Online Reference: FLWSUPP 2804DAUG

Criminal law -- Driving under influence -- Search and seizure -- Field sobriety exercises -- Where defendant, who was lawfully stopped and detained, was never asked if he would consent to field sobriety exercises, but merely submitted to trooper's show of apparent authority that would lead reasonable person to conclude that he was not free to leave or refuse, motion to suppress exercises is granted -- Post-arrest evidence is also suppressed where there was no probable cause for arrest without evidence of exercises

STATE OF FLORIDA, v. KEVIN DAUGHTRY, Defendant. County Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2018-CT-4298, Division O. June 9, 2020. Ronald P. Higbee, Judge. Counsel: Jose Leon, Office of the State Attorney, for State. L. Lee Lockett, LockettLaw, Jacksonville Beach, for Defendant.

ORDER GRANTING DEFENDANT'S

MOTION TO SUPPRESS

This cause came to be heard on Defendant's Motion to Suppress and the Court having received testimony, the benefit of observing the demeanor of the witnesses, and the argument of counsel, the Court finds as follows:

FACTUAL FINDINGS

The following facts were adduced at the hearing on Defendant's Motion To Suppress held on December 20, 2019 as well as the video that was admitted at said hearing. Mr. Daughtry was stopped for exceeding the speed limit by Trp. Farley on March 7, 2018. Trp. Farley measured Mr. Daughtry's speed with his radar equipment. Once blue lighted Mr. Daughtry stopped in a timely and safe manner. A video of the stop and investigation was entered at the hearing by the defense. After a brief encounter with Mr. Daughtry at the driver's side window, Trp. Farley directs Mr. Daughtry to get out of the car. Farley alleged certain observations such as an absence of fine motor skills, bloodshot and watery eyes, flushed face and an odor of an alcoholic beverage.

In the video, Mr. Daughtry is seen getting out of the car just fine without any difficulty and is able to walk around fine thereafter. Farley can be heard advising, not asking, Mr. Daughtry that he's going to be requesting sobriety exercises. Instead of asking if that would be okay with Mr. Daughtry, Trp. Farley never pauses and continues speaking and orders Mr. Daughtry to take his hat off and then tells him where to stand to begin the eye exercise. Instead of asking Mr. Daughtry if he would agree to perform the exercises, Farley begins the instructions and the administration of the exercises. Farley administered the HGN, the walk and turn, one leg stand, finger to nose and the Romberg balance exercise. Mr. Daughtry was subsequently arrested for DUI where he allegedly refused a breath test.

The Defense filed a Motion To Suppress challenging the lawfulness of the stop, detention, evidence of the sobriety exercises and the lawfulness of the arrest. The stop and the subsequent detention were lawful, and therefore those grounds in the motion are DENIED. For the following reasons, this Court finds that Mr. Daughtry did not consent to the sobriety exercises and therefore probable cause for the arrest was lacking.

LEGAL GROUNDS

Because roadside sobriety exercises invoke the protections under the Fourth Amendment of the United States Constitution as well as Article I, Section 12 of the Florida Constitution, police officers must obtain voluntary consent from the subject prior to administering these exercises. *State v. Taylor,* 648 So.2d 701 (Fla. 1995) [20 Fla. L. Weekly S6b] (*Quant's request that Taylor perform field sobriety tests was reasonable under the circumstances and did not violate any Fourth Amendment rights*); *State v. Whelan,* 728 So.2d 807 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D640b] (Although no Fifth Amendment implications with respect to sobriety exercises, the Fourth Amendment does in fact apply); *State v. McKenzie,* 14 Fla. L. Weekly Supp. 472b (4th Jud. Cir. Cty Ct. 2006). “Consent is an exception to the warrant requirement, but the state bears the burden of proving

that it was unequivocally given. Any doubt concerning a suspect's consent must be resolved in his favor". *Wynn v. State,* 14 So.3d 1094 (Fla. 2nd DCA 2009) [34 Fla. L. Weekly D1158a].

Here, the state was not able to carry their burden because of the contents of the roadside video that was entered into evidence by the defense. In the video, it is clear that Mr. Daughtry was never asked if he would consent to the exercises and instead merely submitted to the show of apparent lawful authority of Trp. Farley. Although officers are not required to advise subjects of their right to refuse to perform the sobriety exercises, this factor can still nonetheless be considered by courts when making a determination on the voluntariness of consent. *Schneckloth v. Bustamante,* 93 S.Ct. 2041 (1973)(While the failure to inform is not a per se basis to invalidate a search, it is the most important factor when determining voluntariness). The language used by Trp. Farley may not be fairly characterized as reflecting a "request". Rather, Farley's directives to Mr. Daughtry such as "take off your hat" and "stand over here" in order to begin sobriety testing without ever stopping to ask Mr. Daughtry would lead a reasonable person to conclude that they were not free to leave or refuse. *State v. Grillo,* Case No. 2016CT-007088-WH (Fla. 10th Jud. Cir. Cty Ct. 2016)(*aff'd on appeal*, Case No. TT-13).

It is therefore:

ORDERED AND ADJUDGED that the Defendant's Motion To Suppress based on involuntary consent to perform the sobriety exercises and a lack of probable cause to arrest (based on the suppression of all the exercises) are GRANTED. Therefore, any and all evidence of any conversations pertaining to, or observations of performance of the sobriety exercises are suppressed as well as any post arrest evidence obtained, including but not limited to any conversations or evidence regarding any subsequent requests to submit to breath testing and any alleged refusals thereto.

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