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

CASE NO: 2014-AP-88-A-O
Lower Case No.: 2014-CT-7383-A-O

STATE OF FLORIDA,

Appellant,

v.

JORGE OCASIO,

Appellee.

_____/

Appeal from the County Court for Orange County,
Steve Jewett, County Court Judge

Jeffrey L. Ashton, State Attorney, Stacy G. Fallon,
Assistant State Attorney, for Appellant

Stuart I. Hyman, Esquire, for Appellee

Before WHITEHEAD, J. KEST, MYERS, JJ.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT

The State appeals the trial court's order suppressing Appellee's refusal to submit to field sobriety tests, finding no probable cause to arrest Appellee for driving under the influence, and suppressing Appellee's refusal to submit to a breath test.

Facts and Procedural History

At approximately 4:30 a.m. on August 12, 2014, Deputy Rene Davila of the Orange County Sheriff's Office responded to a call of a "man down" at the intersection of Somersby and Bridgewater Crossing Boulevard. When he arrived, Deputy Davila saw a vehicle parked diagonally, blocking the road, almost hitting another vehicle. The driver was in the vehicle,

which was running. Deputy Davila spoke with Lieutenant Suarez of the fire department who told him that he (Suarez) originally responded to Ancilla and Bridgewater Crossing. Suarez attempted to make contact with the driver of the vehicle, but the driver started to drive away. Lieutenant Suarez followed. The Lieutenant told Deputy Davila that the driver was driving in a zig-zag pattern, unable to maintain a single lane and almost struck other vehicles parked on the left side of the road. However, the vehicle did not strike any other vehicles and the firemen decided to wait for the Orange County Deputies to arrive on-scene before making contact with the driver.

When Deputy Davila approached Appellee, along with Deputy Hernandez who was already on scene, the car was in drive and Deputy Hernandez asked Appellee to put it into park. Deputy Davila heard Deputy Hernandez ask Appellee if he needed any medical assistance, and noticed that Appellee's speech was "somewhat slurred."

On cross-examination, Deputy Davila stated that when he wrote his statement, he never wrote that he observed any slurred speech by Appellee. Further, he did not observe any odor of alcohol although he stood within a foot or so of Appellee. Deputy Davila did not observe bloodshot or red eyes, nor did he observe Appellee having any difficulty exiting the vehicle.

Deputy Hernandez testified that on August 12, 2014, around 4 a.m., he responded to a call at Bridgewater Crossing and Ancilla Boulevard. The call was for a well-being check on a male who was slumped over a steering wheel. When Deputy Hernandez arrived on-scene, he saw a black Infiniti parked along the road "on incoming traffic, not in its own lane…" at an angle. Appellee's vehicle was approximately two feet from a parked vehicle on the opposite side of the road.

Deputy Hernandez could see that the vehicle was on because he could see the exhaust. When he made contact with the driver, the key was in the car's ignition and in the drive position. Appellee was in the driver's seat, slumped over, and unresponsive until the Deputy shined his flashlight into Appellee's face. Appellee responded to the flashlight "very slow." Deputy Hernandez recognized the odor of alcohol coming from inside the vehicle, and observed that Appellee's eyes were bloodshot. When the Deputy asked Appellee to put the car into park, it took Appellee several attempts to figure out what the deputy was saying and to comply.

Deputy Hernandez asked Appellee if he'd had anything to drink and Appellee stated that he'd had two alcoholic drinks. At that point, the Deputy asked Appellee to get out of the car, which Appellee did slowly. After Appellee exited the car, Deputy Hernandez made contact with Lieutenant Suarez. This was approximately 15 or 20 minutes after the Deputy had arrived on scene. The Lieutenant told Deputy Hernandez that when he (Suarez) arrived, he observed the vehicle in motion, in a left to right pattern, unable to maintain his lane.

After Appellee was medically cleared by fire and rescue, Deputy Hernandez asked him where he was coming from. Appellee stated that was coming from a concert and was going to drop off a friend. The Deputy noticed that Appellee's speech was "very slow and slurry" and there was a smell of alcohol. Deputy Hernandez asked Appellee to perform field sobriety exercises and Appellee declined. At that point, Deputy Hernandez informed Appellee that based on his observations, Appellee would be placed under arrest.

Deputy Hernandez based his decision to arrest Appellee on how the vehicle was parked, the odor of alcohol, Appellee's eyes, Appellee being behind the steering wheel, the statement of Lieutenant Suarez, and Appellee's refusal to perform field sobriety tests.

The Deputy arrested Appellee for DUI, and took him to the DUI Center, where he read Appellee implied consent and asked him to provide a breath sample. Appellee refused to do so.

On cross-examination, Deputy Hernandez stated that he did not personally have contact with Lieutenant Suarez, Deputy Davila did. Additionally, on re-cross, Deputy Hernandez conceded that nowhere in his report did it indicate that he had spoken with Deputy Davila regarding what Lieutenant Suarez told Deputy Davila.

Once Appellee had been medically cleared by fire and rescue, Deputy Hernandez did not tell him he was free to go. The Deputy started an investigation and Appellee was not free to leave at that point. Although Deputy Hernandez described Appellee's speech as "slurred" on direct examination, he conceded on cross that in his report he describe the speech merely as "slow."

