

STATE OF MAINE

KENNEBEC, ss.

STATE OF MAINE

v.

JACOB MacGILLIVARY,

Defendant

SUPERIOR COURT
CRIMINAL ACTION

RECEIVED AND FILED DOCKET NO. CR-05-050
KENNEBEC SUPERIOR COURT

2005 MAR 16 P 1:10

HARRY DESJARDIN
CLERK OF COURTS

ORDER

DOUGLAS G. BENTLEY
JUDGE

JUN 3 2005

Before the court is the the defendant's Motion to Suppress. Matthew Nichols, Esq. for defendant and Paul Rusha, Assistant District Attorney for the State of Maine.

Facts

Waterville Police Officer Matthew Libby was on patrol at 1:30 a.m. on October 31, 2004. The police officer observed a Jeep Cherokee stopped at a red light at an intersection. When the vehicle took a right turn the officer observed the vehicle "accelerating heavily, with its tires spinning." The police officer indicated that the pavement was wet on the evening in question. The police officer also indicated that he thought the driving was erratic because the "spinning tires" was not normal behavior. He stated he was concerned about the rate of speed of the vehicle but never indicated that the speed exceeded the posted speed limit or was imprudent under the circumstances. The police officer indicated that he pursued the vehicle and it was his intention to detain the vehicle.

Legal

The law in this area is quite clear. An investigatory stop is justified when the officer has "an articulable suspicion that criminal conduct has taken place, is occurring or imminently will occur." *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1969). The issue in

this case is whether the police officer had articulable suspicion warranting an investigatory stop.

Discussion

This court finds that the police officer failed to articulate any suspicion that criminal conduct had taken place, was taking place, or was imminently going to take place. The acceleration, though noted as heavy, was not in violation of any traffic law. It did not exceed the speed limit and was not imprudent under the circumstances. Furthermore, the spinning of the tires on wet pavement is not in violation of any traffic offense. Title 29-A M.R.S.A. § 2079 entitled "Unnecessary Noise" states that acceleration may not be unnecessarily made so as to cause a "harsh and objectionable noise." The police officer never mentioned that the acceleration was harsh or objectionable.

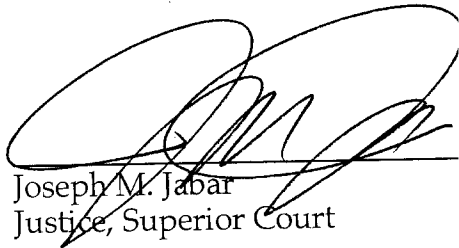
This case is distinguishable from the case of *State v. Buxton*, 687 A.2d 227 (1996). A police officer in the *Buxton* case had a suspicion that the driver might be intoxicated. He observed the fact that the driver was substantially below the speed limit and both his passenger side tires were off the roadway for a distance of 150 feet.

In this case, the police officer did not state that he had any suspicion that the driver was intoxicated. He had suspicion that the driver may have violated 29-A M.R.S.A. 2079 – unnecessary noise. However, by his own testimony, he did not observe the necessary elements to stop one for an unnecessary noise violation, i.e., harsh and objectionable noise.

Even if he suspected an intoxicated driver, which he did not, spinning tires on a wet pavement and accelerating heavily without exceeding the speed limit or being imprudent under the circumstances does not constitute erratic or abnormal driving such that he would be justified in being suspicious of an intoxicated driver.

Since this court finds that the police officer failed to articulate any suspicion as to any criminal conduct, the defendant's motion to suppress is hereby GRANTED. All evidence obtained subsequent to the stop is hereby suppressed.

Dated: March 16, 2005



Joseph M. Jabar
Justice, Superior Court

STATE OF MAINE
vs
JACOB A MACGILLIVARY
20 CENTER STREET APT #1
WATERVILLE ME 04901

SUPERIOR COURT
KENNEBEC, ss.
Docket No AUGSC-CR-2005-00050

DOCKET RECORD

DOB: 11/23/1976
Attorney: MATTHEW NICHOLS
NICHOLS & WEBB PA
110 MAIN ST, SUITE 1520
SACO ME 04072
RETAINED 12/13/2004

State's Attorney: TRACY DEVOLL

Filing Document: UNIFORM SUMMONS AND COMPLAINT
Filing Date: 12/10/2004

Major Case Type: MISDEMEANOR (CLASS D,E)

Charge(s)

1 FAILURE TO REGISTER VEHICLE
Seq 9142 29-A 351(1)(B)
LIBBY / WAT

Class E

10/31/2004 WATERVILLE

Docket Events:

01/21/2005 Charge(s): 1
TRANSFER - TRANSFER FOR JURY TRIAL EDI ON 01/21/2005 @ 20:01

TRANSFERRED CASE: SENDING COURT CASEID WATDCCR200402531
FILING DOCUMENT - UNIFORM SUMMONS AND COMPLAINT FILED ON 12/10/2004

Charge(s): 1
HEARING - ARRAIGNMENT SCHEDULED FOR 12/15/2004 @ 8:30

NOTICE TO PARTIES/COUNSEL
Charge(s): 1
HEARING - ARRAIGNMENT WAIVED ON 12/15/2004

Party(s): JACOB A MACGILLIVARY
ATTORNEY - RETAINED ENTERED ON 12/13/2004

Attorney: MATTHEW NICHOLS
Charge(s): 1
PLEA - NOT GUILTY ENTERED BY COUNSEL ON 12/15/2004

