was no testimony as to any factors that would support reasonable suspicion that defendant was intoxicated or fatigued, and officer testified that defendant was not driving erratically).

In instances where other courts have found appropriate reasonable suspicion for the stop of a vehicle, the presence of other factors indicating fatigue or impairment were present to justify the stop. *See, e.g.*, *U.S. v. Briot-Betancourt*, 52 Fed. Appx. 978 (9th Cir. 2002) (Officer had reasonable suspicion of fatigue or impairment necessary to justify stop of vehicle where motorist was driving at 1:45 in the morning, drifted over fog lane by foot and a half on two different

occasions, and began to exit highway before swerving back over solid white exit lines to return to highway); *Commonwealth v. Sands*, 887 A.2d 261 (Pa. Super. Ct. 2005) (Officer had reasonable suspicion defendant was driving under the influence where, during early morning hours, defendant's vehicle drifted across clearly visible fog line by three feet and slowly drifted back); *People v. Rodriguez*, 924 P.2d 1100 (Colo. App. 1996), *aff'd and remanded*, 945 P.2d 1351 (Colo. 1997) (Officer had reasonable, articulable suspicion that driver was intoxicated, justifying stop where vehicle crossed over line on right side of lane, move back to center line, and then proceeded in center of right-hand lane); *State v. Cusack*, 649 A.2d 16 (Me. 1994) (It was objectively reasonable for police officer to conduct investigatory stop based on observation of vehicle traveling below speed limit in early morning which crossed the fog line several times).

IV. Analysis

South Dakota differs from these other jurisdictions with respect to violations of a practicable lane statute. Defendants' contention that a person violates South Dakota's practicable lane statute by "crossing over the fog line" is not entirely accurate. The Court in *Hett* instead held that the driving, road, and vehicle conditions present in that case – where the road was straight, dry, and unobstructed and the vehicle a common truck rather than an unwieldly trailer or motorhome – demonstrated a certain practicability of the defendant remaining entirely within his lane of travel.[3] *Hett*, ¶ 16, 834 N.W.2d at 323. Therefore, the evidence adduced was found sufficient to support the officer's reasonable and articulable suspicion that Hett had violated the practicable lane statute by crossing the fog line. *Id.* The relevant statute does not actually proscribe touching or crossing the fog line if the movement "can be made with safety." *See* SDCL § 32-26-6; *see also United States v. Carrasco-Ruiz*, 587 F. Supp. 2d 1089, 1099 n.6 (D.S.D. 2008). It is the practicability of remaining in one's own lane, along with the degree to which a motorist fails to drive "entirely within a single lane" that is determinative – not simply whether a vehicle's tires cross the fog line entirely or not. If the driving, road, and vehicle conditions are such that remaining in one's own lane is practicable, where an officer observes a vehicle deviate from their lane (whether on or across the fog line) they may have reasonable suspicion to make a stop as our practicable lane statutes "require[] the officer to make a determination as to what is 'practicable' under the circumstances." *Dahl*, ¶ 8, 809 N.W.2d at 846. Under South Dakota's caselaw, a motorist traveling on top of or across the fog line, where the

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[3] As opposed, for example, to windy or slick road conditions that may make driving entirely within one's own lane less "practicable."

conditions are such that remaining entirely within one's own law is practicable, would constitute a violation of SDCL § 32-26-6.

In this case, while Trooper Griffith testified that he observed the vehicle, at minimum, breach the highway's fog line; he was uncertain as to whether the vehicle's tires entirely crossed the fog line. Trooper Griffith's testimony and video taken from his patrol car at the time of the stop indicate that weather conditions were clear, visibility was good, and the roadway was unobstructed by traffic, barriers, or other congestion. The portion of highway where Defendants' vehicle was observed was dry and straight. These facts demonstrate the practicability of Defendants' vehicle remaining entirely within its own lane of traffic. Viewed in the totality of the circumstances, the evidence is sufficient to find that Trooper Griffith had a reasonable and articulable suspicion that a violation of the practicable lane statute had occurred where Defendants' vehicle breached the fog line. Trooper Griffith reasonably determined that Defendants' vehicle did not remain as nearly as practicable entirely within a single lane therefore the traffic stop was appropriate to investigate whether Defendants violated SDCL § 32-26-6.

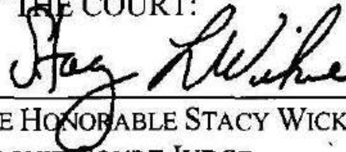
ORDER

For the reasons set forth above, it is hereby:

ORDERED, that Defendant's Amended Motion to Suppress is **DENIED**.

Dated: August 16, 2022.

