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Criminal law -- Driving under influence -- Evidence -- Field sobriety exercises -- Pre-arrest -- Voluntariness -- Based on totality of circumstances, officer did not have reasonable suspicion to request that defendant, who was found asleep in vehicle at traffic light and had odor of alcohol and bloodshot eyes, submit to field sobriety exercises -- Defendant did not voluntarily consent to performance of exercises -- Body-camera footage shows that defendant was surrounded by five uniformed and armed officers, patrol vehicles were blocking off roadway around defendant's vehicle with their overhead lights flashing, and officer unholstered taser in show of authority when defendant resisted performing exercises -- Officer lacked probable cause to arrest defendant for DUI -- Motion to suppress pre-arrest field sobriety exercises, resulting arrest, and refusal to submit to breath test is granted

STATE OF FLORIDA, Plaintiff, v. JAMES EDWARD JACKSON, JR., Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. 22001956MU10A. March 30, 2023. Deborah Carpenter-Toye, Judge. Counsel: Jackson Lubin, Assistant State Attorney, for Plaintiff. Robert S. Reiff, Law Offices of Robert S. Reiff, P.A., for Defendant.

ORDER

THIS CAUSE, having come to be considered on a Motion filed pursuant to Fla. R. Crim. Pro. 3.190, 316.193, Fla. Statute., the Fourth and Fourteen Amendments to the United States Constitution, Article I, Section 23 of the Florida Constitution, and *Wong Sun v. United States,* 371 U.S. 47 (1963), to enter an order suppressing and any all evidence illegally obtained by the police,[1] and this Court, being otherwise fully advised in the premises, having heard and evaluated the testimony of Officer Devarious Holloway, and having watched the officer's body-worn camera video [hereafter referred to as "BWC"], and having read and considered the Motion and the cases submitted, it is Hereby

ORDERED AND ADJUDGED, that the Motion is ***GRANTED*** and this Court hereby suppresses any statements made by Jackson, any descriptions or observations made of him before, during and after the administration of the field sobriety exercises, any evidence of a breath test, and any *alleged* refusal thereof. As grounds for the foregoing, the Court makes the following findings of fact and law:

On February 13, 2022 at approximately 5:30 a.m., James Edward Jackson, Jr. was discovered asleep at a traffic light at the intersection of Fairmont Avenue and Miramar Parkway. While the reason why he fell asleep was subject to dispute, the Court finds that the initial contact with him by Officer De Los Rios of the Miramar police department was both lawful and proper. Thereafter, Officer Holloway, and three (3) other officers responded to the scene as back up.

After hearing the testimony and having watched the "BWC" video, this Court finds that officer Holloway's behavior and demeanor was particularly aggressive. His tone of voice and his questions and comments were also very aggressive.

Mr.Jackson turned off his vehicle when instructed to do so by the officers and he produced the documents requested of him without difficulty.

The officers never inquired if Jackson was suffering from a medical issue or if he was in need of any assistance. The officers instead, ordered him to step out of his car. Mr. Jackson did so without difficulty or delay, and, as the officer testified and the "BWC" video confirmed, he walked in a normal and prudent manner away from the vehicles as he was directed to do. See *Wiggins v. Fla. Dep't of Highway Safety & Motor Vehicles,* 209 So. 3d 1165 (Fla. 2017) [42 Fla. L. Weekly S85a] (proper for the court to review and evaluate video evidence to see if it contradicts an officer's testimony). The officer then conducted a pat-down search of Mr. Jackson.

Mr. Jackson then told the officer that he needed to use the bathroom. *See* HOLLOWAY BWC beginning at approximately 05:23:50. The officer appeared to become agitated with Mr. Jackson after he placed his hands

inside his pants. The officer commented that Mr. Jackson was, "an adult" and stated he should have, "used the restroom" before he got into his car. The officer is then observed on video unhoistering his department-issued taser. The officer removes the taser from his left hip with his right hand, in a manner that implied that he might use it against the defendant. *See* HOLLOWAY BWC at 05:24:30.

It is clear to this Court that Mr. Jackson did not want to perform the exercises at that time. The Court also notes that he appeared "scared" that the officer might use his taser on him.

During his cross-examination the officer made several statements that were concerning to the Court. The officer incorrectly stated that, "it is illegal in the State of Florida to consume any alcohol and drive a vehicle". He further stated that it was *Jackson's* obligation to, "prove his innocence." The Court finds that he also correctly testified that he did not believe he had probable cause to arrest Jackson prior to the exercises being performed.

