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

STATE OF FLORIDA,

Appellant,

vs.

EDWARD BURKE,

Appellee.
_____/

APPELLATE CASE NO.: CJAP 07-60
LOWER CT. CASE NO.: 48-2007-CT-1034-E

Appeal from the County Court
for Orange County, Florida
Faye Allen, County Court Judge

Abigail F. Jorandby
Assistant State Attorney
for Appellant.

William Direnzo, Esquire
for Appellee.

Before MIHOK, BRONSON, and FLEMING, J.J.

FINAL ORDER AND OPINION REVERSING TRIAL COURT

This is an appeal by the State of Florida (herein "State"), challenging the trial court's order granting the Motion to Suppress the Pre-Arrest Field Sobriety Tests filed by Edward Shannon Burke (herein "Appellee"). After reviewing the briefs, the trial court record, and the applicable law, this Court reverses the trial court's decision.

At approximately 2:39 a.m. on Sunday, July 15, 2007, Officer Mark Dawkins was on routine patrol when he noticed the Appellee's white Chevy Suburban idling in the driveway of 249 Blossom Lane. Officer Dawkins' attention was drawn to the vehicle because its lights were on and the engine was racing. It was the only vehicle parked in the driveway. Officer Dawkins parked his vehicle and went to investigate. As he approached the passenger's side of the vehicle, Officer Dawkins observed the Appellee seated upright behind the wheel with his head down as if he were asleep. By looking in on the driver's side of the vehicle, he was able to observe the vehicle's tachometer, which showed the motor running at 4,500 RPM. Officer's Dawkins was afraid that if he knocked on the glass of the vehicle and woke up the Appellee that the vehicle could be put into gear and race forward crashing through the garage or backward into another residence. In light of these concerns, back-up officer Michael Bishop arrived and strategically placed his patrol car behind the Appellee's vehicle in order to prevent it from going backwards

and injuring others. Officer Dawkins then tapped on the driver's side window. The Appellee jerked up, and the engine began to race even faster. At that point, Sergeant Biles opened the passenger side door, immediately reached in the vehicle, grabbed the keys, turned the ignition off and pulled the keys from the ignition. Officer Dawkins asked the Appellee to open his door and he complied. He then requested to see the Appellee's identification. The Appellee looked confused, but began patting himself around the middle of his torso presumably looking for his wallet. After the Appellee did not find his wallet by patting himself down, the Appellee stepped out of the vehicle. The Appellee was shuffling his feet back and forth and appeared unsteady on his feet. When the Appellee spoke to Officer Dawkins, who was approximately four feet away from the Appellee, Officer Dawkins "could readily discern a moderate odor of alcohol on his breath." The Appellee eventually located his wallet in his right rear pocket, but he continued searching his pocket. After Officer Dawkins suggested that the Appellee look in his wallet for his driver's license, the Appellee opened up his wallet and his license was readily visible. Officer Dawkins asked the Appellee whether he had been drinking and the Appellee replied that he had been drinking earlier. Based upon Officer Dawkins observations and the Appellee's statement, Officer Dawkins informed the Appellee that "given the circumstances, it would be necessary for him to perform a series of field sobriety exercises to determine if he was impaired." Following the Appellee's performance of the field sobriety tests, Officer Dawkins placed the Appellee under arrest for Driving Under the Influence in violation of section 316.193, Florida Statutes (2007).

The Appellee subsequently filed a Motion to Suppress Pre-Arrest Field Sobriety Tests. After a hearing on September 28, 2007, the trial court granted the Appellee's motion. In ruling on the motion, the trial court relied on *State v. Lynn*, 11 Fla. L. Weekly Supp. 798b (Fla. 17th Cir. Ct. Jun. 15, 2004); *State v. Earnshaw*, 14 Fla. L. Weekly Supp. 77b (Fla. Leon Cty. Ct. Oct. 12, 2006); and *State v. McKenzie*, 14 Fla. L. Weekly Supp. 472b (Fla. Nassau Cty. Ct. Mar. 5, 2007), which held that field sobriety tests are a search under the Fourth Amendment and consistent with Fourth Amendment principals, a valid consent to perform the tests is required for the search to be lawful.

