Reasonable Suspicion, Probable Cause, or Something in Between: What Is the Standard for a Valid Vehicle Stop in Drunk Driving Cases, and Will Courts Adhere to the Standard?

Jacob C. McCrea

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Reasonable Suspicion, Probable Cause, or Something in Between: What is the Standard for a Valid Vehicle Stop in Drunk Driving Cases, And Will Courts Adhere to the Standard?

I. INTRODUCTION

Whether a criminal defendant avoids or is convicted of violating Pennsylvania's drunk driving laws' often turns upon the outcome

1. Pennsylvania's current drunk driving laws are codified at 75 PA. CONS. STAT. ANN. § 3802, which reads as follows:

§ 3802. Driving under influence of alcohol or controlled substance
(a) General impairment. -
   (1) An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the individual is rendered incapable of safely driving, operating or being in actual physical control of the movement of the vehicle.
   (2) An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the alcohol concentration in the individual's blood or breath is at least 0.08% but less than 0.10% within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.
   (b) High rate of alcohol. - An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the alcohol concentration in the individual's blood or breath is at least 0.10% but less than 0.16% within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.
   (c) Highest rate of alcohol. - An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the alcohol concentration in the individual's blood or breath is 0.16% or higher within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.
   (d) Controlled substances. - An individual may not drive, operate or be in actual physical control of the movement of a vehicle under any of the following circumstances:
      (1) There is in the individual's blood any amount of a:
         (i) Schedule I controlled substance, as defined in the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act;
         (ii) Schedule II or Schedule III controlled substance, as defined in The Controlled Substance, Drug, Device and Cosmetic Act, which has not been medically prescribed for the individual; or
         (iii) metabolite of a substance under subparagraph (i) or (ii).
      (2) The individual is under the influence of a drug or combination of drugs to a degree which impairs the individual's ability to safely drive, operate or be in actual physical control of the movement of the vehicle.
      (3) The individual is under the combined influence of alcohol and a drug or combination of drugs to a degree which impairs the individual's ability to safely drive, operate or be in actual physical control of the movement of the vehicle.
of a suppression hearing to determine whether the police lawfully stopped the defendant's vehicle. With conviction or innocence hinged upon whether the police officer's action was constitutional, the facts needed to meet the threshold for a lawful stop are often litigated. Prosecutors and police officers may rely upon a variety of theories to show that police stops were within the letter of the

(4) The individual is under the influence of a solvent or noxious substance in violation of 18 Pa. C.S. § 7303 (relating to sale or illegal use of certain solvents and noxious substances).

(e) Minors. - A minor may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the alcohol concentration in the minor's blood or breath is 0.02% or higher within two hours after the minor has driven, operated or been in actual physical control of the movement of the vehicle.

(f) Commercial or school vehicles. - An individual may not drive, operate or be in actual physical control of the movement of a commercial vehicle, school bus or school vehicle in any of the following circumstances:

(1) After the individual has imbibed a sufficient amount of alcohol such that the alcohol concentration in the individual's blood or breath is:
   (i) 0.04% or greater within two hours after the individual has driven, operated or been in actual physical control of the movement of a commercial vehicle other than a school bus or a school vehicle.
   (ii) 0.02% or greater within two hours after the individual has driven, operated or been in actual physical control of the movement of a school bus or a school vehicle.

(2) After the individual has imbibed a sufficient amount of alcohol such that the individual is rendered incapable of safely driving, operating or being in actual physical control of the movement of the vehicle.

(3) While the individual is under the influence of a controlled substance or combination of controlled substances, as defined in section 1603 (relating to definitions).

(4) While the individual is under the combined influence of alcohol and a controlled substance or combination of controlled substances, as defined in section 1603.

(g) Exception to two-hour rule. - Notwithstanding the provisions of subsection (a), (b), (c), (e) or (f), where alcohol or controlled substance concentration in an individual's blood or breath is an element of the offense, evidence of such alcohol or controlled substance concentration more than two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle is sufficient to establish that element of the offense under the following circumstances:

(1) where the Commonwealth shows good cause explaining why the chemical test could not be performed within two hours; and

(2) where the Commonwealth establishes that the individual did not imbibe any alcohol or utilize a controlled substance between the time the individual was arrested and the time the sample was obtained.


2. A suppression hearing is defined as "[a] pretrial proceeding in criminal cases in which a defendant seeks to prevent the introduction of evidence alleged to have been seized illegally." BLACK'S LAW DICTIONARY 1440 (6th ed. 1990).
law. Defense attorneys, by contrast, necessarily argue that the facts adduced by the prosecution are insufficient for an officer to validly stop a motorist. During the last decade, Pennsylvania's lower courts' rulings on both the standard to be applied and the facts necessary to demonstrate that the standard has been met have been inconsistent. This inconsistency and the current state of the law are the subject of this comment.

