IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT, IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
Criminal Justice and Trial Division

STATE OF FLORIDA,
Plaintiff,

Case No. 06-CF-13723
Division F

v.

TIMOTHY McKENNA,
Defendant.
_____/

**DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AND / OR MOTION IN LIMINE**

COMES NOW, Defendant, TIMOTHY McKENNA, by and through the undersigned attorney, pursuant to Rule 3.190(h), Fla. R. Crim. P., and hereby moves this Court to suppress all observations made of the Defendant, all statements made by the Defendant, breath-alcohol test results, and any refusal to submit to testing subsequent to the illegal arrest and seizure of Defendant. As grounds therefore, Defendant would show:

Facts

1. Defendant is charged with Driving Under the Influence (Fourth or Subsequent Conviction) per Fla. Stat. 316.193(1) and (2)(b)3 (2006), and Refusal to Submit to Testing, per Fla. Stat. 316.1939 (2006).
2. On July 12, 2006, Deputy John Hajj of the Hillsborough County Sheriff's Office stopped Defendant at around 1 p.m. Deputy Hajj allegedly witnessed Defendant speed at a rate of 66 miles per hour in a posted 45 mph zone. Defendant also allegedly changed lanes without signaling causing another vehicle to abruptly put on its brakes.
3. Subsequent to the traffic stop, Deputy Hajj allegedly noticed an odor of an alcoholic beverage on Defendant's breath, his eyes were red and glassy, and his speech was supposedly slurred.
4. Deputy Hajj had Defendant perform the HGN, One Leg Stand, Walk and Turn, and Finger to Nose exercises. Defendant allegedly performed poorly on those exercises. To the best of the undersigned's knowledge, Deputy Hajj is not a certified drug recognition expert.
5. Defendant allegedly admitted to drinking two beers. Furthermore, prior to refusing to submit to a test of his urine, Defendant allegedly stated it would be best for him to refuse because he was recently around a person who had smoked marijuana.

6. Also, during an "inventory" search of the vehicle, Deputy Hajj located a 16 oz. can of Budweiser beer, which was half empty and cold to the touch. Defendant denied ownership of the beer.

7. Defendant was subsequently arrested and submitted to a test of his breath. The results of the test were 0.07 and 0.07 g/210L. Defendant refused to submit to a test of his urine.

I. The Traffic Stop

1. An officer must possess probable cause that a traffic violation has occurred prior to stopping a motorist for a violation of the traffic laws. *See* Holland v. State, 696 So. 2d 757 (Fla. 1997) and Whren v. U.S., 517 U.S. 806 (1996).

2. As such, reasonable suspicion of a traffic violation will not support a traffic stop. *Contra* State v. Allen, 978 So.2d 254 (Fla. 2nd DCA 2008) (Court relied on two pre-Holland cases in holding that reasonable suspicion of speeding can justify a traffic stop.)

3. Without the proper predicate laid for either radar or pacing, an officer's testimony that he believes a motorist was speeding based on following the vehicle and familiarity with the speeds of vehicles on a particular road will not give an officer probable cause to stop a motorist for speeding. State v. Negron, 15 Fla. L. Weekly Supp. 727a (13th Cir. Hillsborough Cty Ct., April 14, 2008). *See also*, State v. Sparks, 17 Fla. L. Weekly Supp. 39a (15th Cir. Palm Beach Cty. Ct., October 15, 2009); State v. Bowery, 13 Fla. L. Weekly Supp. 345a (4th Cir. Duval Cty. Ct., December 5, 2005); and State v. Paolini, 13 Fla. L. Weekly Supp. 607a (4th Cir. Duval Cty. Ct., March 15, 2006).

4. Therefore, while Deputy Hajj alleges that he was able to radar Defendant's speed, at the hearing on this Motion, the proper predicate for this evidence must be laid or testimony of Defendant's speed should not be considered for probable cause for the traffic stop. Without sufficient evidence of speeding, the traffic stop on that basis was illegal and everything subsequent to the stop must be suppressed.