BY THE COURT:



THE HONORABLE STACY WICKRE
CIRCUIT COURT JUDGE

FILED
7TH JUDICIAL CIRCUIT COURT
AT HOT SPRINGS, SD
AUG 16 2022
By: TH

ATTEST:
TAMMY GRAPENTINE
CLERK OF COURTS

By:
Deputy
(SEAL)

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)
COUNTY OF FALL RIVER) SEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,)
Plaintiff,)
v.)
)
JESSE LEE RICHTER) **23CRI21-141**
DOB: 06.27-1979

JUDGMENT OF CONVICTION

An Information was filed in this Court on the 22nd day of July, 2021, charging the Defendant with the crime of

COUNT 1: POSSESSION OF CONTROLLED DRUG OR SUBSTANCE SCHEDULE II WITH INTENT TO MANUFACTURE, DISTRIBUTE OR DISPENSE, in violation of SDCL 22-42-4.3, a Class 3 Felony,

COUNT 2: POSSESSION OF CONTROLLED DRUG OR SUBSTANCE, in violation of SDCL 22-42-5, a Class 5 Felony,

COUNT 3: POSSESSION OF DRUG PARAPHERNALIA, in violation of SDCL 22-42A-3, a Class 2 Misdemeanor.

The Defendant was arraigned on said Information and received a copy thereof in open Court at Hot Springs, Fall River County, South Dakota, on the 20th of August, 2021. The Defendant, the Defendant's attorney, William H. Hustead, and state's attorney, Lance S. Russell, appeared at the Defendant's arraignment. The court advised the Defendant of all constitutional and statutory rights pertaining to the charge that had been filed against Defendant, including but not limited to, the right against self-incrimination, the right of confrontation, the right to be represented by counsel, and the right to a jury trial.

A Jury Trial was held on the 26th day of February and the 27th day of February, 2024 in Fall River County Circuit Court. On the 27th day of February, 2024, the lawfully selected jury finding the Defendant guilty, beyond a reasonable doubt, of **ALL counts** in the Information dated July 22, 2021.

The Defendant was remanded to the Fall River County Jail to await sentencing scheduled for April 5, 2024 and sentencing will be held in Pennington County, SD.

The Defendant, the Defendant's attorney, William E. Hustead, and the Fall River County State's Attorney, Lance S. Russell appeared at the Defendant's sentencing on April 5, 2024, held in Pennington County SD.

SENTENCE

On April 5, 2024, with the Honorable Jeffrey R. Connolly presiding, in open Court at Rapid City, Pennington County, South Dakota, the Court asked the Defendant if any legal cause existed to show why Judgment should not be pronounced. As no cause was offered, the Court thereupon pronounced the following sentence:

IT IS ORDERED, that the Defendant, JESSE LEE RICTHER, be sentenced to

COUNT 1: POSSESSION OF CONTROLLED DRUG OR SUBSTANCE SCHEDULE II WITH INTENT TO MANUFACTURE, DISTRIBUTE OR DISPENSE, SDCL 22-42-4.3, a Class 3 Felony, to TEN (10) years with TWO (2) years suspended in the South Dakota State Penitentiary with credit for time served of fifty-three (53) days and shall receive credit for time served while awaiting transport;

and

COUNT 2: POSSESSION OF CONTROLLED DRUG OR SUBSTANCE, SDCL 22-42-5, a Class 5 Felony, FIVE (5) years with FIVE (5) years suspended;

and

COUNT 3: POSSESSION OF DRUG PARAPHERNALIA, SDCL 22-42A-3, a Class 2 Misdemeanor, CREDIT TIME SERVED

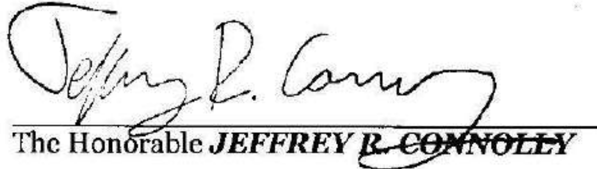
ALL counts shall run **concurrently**.

IT IS FURTHER

ORDERED, that the Defendant pay court costs of one hundred sixteen dollars and fifty cents ($116.50), prosecution costs in the amount of two thousand seven hundred sixty five dollars and two cents ($2765.02) and for the cost of his Court-Appointed Attorney Fees in an amount to be submitted by order and which may be liened.

DATED this 5th day of April, 2024.

BY THE COURT:



The Honorable ***JEFFREY R. CONNOLLY***

ATTEST:

Fall River County Clerk of Courts
(SEAL)

NOTICE OF RIGHT TO APPEAL

You, **JESSE LEE RICHTER,** are hereby notified that you have a right to appeal as provided for by SDCL 23A-32-15, which you must exercise by serving a written notice of appeal upon the Attorney General of the State of South Dakota and the State's Attorney of Fall River County and by filing a copy of the same, together with proof of such service with the Clerk of this Court within Thirty (30) days from the date that this Judgment is filed with said clerk.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30679

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JESSE LEE RICHTER,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
FALL RIVER COUNTY, SOUTH DAKOTA

THE HONORABLE JEFFERY R. CONNOLLY
Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal filed April 10, 2024

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30679

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JESSE LEE RICHTER,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, State of South Dakota, Plaintiff and Appellee, will be referred to as "State." Jesse Lee Richter, Defendant and Appellant, will be identified as "Defendant." Citations to the settled record will be identified as "SR." Defendant's Brief will be identified as "DB." All references will be followed by the appropriate number(s).