II. HISTORY AND DEVELOPMENT OF THE STANDARD FOR A VEHICLE STOP

The Supreme Court of Pennsylvania first addressed the standard for a constitutional vehicle stop in *Commonwealth v. Swanger*. In *Swanger*, police officers stopped an automobile in which Glenn Swanger was a passenger to perform a "routine" check. While questioning the driver, an officer observed burglary tools on the vehicle's floor. The officers arrested the driver and the passengers for possession of burglary tools, and a later investigation linked Swanger to a burglary. Swanger made a pretrial motion to suppress all evidence derived from the search. He argued that the "routine" stop of the vehicle in which he was riding violated the Fourth Amendment. At a pretrial hearing, the arresting officer testified that he ordered the vehicle to stop notwithstanding the fact that there was nothing atypical about the vehicle or its operation. The trial court denied Swanger's motion to suppress, and he was convicted of burglary. After the Superior Court affirmed the conviction, the Supreme Court granted alloc--


5. *Swanger*, 307 A.2d at 876. The stop occurred at approximately 3:45 a.m. Id.

6. Id.

7. Id.

8. Id.

9. Id. at 876-77. The Fourth Amendment's grant of protection reads as follows: The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. CONST. amend. IV.


11. Id. at 876-77.
tur" to determine "whether a police officer may stop a single automobile without any outward sign of a violation of the Motor Vehicle Code." After weighing the Commonwealth's interest in maintaining public safety against the public's right to be free from government intrusion, the court concluded that:

Before a police officer may stop a single vehicle to determine whether or not the vehicle is being operated in compliance with the Motor Vehicle Code, he must have probable cause based on specific facts which indicate to him either the vehicle or the driver are in violation of the code.

The Pennsylvania Supreme Court affirmed that probable cause was the appropriate standard for a valid vehicle stop two years later in Commonwealth v. Murray. In Murray, police officers observed the shadow of a person running from the rear of a department store after they responded to the store's burglar alarm. The fleeing suspect eluded the police; an investigation of the premises revealed only a pry bar wedged into a door jamb at the rear of the building. Nearly an hour after the police were summoned by the burglar alarm, the officers spotted an automobile entering the driveway of a house near the store. The automobile departed after a few moments, and the police decided to follow it. The police stopped the car after following it for half a mile, notwithstanding the fact that no traffic laws had been violated and there was nothing unusual about the vehicle's appearance or its occupants' behavior. An officer shined a flashlight into the car and noticed a hammer and a railroad spike behind the driver's

12. The term "allocatur," translated literally, means "it is allowed" and is "used to denote that a writ or order was allowed." BLACK'S LAW DICTIONARY 75-76 (6th ed. 1990).
14. Id. at 878-79. The Supreme Court's opinion did not address whether the analysis and outcome would be different under Article I, Section 8 of the Pennsylvania Constitution, which mirrors the language of the Fourth Amendment and provides as follows:

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed by the affiant.

17. Id.
18. Id.
19. Id.
20. Id.
The police obtained a search warrant for the vehicle later that evening, and the search revealed items stolen from the department store burglary. The trial court denied Murray's motion to suppress the evidence, and a jury found him guilty of possession of burglary tools and burglary. An equally divided Superior Court affirmed the conviction, and the Pennsylvania Supreme Court granted allocatur. The Court began its analysis by reiterating that "in this Commonwealth we will not permit the State under the guise of regulating the operation of motor vehicles upon the highway to single out vehicles for routine stops." The Court went on to find that nothing could have reasonably suggested that the vehicle's occupants were involved with the earlier burglary or had violated any other laws, and that the trial court erred in determining that the stop was lawful. The Court rejected the Commonwealth's argument that the officers were justified in assuming that the vehicle's occupants saw the police and drove in the opposite direction to avoid being discovered, noting that "there is an absence in [the] record of any facts that would cause this seemingly innocent conduct to be viewed as suspicious."

