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Case Name: [James Edward Leming v. The State of Texas](#)

- OFFENSE: Driving While Intoxicated
- COUNTY: Gregg
- C/A CASE No. 06-13-00264-CR
- DATE OF OPINION: December 17, 2014
- DISPOSITION: Conviction Reversed OPINION: [Moseley, J.](#)
- TRIAL COURT: 124th D/C; Hon. Alfonso Charles
- LAWYERS: [Clement Dunn](#) (Defense); [Zan Brown](#) (State)

(Background Facts) Longview police officer Manfred Gilow testified that about 2:00 p.m. January 20, 2012, he was dispatched to investigate a report from a caller who reported a vehicle “swerving from side to side.” After having been alerted to the content of the call, Gilow located the reported vehicle, eventually shown to be driven by Appellant, and began tracking that car. Gilow testified that he also made contact with “Arliss,” the informant, who was still following Appellant’s car, telling Arliss to “back off” so Gilow could better follow and observe the suspect vehicle. Gilow followed Appellant for about three minutes before conducting a traffic stop. Gilow indicated that rather than following Appellant as long as he did, he “would have liked to stop him way earlier . . . but the traffic was too heavy.”

 **31.024 Search & Seizure / Traffic Stops / Reasonable Suspicion:** At a hearing on Appellant’s motion to suppress, Gilow testified observed Appellant driving thirteen miles below the posted limit of forty-five miles per hour, and as Gilow followed and observed, Appellant “slowed down more and more.” During the video recorded period, Appellant to a complete stop at a traffic light and exhibited no unusual driving behavior except that noted above, proceeding to advance with the rest of the traffic, although slower than the prevailing traffic pattern. Gilow testified that, after stopping the vehicle, he observed that Appellant appeared to be “very tired,” that he “had a hard time keeping his eyes open,” and that “[h]e was just very, very exhausted.” Appellant admitted having taken clonazepam and hydrocodone. He was arrested for driving while intoxicated (DWI). Appellant argues the trial court should have suppressed any evidence which came from Gilow’s stop because the stop was neither reasonable nor justified under the circumstances.

Holding: Even should we concur with the conclusion of the trial court that [Appellant]’s car was shown to have encroached into the adjacent lane, that act alone does not constitute a traffic offense. In order for it to have been unlawful, the encroachment must have been made unsafely. On each of the two instances one could judge that [Appellant] encroached on the line dividing the lanes, there was no real danger of his colliding with another vehicle in the adjacent lane. The closest time interval to the occupancy of that adjacent lane by another car was about fifteen seconds after [Appellant] was no longer near the dividing line. When one takes the speed of the traffic and the totality of the circumstances into account, we cannot say that any such encroachment from lane to lane by [Appellant] was done in an unsafe manner. Therefore, we find the trial court’s ruling that the stop was prompted by the officer’s observation of a traffic violation to be unsupported by the record. *** There is more information here than a simple anonymous telephone call. Glow attempted to corroborate the information from the citizen caller by following [Appellant] for about three minutes and video recording the events he witnessed. Based on our view of the recording, we hesitate to call [Appellant]’s driving “swerving from side to side,” which is what was reported by the caller to Gilow. The video recording does show that [Appellant]’s car drifted or moved from side to side within its lane of traffic and, perhaps, even encroached into the adjacent lane marked for travel in the same direction, and one person’s belief that a “swerve” had taken place may be construed by another as being a “drift” or “movement.” However, we do not find this significant to our analysis; at issue is the reasonableness of Gilow’s stop of [Appellant]. No traffic violation having occurred, the only basis for the stop, under the facts presented, would be if Gilow was acting in the community caretaking function of his law enforcement duties, not because of an observation of a violation of the law.

§ 31.02 Search & Seizure / Traffic Stops (Community Caretaking Exception): The State argues the officer’s traffic stop of Appellant was proper under the community caretaking function of the officer’s law enforcement duty, citing the officer’s testimony that he was concerned that Appellant might have been somehow in distress. At the hearing, the State never specifically invoked the community caretaking function, in so many words; but as can be seen in some of Gilow’s testimony, he testified he was concerned about Appellant’s welfare.

Holding: The evidence could be construed to find some danger to [Appellant] or others. Driving a motor vehicle is always a potentially dangerous act. However, we do not see the video as establishing that [Appellant] was operating the vehicle in an unsafe or dangerous manner, even in the period of about three minutes for a distance of several city blocks. Even if [Appellant] did briefly leave his lane of traffic, the other traffic was not so close as to conclude that [Appellant] or others had been placed in danger by his driving. This factor weighs against the stop. *** The community caretaking exception to warrantless seizures is to be applied narrowly. *** Considering the totality of the circumstances, we find Gilow’s stop of [Appellant]’s truck was not reasonable under the community caretaking function. The trial court abused its discretion in denying the motion to suppress.