The standard of review of an order ruling on a motion to suppress is mixed. The findings of fact made by the trial court are subject to the substantial competent evidence standard and the trial court's application of the law is subject to the de novo standard. *McMaster v. State*, 780 So. 2d 1026, 1028 (Fla. 5th DCA 2001). On review, the trial court's ruling is clothed with a presumption of correctness, and the evidence and all reasonable inferences drawn from it are interpreted in a manner most favorable to sustaining the ruling. *Id.*

The State does not challenge the trial court's finding that the Appellee did not voluntarily consent to the administration of the field sobriety exercises, but argues that field sobriety exercises are not voluntary. The State contends that this proposition is directly supported by *Liefert v. State*, 247 So. 2d 18 (Fla. 2d DCA 1971) wherein the court found that a driver could be required to take part in physical sobriety exercises because the officer had sufficient cause to believe that the driver had committed a crime in the operation of a motor vehicle; *State v. Whelen*, 728 So. 2d 807 (Fla. 3d DCA 1999) in which the court held that the Fourth Amendment does not require a law enforcement officer to advise a motorist of the right to refuse to perform roadside sobriety tests; and *State v. Taylor*, 648 So. 2d 701, 703 (Fla. 1995), wherein the Florida

Supreme Court found that the subject's refusal to perform the field sobriety tests when requested to do so was obtained in conformity with the Fourth Amendment because the stop was based on the officer's reasonable suspicion that criminal activity was afoot.

The Appellee asserts that the *Liefert*, *Whelen* and *Taylor* cases are distinguishable from the present case because the officers in those cases requested that the subjects perform the field sobriety tests. Additionally, the Appellee argues that the *Whelen* and *Taylor* cases support his proposition that a subject must freely and voluntarily consent to the performance of the field sobriety tests. The Appellee argues that in *Whelen*, the court, in holding that the Fourth Amendment did not require that an officer advise or warn a motorist of the right to refuse to perform the roadside sobriety exercises, reasoned: "'[I]t would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning.' *Schneckloth v. Bustamonte*, 412 U.S. 218, 231, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)…." (Emphasis added). Further, the Appellee contends that in *Taylor*, the court not only found that the subject's refusal to perform the field sobriety tests when requested to do so was obtained in conformity with the Fourth Amendment, but also that the subject's refusal "was not compelled in any way since he was given a choice whether to submit to the test or not…." *Id* at 703-704.

Field sobriety tests are subject to Fourth Amendment principals. *Whelen*, 728 So. at 811; *Taylor* at 703. Further, the administration of field sobriety tests is a search within the meaning of the Fourth Amendment because the performance allows an officer to obtain evidence that was not otherwise subject to observation and it encroaches on an individual's reasonable expectation of privacy. *State v. Nagel*, 880 P.2d 451 (Or. 1994); *Hulse v. State, Dept. of Justice, Motor Vehicle Div.*, 961 P.2d 75 (Mont.1998); *Blasi v. State*, 893 A.2d 1152 (Md. Ct. Spec. App.), *cert. denied*, 900 A.2d 751 (Md. 2006). *See also, Whelen*, 728 So. 2d at 811 ("'[I]t would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning.' *Schneckloth v. Bustamonte*, 412 U.S. 218, 231, 93. S.Ct. 2041, 36 L.Ed.2d 854 (1973)").

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated." U.S. Const. Amend. IV. The Fourth Amendment does not forbid all searches and seizures; it forbids unreasonable ones. *Skinner v. Ry. Labor Exec. Ass'n*, 489 U.S. 602, 619 (1989). Usually, a search or seizure is not reasonable unless it is accomplished pursuant to a warrant issued upon probable cause. *Id.* However, the Supreme Court has recognized certain exceptions to the general rule when "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable." *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985)). The five principal exceptions are: "(1) consent, (2) incident to a lawful arrest, (3) with probable cause to search but with exigent circumstances, (4) in hot pursuit, and (5) stop and frisk." *Gnann v. State*, 662 So. 2d 406, 408 (Fla. 2d DCA 1995). However, additional exceptions have been recognized. *See New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (finding that a school official's warrantless search of a student's purse did not violate the Fourth Amendment because the official had a reasonable suspicion that the student had violated a school rule); *Board of Education v. Earls*, 536 U.S. 822 (2002) (random drug testing of students in competitive extracurricular activities where the only result of a positive test was to bar participation in the activity, and the policy preserved non-

participation as an option for conscientious objectors); *Vernonia School District 47J v. Acton*, 515 U.S. 646 (random drug testing of student athletes in light of "the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care"); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (suspicionless drug testing of customs officials because of the "extraordinary safety and national security hazards" peculiar to their positions and their routine handling of controlled substances and their practice of carrying firearms); *Skinner v. Ry. Labor Exec. Ass'n*, 489 U.S. 602 (1989) (suspicionless drug and alcohol testing of railroad employees because they are charged with protecting life and property and voluntarily participate in a heavily regulated industry); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (warrantless, work-related searches of government employee offices based on individualized suspicion of misconduct); *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (warrantless search of a probationers home upon reasonable grounds); *Samson v. California*, 547 U.S. 843 (2006) (suspicionless search of a parolee); *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990) (sobriety checkpoints limited to brief questioning and observation because of the state's "interest in preventing drunken driving"); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (suspicionless stops limited to brief questioning and observation at "reasonably located" permanent border checkpoints). All of the exceptions to the warrant requirement are based upon whether the search was reasonable under the circumstances. Reasonableness of a search is determined "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999).

