

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA

APPELLATE CASE NO. 2013-AP-30-A-O
Lower Case No. 2013-CT-569-A-E

Appellant,

v.

DEBORAH ANNE SCHENCK,

Appellee.

_____ /

Appeal from the County Court
for Orange County, Florida
A. James Craner, County Court Judge

Jeffrey Ashton State Attorney,
and Brian Toti, Assistant State Attorney
for Appellant

William R. Ponall, Esq.
for Appellee

Before J.KEST, ROCHE, PERRY, J.J.

PER CURIAM.

FINAL ORDER REVERSING THE TRIAL COURT

The State appeals the trial court's order granting Appellee's motion to suppress the evidence resulting from a traffic stop. Where the facts are not in dispute, which they are not here, the appellate court reviews the application of the law to the facts. *Armstrong v. State*, 46 So. 3d 589, 593 (Fla. 1st DCA 2010).

At the suppression hearing held on August 16, 2013, Orlando Police Officer Steve Adams testified that he was off duty, out of uniform, in his own car, and out of his jurisdiction

when he observed Appellee's car in front of him weaving in and out of its lane and driving significantly slower than the speed limit—about 20 mph in a 35 mph zone. He said the car's tires went off the right side of the roadway, then came across to the left and crossed the centerline. He followed the car for about two miles, during which time it “snaked” along the road at least ten times. The officer called 911, and, when both cars stopped at a red light, he exited his car, approached the driver, and identified himself as an off-duty officer. He told her he was stopping her from driving any further. An on-duty officer arrived shortly thereafter to conduct a DUI investigation and Appellee's arrest ensured.

Appellee sought to suppress the arrest on the grounds that the off-duty officer had no authority to stop her vehicle. An off-duty officer outside of his or her jurisdiction has the same but no greater authority to conduct an arrest than any other citizen. *State v. Price*, 74 So. 3d 528, 530 (Fla. 2d DCA 2011). A citizen may conduct an arrest when he or she observes a person commit any felony, or a misdemeanor if that misdemeanor constitutes a breach of the peace. *Roberts v. Dep't of Highway Safety & Motor Vehicles*, 976 So. 2d 1241 (Fla. 2d DCA 2008). See also, *Edwards v. State*, 462 So. 2d 581, 582 (Fla. 4th DCA 1985): “At common law, a private citizen may arrest a person who in the citizen's presence commits a felony or breach of the peace.”

The trial court ruled that there was no evidence that Appellee was committing a breach of the peace. It noted that there was no other traffic affected by her driving. With regard to misdemeanor DUI constituting a breach of peace, *State v. Furr*, 723 So. 2d 842. (Fla. 1st DCA 1998) found that it was not necessary that a driver impact any other traffic for DUI to constitute a breach of the peace. *Furr* concluded, “We . . . reject the notion that appellee's drunk driving on a less-traveled stretch of rural roadway is not a breach of the peace.” *Id.* at 844. Under the

rational of *Furr*, the mere act of DUI is a breach of the peace because it endangers the public with actual or threatened violence and an off-duty officer is not obligated to wait for a suspected DUI driver to run vehicles off the road or worse before intervening.

Furr teaches that an off-duty officer outside of his or her jurisdiction can conduct a citizen's arrest if the actions of the driver constituted a "breach of the peace" and, further, that DUI can be a breach of peace if the driver endangers or threatens to endanger the public. It appears that each case has to be reviewed on its own facts. The question comes down to whether the observed actions are sufficient to constitute a threat to the peace if the driver was not observed impacting other traffic.