The Supreme Court of Pennsylvania revisited the issue of vehicle stops in Commonwealth v. Whitmyer. In Whitmyer, the Pennsylvania Supreme Court granted allocatur to determine whether the lower court had applied the correct standard when determining whether the defendant's car was lawfully stopped. The case began in October of 1990 when a Pennsylvania State Police officer observed the defendant's car traveling in the same direction on Interstate 81. The defendant's car was behind another car as the two vehicles approached a point where Interstate 81 merged from two lanes to one. The defendant passed the vehicle in front of him before the other vehicle merged into his lane; in the course of

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22. Id.
23. Id. at 415. As in Swanger, the defendant in Murray relied exclusively on the Fourth Amendment. Id. at 417.
24. Id. at 415-16.
25. Id. at 416.
27. Id. at 418.
29. Whitmyer, 668 A.2d at 1114.
30. Id.
31. Id.
doing so, the defendant drove over a solid white line. The defendant’s driving was neither reckless nor careless, and this event did not interfere with other vehicles on the road. Nevertheless, the officer followed the defendant and utilized his speedometer to estimate the defendant’s speed. After following the defendant and monitoring his speed for two-tenths of a mile, the officer estimated that he was traveling at seventy miles per hour. The defendant then slowed down and exited the highway, and the officer then stopped him, intending to issue a citation for driving at an unsafe speed and a warning about changing lanes erratically. When the defendant rolled down his window, the officer noticed the aroma of burnt marijuana coming from the interior. The defendant was ordered out of the vehicle and searched, which revealed marijuana and drug paraphernalia. A urine test was administered at a local hospital to determine if he was under the influence of marijuana.

The defendant was charged with, inter alia, driving under the influence of a controlled substance. The Court of Common Pleas of Cumberland County granted the defendant’s motion to suppress all of the evidence. The trial court held that the stop was not founded on probable cause to believe that the defendant had violated the Vehicle Code. The trial court’s holding “was based on the fact that [the defendant] did not fail to yield to any oncoming vehicle when he entered the highway nor did he pass the vehicle in front of him in a posted no passing zone.” The trial court also held that the officer lacked probable cause based on timing his vehicle’s speed for two tenths of a mile because the relevant stat-

32. Id.
33. Id.
34. Whitmyer, 668 A.2d at 1114.
35. Id.
36. Id.
37. Id.
38. Id.
39. Whitmyer, 668 A.2d at 1114.
40. Id. The defendant was also charged with unlawful possession of a small amount of marijuana, unlawful possession of drug paraphernalia, and failure to drive at a safe speed. Id. at 1114-15.
42. Whitmyer, 668 A.2d at 1115.
43. Id. (citing trial court opinion at p. 4).
ute requires that a vehicle's speed be timed for three tenths of a mile.\textsuperscript{44}

The Superior Court, relying on \textit{Commonwealth v. Swanger} and \textit{Commonwealth v. Murray}, concluded that the trial court correctly applied the law to the facts and affirmed the suppression order.\textsuperscript{45} On appeal to the Pennsylvania Supreme Court, the Commonwealth argued that the standard for a vehicle stop was not governed by \textit{Swanger} and \textit{Murray}, but by 75 Pa.C.S.A. § 6308(b).\textsuperscript{46} This statute provides that a police officer may stop a vehicle if there are "articulable and reasonable grounds to suspect a violation of this title."\textsuperscript{47} The Commonwealth maintained that "both the trial court and the Superior court have disregarded [75 Pa.C.S.A. § 6308(b)] in favor of a heightened probable cause standard in assessing the legal justification of the stop of [the defendant]." The core of the Commonwealth's argument was that Murray's standard of "probable cause to believe that there has been a violation of the vehicle code" was modified by the "articulable and reasonable" language of 75 Pa.C.S.A. § 6308(b).\textsuperscript{48} The Supreme Court rejected the Commonwealth's argument, finding that "the two standards amount to nothing more than a distinction without a difference."\textsuperscript{49} The Court went on to affirm the lower courts' rulings, finding no evidence in the record to refute the trial court's

\begin{itemize}
\item \textsuperscript{44} \textit{Whitmyer}, 668 A.2d at 1115 (citing trial court opinion at p. 4-5).
\item 75 PA. CONS. STAT. ANN. § 3368(a), allowing police officers to monitor the speed of traffic with their speedometers, provides as follows:

\begin{itemize}
\item \textsuperscript{a} Speedometers authorized.- The rate of speed of any vehicle may be timed on any highway by a police officer using a motor vehicle equipped with a speedometer. In ascertaining the speed of a vehicle by the use of a speedometer, the speed shall be timed for a distance of not less than three tenths of a mile.
\end{itemize}