The Court also notes that there was no testimony from the officer that he observed *any* specific indicators of impairment prior to ordering the defendant to get out of the car. Upon speaking with Mr. Jackson, the officer testified that he smelled an odor of alcohol and his eyes were bloodshot.

The officer also testified that he could tell the type of alcohol consumed by an individual from the odor on their breath. It is common knowledge, and most experienced officers regularly testify before this Court, that an individual cannot determine the type of alcohol consumed based solely on the odor.

After Mr. Jackson performed the exercises the officer advised him that he was being placed under arrest for Driving Under the Influence.

A review of the BWC evidence introduced into evidence at the hearing contradicts the officer's testimony regarding Mr. Jackson's performance on the exercises. The Court notes that the BWC established that Mr. Jackson performed the exercises without difficulty.

The defense submitted three (3) separate grounds for this Court to suppress the evidence obtained. The Court addresses the facts and the law as to each individual ground argued:

1. THE OFFICER LACKED REASONABLE SUSPICION TO REQUEST JACKSON TO PERFORM SOBREITY EXERCISES.

A law enforcement officer may request a citizen to perform field sobriety exercises if that officer has a **reasonable suspicion** to believe that the driver may be DUI. *See, e.g., Jones v. State,* 459 So.2d 1068, 1080 (Fla. 2d Dist. Ct. App. 1984), *affirmed,* 483 So.2d 433 (Fla. 1986); *Department of Highway Safety & Motor Vehicles v. Guthrie,* 662 So. 2d 404 (Fla. 1st Dist. Ct. App. 1995) [20 Fla. L. Weekly D2480b]. A lawful investigative detention and request of a citizen to perform field sobriety tests cannot occur unless the officer has some objective manifestation that the person stopped is driving under the influence. *State v. Ameqrane,* 2010 Fla. App. LEXIS 7037. *See also Jones v. State,* 459 So.2d 1068, 1080 (Fla. 2d DCA 1984), *affirmed,* 483 So.2d 433 (Fla. 1986).

As the mere odor of an alcoholic beverage on an individual's breath is *not* consistent with the ability to operate a motor vehicle, an odor of alcohol from a suspect is not, in and of itself, sufficient legal grounds to request the performance of such exercises. *See State v. Kliphouse,* 2000 Fla. App. LEXIS 12347, 15, 771 So.2d 16 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2309f].

In *State v. Taylor,* 648 So.2d 701, 703-04 (Fla. 1995) [20 Fla. L. Weekly S6b], the Florida Supreme Court provided an example of what constitutes reasonable suspicion sufficient to detain a citizen and then conduct a DUI investigation:

> When [the defendant] exited his car, he staggered and exhibited slurred speech, watery, bloodshot eyes, and a strong odor of alcohol. This, combined with a high rate of speed on the highway, was more than enough to provide [the officer] with reasonable suspicion that a crime was being

> committed, i.e., . The officer was entitled under *section* 901.151 to conduct a reasonable inquiry to confirm or deny that probable cause existed to make an arrest. [The officer's] request that [the defendant] perform field sobriety tests was reasonable under the circumstances and did not violate any Fourth Amendment rights.

The Court finds that in this case based on the totality of the circumstances the officer did *not* have the necessary reasonable suspicion to request that Jackson submit to field sobriety exercises. This Court has previously noted that an unlawful driving pattern and the odor of an alcoholic beverage alone are not legal grounds for a DUI investigation. *See State v. Zavala,* 27 Fla. L. Weekly Supp. 204a (Fla. 17th Jud. Cir. Cty Ct. 2019). And *State v. Jacobs,* 22 Fla. L. Weekly Supp. 831a (Fla. 7th Jud. Cir. County Court) (where officer who stopped defendant for driving in without headlights did not observe any indicia of impairment other than a slight odor of alcohol and slightly slurred speech, officer did not have reasonable suspicion to detain defendant for a DUI investigation).

2. THE OFFICER UNLAWFULLY COMPELLED JACKSON TO THE PERFORM SOBRIETY EXERCISES.

All searches and seizures by government agents are controlled by the Fourth Amendment of the United States Constitution, which protects against unreasonable seizures of persons and property.

Since a warrant is the constitutionally preferred means of law enforcement, all warrantless searches ” are *per se* unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions.” *Katz v. United States,* 389 U.S. 347, 357 (1967). The United States Supreme Court has established these exceptions to the general rule that a search or arrest warrant must be based on probable cause to satisfy the Fourth Amendment. In the present case, the applicable exception is for investigatory detentions -- a brief seizure by police based on probable cause or reasonable suspicion of criminal activity -- and a “narrowly drawn” exception to the probable cause requirement of the Fourth Amendment. *United States v. Sharpe,* 470 U.S. 675, 689 (1985).