5. Additionally, Fla. Stat. § 316.089 requires that a vehicle should be driven a nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

6. As referenced previously, the objective test is used to determine whether a traffic stop is reasonable. "When applying the objective test, generally the only determination to be made is whether probable cause existed for the stop in question." Holland v. State, 696 So. 2d 757, 759 (Fla. 1997). A violation of traffic law provides sufficient probable cause to make the subsequent search and seizure reasonable. Whren v. United States, 517 U.S. 806 (1996).

7. The failure to maintain a single lane must create some sort of danger to the driver or other traffic in order to justify a traffic stop. Jordan v. State, 831 So. 2d 1241, 1243 (Fla. 5th DCA 2002). *See also* Hurd v. State, 958 So.2d 600(Fla. 4th DCA 2007). The driver's conduct must establish a reasonable safety concern. Crooks v. State, 710 So. 2d 1041, 1043 (Fla. 2d DCA 1998). There is no evidence of danger to Defendant or other traffic in this case. *See also* State v. Townley, 6 Fla. L. Weekly Supp. 531a (Cir. Ct. 9th Cir., May 17, 1999); State v. Pierce, 15 Fla. L. Weekly Supp. 614a (Volusia Cty. Ct. 7th Cir., April 14, 2008).

8. While Deputy Hajj indicates in his report that another vehicle applied its brakes shortly after Defendant's vehicle enter its lane without signaling, this does not necessarily mean that Defendant's movement was not made safely. As such, there is no evidence that Defendant violated Fla. Stat. 316.089.

9. Therefore, the traffic stop on this basis is also illegal and all evidence discovered subsequent to the stop must be suppressed.

10. "The right 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 persons or things to be seized." U.S. Const., Amendment 4.

11. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution. Fla. Const. Art. I, Section 12.

12. Once the defendant shows that evidence was obtained without a warrant, the burden shifts to the State to justify the warrantless search and seizure. State v. Morsman, 394 So. 2d 408, 410 (Fla. 1981); accord Forrester v. State, 565 So. 2d 391, 393 (Fla. 1st DCA 1990) (In the search-and-seizure context, once a defendant has established that he or she had a reasonable expectation of privacy under the circumstances, and that a warrantless search and seizure occurred, the burden shifts to the state to demonstrate that the search was reasonable-that the state was not required to obtain a warrant under the circumstances."

13. A warrantless search is per se unreasonable under the Fourth Amendment. Jorgenson v. State, 714 So. 2d 423, 426 (Fla. 1998).

14. Evidence seized during an unlawful search cannot constitute proof against the victim of the search. Wong Sun v. U.S., 371 U.S. 471, 484 (1963); see also State v. Campbell, 948 So. 2d 725, 726-27 (Fla. 2007) (Pariente, J. *concurring*) ("This case involves a warrantless search and seizure, a situation in which evidence obtained in violation of the Fourth Amendment remains subject to suppression as "fruit of the poisonous tree" under Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), and its progeny. In the absence of a probable cause determination by a detached magistrate, exclusion of evidence continues to vindicate persons' entitlement to the shield against government intrusion provided by the Fourth Amendment.")

15. Following an illegal traffic stop, evidence of the identity of the Defendant is suppressible as well. Delafield v. State, 777 So. 2d 1020, 1021 (Fla. 2d DCA 2000).

II. Lack of Reasonable Suspicion to Request Field Sobriety Exercises

16. Even assuming a valid detention at this point in the investigation, Deputy Hajj lacked the requisite level of suspicion of impairment to request Defendant to perform field sobriety exercises.

17. If an officer does not possess reasonable suspicion of impairment, they *cannot request* a suspect to perform field sobriety exercises. If an officer possesses reasonable suspicion of impairment, then can *request* performance of field sobriety exercises but they cannot compel performance. Where an officer possesses probable cause of driving under the influence, an officer can *compel* performance of field sobriety exercises. State v. Carney, 14 Fla. L. Weekly Supp. 287a (Hillsborough Cty. Ct., 13th Cir., December 7, 2006).