\item 75 PA. CONS. STAT. ANN. § 3368(a) (1986).
\item \textit{Whitmyer}, 668 A.2d at 1116. 75 PA. CONS. STAT. ANN. § 6308(b), enacted in 1983, provides as follows:

\begin{itemize}
\item Authority of police officer.—Whenever a police officer ... has articulable and reasonable grounds to suspect a violation of this title, he may stop a vehicle, upon request or signal, for the purpose of checking the vehicle's registration, proof of financial responsibility, vehicle identification number or engine number or driver's license, or to secure such other information as the officer may reasonably believe to be necessary to enforce to provisions of this title.
\end{itemize}

\item 75 PA. CONS. STAT. ANN. § 6308(b) (1990).
\item 75 PA. CONS. STAT. ANN. § 6308(b) (1990).
\item \textit{Whitmyer}, 668 A.2d at 1116.
\item Id.
\item Id.
conclusion that the officer lacked probable cause to stop the defendant's automobile.  

In Commonwealth v. Lawrentz, the Superior Court had an opportunity to apply the standard of probable cause as reaffirmed by Whitmyer, but it missed the mark. In Lawrentz, the defendant was stopped by the Pennsylvania State Police after his vehicle was observed weaving between the lines. After hearing testimony from the arresting officer and the defendant, the trial court, apparently applying the correct standard, suppressed the evidence on the grounds that the officer did not have articulable and reasonable grounds to stop the defendant. The trial court reasoned as follows:

The conduct of the defendant herein did not display a reckless disregard for the safety of others and the slight crossing of the center line over a distance of a mile to a mile and a half without creating a safety hazard is simply inadequate evidence to make a stop.

The Superior Court disagreed and vacated the suppression order, finding that the trial court's findings of fact and legal conclusions lacked support from the record. The Superior Court based its decision on the uncontradicted testimony of the arresting officer, who testified that the defendant had been weaving in between the fog line and the center line for a mile to a mile and a half. The Superior Court also emphasized the arresting officer's testimony that the defendant's vehicle had crossed the center line twice, and that the defendant's driving caused the vehicle behind him to slow down. Judge Tamilia concluded that the police had "conducted a valid investigatory stop." The opinion contained no

51. Id. at 1117.
53. Lawrentz, 683 A.2d at 304. The defendant's blood alcohol content was .23 percent. Id. at 303.
54. Id. at 303-05.
55. Id. at 304 (citing the trial court's slip opinion at p. 2).
56. Lawrentz, 683 A.2d at 304.
57. Id. at 304-05.
58. Id. at 305. The officer also testified that the defendant's driving was "unsafe." Id.
59. Id. The Superior Court's view of the case is best expressed by this passage from the opinion:

In summary, this case presents a scenario in which a vehicle driving at a high rate of speed weaves down the roadway for over a mile, crossing the center line twice and forcing other vehicles to alter their speed and location. The police not only have the authority, but the obligation, to prevent such driving.
reference to the Supreme Court’s decision in *Whitmyer*, and it did not address whether the trial court was correct in using the “articulable and reasonable grounds” standard codified at 75 Pa.C.S.A. § 6308(b). In fact, the Superior Court’s only citation to legal authority was *Commonwealth v. Hamme*, in which the Superior Court stated that “erratic driving provides a sufficient, reasonable basis to support an investigatory stop.”

After *Lawrentz*, the Superior Court continued its departure from the Supreme Court’s ruling in *Commonwealth v. Whitmyer*. In *Commonwealth v. Masters*, the Superior Court stated, albeit in dicta, that an officer need only have reasonable suspicion to believe that the driver is under the influence of alcohol to stop the vehicle. In *Commonwealth v. Starr*, the Superior Court actually applied the standard of reasonable suspicion to analyze the legality of a DUI stop. *Starr* involved the post-conviction appeal of a guilty verdict. Evidence adduced at the suppression hearing and the trial revealed that the incident began when a citizen reported a maroon or purple Ford Explorer weaving from side to side and driving erratically. An officer soon spotted a vehicle matching the description and followed it. Over the distance of a mile and a half, the officer observed the vehicle “being driven erratically and repeatedly straddling the white fog line on the right side of the road.” The officer also observed that the vehicle’s right tires left the road on two occasions, and at one point the tires rode on the fog line for about 300 yards. After the vehicles tires left the road the second time, the officer stopped the defendant. The odor of alcohol emanated from the car, and Starr was arrested after fail-

*Id.* The “high rate of speed” referred to by Judge Tamilia was 50-55 miles per hour. *Id.* The Superior Court’s opinion makes no mention of the defendant’s driving affecting more than one vehicle.