Once Appellee declined to perform field sobriety tests, Deputy Hernandez informed him that he was going to be arrested. He did not give Appellee a second opportunity to perform the tests after informing Appellee that he would be arrested.

Standard of Review

A mixed standard of review applies to a trial court's ruling on a motion to suppress. While the trial court's determination of facts is afforded a presumption of correctness, its findings are reversible if they are not supported by competent, substantial evidence in the records. *State v. Amegrane*, 39 So. 3d 339, 340-41 (Fla. 2d DCA 2010); *State v. Garcia*, 866 So. 2d 124, 126 (Fla. 4th DCA 2004) ("Rulings based on purely factual questions are clothed with a presumption of correctness, but must be supported by substantial competent evidence.")

However, the trial court's "determination on mixed questions of law and fact and its legal conclusions are subject to de novo review." *Id.*

Analysis

The court found that based on the odor of alcohol, the slowness of Appellee's speech, and his bloodshot eyes, Deputy Hernandez asked Appellee to participate in field sobriety exercises. When Appellee refused, the Deputy indicated that he was then going to arrest Appellee. The court found that this was not sufficient "as far as the requirements that the deputy let him know that if he does not take part in those then all he can do is base his decision to arrest on that. Doesn't give the defendant the proper indication as to whether or not there's a safe harbor there. And so therefore, I'm not going to consider the refusal of the field sobriety exercises to do that. And --- oh, I'll suppress that."

The court noted that while there was testimony that Appellee was driving in a zig-zag pattern, it could have been back and forth one time or 20 times. There was no witness to testify as to that. Additionally, although there was testimony regarding the driving pattern, the bloodshot eyes, and the odor of alcohol, there was no testimony of weaving, fumbling with things: nothing to actually indicate impairment.

The court found that without consideration of the refusal to participate in field sobriety exercises, there was no sufficient probable cause for an arrest at that time. Thus, the court also suppressed the refusal to submit to a breath test.

Findings

The court erred in finding that the deputy did not give Appellee sufficient warning that if he did not participate in field sobriety exercises he would be arrested. The law does not require such a warning.

Section 316.1932(1)(a)1.a., Florida Statues provides, in part:

> The person shall be told that his or her failure to submit to any lawful test of his or her breath will result in the suspension of the person's privilege to operate a motor vehicle for a period of 1 year for a first refusal, or for a period of 18 months if the driving privilege of such person has been previously suspended as a result of a refusal to submit to such a test or tests, and shall also be told that if he or she refuses to submit to a lawful test of his or her breath and his or her driving privilege has been previously suspended for a prior refusal to submit to a lawful test of his or her breath, urine, or blood, he or she commits a misdemeanor in addition to any other penalties.

However, there is no comparable requirement when an officer requests a defendant to engage in field sobriety exercises.

The trial court found that once the refusal to participate in field sobriety exercises was removed from the equation, all the Deputy had left was a zig-zag pattern of driving, bloodshot eyes, and the odor of alcohol. The court found that this was insufficient probable cause for arrest. Thus, the refusal to take the breath test was also suppressed.

However, the court relied on a mistake of law regarding the need to warn a defendant of the consequences of the refusal to submit to field sobriety exercises. "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) An arrest for driving under the influence (DUI) must be supported by probable cause. U.S. Const. Amend. IV; § 901.151(4), Fla. Stat. (2014); *Skinner v. State*, 31 So. 3d 940 (Fla. 1st DCA 2010).

"Probable cause" is "a reasonable ground of suspicion supported by circumstances strong enough in themselves to warrant a cautious person in belief that the named suspect is guilty of the offense charged." *Johnson v. State*, 660 So. 2d 648, 654 (Fla. 1995). Probable cause for a DUI arrest must arise from facts and circumstances that show a probability that a driver is

impaired by alcohol or has an unlawful amount of alcohol in his system. *State v. Kliphouse*, 771 So. 2d 16, 22 (Fla. 4th DCA 2000); see also § 316.193(1)(a), Fla. Stat. (2014).

In the instant case, the trial court erred in finding that the Deputy was required to give Appellee a warning regarding his refusal to participate in field sobriety exercises, and in suppressing the refusal for that reason. The court then found that once the refusal was eliminated from the equation, evidence of zig-zag driving, alcohol odor in Appellee's car, and bloodshot eyes did not amount to probable cause to arrest Appellee for driving under the influence. Thus, Appellee's subsequent refusal to submit to a breath test was also suppressed.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that order of the trial court is **REVERSED** and the case is **REMANDED** for the trial court to consider the issue of probable cause for arrest and the issue of suppression of Appellee's refusal to take a breath test, taking the refusal to submit to field sobriety exercises into consideration.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 29th day of October, 2015.

/S/
REGINALD WHITEHEAD
Presiding Circuit Judge

J. KEST and MYERS, JJ., concur.

Certificate of Service

I HEREBY CERTIFY that a copy of the foregoing Final Order Reversing Trial Court has been provided to **Stuart Hyman, Esquire**, 1520 E. Amelia Street, Orlando, FL 32803, and to **Stacy Fallon, Esquire**, Assistant State Attorney, 415 North Orange Avenue, Orlando, Florida 32801 this 29th day of October, 2015.

/S/
Judicial Assistant