JURISDICTIONAL STATEMENT

A jury trial was held on February 26, 2024, in which Defendant was found guilty of:

> COUNT 1: Possession of Controlled Drug or Substance, Schedule II with Intent to Manufacture, Distribute or Dispense, in violation of SDCL 22-42-4.3, a Class 3 felony;
>
> COUNT 2: Possession of Controlled Drug or Substance, in violation of SDCL 22-42-5, a Class 5 felony; and
>
> COUNT 3: Possession of Drug Paraphernalia, in violation of SDCL 22-42A-3, a Class 2 misdemeanor.

SR:543-45.

This appeal stems from a Judgment of Conviction and Sentence filed on April 5, 2024, by the Honorable Jeffery R. Connolly, Circuit Court Judge, Seventh Judicial Circuit, Fall River County. *Id.* Defendant filed a Notice of Appeal on April 10, 2024. SR:602. This Court has jurisdiction as set out in SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I.

WHETHER THE TRIAL COURT ERRED IN FINDING REASONABLE SUSPICION TO EXECUTE A TRAFFIC STOP ON THE VEHICLE IN WHICH DEFENDANT WAS RIDING?

The trial court denied Defendant's motion to suppress.

SDCL 32-26-6

State v. Ballard, 2000 S.D. 134, 617 N.W.2d 837

State v. Hett, 2013 S.D. 47, 834 N.W.2d 317

State v. Wendling, 2008 S.D. 77, 754 N.W.2d 837

State v. Wright, 2010 S.D. 91, 791 N.W.2d 791

II.

WHETHER THE TRIAL COURT'S FACTUAL FINDINGS CONCERNING THE ARRESTING TROOPER'S TESTIMONY WERE CLEARLY ERRONEOUS?

The trial court denied Defendant's motion to suppress.

State v. Downing, 2002 S.D. 148, 654 N.W.2d 793

State v. Talarico, 2003 S.D. 41, 661 N.W.2d 11

State v. Owens, 2002 S.D. 42, 643 N.W.2d 735

STATEMENT OF THE CASE AND FACTS

Defendant's trial began on February 26, 2024. SR:1176. Prior to the witnesses being called, Defendant renewed his motion to suppress all the State's evidence. SR:1150. The trial court reaffirmed the prior denial of the motion. *Id.* Both the State and Defendant gave opening statements. SR:1152-59.

The State's first witness was South Dakota Highway Patrol Trooper Stuart Schaffer Griffith. SR:866. He has served as a drug recognition expert instructor. SR:869. His drug dog is named Sem. SR:211. The court determined that Trooper Griffith was a drug recognition expert witness. SR:874.

Trooper Griffith testified that on March 23, 2021, he was on duty and traveling on Highway 18 into Edgemont. SR:875. He noticed a Ford Expedition with a California license plate driving in the opposite direction. *Id.* After it passed him, the Trooper kept watching the vehicle, using both his rearview and driver's side door mirror. *Id.* Trooper Griffith observed the vehicle "drive onto the fog line and cross the fog line with its tire." SR:875-86. He clarified that because the tire was "twice as wide as the fog line," driving onto the line means "the tire is all the way across the line."[1] SR:876.

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[1] The Ford Expedition had 20-inch tires and rims. SR:915.

Trooper Griffith turned his vehicle around, caught up with the Ford Expedition, and successfully stopped it. SR:876. He approached the vehicle, spoke with the driver, and then asked the name of the female in front passenger's seat. *Id.* The female provided a false name. *Id.* There was another passenger in the back seat who was identified as Defendant. *Id.*

Because the Ford Expedition was a rental vehicle, Trooper Griffith asked for a copy of the rental agreement. SR:878. The leaser identified in the rental agreement was not present in the vehicle. SR:880-81. Trooper Griffith asked and was granted permission to search the vehicle by all the occupants. SR:885-86. While searching in the back of the vehicle, a bag was found containing "multiple cell phones." SR:886. Black electrical tape was also found, which Trooper Griffith testified is often used in packaging drugs to conceal their odor from canines alerting it. *Id.*

Trooper Griffith entered the rear of the vehicle where Defendant was sitting. SR:887. He noticed a torch lighter and a Faraday bag[2] containing two cell phones. *Id.* When checking the map pocket, Trooper Griffith found a police scanner and three pairs of binoculars. *Id.*

Trooper Griffith also searched the front seat area, starting with the driver's side. SR:892. He saw "a white crystal substance in the seat

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[2] A Faraday bag is designed to block cell phone signals and prevent law enforcement from tracking a phone inside the bag. SR:890-91.

seam;" he then field tested and confirmed it was methamphetamine. *Id.* Trooper Griffith then deployed his drug dog. *Id.* The dog manifested an odor alert at the rear bumper and Trooper Griffith responded by handcuffing the three in the vehicle. SR:893. The search continued while waiting for the tow truck that was called. One white bag was found on the vehicle floor containing a little over $10,000. SR:895.