60. *Id.*
66. *Id.* at 192-93. Specifically, *Starr* was found guilty of violating 75 PA. CONS. STAT. ANN. § 3731(a)(1)(4) (1995). *Id.* at n.1.
67. *Id.* at 193.
68. *Id.*
69. *Id.*
70. *Starr*, 739 A.2d at 193.
71. *Id.*
The Superior Court arrived at this conclusion after hearing testimony and reviewing the video of Starr's driving taken by the camera in the officer's car, which established that "[Starr's] vehicle weaved constantly, the vehicle's tires were on the berm numerous times, the vehicle almost struck a traffic sign and [Starr's] driving was erratic." 74

The Superior Court was asked to review whether the suppression court correctly concluded that the arresting officer "had reasonable and articulable suspicion so as to justify the stop of [Starr's] vehicle." 75 Judge Tamilia concluded that based upon all of the evidence, the suppression court correctly concluded that the officer lawfully stopped Starr's vehicle. 76 Notably, the opinion cited no Supreme Court opinions on the standard to be applied.

In Commonwealth v. Howard, 77 the Superior Court again erred in applying reasonable suspicion as the governing standard in a DUI case. In Howard, a state trooper observed the van traveling in front of his police cruiser veer over the fog line and off of the road on two occasions. 78 The driver then turned onto an unlined road and proceeded to travel down the middle of the road. 79 After reaching an intersection, the driver made another turn, immediately drove into the oncoming lane, and then returned to own his lane of travel. 80 The trooper approached the van when the driver pulled into a driveway. 81 After the trooper noticed indicia of drunkenness, he administered field sobriety tests, which the driver failed. 82 The suppression court suppressed the evidence, finding that the trooper "did not have sufficient reasonable suspicion to make the traffic stop." 83 The Superior Court began its analysis by noting that reasonable suspicion was the standard for

72. Id.
73. Id. at 194.
74. Id. (citing the trial court's slip opinion at p. 3.)
75. Starr, 739 A.2d at 193.
76. Id. at 195.
78. Howard, 762 A.2d at 361.
79. Id.
80. Id.
81. Id.
82. Id.
83. Howard, 762 A.2d at 361.
a vehicle stop, and it cited Commonwealth v. Korenkiewicz,\textsuperscript{84} Commonwealth v. Wright,\textsuperscript{85} and 75 Pa.C.S.A. § 6308(b) as authority for the reasonable suspicion standard. Amazingly, the opinion also cited the Supreme Court's opinion in Commonwealth v. Whitmyer,\textsuperscript{86} for the proposition that reasonable suspicion was the governing standard.\textsuperscript{87} After erroneously stating the law to be applied, the Superior Court went on to find that the suppression court's findings were unsupported by the record and remanded the case for trial.\textsuperscript{88}

The Superior Court continued to veer from the standard established by Whitmyer in Commonwealth v. Baumgardner.\textsuperscript{89} Christopher Baumgardner was stopped after a police officer suspected that he was driving under the influence of alcohol.\textsuperscript{90} The officer followed Baumgardner while he traveled south on the Carlisle Pike, an undivided four lane highway, in the early morning hours of June 25, 1999.\textsuperscript{91} Over the course of two miles, the officer observed Baumgardner weaving from side to side in his lane.\textsuperscript{92} Baumgardner was pulled over and, based upon further investigation, the officer found that he was driving under a suspended license.\textsuperscript{93} Baumgardner's motion to suppress was denied by the Court of Common Pleas of Cumberland County.\textsuperscript{94}

On appeal, Baumgardner asked the Superior Court to decide whether weaving within his own lane of travel justified an investigatory stop.\textsuperscript{95} The Superior Court began its analysis by noting that "[a] police officer may stop a vehicle when he or she has reasonable and articulable grounds to suspect a violation of the Vehicle Code."\textsuperscript{96} The court went on to state that "[t]he reasonable suspicion necessary to justify a vehicular stop is less stringent than probable cause, but the officer must have more than a hunch as

\textsuperscript{84} 743 A.2d 958 (Pa. Super. Ct. 1999).
\textsuperscript{86} Whitmyer, 668 A.2d 1113 (Pa. 1995).
\textsuperscript{87} Howard, 762 A.2d at 362. As discussed above, the Whitmyer Court affirmed the lower courts' rulings that probable cause was the correct standard. Whitmyer, 668 A.2d at 1116.
\textsuperscript{88} Id. at 361-63.
\textsuperscript{90} Baumgardner, 767 A.2d at 1066.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} Id. (citing 75 PA. CONS. STAT. ANN. § 6308(b) (1990)).
the basis of a stop."97 After reviewing sister states' case law dealing with whether weaving within one's own lane justifies a police stop, the Superior Court concluded that Baumgardner's weaving supported "an investigatory stop based on suspicion of intoxication."98 The court concluded by stating that the degree of weaving exhibited by a motorist may vary, but that merely swerving or weaving once does not create reasonable suspicion to believe that a motorist is intoxicated.99 The Superior Court did not explain why it felt compelled to examine and rely upon sister states' case law on weaving within one's own lane.