Under the "stop and frisk" exception, it is reasonable for law enforcement officers to stop and briefly detain persons suspected of criminal activity on less information than is constitutionally required for probable cause to arrest. *Terry v. Ohio*, 392 U.S. 1, 22 (1968). A law enforcement officer may even frisk the person to determine whether the person is carrying a weapon, if the officer has a reasonable suspicion that the person is armed and poses a threat to the officer or others. *See id.* at 27. The investigatory stop is justified under the Fourth Amendment if there is reasonable and articulable suspicion that the person has committed or is about to commit a crime. *Florida v. Royer*, 460 U.S. 491, 498 (1983). The scope of the detention and search must be carefully tailored to its underlying justification. *Id* at 500. The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. *Id.* The scope of the detention must be temporary and last no longer than necessary to effectuate the purposes of the stop. *Id*. Furthermore, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicions within a short period of time. *Id*.

Field sobriety tests may be analogized to the warrantless search of an individual for weapons, conducted during an investigative detention. There is indeed a significant safety concern at stake when an officer is investigating a suspected intoxicated driver, although it is not the same one as where the officer frisks the detained person for weapons. An intoxicated driver is a deadly threat to anyone sharing the highways with him or her. The peril to the public created by intoxicated drivers is so horrifyingly real that no statistical demonstration is required. *Jones v. State*, 459 So. 2d 1068, 1075 (Fla. 2d DCA 1984) (*citing State v. Olgaard*, 248 N.W.2d 392 (S.D. 1976)). The *Terry* decision clearly recognized that it is not only the officer's concern for

his own safety, but for that of others as well, that may form the basis for a reasonable search. *Terry* , 392 U.S at 24. Further, the field sobriety tests are noninvasive, short in duration and are the least intrusive means by which an officer can verify or dispel any suspicion that the individual may have been driving while intoxicated. *See Royer*, 460 U.S. at 500 ("an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."). Accordingly, it is reasonable for a law enforcement officer with reasonable suspicion that a person is operating a vehicle while under the influence of alcoholic beverages or chemical or controlled substances to require the person to perform the field sobriety tests in order to ensure public safety. This conclusion is in conformity with the Florida Supreme Court's decision in *Taylor* and the district courts opinions in *Liefert* and *Whelen*. Further, it is in accord with other jurisdictions that have considered the issue. *See Commonwealth v. Blais*, 701 N.E.2d 314 (Mass 1998); *Hulse v. State, Dept. of Justice, Motor Vehicle Div.*, 961 P.2d 75 (Mont.1998); *State v. Ferreira*, 988 P.2d 700 (Idaho Ct. App. 1999); 121 P.3d 1283 (Ariz. Ct. App. 2006); *Blasi v. State*, 893 A.2d 1152 (Md. Ct. Spec. App.), *cert. denied*, 900 A.2d 751 (Md. 2006); *State v. Royer*, 753 N.W.2d 333 (Neb. 2008); *State v. McGuigan*, ___ A.2d. ___, 2008 WL 3491526 (Vt. 2008); *State v. Buell*, 175 P.3d 216 (Idaho Ct. App. 2008). *But see, People v. Carlson*, 677 P.2d 310 (Colo. 1984); *State v. Nagel*, 880 P.2d 451 (Or. 1994).

Under the circumstances of this case, Officer Dawkins had reasonable suspicion that the Appellee was under the influence of alcohol. The Appellee was sleeping in his vehicle with the lights and engine running at 2:39 a.m. on a Sunday. The engine was racing and the Appellee had a problem locating his identification when requested to do so. The Appellee appeared unsteady on his feet and had an odor of alcohol on his breath. Additionally, the Appellee admitted that he had been drinking. Therefore, the Appellee's consent was not required for the administration of the tests to be lawful under the Fourth Amendment and the suppression of the results was improperly granted.

Based on the foregoing, it is hereby

ORDERED AND ADJUDGED that the trial court's order granting Appellee's Motion to Suppress the Pre-Arrest Field Sobriety Tests is REVERSED and this case is REMANDED for further proceedings in accordance with this decision.

DONE AND ORDERED, in Chambers, at Orlando, Orange County, Florida, this _14___ day of ___October_____, 2008.

_/S/_____
A. THOMAS MIHOK
Circuit Court Judge

__/S/_____
THEOTIS BRONSON
Circuit Court Judge

_/S/_____
JEFFREY M. FLEMING
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Abigail F. Jorandby, Assistant State Attorney, 415 N. Orange Ave., Orlando, FL 32801 and William Direnzo, Esq., Parks & Braxton, 1041 Ives Dairy Rd., Suite 137, Miami, FL 33179, this __14_____ day of ____October_____, 2008.

__/S/_____
Judicial Assistant