“The well-established test is that if, by physical force or show of authority, a reasonable citizen would not believe that he is free to ignore police questioning and go about his business, he has been unconstitutionally seized.” *Id.; Terry v. Ohio,* 392 U.S. 1, 19 n. 16 (1968) (“[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a ‘seizure' has occurred”).

Mr. Jackson's initial detention was the product of a routine traffic-related investigation, prompted by his falling asleep as he waited at a traffic light. This contact with Jackson was appropriate and lawful. However, once the officer proceeded to conduct a DUI investigation, and compelled him to perform sobriety exercises, by a show of force with his taser, he was “seized” under the Fourth Amendment.

The U.S. Supreme Court in *U.S. v. Mendenhall*, 446 U.S. 544 (1980) specifically stated, “examples of circumstances that might indicate a seizure, even when the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, . . . or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.” *Id.* at 550.

As all warrantless searches are presumptively unlawful, where the state relies on an individual's consent, it must establish that the individual consented voluntarily. If not “voluntary,” the Due Process clause of the Fourteenth Amendment to the United States Constitution prohibits the government from using the coerced conduct against him or her. *Brewer,* 386 So.2d at 235; *Brown v. Mississippi,* 297 U.S. 278 (1936).

As shown on the BWC and confirmed by his testimony, the officer in this case said to Mr. Jackson, “You are **suspected** of driving under the influence. Okay. I have a couple of exercises that **I want you to perform to** make sure that you are okay to continue to drive.” *See* HOLLOWAY BWC, beginning at approximately 05:23:00. (emphasis added). Mr. Jackson asked the officer if he could use the bathroom and he was told to begin

performing the exercises. *Id.* The officer became agitated with Mr. Jackson and he **unholstered his department-issued taser**. *See* HOLLOWAY BWC at 05:24:30 (emphasis added).

There is no provision under Florida law that a person under investigation for DUI has impliedly consented to perform physical, roadside sobriety exercises. Indeed, as noted on all driver licenses, "[o]peration of a motor vehicle constitutes consent to any sobriety test required *by law*." (emphasis added). In Florida, the only "sobriety test required by law" is the post-arrest breath-test. *See* 316.1932, Fla. Stat.

In *State v. Lynn,* 11 Fla. L. Weekly Supp. 798b (Fla. 17th Jud. Cir. 2004), the court was asked to address just such an issue. In *Lynn,* the appellate court noted that, "there is nothing in the record to support the finding that the Defendant's performance of roadside exercises was voluntary. The language used by the arresting officer in instructing the Defendant to perform the exercises is consistent with a finding that the Defendant was acquiescing to the apparent authority of the officer." *Id., citing with approval to Smith v. State,* 753 So.2d 713, 715 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D678a]. *See also State v. Zalis,* 12 Fla. L. Weekly Supp. 884a (Fla. 15th Cir. 2005); *State v. Shaprio,* 7 Fla. L. Weekly Supp. 149a (Brwd. Cty. Court 1999); *State v. Tuinen,* 7 Fla. L. Weekly Supp. 221a (Brwd. Cty. Court 1999); *State v. Ryan,* 8 Fla. L. Weekly Supp. 517a (Brwd. Cty. Court 2001); *State v. Zalis,* 14 Fla. L. Weekly Supp. 567a (Fla. 2nd Cir. 2007); *State v. Barbary,* Miami Dade Case No. 050587-W (Miami Dade Court 2003); *State v. Esper,* Miami Dade Case No. 412716-X (Miami Dade Court 2004). *See also Bautista v. State,* 902 So.2d 312 (Fla. 2d. DCA 2005) [30 Fla. L. Weekly D1347a] (defendant's act of producing driver's license and alien card in response to officers' "requests" was presumptively involuntary).