III. THE CURRENT STATE OF THE LAW

In Commonwealth v. Gleason,100 the Supreme Court of Pennsylvania, perhaps recognizing the lower courts' deviation from its precedents, granted allocatur to determine whether an officer "possesses reasonable and articulable grounds to believe that a [driver] violated a provision of the Vehicle Code . . . based upon his observations that the [driver's] vehicle crossed the berm line by six to eight inches on two occasions . . . over a distance of approximately one quarter of a mile."101 Based upon these facts, the trial court concluded that Gleason's actions "do not warrant a stop on any cognizable legal theory."102 The Superior Court issued an unpublished decision reversing the trial court, finding that the officer had reasonable suspicion to believe that Gleason had violated section 3309(1) of the Motor Vehicle Code,103 which commands that "[a] vehicle shall be driven as nearly as practicable entirely within a single lane."104 The Superior Court found no evidence of a violation of section 3309(1), but nevertheless found the stop to be lawful based upon the theory that the officer could lawfully "check on

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98. Id. at 1068.
99. Id.
100. 785 A.2d 983 (Pa. 2001).
101. Gleason, 785 A.2d at 983.
102. Id. at 986 (quoting the trial court's opinion at p. 2 n.1.).
103. 75 PA. CONS. STAT. ANN. § 3309(1) provides that "[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that the movement can be made with safety."
104. Gleason, 785 A.2d at 986.
the operator for his erratic driving; his condition, whether he had been drinking or possibly falling asleep.\textsuperscript{106}

The defendant appealed, arguing that the Superior Court's opinion conflicted with \textit{Commonwealth v. Whitmyer}, which held that "before stopping a vehicle, an officer must be able to articulate specific facts which establish probable cause to believe that the vehicle or its driver was in violation of some provision of the Vehicle Code."\textsuperscript{106} The Supreme Court agreed and, after reviewing its decisions in \textit{Swanger}, \textit{Murray} and \textit{Whitmyer}, reiterated that the standard is still "probable cause to believe that the driver or the vehicle was in violation of some provision of the Code."\textsuperscript{107}

The Supreme Court's decision in Gleason had a notable impact upon cases pending before the Supreme and Superior Courts. For example, in \textit{Commonwealth v. Roudybush},\textsuperscript{108} the Supreme Court simply reversed, without an opinion, a Superior Court decision reversing a trial court's suppression order.\textsuperscript{109} The Supreme Court also summarily overruled the Superior Court's opinion in \textit{Commonwealth v. Baumgardner},\textsuperscript{110} which applied reasonable suspicion to review whether a DUI stop was justified.\textsuperscript{111}

In \textit{Commonwealth v. Slonaker},\textsuperscript{112} the Superior Court applied probable cause to determine whether a vehicle stop was lawful under the following circumstances: A police officer, apparently traveling behind Slonaker, observed him cross the fog line on the right side of the road.\textsuperscript{113} The officer followed Slonaker for about five miles, during which time his car weaved continuously within his lane, accelerated and decelerated, and crossed the fog and center lines a few times.\textsuperscript{114} The officer stopped the car, noticed classic indicia of intoxication, and administered two field sobriety tests.\textsuperscript{115}