Charge(s): 1
TRANSFER - TRANSFER FOR JURY TRIAL GRANTED ON 01/21/2005

Charge(s): 1
TRANSFER - TRANSFER FOR JURY TRIAL REQUESTED ON 12/15/2004

MOTION - OTHER MOTION FILED BY DEFENDANT ON 12/15/2004

MOTION FOR PREPARATION OF REPORTS BY EXPERT WITNESSES
MOTION - MOTION TO SUPPRESS FILED BY DEFENDANT ON 12/15/2004

OTHER FILING - OTHER DOCUMENT FILED ON 12/15/2004

4 REQUESTS FOR DISCOVERY; NOTICE TO PRODUCE TESTIMONY FILED BY NICHOLS
Charge(s): 1
FINDING - TRANSFER FOR JURY TRIAL TRANSFERRED ON 01/21/2005

AUGSC

01/26/2005 Charge(s): 1
TRANSFER - TRANSFER FOR JURY TRIAL RECVD BY COURT ON 01/24/2005

RECEIVED FROM WATERVILLE DISTRICT COURT DOCKET NO: CR-04-2531
02/07/2005 HEARING - MOTION TO SUPPRESS SCHEDULED FOR 03/09/2005 @ 9:00

NOTICE TO PARTIES/COUNSEL
02/07/2005 HEARING - MOTION FOR DISCOVERY SCHEDULED FOR 03/09/2005 @ 9:00

NOTICE TO PARTIES/COUNSEL
02/07/2005 HEARING - MOTION EXPERT WITNESS REPORT SCHEDULED FOR 03/09/2005 @ 9:00
02/07/2005 HEARING - OTHER MOTION SCHEDULED FOR 03/09/2005 @ 9:00

MOTION TO PRODUCE TESTIMONY
03/09/2005 HEARING - MOTION TO SUPPRESS HELD ON 03/09/2005
JOSEPH M JABAR , JUSTICE
Attorney: MATTHEW NICHOLS
DA: BRAD GRANT Reporter: DIANE MCMANUS
Defendant Present in Court

STATE WITNESSES: MATTHEW LIBBY
03/09/2005 MOTION - MOTION TO SUPPRESS UNDER ADVISEMENT ON 03/09/2005
JOSEPH M JABAR , JUSTICE
03/16/2005 MOTION - MOTION TO SUPPRESS GRANTED ON 03/16/2005
JOSEPH M JABAR , JUSTICE
COPY TO PARTIES/COUNSEL

A TRUE COPY

ATTEST: _____

Clerk

STATE OF MAINE
vs
JACOB A MACGILLIVARY
20 CENTER STREET APT #1
WATERVILLE ME 04901

SUPERIOR COURT
KENNEBEC, ss.
Docket No AUGSC-CR-2005-00051

DOCKET RECORD

DOB: 11/23/1976
Attorney: MATTHEW NICHOLS
NICHOLS & WEBB PA
110 MAIN ST, SUITE 1520
SACO ME 04072
RETAINED 12/13/2004

State's Attorney: TRACY DEVOLL

Filing Document: CRIMINAL COMPLAINT
Filing Date: 12/10/2004

Major Case Type: MISDEMEANOR (CLASS D,E)

Charge(s)

1 OPERATING UNDER THE INFLUENCE-1 PRIOR 10/31/2004 WATERVILLE
Seq 9879 29-A 2411(1-A)(B)(1) Class D
LIBBY / WAT

Docket Events:

01/21/2005 Charge(s): 1
TRANSFER - TRANSFER FOR JURY TRIAL EDI ON 01/21/2005 @ 20:01

TRANSFERRED CASE: SENDING COURT CASEID WATDCCR200402532
FILING DOCUMENT - CRIMINAL COMPLAINT FILED ON 12/10/2004

Charge(s): 1
HEARING - ARRAIGNMENT SCHEDULED FOR 12/15/2004 @ 8:30

NOTICE TO PARTIES/COUNSEL
Charge(s): 1
HEARING - ARRAIGNMENT WAIVED ON 12/15/2004

Party(s): JACOB A MACGILLIVARY
ATTORNEY - RETAINED ENTERED ON 12/13/2004

Attorney: MATTHEW NICHOLS
Charge(s): 1
PLEA - NOT GUILTY ENTERED BY COUNSEL ON 12/15/2004

Charge(s): 1
TRANSFER - TRANSFER FOR JURY TRIAL GRANTED ON 01/21/2005

Charge(s): 1
TRANSFER - TRANSFER FOR JURY TRIAL REQUESTED ON 12/15/2004

MOTION - MOTION TO SUPPRESS FILED BY DEFENDANT ON 12/15/2004

MOTION - OTHER MOTION FILED BY DEFENDANT ON 12/15/2004

MOTION FOR PREPARATION OF REPORTS BY EXPERT WITNESSES

OTHER FILING - OTHER DOCUMENT FILED ON 12/15/2004

4 REQUESTS FOR DISCOVERY; NOTICE TO PRODUCE TESTIMONY

Charge(s): 1

FINDING - TRANSFER FOR JURY TRIAL TRANSFERRED ON 01/21/2005

AUGSC

01/26/2005 Charge(s): 1

TRANSFER - TRANSFER FOR JURY TRIAL RECVD BY COURT ON 01/24/2005

RECEIVED FROM WATERTOWN DISTRICT COURT DOCKET NO: CR-04-2532

03/09/2005 HEARING - MOTION TO SUPPRESS HELD ON 03/09/2005 @ 1:00

JOSEPH M JABAR , JUSTICE

Attorney: MATTHEW NICHOLS

DA: BRAD GRANT Reporter: DIANE MCMANUS

Defendant Present in Court

03/09/2005 MOTION - MOTION TO SUPPRESS UNDER ADVISEMENT ON 03/09/2005

JOSEPH M JABAR , JUSTICE

03/16/2005 MOTION - MOTION TO SUPPRESS GRANTED ON 03/16/2005

JOSEPH M JABAR , JUSTICE

COPY TO PARTIES/COUNSEL

A TRUE COPY

ATTEST:

Clerk