South Dakota Highway Patrol Trooper Brandon Hansen and Fall River County Deputy Sheriff Lyle Norton came out to assist. SR:159, 896. The vehicle was then towed to the Department of Transportation shop in Edgemont. SR:895-96. At the shop, Trooper Griffith continued his search by doing an "echo test" on the spare tire. SR:897. The test helps determine whether just air is in the tire or something more solid. *Id.* The test indicated something was in the tire. *Id.* The tire was cut open and found to contain a vacuum sealed package of methamphetamine. SR:898. Trooper Griffith estimated the value of the methamphetamine to be a minimum of $20,000. SR:901. Other items found in the vehicle included "$55,0000 of notes," a thermal imaging device to see in the dark, and a "snort straw." SR:902, 907, 910. There was also a receipt indicating that the vehicle had been on the United States-Mexico border a couple of days before it was stopped. SR:904.

The State's second witness was Trooper Hansen. SR:949. On March 23, 2021, he responded to Trooper Griffith's request to assist Defendant's stop. SR:950. He primarily photographed the evidence

during the search. SR:952, 966. He noticed that the spare tire was neither new nor the same size as the other wheels on the Expedition. SR:952. Trooper Hansen stated that the butane lighter that was found is often used "to ingest controlled substances." SR:961. He concluded his testimony by stating that he believed the three vehicle occupants should all be charged with intent to distribute methamphetamine. SR:965.

John Minnick, who was an occupant in the vehicle with Defendant, was also called by the State to testify. SR:970-71. Minnick previously plead guilty to possession and intent to distribute because of the incident. SR:972. He and Defendant were good friends for years. SR:973. Minnick admitted using methamphetamine in the vehicle with Defendant and "Dena." SR:974-75. Minnick was driving and Defendant was in the front seat during the "four or five times" they were using methamphetamine. SR:976, 1013.

Department of Criminal Investigation Agent Dean Rasmussen testified he conducted an interview with Defendant. SR:1025-27. During the interview, Defendant referred to the female occupant of the vehicle with the false name, Stacey Jensen, instead of her real name Dena Rodgers. SR:1029. He claimed that he would be marrying her. *Id.*

The State called Jasmine Farmakes, who had served as a forensic chemist for the Rapid City Police Department. SR:1087-88. She was determined by the court to be an expert witness in the field of forensic chemistry and analysis of controlled substances. SR:1091. She

determined that the bag in the tire contained methamphetamine. SR:1094. She also tested State's exhibits 65 and 73. SR:1097. Exhibit 65 contained methamphetamine and exhibit 73 contained LSD. SR:1098. After Ms. Farmakes testified, the State rested its case. SR:1099.

Defendant did not call any witness but renewed his motion to suppress the evidence from the traffic stop, in addition to a motion for judgment of acquittal. SR:1100, 1104. The trial court reaffirmed its denial of both motions. SR:1104-05. After closing arguments, the jury deliberated and returned verdicts of guilty for all three counts. SR:1136.

Defendant's sentencing took place on April 5, 2024. The State told the trial court that Defendant did not cooperate with the pre-sentence investigation, and claimed he did not have "a drug problem." SR:1164. Sentencing recommendations were made by both the State and defense counsel, but Defendant declined to address the court directly. SR:1166-68.

For Count 1, Possession of Controlled Drug or Substance, Schedule II with Intent to Manufacture, Distribute or Dispense, the court sentenced Defendant to ten years in the penitentiary with two years suspended. SR:1171. Defendant received credit for the fifty-two days that he has been incarcerated. SR:1171-72. The sentence for Count 2, Possession of Controlled Drug or Substance, was five years, with all five years suspended and to run concurrent with Count 1. SR:1172. As for

Count 3, Possession of Drug Paraphernalia, Defendant was sentenced to time served. *Id.* The trial court filed a Judgment of Conviction and Sentence on April 5, 2024. *Id.* Defendant filed his Notice of Appeal on April 10, 2024. SR:602.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN FINDING THERE WAS REASONABLE SUSPICION TO EXECUTE A TRAFFIC STOP ON THE VEHICLE IN WHICH DEFENDANT WAS RIDING.

A. Background.

Defendant filed a motion to suppress "all evidence obtained against, and statements made by the Defendant during the traffic stop" on March 23, 2021. SR:193-94. On June 21, 2022, a hearing was held before the Honorable Stacy Wickre,[3] Circuit Court Judge for Fall River County. SR:196. Co-defendant Minnick was also present and represented at the hearing, as both motions were heard simultaneously. SR:198.

At the hearing, Trooper Griffith testified that on March 23, 2021, he stopped a "California-plated SUV for crossing over the fog line of Highway 18." SR:202. He stated that he was "probably a couple hundred yards" away when he saw the SUV cross the fog line leading him to initiate the traffic stop. SR:202. When told why he was stopped, the driver, Minnick, said it was "possibly a low tire on the vehicle" that caused the pull over the fog line. SR:203. Minnick then gave Trooper Griffith permission to

[3] Judge Wickre did not serve as the judge for Defendant's trial.

search the property in the vehicle. SR:204-05. During the search, Trooper Griffith identified items "consistent with drug trafficking . . . [such as] multiple cell phones, torch-type lighters, a police scanner, [and] three sets of binoculars." SR:206.

Defendant tried to attack the credibility of Trooper Griffith. DB:6-8. The trial court is the sole judge of a witness's credibility. *Lindblom v. Sun Aviation, Inc.*, 2015 S.D. 20, ¶ 9, 862 N.W.2d 549, 552. Judge Wickre found that Trooper Griffith's testimony provided reasonable suspicion for the traffic stop and denied Defendant's motion to suppress. SR:288-294. At the conclusion of the trial, Defendant reasserted his motion to suppress and made a motion for judgment of acquittal. SR:1104. Trial Judge Jeffery R. Connolly also denied the motion. SR:1104-05.