18. Deputy Hajj, upon contact with Defendant, allegedly observed an odor of an alcoholic beverage, red/glassy eyes, and slurred speech. These observations alone do not rise to the level of reasonable suspicion. State v. Negron, 15 Fla. L. Weekly Supp. 727a (13th Cir. Hillsborough County, April 14, 2008); *Contra* State v. Ameqrane, 39 So.3d 339 (Fla. 2nd DCA 2010) (speeding at 4 a.m. along with odor of alcoholic beverage, bloodshot, glassy eyes, and poor performance on HGN examination provided reasonable suspicion to ask Ameqrane to submit to further field sobriety exercises.)

19. Because Deputy Hajj lacked reasonable suspicion that Defendant drove while under the influence, Defendant could not be requested to perform field sobriety exercises. Because the request was made nonetheless, any evidence of those exercises and any evidence obtained subsequent to those performances must be suppressed.

III. Lack of Probable Cause for Arrest and Request to Take Breath Test

20. Fla. Stat. 901.15 allows for law enforcement to arrest a person when a misdemeanor has been committed in their presence or when a violation of chapter 316 has occurred in their presence or a violation of that chapter has been relayed to them by another fellow officer.

21. Fla. Stat. 316.193 is violated when a person is driving or in actual physical control of a vehicle and that person is under the influence of alcohol or controlled substances to the extent that their normal faculties are impaired.

22. Fla. Stat. 316.1932 allows for a test of a person's breath to determine its alcohol content if that person has been lawfully arrested for driving under the influence.

23. As discussed in Part II of this Motion, Deputy Hajj lacked reasonable suspicion to even request Defendant to perform Field Sobriety Exercises.

24. However, if the Court is inclined to believe the requisite level of suspicion was possessed to request FSEs, Deputy Hajj still falls short of possessing probable cause to arrest Defendant for driving under the influence even after performance of the exercises.

25. While Deputy Hajj's report indicates that Defendant performed poorly, no video evidence was obtained from the scene to verify his report. As such, it is Defendant's position that his performance was not as poor as indicated and that it did nothing to increase Deputy Hajj's suspicion level to probable cause for an arrest.

26. Furthermore, Defendant performed the HGN, which should not be considered because Deputy Hajj is not a certified drug recognition expert.

27. Therefore, even assuming Deputy Anderson possessed reasonable suspicion to request field sobriety exercises, Deputy Anderson did not possess probable cause to arrest Defendant and to request that he submit to a test of his breath. As such, any evidence obtained subsequent to the illegal arrest must be suppressed.

IV. Illegal Search of Vehicle Subsequent to Defendant's Arrest

28. After Defendant was placed under arrest and placed in the secure patrol vehicle, Deputy Hajj searched Defendant's vehicle and subsequently found an open Budweiser can of beer.

29. The search of the vehicle after Defendant was secured and placed under arrest was an illegal search pursuant to Arizona v. Gant, 129 S. Ct. 1710 (2009) because the search was not conducted while the Defendant was within reaching distance of the passenger compartment nor was there a reasonable belief that evidence related to the crime was located in the vehicle. State v. K.S., case No. 2D09-2790 (Fla. 2nd DCA 2010).

30. In Gant, police officers, after arresting, handcuffing, and securing the arrestee in the back of a patrol vehicle, searched the arrestee's vehicle discovering cocaine in the pocket of a jacket on the backseat. Id. at 1714.

31. The Court held the search unlawful, stating that "police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." Id. at 1723. Absent these justifications, a warrant, or the application of another exception to the warrant requirement, a search of an arrestee's vehicle will be unreasonable and a violation of the arrestee's Fourth Amendment right against unlawful searches. Id. at 1723-24.

32. The search incident to arrest exception to the warrant requirement was often used as a justification for this particular type of search before Gant. Id. at 1716 (stating that one exception to the general rule that searches conducted without a warrant are per se unreasonable under the Fourth Amendment is a search incident to arrest). The purpose of allowing the search incident to arrest exception to the warrant requirement is to ensure officer safety and preservation of evidence. Id.

However, as stated by the Gant Court, this justification is absent when the Arrestee is handcuffed and secured in a patrol car. Id.