In *Furr*, the out-of-jurisdiction officer received a radio call that a truck was driving west in an eastbound lane. Two other individuals also told him that the truck was "all over the roadway." The officer apparently observed the truck cross the center dividing line four or five times and then the officer pulled the truck over. The appellate court reversed the trial court's order suppressing the stop and found that the officer made a proper citizen's arrest albeit outside his jurisdiction. The *Furr* court accepted the rational of *State v. Edwards*, 462 So.2d 581 (Fla. 4th DCA 1985) with regard to DUI being a breach of the peace, noting that "the notion that no breach would occur unless the offending driver progressed from merely scaring other drivers to actually killing them" did not make sense and should be rejected. *Furr* at 844.

In *Charlotin v. State of Florida, Dept. of Highway Safety and Motor Vehicles*, 12 Fla. L. Weekly Supp. 907a (Fla. 9th Cir. Ct. May 25, 2005), this Court quashed a driver's license suspension, finding the evidence was not sufficient to allow a citizen's arrest by an out-of-jurisdiction officer. In *Charlotin*, the only evidence was an observation of a speed of 20 mph in a 10 mph zone, and a failure to come to a complete stop while exiting an apartment complex.

The Court found that “petitioner’s driving pattern did not rise to the level that would constitute a breach of the peace,” comparing it to other more egregious cases where the driving did constitute a breach: *Seay v. Dep’t of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 312a (Fla. 9th Cir. Ct. Dec. 27, 2004) (asleep at wheel in middle of street); *Cortinas v. State*, 11 Fla. L. Weekly Supp. 416d (Fla. 17th Cir. Ct. Feb. 11, 2004) (finding breach of the peace where driver swerved into oncoming traffic and struck the median); *Overton v. Dep’t of Highway Safety & Motor Vehicles*, 8 Fla. L. Weekly Supp. 529a (Fla. 8th Cir. Ct. June 12, 2001) (finding breach of peace where driver ran two stop signs, failed to maintain a single lane, struck a curb, and ran off the road); *Kuse v. State*, 6 Fla. L. Weekly Supp. 473a (Fla. 11th Cir. Ct. May 28, 1999) (finding breach of the peace where driver swerved from lane to lane and drove onto the sidewalk on two occasions).

Similarly, in *Randall v. State of Florida, Dept. of Highway Safety and Motor Vehicles*, 16 Fla. L. Weekly Supp. 614a (Fla. 9th Cir. Ct. April 1, 2009), this Court quashed a license suspension based on an out-of-jurisdiction citizen’s arrest where the officer reported the vehicle going 65-68 miles per hour in a 50 MPH zone and drifting within her lane from side to side. No witness testified at the hearing and no factual findings were made. Unlike *Edwards* and *Furr*, the officer apparently had not followed the defendant for any length of time. The Court found that “the driving pattern did not rise to the level that would constitute a beach of peace.”

Considering the facts detailed by Officer Adams in the case now before the Court, *Furr*, *Edwards*, *Seay*, *Overton*, and *Kuse* all suggest that the fact pattern did authorize the off-duty officer to conduct the stop. He testified that he followed the vehicle for approximately two miles and saw it (1) weaving in and out of its lane, (2) driving significantly below the speed limit, (3) its tires going off the roadway, (4) crossing the centerline and (5) “snaking” along the roadway at

least 10 times. While any one of these alone may not have been sufficient, the totality of the observations made by the officer himself over a two-mile stretch of road were sufficient to allow the stop. *Randall* and *Charlotin*, are distinguishable as having less egregious driving patterns that were not observed over a significant period of time.

It is hereby **ORDERED AND ADJUDGED** that the trial court's order granting the motion to suppress is **REVERSED** and the matter **REMANDED** for further proceedings.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 16th day of June, 2014.

/S/ _____
JOHN MARSHALL KEST
Presiding Circuit Judge

ROCHE and PERRY, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was provided to **Brian Toti**, Assistant State Attorney, Office of the State Attorney, 415 North Orange Avenue, Orlando, Florida, 32801; and **William R. Ponall**, Esq., 425 N. New England Avenue, Winter Park, Florida 32789 this 16th day of June, 2014.

/S/ _____
Judicial Assistant