IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

APPELLATE CASE NO: CJAP 07-35
LOWER COURT CASE NO: 48-CT-1229-O

STATE OF FLORIDA,
Appellant,

vs.

JAIME SANTIAGO,
Appellee.
_____/

Appeal from the County Court for Orange County, Florida,
Maureen A. Bell, County Court Judge

Lawson Lamar, State Attorney,
Abigail Forrester Jorandby, Assistant State Attorney,
for Appellant

Neal T. McShane, Esquire,
for Appellee

Before LAUTEN, G. ADAMS, WATTLES, J.J.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT

The State (herein "Appellant") appeals the court's suppression of evidence after a motion hearing on May 2, 2007. We reverse.

Orlando Police Department ("OPD") Officer Varela ("Varela") responded to a car accident in which Appellee had rear-ended another car that in turn rear-ended a second car. Appellee attempted to flee the scene but the occupants in the other two vehicles stopped him. When Varela approached Appellee, he observed a strong odor of alcohol

coming from him, that he had red and bloodshot eyes and that his speech was slurred. At this point, Varela called OPD Officer Schellhorn ("Schellhorn") to the scene.

When Schellhorn arrived, Varela shared his observations. Schellhorn then approached Appellee and observed that he smelled like alcohol, that his eyes were bloodshot and glassy and that he wore a "bar band" on his wrist. He asked Appellee if he was injured and he said, "no;" he asked Appellee what was going on and he said that he had been involved in an accident. The odor of alcohol increased as he spoke with slow, slurred speech. Schellhorn then advised Appellee that Varela's crash investigation had ended and that he was commencing a DUI investigation. Schellhorn then advised Appellee of his *Miranda* rights using a prepared card. "The defendant verbally indicated that he understood his rights." Schellhorn asked him how much he had had to drink and he replied 4 or 5 beers. Schellhorn told him about his observations and then asked him if he would submit to some field sobriety exercises, and Appellee stated that he would.

After Appellee performed four exercises, Schellhorn arrested him. He transported him to the DUI Testing Center and read implied consent; Appellee produced three samples reading 0.288, 0.315 and 0.319.

Appellee filed numerous pre-trial motions, including a "Motion to Suppress--- Accident Report Privilege No Waiver of Miranda." In it he argues that all evidence ("any and all statements or admissions made by the Defendant; the field sobriety exercises; all aspects of the breath test and said results; all observations of all law enforcement personnel; and the videotape of the Defendant...") gathered by law enforcement after Schellhorn advised him of his *Miranda* warnings is inadmissible because he never

waived his rights. The court granted the motion after it conducted a hearing on May 2, 2007. It held,

> From the facts presented it is not clear that the defendant was advised that a criminal investigation had commenced. Further, this matter involved a motor vehicle accident as distinguished from a routine stop for a traffic infraction. The state failed to meet its burden, by the preponderance of evidence, that the defendant knowingly and voluntarily waived his Miranda rights.

This timely appeal follows.

Appellant argues that the trial court erred because *Miranda* does not require a *per se* express written or oral statement of a waiver. Rather, a court must consider the facts and circumstances of the case, including the background, experience and conduct of the accused. Here, given the totality of circumstances, Appellee knowingly and voluntarily waived his *Miranda* rights.

Appellee answers by citing the trial court's opinion and reiterating that he did not voluntarily, knowingly and intelligently waive his *Miranda* rights.

The reviewing court must approach mixed questions of law and fact that "ultimately determine" constitutional rights using a two-step approach. *Connor v. State*, 803 So. 2d 598, 605 (Fla. 2001). The appellate court shall defer to the trial court on questions of historical fact but conduct a de novo review of the constitutional issue. *Id.* The appellate court therefore independently reviews the trial court's determination of whether or not the defendant waived his *Miranda* rights. *See id.* at 606-607.

When determining whether or not the defendant waived his *Miranda* rights, the court must look to the totality of the circumstances. *Bevel v. State*, 983 So. 2d 505, 515 (Fla. 2008). The State must show by the preponderance of the evidence that the defendant knowingly, intelligently and voluntarily waived his *Miranda* rights. *Id.* at 516.

Subsections 316.066 (1) and (2), Florida Statutes require the driver of a vehicle to make a written report of a crash if it involves bodily injury, the death of a human being, or property damage of at least $500. §§ 316.066 (1) and (2), Fla. Stat. (2007). Any statements made by a defendant to law enforcement in compliance with that requirement cannot be used against him in either a civil or criminal proceeding unless and until the officer (a) advises him that the crash investigation has become a criminal investigation and (b) advises him of his *Miranda* rights. § 316.066 (4) Fla. Stat. (2007); *see State v. Marshall*, 695 So. 2d 686, 686 (Fla. 1997); *Norstrom v. State*, 613 So. 2d 437, 440-441 (Fla. 1993); *State v. Cino*, 931 So. 2d 164, 167-168 (Fla. 5th DCA 2006). The purpose of the accident report privilege is to ensure that the State does not violate an individual's constitutional right against self-incrimination when he is compelled to truthfully report the facts concerning a crash to law enforcement. *Norstrom*, 613 So. 2d at 440; *Cino*, 931 So. 2d at 168.

State v. Norstrom is an instructive case. Its (relevant) fact pattern is analogous to this situation. In *Norstrom*, as in this case, the law enforcement officer told the defendant that she (he in this case) was changing hats and that the accident investigation was turning into a criminal investigation; she also advised him of his *Miranda* rights and confirmed that he understood.[1] 613 So. 2d at 439. There, as here, the officer did not tell the defendant that he was "required to answer any questions or otherwise referred to his obligation under the accident investigation statute." *Id.* The *Norstrom* court held that the

[1] Neither the officer here nor in *Norstrom* used the word "criminal." The *Norstrom* officer said "DUI charge;" here, Schellhorn said "DUI."

defendant voluntarily made his statements and that law enforcement did not violate his Fifth Amendment rights. *Id*. at 440.

