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

EDWARDO R. ROSA,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO: 2010-AP-09-A-O
Lower Court Case No: 2009-CT-16450-A-O
2009-CT-16452-A-O

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

Robert Wesley, Public Defender and
Justin Bleakley, Assistant Public Defender,
for Appellant

Lawson Lamar, State Attorney and
David H. Margolis, Assistant State Attorney,
for Appellee

Before POWELL, O'KANE, and ARNOLD, J.J.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT

Rosa seeks appellate review of his conviction for DUI after entry of a plea of nolo contendere, reserving his right to appeal[1] the denial of his pretrial motion to suppress evidence. This case concerns the allocation of burdens of proof in a hearing on a motion to suppress.

In the case at bar, Appellant called a single witness, a deputy sheriff. The deputy testified that he detained Rosa, directed him to perform field sobriety exercises, arrested him and had

[1]When asked by the trial judge, the prosecutor stated he had no objections to Appellant's reservation of right to appeal. We deem this to be a stipulation that the motion to suppress was legally sufficient and was dispositive.

Rosa submit to a breathalyzer test. The deputy testified that he did not have an arrest warrant or search warrant. At that point, the prosecutor declined to cross-examine the deputy or to present any evidence. The trial judge agreed with the prosecutor that because Appellant had not presented any testimony as to the invalidity of the stop or the impropriety of the field sobriety exercises, Appellant failed to carry his burden. She denied the motion.

A defendant who files a legally sufficient motion to suppress evidence has the initial burden to produce evidence demonstrating that the evidence sought to be suppressed was obtained by a search and seizure which he had standing to challenge. If conducted with a search warrant, the defendant has the burden of showing invalidity. If conducted without a warrant, the burden then shifts to and remains with the State to show its validity. *See Mann v. State*, 292 So. 2d 432 (Fla. 2d DCA 1974); *Filmon v. State*, 336 So. 2d 586 (Fla. 1976) (dissent); *Palmer v. State*, 753 So. 2d 679 (Fla. 2d DCA 2000); *Beasley v. State*, 939 So. 2d 220 (Fla. 1st DCA 2006).

Since the trial judge misallocated the burden of proof, and the State failed to establish the legality of the stop, the denial of Appellant's dispositive motion to suppress was error[2]. Consequently, appellant's conviction is **REVERSED and REMANDED with directions to grant appellant's motion to suppress.**

DONE AND ORDERED at Orlando, Florida this __28th___ day of _June____, 2012.

_/S/_____
ROM W. POWELL
Senior Judge

_/S/_____
JULIE H. O'KANE
Circuit Judge

_/S/_____
C. JEFFERY ARNOLD
Circuit Judge

[2] Where a stop is unlawful, the *Wong Sun* doctrine of "fruit of the poisonous tree" doctrine would require suppression of the officer's observations of signs of impairment, the performance of the field sobriety exercises, and the results of the breath alcohol test. *See Danielewicz v. State*, 730 So. 2d 363 (Fla. 2d DCA 1999).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing order was furnished to **Justin Bleakley, Assistant Public Defender**, 435 N. Orange Avenue, Ste. 400, Orlando, Florida 32801; **Dugald McMillan, Assistant State Attorney,** 415 N. Orange Avenue, Ste. 200, Orlando, Florida 32802-1673; and **Honorable Faye Allen**, 425 N. Orange Avenue, Orlando, Florida 32801, by mail, this __29th__ day of ___June_____, 2012.

_/S/_____
Judicial Assistant