33. Therefore, an officer is not justified in searching an arrestee's vehicle once they are handcuffed and placed within a secured police car because the arrestee is not within reaching distance of the passenger compartment of the vehicle. Id. Additionally, the Court stated in Gant that in many cases, such as traffic violations, there will be no reasonable basis to believe the vehicle contains relevant evidence authorizing a search. Id. at 1719.

34. Allowing police officers "to conduct a search whenever an individual is caught committing a traffic offense, when there is no good basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals." Id. at 1720.

35. In the present case, the deputies' actions amounted to a violation of the Defendant's Fourth Amendment rights against unlawful searches. Before the deputies searched the Defendant's vehicle, Defendant was placed in handcuffs and in the secured patrol vehicle, at that time the Defendant was not within reaching distance of the passenger compartment of his vehicle.

36. Additionally, the deputies were not justified in searching the Defendant's vehicle because it was not reasonable to believe that evidence of DUI was located within the vehicle. Gant, 129 S.Ct. at 1719 (stating that in many cases, such as traffic violations, there will be no reasonable basis to believe the vehicle contains relevant evidence).

V. Refusal to Provide Urine Sample for Testing

37. After the breath test, which registered a below the legal limit BAC of 0.07, Deputy Hajj requested Defendant to provide a urine sample.

38. Fla. Stat. 316.1932(a)(1)1.b states that a driver has consented to urinalysis when law enforcement has probable cause that a driver has operated a motor vehicle while under the influence of a controlled substance.

39. A breath test below the legal limit is not enough to trigger probable cause for urinalysis. In State v. Yates, 16 Fla. L. Weekly Supp. 319b (18th Cir. Ct., February 6, 2009), the defendant blew a 0.66 and 0.067, smelled of alcohol, admitted to consuming alcohol, the physical signs of impairment did not indicate drug use, and no drugs were found after a search of the vehicle. All signs pointed to alcohol impairment. Any belief that the defendant was

under the influence of a controlled substance could only be characterized as a hunch. As such, the defendant's refusal to submit to urinalysis was properly suppressed by the trial court.

40. Quite a few county and circuit courts have held similarly. State v. Mata, 14 Fla. L. Weekly Supp. 440 (17th Cir. Ct., March 12, 2007) (refusal properly suppressed where defendant blew 0.077 and 0.082, had odor of alcohol, and several indicators of impairment); State v. Hills, 16 Fla. L. Weekly Supp. 175 (Escambia Cty. Ct., November 25, 2008); State v. Desmaison, 14 Fla. L. Weekly Supp. 1060 (Dade Cty. Ct., August 23, 2007); State v. Stanis, 13 Fla. L. Weekly Supp. 997 (Volusia Cty. Ct., August 2, 2006) (defendant not required to provide urine where breath results were 0.078 and 0.075, video of SFSTs was consistent with alcohol impairment, and no other evidence of drug use).

41. This case is very similar to Yates. All of the allegations against Defendant indicate alcohol consumption. There is not a single piece of evidence of drug use. In fact, Defendant's alleged statement that he better not take the urine test because he was recently around a friend who used marijuana came *after* the request for urinalysis and *after* the implied consent reading. It is elementary that probable cause to request urinalysis must come *before* the request.

42. Without probable cause to request urine, Deputy Hajj merely had a hunch that Defendant had used drugs because of the low breath result. This is insufficient and requires suppression of Defendant's refusal.

43. Furthermore, should this Court suppress the refusal, Count Two of the Information should be dismissed for lack of evidence.

Evidence to be Suppressed

44. Any evidence or observations subsequent to the illegal traffic stop.

45. The observations and results of any field sobriety tests performed by Defendant.

46. The breath-alcohol test results.

47. Any evidence recovered subsequent to Defendant's arrest.

48. Any refusals to submit to testing.

49. Any statements made by Defendant.

WHEREFORE, Defendant respectfully requests this Court to suppress any and all observations made subsequent to the illegal seizure of Defendant, specifically but not limited to the evidence referenced in paragraphs 44 through 49 of this Motion.

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Suppress was furnished to the Office of the State Attorney, 419 N. Pierce St., Tampa, Florida 33602, by U.S. mail on this 7th day of June, 2011.

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