IN THE COUNTY COURT OF THE THIRTEENTH JUDICIAL CIRCUIT, IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA
County Criminal

STATE OF FLORIDA,
Plaintiff,

Case No. CT-009283-XEF
Division A

v.

NASHON OMANWA,
Defendant.
_________________________/

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

COMES NOW, Defendant, NASHON OMANWA, 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, and refusal to submit to breath test subsequent to the illegal arrest and seizure of Defendant. As grounds therefore, Defendant would show:

Facts

1. On February 19, 2011, Officer Raymond Fernandez stopped Defendant at approximately 3:17 a.m. for allegedly speeding and weaving between lanes to pass vehicles. Defendant pulled over his vehicle in a timely and proper fashion.
2. Officer Fernandez did not get Defendant's speed on radar and his vehicle is not calibrated to ensure that it accurately reflects the speed actually traveled.
3. Subsequent to the traffic stop, Officer Fernandez came into contact with Defendant and allegedly noticed an odor of an alcoholic beverage emanating from Defendant's breath and glassy, bloodshot eyes. Officer Fernandez also alleges that Defendant admitted to drinking but Defendant did not say how much or when it was consumed.
4. Officer Fernandez then requested a DUI unit to respond and Officer Ferdinand Barbosa responded some time later.
5. Officer Ferdinand allegedly noticed the odor of an alcoholic beverage emitting from Defendant's breath, that he had glassy, bloodshot eyes, and Defendant admitted to consuming alcohol.
6. Officer Barbosa had Defendant perform an HGN examination, walk-and-turn exercise, one-leg-stand exercise, finger-to-nose exercise, alphabet recital, and count-backwards exercises. The video shows Defendant performing well on these exercises.

7. Officer Babosa is not a drug recognition expert.

8. Defendant was subsequently arrested and refused to submit to a test of his breath.

I. The Traffic Stop

9. 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).

10. 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.)

11. 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).

12. Therefore, because Officer Fernandez only visually estimated Defendant's speed, the traffic stop on that basis was illegal and everything subsequent to the stop must be suppressed.

13. 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.

14. 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).

15. 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).

16. Officer Fernandez testified at the Formal Review Hearing that no vehicle reacted to Defendant's alleged swerving between lanes. As such, there is no evidence that Defendant violated Fla. Stat. 316.089 because the movement was made safely.

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

18. "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.

19. 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.

20. 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."

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

22. 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.")

23. 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. Illegal Detention Awaiting DUI Investigator

24. The law is clear that a person may not be detained on a traffic stop for any longer than necessary to issue a traffic citation. Creswell v. State, 564 So.2d 480 (Fla. 1990).

25. At the time Officer Fernandez requested the DUI unit to respond, Officer Fernandez did not have probable cause that Defendant was driving while impaired. The only clues of impairment were, allegedly, odor of an alcoholic beverage, bloodshot, watery eyes, and an admission of drinking. Officer Fernandez did not note soiled clothing, fumbling fingers, slurred speech, thinck tongue, abusive language, difficulty exiting the vehicle, inability to maintain balance, or any other traditional clues of alcohol impairment in his report.

26. It should have taken Officer Fernandez no longer than five minutes to issue a traffic citation for the alleged speeding and failure to maintain a lane. It took Officer Barbosa more time to arrive at the scene that it would have taken Officer Fernandez to issue the citation(s).

27. Therefore, the seizure of Defendant subsequent to the time necessary to issue the citation was illegal. State v. Schepp, 16 Fla. L. Weekly Supp.766a (Sarasota Cty. Ct., 12th Circuit, December 12, 2008) (detention for a couple of minutes while awaiting arrival of DUI unit unreasonable where investigation had ceased and

defendant detained longer than necessary to confirm or dispel suspicion of DUI); *see also* Fla. Stat. § 901.151 (2010); Whitfield v. State, 33 So.3d 787 (Fla. 5th DCA 2010) (any delay after a reasonable time to complete the traffic stop is illegal).

28. Because of the illegal seizure, all evidence subsequent to that event should be suppressed.

III. Lack of Reasonable Suspicion to Request Field Sobriety Exercises

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

30. 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).

31. Officer Barbosa, upon contact with Defendant, allegedly observed an odor of an alcoholic beverage, watery eyes, and Defendant allegedly admitted to consuming some alcohol, but he did not say how much or when it was consumed. 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.)

32. Because Officer Barbosa 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.

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

33. 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.

34. 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.

35. 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.

36. As discussed in Part III of this Motion, Officer Barbosa lacked reasonable suspicion to even request Defendant to perform Field Sobriety Exercises.

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

38. Defendant's performance of the exercises did nothing to increase Officer Barbosa's suspicion level from reasonable to probable cause.

39. Defendant performed the HGN, which should not be considered because Officer Barbosa is not a certified drug recognition expert, walk and turn, one leg stand, finger-to-nose, alphabet recital, and backwards counting.

40. On the walk and turn, Defendant had a slight fall of the line, made an improper turn, and allegedly took too few steps. However, his balance is great throughout most of the exercise.

41. On the one leg stand, Defendant only allegedly swayed slightly while balancing.

42. On the finger-to-nose, Defendant only allegedly missed once.

43. One the alphabet test, Defendant recited it perfectly but allegedly swayed during the recital.

44. On the count backwards test, Defendant counted back from 100 to 75 perfectly but, again, allegedly swayed during the exercise.

45. Therefore, even assuming Officer Barbosa possessed reasonable suspicion to request field sobriety exercises, he did not possess probable cause to arrest Defendant and to request that he submit to a test of his breath.

46. As such, any evidence obtained subsequent to the illegal arrest must be suppressed.

V. Evidence to be Suppressed

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

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

49. The refusal to submit to the breath-alcohol test.

50. Any statements made by Defendant subsequent to the time necessary to issue a traffic citation.

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 48 through 50 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 11th day of May, 2011.

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