\begin{thebibliography}
\bibitem{105} \textit{Id.} (quoting the Superior Court's slip opinion at p. 4).
\bibitem{106} \textit{Gleason}, 785 A.2d at 986.
\bibitem{107} \textit{Id.} at 989 (citations omitted).
\bibitem{108} 790 A.2d 313 (Pa. 2002).
\bibitem{109} \textit{Id.} The Supreme Court's order reads, in its entirety, as follows: "AND NOW, this 22nd day of February, 2002, the Order of the Superior Court is reversed. \textit{See Commonwealth v. Gleason}, 785 A.2d 983 (Pa. 2001)" (emphasis in original).
\bibitem{111} \textit{Commonwealth v. Baumgardner}, 796 A.2d 695 (Pa. 2002). The Supreme Court's order reads, in its entirety, as follows: "AND NOW, this 15th day of February, 2002, the Petition for Allowance of Appeal is granted. The Superior Court Order dated January 23, 2001 is reversed based on our decision in \textit{Commonwealth v. Gleason}, 785 A.2d 983 (Pa. 2001)."
\bibitem{113} \textit{Slonaker}, 795 A.2d at 399.
\bibitem{114} \textit{Id.}
\bibitem{115} \textit{Id.}
\end{thebibliography}
After failing both tests, Slonaker was arrested; a trial court denied his motion to suppress, and a jury found him guilty.\(^{116}\) On appeal, Slonaker argued that the officer lacked probable cause to stop his vehicle.\(^{117}\) After reviewing Whitmyer and Gleason, the Superior Court found no error and affirmed Slonaker’s conviction.\(^{118}\) Like many opinions applying reasonable suspicion, the Superior Court found that the defendant’s weaving, inconsistent speed, and crossing the center and fog lines were enough to justify the stop.\(^{119}\) Although the extent of weaving and crossing the lines strongly supports the result, the analysis sounds just like earlier opinions applying reasonable suspicion, and it appears that the only difference between Slonaker and earlier opinions is the substitution of “probable cause” for “reasonable suspicion.”

The case of Commonwealth v. Battaglia\(^{120}\) gave the Superior Court another chance to apply probable cause to a DUI stop, and the case appears to apply Supreme Court precedents consistently. The case involved the Commonwealth’s appeal of a trial court’s suppression order, and the essential facts were as follows: A parked police officer pulled out and began to follow two cars after noticing that the second car was following the first car closely.\(^{121}\) The officer observed nothing unusual about the second car, but the lead car was weaving in its lane without crossing the center or fog lines.\(^{122}\) The lead car weaved for a half mile, then turned onto another road, where the weaving continued.\(^{123}\) After following the defendant for over a half mile, the officer stopped the driver when he made a wide turn “based on a suspicion of D.U.I.”\(^{124}\) The trial court found that the officer lacked probable cause to believe that Battaglia was intoxicated and suppressed the evidence.\(^{125}\) The Superior Court, finding no error, affirmed the trial court’s order.\(^{126}\)

In doing so, the court reviewed the Supreme Court’s recent pronouncements and recognized its earlier errors in applying reasonable suspicion. Specifically, the court recognized that the Su-
The standard for a valid vehicle stop in Pennsylvania has been litigated for well over thirty years with varying results. The reasons for the results seem to vary as much as the results themselves. One part of the problem may be defense attorneys who fail to argue that probable cause is the governing standard in appeals to the Superior Court. Considering the Pennsylvania Supreme Court's controlling case law holding that probable cause is the standard, it is simply malpractice to argue that the lesser standard of reasonable suspicion governs the stop. It is possible that, as in Gleason, Roudybush and Baumgardner, many defendants' convictions could have been reversed through an appeal to the Supreme Court on the argument that the lower courts analyzed the stop under the wrong standard.

Another part of the problem appears to be misinformed judges. Again, in light of the Pennsylvania Supreme Court's long-standing commitment to probable cause as the standard, judicial opinions stating or implying that reasonable suspicion is the standard simply should not be issued. While reasonable jurists and attorneys may differ over how poorly a motorist must drive to reach the...
threshold of probable cause, it is sad to find that Pennsylvania’s lower courts have often failed to apply the correct standard.

Rambling dicta and the careless use of terms of art in judicial opinions describing the standard add to the confusion surrounding this issue. For example, in Commonwealth v. Murray, after stating that probable cause was the standard for determining whether a stop was valid, the Supreme Court of Pennsylvania noted that:

[I]t is also clear that an investigative stop of a moving vehicle to be valid must be based upon objective facts creating a reasonable suspicion that the detained motorist is presently involved in criminal activity. The only factor relied upon to suggest suspicious behavior was the assumption the occupants of the vehicle could have seen the police car and, not wishing to be discovered, pulled into the driveway, backed out and proceeded slowly in the opposite direction.

A careless reading of Murray might lead courts to believe that reasonable suspicion is the standard for a valid vehicle stop. However, when read carefully in the context of the case, one sees that a lawful stop will always be based on reasonable suspicion because reasonable suspicion is a lesser standard than probable cause. Passages like the foregoing add little to judicial opinions and create endless opportunities for litigation, erroneous rulings by lower courts and confusion regarding the true state of the law. In the future judges, should strive to state the law in this area clearly in order to clarify the confusion that has surrounded this issue. With the constitutional rights of the Commonwealth’s citizens hanging in the balance, the importance of doing so needs no explanation.