Here, the relevant testimony is as follows: Schellhorn testified that when he arrived, he spoke with Varela, who informed him that Appellee might be impaired because he smelled of alcohol, his eyes were red and bloodshot and his speech was slurred. Schellhorn approached Appellee and asked him if he was injured, and he replied that he was not. Schellhorn then informed Appellee that Varela had concluded his crash investigation and he was now conducting a DUI investigation. The testimony continued,

> Q: Did he respond to that?
>
> A: I don't remember him saying anything specific, but I then went in---went into telling him that I was going to advise him his---his Miranda rights, prior to asking him any questions.
>
> Q: And did you advise him of his Miranda rights?
>
> A: Yes, sir, I did.
>
> Q: Did he indicate that he understood those rights?
>
> A: Yes.
>
> Q: And what did you do after that?
>
> A: I---I told him of Officer Varela's observations of him, I told him of my own observations of him, and I asked him to consent to field sobriety exercises.
>
> Q: And did he respond to that?
>
> A: He stated---he said he would.

On cross-examination, Appellee asked Schellhorn more specifics about the *Miranda* warnings:

Q: …And when you read him his rights, the State asked---the standard rights, you have the right to remain silent, anything you say can be used against you, or anything like that?

A: Yes.

Q: State asked you did he understand and I think you indicated, yes.

A: Yes.

Q: Did you ever specifically ask him, though, if he was waiving his *Miranda* rights? Specifically ask him if he was giving up his *Miranda* rights; did you ever specifically ask him to do that? Say, Mr. Santiago, knowing---I've read you your rights, you now understand your rights. I'm now asking you to waive those rights and to give up those rights, because I didn't see that part in the police report?

A: I just asked him if---if anybody had threatened him in any way or promised him anything to get him…

Q: Right.

A: …to talk to me.

Q: Right. And---and that's part of the card---part of it and everything?

A: Yes.

Q: Okay. But does the OPD card deal with the specificity of waiver and---and giving up those rights, or just giving of the rights and the understand the rights?

A: I'd have to look at it, but I don't believe that it does.

Q: Okay. You can look at it. I mean, I don't think…(Pause) Did you read directly from the card?

A: Yes, sir. (Pause)

Q: …Okay. Did you ever ask him for an express waiver? It said at the bottom if express waiver is desired. You never asked him for an express waiver?

A: No, probably not.

On re-direct, Schellhorn stated that OPD issued the *Miranda* card and he uses it whenever he Mirandizes a defendant. The hearing ended after the parties discussed

Schellhorn's reading of *Miranda*; it did not include any testimony about the field sobriety exercises or the breath test.

In *Norstrom*, the same officer asked questions regarding both the accident and the DUI investigation; here, Appellee spoke with separate officers: one for the crash and the other for the DUI, further diminishing the likelihood that he felt compelled to answer questions pursuant to an accident report. The accident report privilege is not applicable because neither Norstrom nor Appellee were told that he had to respond to the questions asked by the officers and they both were given their *Miranda* rights. *Norstrom*, 613 So. 2d at 440.

Most importantly, Appellant showed by a preponderance of the evidence that Appellee's waiver was knowing and voluntary. The Court must make two determinations: first, it must ascertain if the waiver was voluntary, i.e. "the product of free and deliberate choice rather than intimidation, coercion, or deception." *Sliney v. State*, 699 So. 2d 662, 668 (Fla. 1997). Second, the Court must determine whether the waiver "was executed with a full awareness of the nature of the rights being abandoned and the consequences of their abandonment." *Id*. When determining the validity of a waiver, the Court must use a "totality-of-the-circumstances" analysis. *Id*. Lastly, an unsigned waiver form does not necessarily equate to a failure to waive *Miranda* rights. *Id.*

Neither party disputes that Schellhorn read Appellee his *Miranda* rights. Additionally, neither party disputes that he understood them. The record does not suggest any type of intimidation, coercion, or deception by Schellhorn (or Varela). Furthermore, the record does not reflect that Appellee made any indication to Schellhorn

that he wanted to stop talking or that he wanted to speak with a lawyer. From the totality of the circumstances, Appellant showed by a preponderance of the evidence that Appellee made a free and deliberate choice with an awareness of the rights he was abandoning.

The trial court erred when it suppressed all the evidence gathered by law enforcement after Schellhorn advised Appellee of his *Miranda* rights.

Based on the foregoing, it is **ORDERED AND ADJUDGED** that the trial court's order is hereby **REVERSED.** The case is **REMANDED** for further proceedings consistent with this opinion.

DONE AND ORDERED on this __27__ day of ____August_____ 2008.

__/S/_____
FREDERICK J. LAUTEN
Circuit Court Judge

__/S/_____
GAIL ADAMS
Circuit Court Judge

_/S/_____
BOB WATTLES
Circuit Court Judge

Certificate of Service

I hereby certify that a copy of the foregoing Final Order Reversing Trial Court has been provided to **Assistant State Attorney Abigail Forrester Jorandby**, 415 North Orange Avenue, Orlando, Florida, 32801 and **Neal T. McShane, Esq.,** 836 North Highland Avenue, Orlando, Florida, 32803, this _28___ day of _August_____ 2008.

____/S/_____
Judicial Assistant