B. Standard of Review.

"The Fourth Amendment of the United States Constitution and Article VI, § 11 of the South Dakota Constitution protect individuals from unreasonable searches and seizures." *State v. Burkett*, 2014 S.D. 38, ¶ 44, 849 N.W.2d 624, 635 (citing *State v. Rademaker*, 2012 S.D. 28, ¶ 8, 813 N.W.2d 174, 176). The Amendment's "prohibition against unreasonable searches and seizures applies when a car is stopped by law enforcement." *Id.*

When reviewing a motion to suppress based on an alleged violation of a constitutionally protected right, this Court applies a de novo standard of review to the trial court's decision to grant or deny the

motion. *State v. Wendling*, 2008 S.D. 77, ¶ 8, 754 N.W.2d 837, 839; *see also State v. Hirning*, 1999 S.D. 53, ¶ 9, 592 N.W.2d 600, 603 (finding determinations of reasonable suspicion and probable cause should be reviewed under the de novo standard). But the factual findings of the trial court are reviewed under the clearly erroneous standard. *State v. Ballard*, 2000 S.D. 134, ¶ 9, 617 N.W.2d 837, 840. "A finding is clearly erroneous only if, after reviewing the evidence in its entirety, '[this Court is] left with a definite and firm conviction that a mistake was made.'" *Id.* (quoting *State v. Almond*, 511 N.W.2d 572, 574 (S.D. 1994)).

C. *Trooper Griffith had reasonable suspicion to conduct a traffic stop of a vehicle that he saw driving over the fog line.*

The Fourth Amendment's prohibition against unreasonable searches and seizures applies to traffic stops and typically requires law enforcement to obtain a warrant to support such a stop. *State v. Hett*, 2013 S.D. 47, ¶ 7, 834 N.W.2d 317 at 319 (*Rademaker*, 2012 S.D. 28, ¶¶ 8-9, 813 N.W.2d at 176). An officer may, however, stop a vehicle without obtaining a warrant if the officer has "reasonable suspicion . . . that criminal activity may be afoot." *Id.* (quoting *Rademaker*, 2012 S.D. 28, ¶ 9, 813 N.W.2d at 176). This Court has consistently applied the standard of reasonable suspicion when reviewing traffic stops. *Wendling*, 2008 S.D. 77, ¶ 12, 754 N.W.2d at 840.

"Reasonable suspicion to stop must be based on 'specific and articulable facts which taken together with rational inferences from those facts, reasonably warrant the intrusion.'" *Burkett*, 2014 S.D. 38, ¶ 45, 849 N.W.2d at 635 (quoting *State v. Herren,* 2010 S.D. 101, ¶ 8, 792 N.W.2d 551, 554). An officer may not initiate a traffic stop based on "mere whim, caprice, or idle curiosity." *Id.* But an officer may draw "on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" *State v. Olson,* 2016 S.D. 25, ¶ 5, 877 N.W.2d 593, 595 (quoting *Herren,* 2010 S.D. 101, ¶ 7, 792 N.W.2d at 554). "[T]his Court 'must look at all the facts available to [the officer] at the time the stop was effectuated' to 'determine whether reasonable suspicion existed based on the ***totality of the circumstances.***'" *Hett*, 2013 S.D. 47, ¶ 18, 834 N.W.2d at 323 (quoting *Rademaker*, 2012 S.D. 28, ¶ 12, 813 N.W.2d at 177) (emphasis added)). Reasonable suspicion is a "common-sense and non-technical concept dealing with the practical considerations of everyday life." *Rosa*, 2022 S.D. 76, ¶ 17, 983 N.W.2d at 567 (quoting *Herren,* 2010 S.D. 101, ¶ 8, 792 N.W.2d at 554). Reasonable suspicion of criminal activity does not rise to the level of probable cause and "falls considerably short of satisfying a preponderance of the evidence standard." *Id.* (quoting *Olson*, 2016 S.D. 25, ¶ 5, 877 N.W.2d at 595).

The necessary justification for a traffic stop is minimal because "a traffic violation, however minor," supplies reasonable suspicion to support a stop. *State v. Starkey*, 2011 S.D. 92, ¶ 6, 807 N.W.2d 125, 128. This Court has previously held that an officer had reasonable suspicion to stop a vehicle that traveled part way on the shoulder and then crossed the center line. *Ballard*, 2000 S.D. 134, ¶¶ 2, 11, 617 N.W.2d at 839, 840-41. Likewise, reasonable suspicion was found when a vehicle weaved and straddled the line between lanes. *State v. Sleep*, 1999 S.D. 19, ¶ 8, 590 N.W.2d 235, 238. Probable cause for a traffic stop also exists when a driver violates the lane driving requirement statute, SDCL 32-26-6[4]. This statute requires, among other things, that a driver stays inside the fog line. *Hett*, 2013 S.D. 47, ¶ 16-20, 834 N.W.2d at 324. When analyzing such a violation, this Court will consider driving conditions, location, and time of night as relevant to the totality of the circumstances when reviewing reasonable suspicion for such a traffic stop. *Id.* ¶ 11, 834 N.W.2d at 323.