Another factor contributing to the confusion is the Motor Vehicle Code’s “articulable and reasonable grounds” standard for vehicle stops codified at 75 Pa.C.S.A. § 6308(b). This language is simply too close to the “reasonable suspicion” standard for a stop and frisk set forth by the United States Supreme Court in Terry v. Ohio. While no court has explicitly relied on Terry as legal authority for its decision to uphold a vehicle stop, a review of the

131. See, e.g., Commonwealth v. Carlson, 705 A.2d 468, 471 (Pa. Super. Ct. 1998) (“Such an observance does not constitute sufficient facts for Brunst to articulate a reasonable suspicion or probable cause that [sic] Appellant was committing the offense of driving under the influence of alcohol”) (emphasis added).
132. Murray, 331 A.2d at 418.
133. 392 U.S. 1 (1968).
Valid Stops in DUI Cases

Valid Stops in DUI Cases

case law indicates that Pennsylvania's lower courts have applied
the logic and spirit of Terry to suspected drunk drivers. Under
the classic Terry-type scenario, officers who suspect that criminal
activity is afoot may detain a person for a brief period and frisk a
person to check for a concealed weapon or contraband. If the
frisk reveals evidence of a crime, the officers have probable cause
to arrest the suspect and will do so. However, Terry was decided
in the context of a police officer who observed two suspicious char-
acters "casing" a store in order to rob it, and the foundation for
Terry's holding was the government's interest in protecting police
officers from armed criminals.

One could logically apply Terry's implicit preference for protect-
ning the public by stopping crime before it occurs to the context of
DUI stops. However, the law established by Terry is simply not
the law governing vehicle stops. Instead, the Pennsylvania Su-
preme Court has held that probable cause is the standard that
must be applied to vehicle stops. The Pennsylvania legislature
should amend the language of section 3608(b) to unambiguously
reflect the proper standard.

The final part of the problem seems to be the reluctance of po-
lice officers and the lower courts to accept that less than perfect
driving is not criminal, and that police officers do not have unre-
strained discretion to stop motorists for the slightest inconsistency
in their driving. If the Pennsylvania legislature wished to make
it a crime to touch the center line or the fog line while driving
down the road, it could do so. The legislature, perhaps recognizing
the ridiculousness of attempting to regulate the minutia of every-
day driving, has not done so and should not do so.

134. See, e.g., Howard, 762 A.2d at 361.
136. See Id.
137. Terry, 392 U.S. at 5-6, 23-24.
138. See, e.g., Battaglia, 802 A.2d at 657 (Stevens, J., dissenting) (emphasizing the
Commonwealth's obligation to maintain public safety and opining that "the police should be
permitted a reasonable degree of latitude when stopping automobiles to meet this obliga-
tion"). Judge Stevens argued that the facts of Battaglia were enough to establish probable
cause. Id. However, Judge Stevens did not specify the section of the Motor Vehicle Code
that appeared to be violated. Id. In light of the fact that the standard is probable cause to
believe that the vehicle or the driver is in violation of the Motor Vehicle Code, police offi-
cers, prosecutors and judges should be able to point to some provision in the Motor Vehicle
Code, in each stop, to justify their intrusion into the lives of Pennsylvania's citizens. Given
the breadth of the Motor Vehicle Code, doing so does not appear to place a heavy burden on
law enforcement.
139. The Superior Court has correctly observed that "[e]rratic driving is not per se a
violation of the vehicle code." Battaglia, 802 A.2d at n.8.
Hopefully Pennsylvania’s lower courts will continue to adhere to the standard for a lawful vehicle stop set forth in Commonwealth v. Gleason.\textsuperscript{140} The Supreme Court has consistently found that probable cause is the standard that determines the lawfulness of a vehicle stop, and the Superior Court and the Courts of Common Pleas should have no trouble applying the law to the facts. Moreover, although drunken driving has a substantial and detrimental effect upon public safety in Pennsylvania, there is no reason for motorists to be subjected to a police stop based on a lower standard than probable cause. If police officers suspect that a motorist’s driving is indicative of a violation of Pennsylvania’s Motor Vehicle Code, absent some countervailing concern, the officer should wait until he or she has probable cause to believe that a violation has occurred before stopping the vehicle. Based upon a review of the cases, it seems like an officer would only have to delay pulling over a vehicle for a short period of time for an intoxicated driver to meet this threshold. Perhaps better education covering what does and does not amount to probable cause is needed for police officers, prosecutors, defense attorneys and judges to perform their duties without infringing upon the Commonwealth’s citizens’ rights.

*Jacob C. McCrea*

\textsuperscript{140} 785 A.2d 983 (Pa. 2001).