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

APPELLATE CASE NO.: 2016-AP-000034-A-O
Lower Court Case No.: 2014-CT-008505-A-O

STATE OF FLORIDA,

Appellant,

v.

MATTHEW THOMAS O'REILLY,

Appellee.
_____/

Appeal from the County Court,
for Orange County, Florida,
Adam McGinnis, County Court Judge

Aramis D. Ayala, State Attorney, and
Daniel J. Quinn, Assistant State Attorney,
for Appellant

Matthew P. Ferry, Esquire, and
William R. Ponall, Esquire,
for Appellee

Before G. ADAMS, TYNAN, and MUNYON, J.J.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT

The State of Florida appeals the trial court's final order granting Matthew O'Reilly's ("Appellee") Motion to Suppress Evidence. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1). We reverse and remand.

On September 12, 2014, Appellee was arrested for driving under the influence ("DUI") pursuant to section 316.193(4), Florida Statutes (2014). On May 6, 2016, Appellee filed a

Motion to Suppress Evidence contesting his traffic stop, detention, and arrest. On May 31, 2016, the trial court conducted a suppression hearing. On July 11, 2016, the trial court entered an Order Granting Defendant's Motion to Suppress.

At the hearing on the Motion, Orange County Sheriff's Office Deputy Scott Danjou testified that he had worked for the Sheriff's Office for fifteen years, was a member of the aggressive driving DUI enforcement squad, and was a DUI instructor. He stated that he had conducted close to 1,200 field sobriety exercises and made over 800 DUI arrests during his tenure.

Deputy Danjou testified that at approximately 1:00 a.m. on September 12, 2014, he observed Appellee driving at "an extremely high rate of speed," and visually estimated that speed to be 90 miles per hour in a 45 mile-per-hour zone.[1] He conducted a traffic stop for a speeding infraction. When he made contact with Appellee at the driver's side window, he "immediately smelled the odor of alcohol emanating from his exhale[d] breath," and Appellee had "red, glassy eyes and dilated pupils" and slurred speech. He asked Appellee to get out of the vehicle and asked him if he had been drinking. Appellee stated he had two beers and one shot earlier. He also asked Appellee what his level of intoxication was on a scale of one to ten, and Appellee stated he was "between a four and a five." During this interaction with Appellee, he observed Appellee swaying from left to right.

Deputy Danjou then asked Appellee to perform field sobriety exercises. During the exercises, Deputy Danjou smelled a strong odor of alcohol from Appellee's breath as they stood

[1] He testified that his vehicle was equipped with, and he utilized, a radar device to determine Appellee's speed, but he did not have the daily logs from the radar unit with him at the hearing. He stated that he had training in the use of speed-measuring devices and in the estimation of vehicular speed based on visual estimations, and that he had occasion to visually estimate the speed of other vehicles thousands of times with accuracy within a five mile-per-hour variance. He testified that he had to drive approximately ninety to ninety-five miles per hour to catch up to Appellee.

about twenty to twenty-four inches apart, and Appellee continued to sway and repeatedly failed to follow his instructions. Danjou observed six out of eight clues of impairment during the walk-and-turn, and two of the four clues of impairment during both the one-leg stand and Romberg balance exercise. Danjou stated that he arrested Appellee based on Appellee's driving pattern, his personal contact with Appellee, and Appellee's execution of the field sobriety exercises.

The trial court found that there was probable cause to stop Appellee for the speeding infraction, but that there was no reasonable suspicion to perform field sobriety exercises based on the totality of the circumstances, and no probable cause to arrest Appellee based on his performance of those exercises and the totality of the circumstances, "including but not limited to the Deputies [sic] conduct in administering the field sobriety exercises." The trial court took "special concern with the Deputy's decision to use an extraordinary[il]y short piece of tape for the walk and turn."

A trial court's ruling on a motion to suppress is subject to a mixed standard of review. "An appellate court is bound by the trial court's findings of fact that are supported by competent, substantial evidence; however, the application of the law to the facts is subject to de novo review." *State v. K.N.*, 66 So. 3d 380, 384 (Fla. 5th DCA 2011) (citing *Pagan v. State*, 830 So. 2d 792, 806 (Fla. 2002)).

"To request that a driver submit to field sobriety tests, a police officer must have reasonable suspicion that the individual is driving under the influence." *State v. Ameqrane*, 39 So. 3d 339, 341 (Fla. 2d DCA 2010). "A reasonable suspicion 'has a factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer's knowledge and experience.'" *State v. Castaneda*, 79 So. 3d 41, 42 (Fla. 4th DCA 2011) (quoting *Origi v. State*, 912 So. 2d 69, 71 (Fla. 4th DCA 2005)).