In *State v. Hett*, a South Dakota Highway Patrol Trooper was traveling the opposite direction at night, when the Trooper noticed Hett's pickup cross the fog line just before they passed each other. *Id.* at ¶ 16,

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[4] SDCL 32-26-6 states, "On a roadway divided into lanes, a vehicle shall be driven as nearly as practicable entirely within a single lane and may not be moved from such lane until the driver has first ascertained that such movement can be made with safety. A violation of this section is a Class 2 misdemeanor."

834 N.W.2d at 323. Further evidence of the incidence involved a description of the good driving conditions Hett experienced, such as a "long, straight stretch of smooth, dry highway . . . ." *Id.*

In the Order on Defendant's Motion to Suppress, the court found that Trooper Griffith stopped the vehicle "for crossing over the fog line" on the road around noon on March 23, 2021. SR:288-89. Trooper Griffith testified that at the time of the stop, the highway was traffic free, with unimpaired visibility. SR:288-89. He also noted that out-of-state rental vehicles were uncommon at that time of the year. SR:289. He explained that for a lane driving requirement violation, he typically gives the driver a warning and checks to make sure they are "not impaired or fatigued." *Id.*

Defendant's claims that the trial court reached its incorrect holding by "not first declar[ing] the plain meaning of the practicable lane statue, SDCL 32-26-6." DB:9. The State maintains the exact meaning need not be determined to decide whether the officer "had reasonable suspicion to make the stop." *State v. Dahl*, 2012 S.D. 8, ¶ 9, 809 N.W.2d 844, 846. The more accurate question is whether driving on or crossing over the fog line is an objectively reasonable interpretation of a violation of SDCL 32-26-6, by the Trooper. *Id.* ¶ 8, 809 N.W.2d at 846. The trial courts found that it would be in its order denying Defendant's motion to suppress. SR:293-94.

In *State v. Wright*, the officer wrongly believed that the law required a driver to dim his lights when he was passed by a vehicle.[5] *State v. Wright*, 2010 S.D. 91, ¶ 4, 791 N.W.2d 791 at 793. Once stopped, the smell of marijuana emitted from the car and was eventually found inside. *Id.* ¶ 5, 791 N.W.2d at 793. Defendant brought a motion to suppress. *Id.* ¶ 7, 791 N.W.2d at 793. This Court held that the officer's "objectively *unreasonable*" interpretation of a statute cannot serve as the basis of a stop. *Id.* ¶ 21, 791 N.W.2d at 799 (emphasis added). The Court clarified that a "mistake of law that results in a search or seizure . . . must be objectively reasonable to avoid running afoul of the Fourth Amendment." *Id.*

This concept was further clarified in *Dahl*. Dahl argued that the officer's stop was based on a mistaken belief that partially crossing into the left lane was prohibited by statute. This Court said that the language of the statute involved "requires the officer to make a determination as to what is 'practicable' under the circumstances." *Dahl*, 2012 S.D. 8, ¶ 8, 809 N.W.2d at 846. The Court found the stop was appropriate to investigate "whether Dahl violated" the statute. *Id.* It was further clarified by stating "even if Dahl did not break any traffic laws, [the officer] still had reasonable suspicion to make the stop." *Id.* ¶ 9, 809 N.W.2d at 846.

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[5] SDCL 32-17-7.

Similarly, the trial court in Defendant's case correctly denied his motion to suppress. SR:288. The trial court stated that "[u]nder South Dakota caselaw, a motorist traveling on top of or across the fog line, where the conditions are such that remaining entirely within one's [lane] law (sic) is practicable, would constitute a violation of SDCL 32-26-6." SR:293-94.

The trial court explained that "Trooper Griffith testified that he observed the vehicle, at a minimum, breach the highway's fog line; he was uncertain as to whether the vehicle's tires entirely crossed the fog line." SR:294. The video from the patrol car during the stop showed clear weather conditions, good visibility and a straight roadway that was dry, unobstructed by traffic "or other congestion." SR:294.

When this Court reviews the facts available to Trooper Griffith along with his "objectively reasonable" interpretation of the statute, he had reasonable suspicion to stop the vehicle, based on the totality of the circumstances. *Hett*, 2013 S.D. 47, ¶ 18, 834 N.W.2d at 323, *Wright*, 2010 S.D. 91, ¶ 21, 791 N.W.2d at 799.

II.

THE TRIAL COURT'S FACTUAL FINDINGS REGARDING THE ARRESTING TROOPER'S TESTIMONY WERE NOT CLEARLY ERRONEOUS.

Defendant's Statement of Legal Issues lists Issue II as the "Court's Factual Findings Concerning the Arresting Trooper's Testimony Were Clearly Erroneous." DB:V. On page 12 of Defendant's brief, he entitles

Issue II as "The Circuit Court Made Clear Error in Finding the Vehicle Crossed Over or Onto the Fog Line." DB:12. The "clearly erroneous" and "clear error" standards are interchangeable when this Court reviews factual findings:

> We review a trial court's findings of fact under a clearly erroneous standard. Clear error is shown only when, after a review of all the evidence, we are left with a definite and firm conviction that a mistake has been made. The trial court's findings of fact are presumed correct, and we defer to those findings unless the evidence clearly preponderates against them.