In distinguishing the State's reliance on *State v. Liefert,* 247 So.2d 18 (Fla. 2d DCA 1971), the *Lynn* court noted that "[u]nlike in *Taylor* and *Liefert,* the Defendant in this case was not asked, but rather instructed to perform the exercises." *Id.*

This Court is very familiar with this legal issue. In *State v. McFarland,* 27 Fla. L. Weekly Supp. 200a (Fla. 17th Jud. Cir. 2017), *affirmed at* 26 Fla. L. Weekly Supp. 546a, a case that came before this Court, the deputy asked Mr.McFarland to get out of [his] vehicle. The Deputy then said, **'I'm gonna have you do some field sobriety exercises'**. *Id.* (emphasis added). This statement [was] captured on the video tape introduced as evidence at the Hearing. Mr.McFarland submitted to the pre-arrest sobriety exercises. Following the exercises, he was placed under arrest for DUI." *Id.*

As this Court wrote in its opinion in the McFarland case, "[t]he Defense argue[d] that the Defendant 'acquiesced' to the authority of the Deputy. The Defense further argues that if this Court finds that the Deputy had "reasonable suspicion" and not "probable cause", at the time he instructed Mr.McFarland to perform the exercises, the Court must grant the Motion to Suppress." *Id.* In so doing, this Court further noted the following:

> There is a factual dispute as to whether the defendant voluntarily agreed to perform the field sobriety exercises in this case. The video recording established that Deputy Carotti said, "I'm gonna have you do some field sobriety exercises". At the hearing Deputy Carotti testified that his statement was not a command, but rather a question. He further testified that the defendant responded to him by saying "yes". The evidence in this case is clear. As a factual matter, this Court finds that the defendant's performance of the field sobriety exercises was not voluntary. The defendant was instructed to perform the exercises, and he complied with Deputy Carotti's command.
>
> Having found that the exercises were not voluntary, it is necessary to determine whether Deputy Carotti had probable cause at the time he made the statement to the defendant. This Court adopts the line of cases holding that an officer must have probable cause for a DUI arrest before he can compel performance of the field sobriety exercises.

Id. at p. 2.

While this Court found that the facts of the McFarland case "gave rise to reasonable suspicion to conduct a DUI investigation", *id.,* it also found "that based on the above facts and the totality of the circumstances and evidence

presented in this case [the traffic infraction of disobeying a red light, the strong odor of alcohol, bloodshot red eyes, the admission to drinking three vodka and cranberry drinks in an unspecified amount of time], [the deputy] did not have probable cause to believe the defendant had violated Fla. Statute §316.193, at the time he made the statement to the Defendant" and therefore granted the Motion to Suppress. *Id.* at p. 3. This Court found that the offending language in McFarland was when the officer said, "I'm gonna have you do some field sobriety exercises."

In another case that came before this Court [*State v. Barone,* Broward County Case No. 21-009514MU10A], the deputy conducted a traffic stop for speeding and drifting outside of his lane of travel. This Court wrote the following about that case:

> Upon making contact with the Defendant the Deputy observed the following signs of impairment: an odor of an alcoholic beverage on the Defendant's breath, an admission to consuming one alcoholic beverage, red/glassy eyes, slurred speech with an accent. The Defendant immediately provided her registration to the Deputy, however, she had difficulty producing her license and proof of insurance, the Deputy directed Ms.Barone to step out of her car, to submit to Field Sobriety Exercises. The Deputy's specific words were, 'why don't you step on out. . . come on out. Yeah, we're. . .going to make sure you're ok.' After Ms.Barone got out of the car, the deputy said, "what I **would like to do is just to ask you a few questions and have you do a few roadside sobriety exercises so I can make sure you are ok. Would you be willing to do that?** The Defendant responded 'yea."

Id. (emphasis added).

This Court found in Barone that "[t]he testimony presented and the totality of all of the evidence, including the language used by the Deputy that the Defendant, "needed to do some sobriety exercises", caused Ms. Barone to acquiesce to police authority. Ms.Barone appeared to this Court to feel compelled to perform the exercises. . . This Court holds, consistent with McFarland, that the Deputy could not compel Ms. Barone to perform the exercises by a show of police authority. The Defendant, in this case, clearly acquiesced to a show of police authority and did not voluntarily perform the exercises." This Court found that the offending language in Barone was that the officer stated, "we're going to make sure you're ok [to drive]."

In this case, the testimony and the BWC clearly shows that Mr. Jackson was surrounded by five uniformed police officers, all of whom were armed, and their individual police vehicles had closed off the roadway around Mr. Jackson's car with their overhead lights flashing. It is clear to this Court that in this case, Jackson acquiesced to the authority of the officers.