"[P]robable cause sufficient to justify an arrest exists 'where the facts and circumstances, as analyzed from the officer's knowledge, special training and practical experience, and of which he has reasonable trustworthy information, are sufficient in themselves for a reasonable man to reach the conclusion that an offense has been committed.'" *Dep't of Highway Safety and Motor Vehicles v. Whitley*, 846 So. 2d 1163, 1165-66 (Fla. 5th DCA 2003) (quoting *Dep't of Highway Safety and Motor Vehicles v. Smith*, 687 So. 2d 30, 33 (Fla. 1st DCA 1997)).

Here, Deputy Danjou testified that Appellee was traveling approximately 90 miles per hour at around 1:00 a.m., had the odor of alcohol on his breath, had red, glassy eyes with dilated pupils, had slurred speech, swayed, and admitted to drinking alcohol and having a level of intoxication of four or five on a scale of one to ten. Thus, Deputy Danjou had reasonable suspicion that Appellee was driving under the influence. *See State v. Taylor*, 648 So. 2d 701 (Fla. 1995) (holding that staggering, slurred speech, watery, bloodshot eyes, and a strong odor of alcohol, combined with a high rate of speed on the highway, was "more than enough" to provide the officer with reasonable suspicion of DUI); *Castaneda*, 79 So. 3d at 42 (holding that speeding, an odor of alcohol, and bloodshot, watery eyes provided sufficient reasonable suspicion for a DUI investigation); *Ameqrane*, 39 So. 3d at 342 (holding that speeding at 4:00 a.m., an odor of alcohol, and glassy, bloodshot eyes provided sufficient reasonable suspicion to require field sobriety testing); *Origi*, 912 So. 2d at 71-72 (holding that traveling at a high rate of speed, an odor of alcohol, and bloodshot eyes gave rise to reasonable suspicion for a DUI investigation).

Deputy Danjou also testified that during the field sobriety exercises, he continued to smell a strong odor of alcohol from Appellee's breath when they stood about two feet apart, Appellee continued to sway and repeatedly failed to follow instructions, and he observed multiple clues of impairment during the exercises. Thus, based on the totality of the

circumstances, Deputy Danjou had probable cause to arrest Appellee for driving under the influence. *See State v. Geiss*, 70 So. 3d 642, 653 n.1 (Fla. 5th DCA 2011) ("probable cause may be found by a combination of factors, including an 'odor of alcohol on a driver's breath . . . the defendant's reckless or dangerous operation of a vehicle, slurred speech, lack of balance or dexterity, flushed face, bloodshot eyes, admissions, and poor performance on field sobriety exercises.'"); *Whitley*, 846 So. 2d at 1166 (holding that erratic driving, an odor of alcohol, glassy eyes, slurred speech, and an admission of drinking alcohol were sufficient to provide the officer with probable cause to arrest defendant for DUI).

We point out that the trial court did not make any findings of fact in its Order Granting Defendant's Motion to Suppress, other than expressing a concern for Deputy Danjou's use of duct tape to create a line for the walk-and-turn field sobriety exercise.[2] However, Danjou testified that Appellee was able to take the correct number of steps along the line and never stepped off the tape.[3] He testified that some of the issues Appellee had during the walk-and-turn were swaying while balancing, not completing proper turns, and failing to follow instructions, not that there were any issues as a result of use of the tape. And, Appellee did not raise any issues regarding use of the tape at the suppression hearing. Furthermore, the use of the tape does not change the fact that Deputy Danjou's testimony regarding his observations of Appellee provided reasonable suspicion to perform field sobriety exercises and probable cause to arrest Appellee.

[2] At the suppression hearing, the trial court stated it "concerns me a little bit that the piece of tape that he used wasn't even long enough to do the nine steps."

[3] Danjou testified that he used the duct tape to make a line because there were no lines in the parking lot, and that there were no regulations regarding the length or width of a line. Appellee told Danjou that the tape on the ground was flat, well-lit, and he could see it.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the trial court's order granting the Motion to Suppress Evidence is **REVERSED** and this cause is **REMANDED** for further proceedings.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this _____ day of _____, 2017.

/S/_____
GAIL A. ADAMS
Presiding Circuit Judge

TYNAN and MUNYON, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was furnished to: **The Honorable Adam McGinnis**, Orange County Booking and Release Center, 3855 South John Young Parkway, Orlando, Florida 32839; **Daniel J. Quinn, Assistant State Attorney**, dquinn@sao9.org, 415 North Orange Avenue, Suite 200, Orlando, Florida 32801; **Matthew P. Ferry, Esquire**, matt@lindseyandferry.com, Lindsey & Ferry, P.A., 1150 Louisiana Avenue, Suite 2, Winter Park, Florida 32789; and to **William R. Ponall, Esquire**, ponallb@criminaldefenselaw.com, Ponall Law, 253 North Orlando Avenue, Suite 201, Maitland, Florida 32751, on this ____ day of _____, 2017.

_____
Judicial Assistant