Mathis Implement Co. v. Heath, 2003 S.D. 72, ¶ 9, 665 N.W.2d 90, 92 (citing *A.P. & Sons Const. v. Johnson*, 2003 S.D. 13, ¶ 9, 657 N.W.2d 292, 294 (internal citations omitted); *see also Drapeau v. Knopp*, 2008 S.D. 7, ¶ 7, 744 N.W.2d 836, 838 (holding that this Court does not to decide factual issues de novo but gives due regard to the trial court to judge witness credibility).

At the suppression hearing, Trooper Griffith testified that "I could see the tire all the way on top of the fog line as I'm driving. So, there's no doubt in my mind that the vehicle went onto that line, at the very least, if not all the way across it." SR:261. In its Order Denying Defendant's Motion to Dismiss, the trial court's evidentiary finding was that "Trooper Griffith testified that he observed the vehicle, at minimum, breach the highway's fog line; he was uncertain as to whether the vehicle's tires entirely crossed the fog line." SR:294. That fact summary

by the trial court is a reasonable representation of the sworn testimony it received.

Defendant disagrees and claims that the court made a “clearly erroneous” determination of the facts that resulted in “clear error in finding the vehicle crossed over the fog line in its order.” DB:13. He does not point to any eyewitness testimony that counters the only evidence on the subject. Defendant just does not like Trooper Griffith’s testimony.

At Defendant’s evidentiary hearing and trial, Trooper Griffith was the only witness to testify on the tire breaching highway’s fog line. SR:202, 261-67, 875-76. No other testimony or evidence was submitted that countered what the Trooper saw regarding the fog line. Defendant has no claim that the evidentiary findings of the court were “clearly erroneous” when they fairly and accurately represented the only evidence presented to the court.

CONCLUSION

Based on the foregoing arguments and authorities, the State would respectfully request that this Court affirm Defendant's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 3,589 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

Dated this 27th day of February 2025.

/s/ John M. Strohman
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 27th, 2025, a true and correct copy of Appellee's Brief in the matters of *State of South Dakota v. Jesse Lee Richter*, Appeal No. 30679, was served via electronically through Odyssey File and Serve on Cole J. Romey at whustead@husteadlaw.com.

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IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA V. JESSE LEE RICHTER

Appeal No. 30679

Appeal from Circuit Court,
Seventh Judicial Circuit,
Fall River County, South Dakota
The Honorable Jeffery R. Connolly, Presiding

REPLY BRIEF OF APPELLANT JESSE LEE RICHTER

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REPLY ARGUMENT AND AUTHORITIES

I. THE TROOPER LACKED REASONABLE SUSPICION FOR THE STOP.

The State's brief claims that a single alleged instance of crossing onto the fog line amounts to a traffic violation under South Dakota law. Alternatively, the State pivots and argues that as long as a law enforcement officer's interpretation of South Dakota law is reasonable—even if wrong and illegal—it is sufficient to uphold the stop of the vehicle Jesse Richter was riding in. Both arguments are incorrect.

First, the State has failed to identify any caselaw in South Dakota that has held that a single instance of touching the fog line was a traffic violation. The State's brief cites *State v. Ballard* for the proposition that a traffic stop, however minor, allows for a legal stop. 2000 S.D. 134, ¶¶ 2, 11, 617 N.W. 2d at 839, 840-41. But the Court in *Ballard* held specifically that the defendant's "conduct in crossing *over the centerline* and *fog line* provided reasonable suspicion to justify the initial stop." *Id.* ¶ 11, at 840 (citation omitted) (emphasis added). Conversely, here, Richter's vehicle only crossed onto the fog line and did not cross over the centerline.

Likewise, the State's citation to *State v. Sleep* does not support the State's position. 1999 S.D. ¶ 8, 590 N.W.2d 235, 238. In *Sleep*, law enforcement had been alerted to the defendant's erratic driving by others in addition to observing it themselves. *See id.* ¶¶ 7, 8 (crossing the dividing line between lanes). Interestingly, the *Sleep* Court's reasoning appears to imply that the officer's

observation of the defendant "straddling the line", by itself, did not constitute a "definite" traffic violation in light of the totality of circumstances. *See id* ("Nonetheless, a definite traffic violation was not necessary before stopping the truck."). Here, there are no other facts that would give rise to reasonable suspicion factors under the circumstances. Trooper Griffith did not allege any other traffic violations—only that it was a large, black SUV with California license plates (how he knew it was a rental from just driving by it on the highway remains a mystery). Therefore, the only alleged fact was a single observation of touching the fog line which is not a "definite" traffic violation under South Dakota law (as of now). The State also discusses the *Hett* decision which was adequately discussed in Richter's previous brief. *State v. Hett*, 2013 S.D. 47, 834 N.W.2d 317.