While the court in *State v. Whelan,* 728 So.2d 807 (Fla. 3d. DCA 1999) [24 Fla. L. Weekly D640b] held that a person need not be advised of his "right to refuse" to submit himself to such exercises, *id.* at 811, that does not mean that these exercises can be compelled by a law enforcement officer. While the *Whelan* court found that "[n]either the Taylor decision nor the Fourth Amendment requires the officer at roadside to warn the motorist of a right to refuse to perform roadside sobriety [exercises]", *id.,* that does not mean that such exercises can be compelled. This Court finds that the officer's behavior, tone of voice and removal of his taser from his holster clearly had a coercing effect on Mr. Jackson.

The officer, in his testimony, admitted that he was taught, and in fact uses, his taser as a tactic of intimidation. This was an important fact considered by the Court in this case.

While this Court is mindful of the societal importance of enforcing DUI laws, the fact remains that Mr. Jackson's arrest was based on the officer's conclusion that the defendant performed poorly on the exercises. After the arrest, the officer requested a breath test. The performance of these exercises, the resulting arrest, and the refusal to submit to a breath test are therefore suppressed as the "fruit of a poisonous tree". *Wong Sun v. United States,* 371 U.S. 471 (1963).

3. <u>THE OFFICER LACKED PROBABLE CAUSE TO ARREST JACKSON.</u>

A warrantless DUI arrest, as in this case, is considered unreasonable for Fourth Amendment purposes unless there is probable cause to believe the driver is under the influence of alcohol to the extent that his or her "normal faculties" are impaired. *See* 316.193(1)(a), Fla. State. It is because of the very personalized assessment of a suspect's level of impairment that probable cause arises in perhaps its most unique context here. Indeed, in no other crime does the arresting officer's opinion count so much. To be "impaired" under the law, an officer must necessarily engage in a purely subjective evaluation of whether the suspect's "ability to see, hear, walk, talk, make judgments, and, in general, to normally perform the many mental and physical acts of our daily lives" have been affected by alcohol in some material respect.

The Florida Supreme Court defines probable cause as, "a reasonable ground of suspicion supported by circumstances sufficiently strong to warrant a *cautious* person in the belief that the person is guilty of the offense charged." *Dunnavant v. State,* 46 So.2d 871 (Fla. 1950). The constitutional validity of a warrantless arrest turns on "whether at *that* moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Beck v. Ohio,* 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142 (1964). *Accord D'Agostino v. State,* 310 So.2d 12 (Fla. 1975) (probable cause must exist prior to arrest). Such cautionary criteria are especially important where arrests are based on sheer *opinion.* Thus, irrespective of DUI's peculiarly subjective underpinnings, "probable cause must be based on objective facts and circumstances, not on personal opinions or suspicions." *Jackson v. State,* 456 So.2d 916, 918 (Fla. 1st DCA 1984).

Consequently, "[p]robable cause for a DUI arrest must be based upon more than a belief that a driver has consumed alcohol; it must arise from facts and circumstances that show a *probability* that a driver is impaired by alcohol or has an unlawful amount of alcohol in his system." *State v. Kliphouse,* 2000 Fla. App. LEXIS 12347, 15, 771 So.2d 16 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2309f].

In essence, while probable cause "[w]hether a person has consumed sufficient alcohol to be deemed 'under the influence' or impaired to an appreciable degree. . .is a judgement call made by a police officer," *State v. Brown,* 725 So.2d 441, 444 (Fla. 5th DCA 1999) [24 Fla. L. Weekly D368a] (*i.e.,* by a "person of reasonable caution"), the circumstances must nevertheless evince a "*clear indication*" of guilt. *State v. Kliphouse,* 2000 Fla. App. LEXIS 12347, 12.

CONCLUSION

The Court finds based on the totality of the circumstance, in light of the evidence and testimony produced at the Hearing on the Motion to Suppress, Officer Holloway's testimony lacked credibility as to several issues raised, his words, actions and tone of voice caused the Defendant to acquiesce to police authority in performing the exercises. Further, the officer did not have probable cause to arrest the Defendant prior to compelling the exercises.

Accordingly, for the foregoing reasons, the Defendant's Motion to Suppress is HEREBY GRANTED.

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[1]Upon the motion of Jackson's counsel, this Court has taken judicial notice of the fact that the seizure of Jackson was conducted without a warrant signed by a neutral magistrate by reviewing the court file in this case. *See* 90.202(6), Fla. Stat. (court may take judicial notice of the court file). *See also State v. Hinton,* 305 So.2d 804 (Fla. 4th DCA 1975) (court may review court file to take judicial notice of the fact that no warrant has been filed, thereby placing burden on the prosecution to prove the validity of the police's actions under the Fourth Amendment).

* * *