More troubling is the State's reliance on Trooper Griffith's interpretation of what constitutes a violation of SDCL 32-26-6. *See* State's Brief page 13. The State relies upon this Court's decision in *State v. Dahl*, which interpreted a different statute, SDCL 32-26-17[1], under the different circumstances of making right-hand turns versus traveling within a driving lane. 2012 S.D. 8, ¶ 9, 809 N.W.2d 844, 846. In *Dahl*, the defendant took a right-hand turn "considerably

[1] *Compare* "[e]xcept as otherwise provided in § 32-26-20, the driver of a vehicle intending to turn to the right at an intersection shall approach such intersection in the lane for traffic nearest to the right-hand side of the highway, and in turning shall keep as closely as practicable to the right-hand curb or edge of the highway. A violation of this section is a Class 2 misdemeanor." SDCL 32-26-17; *with* "[o]n a roadway divided into lanes, a vehicle shall be driven as nearly as practicable entirely within a single lane and may not be moved from such lane until the driver has first ascertained that such movement can be made with safety. A violation of this section is a Class 2 misdemeanor." SDCL 32-26-6.

wider than necessary" and "clearly crossed over the line." *Id.* ¶ 9. This Court reasoned that the way in which the defendant took that right hand turn "created the reasonable inference that the driver of the vehicle might be impaired." The *Dahl* Court, in its conclusion, suggested that even if a traffic violation had not been committed, the manner of driving alone constituted reasonable suspicion justifying a stop for investigation. *See id.* ¶ 10.

Here, the alleged facts by Trooper Griffith do not indicate such egregious driving facts to constitute even the relatively low standard required for reasonable suspicion. As Richter has maintained throughout the briefing, Trooper Griffith *originally* reported that the vehicle's tire crossed *onto* the fog line *once* while the vehicle traveled at or below the speed limit. CR 10. This is distinguishable from the facts in *Dahl* where the defendant strayed from the curb considerably while making the right-hand turn. Therefore, Trooper Griffith's mistake of law is not reasonable in its application, and the vehicle Richter was riding in did not violate a traffic law.

On a final note, the State's brief fails to address that this is an issue of first impression for the Court and the split in authority among jurisdictions. Richter would urge this Court to adopt the views from reasoned decisions cited in his first brief. Indeed, having this legal issue clear would benefit motorists and courts alike—such as an Eighth Circuit Judge who, while dissenting, refused to hold that one single instance of crossing the fog line was a violation of SDCL 32-26-6. *See, e.g.*, *United States v. Martinez*, 354 F.3d 932, 935 (8th Cir. 2004) (Lay, J.,

dissenting) (abrogated on other grounds) (reasoning as follows:

> [T]he trooper pulled the vehicle over for momentarily crossing the fog line in violation of South Dakota law. I respectfully submit that the obvious purpose of such a statute is to apprehend only those drivers who are intoxicated or otherwise incapable of controlling their vehicles; *one isolated occurrence of crossing the fog line is not sufficient to constitute a violation.* If it were, practically every driver of a vehicle traveling on a South Dakota roadway could be stopped. No doubt acknowledging this fact, other courts construing nearly identical traffic statutes have held that *minor conduct such as that which occurred in this case is an insufficient basis upon which to stop the driver of the vehicle.*

(Emphasis added.) (citation omitted)).

II. THE CIRCUIT COURT MADE A CLEAR ERROR IN FINDING THE VEHICLE CROSSED *OVER* OR *ONTO* THE FOG LINE.

The State claims that Richter has no evidence in the record countering Trooper Griffith's testimony that showed that the circuit court committed clear error. While it is true there was no video evidence and no eyewitnesses on the rural stretch of South Dakota highway, this Court need look no further than the record stemming from Trooper Griffith's testimony to decide whether error occurred. Trooper Griffith's testimony shows his inability to decide how far the tire crossed over the line CR 10, 265 line 10, when it crossed over the line CR 253, 267, what he was looking at when the tire crossed over the line (at the vehicle as a whole or the tire and the line?) CR 228, 267. There are even issues surrounding where Trooper Griffith was looking when he saw the traffic infraction—at his driver's side mirror or his rearview mirror next to his radar. CR 224-26, 253, 265. Or whether it was even possible to see what he claims he saw.

Therefore, it is objectively true when the State says in its brief that "Defendant just does not like Trooper Griffith's testimony." Neither should this Court.

CONCLUSION

For all these reasons, Appellant respectfully requests that the Court reverse the circuit court's decision.

Respectfully submitted this 13th day of March 2025.

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CERTIFICATE OF COMPLIANCE

This Brief is compliant with the length requirements of SDCL § 15-26A66(b). Proportionally spaced font Times New Roman 13 point has been used. Excluding the cover page, Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance, Appellee's Brief contains 1,237 words as counted by Microsoft Word, and this Brief is 10 pages inclusive.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 13th day of March 2025, he electronically filed the foregoing document on Odyssey File and Serve and with the Clerk of the Supreme Court via e-mail at SCClerkBriefs@ujs.state.sd.us, and further certifies that the foregoing document was also e-mailed to:

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The undersigned further certifies that the original of the foregoing brief in the above-entitled action will be mailed by United States mail, postage prepaid to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501 on the March 14, 2025, date.

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