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

APPELLATE CASE NO.: 2017-AP-000014-A-O
Lower Court Case No.: 2016-CT-001456-A-A

STATE OF FLORIDA,

Appellant,

v.

GARY PAUL SUMMERS,

Appellee.
_____/

Appeal from the County Court,
for Orange County, Florida,
Tina Caraballo, County Court Judge

Aramis D. Ayala, State Attorney, and
Carol Levin Reiss, Assistant State Attorney,
for Appellant

Rachel Harman, Assistant Public Defender,
for Appellee

Before CRANER, O'KANE, and THORPE, J.J.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT

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

On November 21, 2016, Appellee was arrested for driving under the influence ("DUI") pursuant to section 316.193(1), Florida Statutes (2016). On March 31, 2017, Appellee filed a

Motion to Suppress contesting his detention and arrest. The trial court conducted a suppression hearing on May 15, 2017. On May 17, 2017, the trial court entered an order granting the motion.

At the hearing on the Motion, Officer Bryan Voiselle testified that he had worked for the Apopka Police Department as road patrol for eight and a half years. On November 21, 2016, he received a call regarding a hit-and-run and was given a vehicle description and tag number which had been supplied by a witness to the accident. On his way to meet with the witness, he observed a vehicle matching the description of the hit-and-run vehicle. He confirmed that the vehicle was the same vehicle described over the dispatch via the tag number and conducted a traffic stop.

Officer Voiselle testified that he approached Appellee and asked him for his license and registration, and asked if he had been involved in an accident and where he was coming from. As Voiselle stood about a foot away from Appellee, he noticed that Appellee had slurred speech, bloodshot and watery eyes, the strong odor of alcohol coming from him inside the vehicle, and "couldn't answer simple questions." He could smell the alcohol even over the cigarette that Appellee was smoking. After "getting nowhere" with the questions, Voiselle returned to his car to run Appellee's license. While he was still at his car, Officers Ashley Eller and Fritz Henry arrived. He testified that he told them "the same observations" he described for the trial court - the glassy eyes, slurred speech, and odor of alcohol. Eller and Henry then made contact with Appellee.

Officer Henry testified that he responded to the traffic stop with Officer Eller and made contact with Officer Voiselle. He stated that Voiselle explained to them that he saw that Appellee had bloodshot, glassy eyes and smelled the odor of alcohol emitting from him, and that based on his observations as well as his years of training and experience Voiselle believed that

Appellee was under the influence of alcohol. Henry then approached Appellee and he also smelled a strong odor of alcohol emitting from him. Based on that odor and what Voiselle told him, he asked Appellee to step out of the vehicle. When Henry noticed that Appellee had a hard time getting out of the vehicle, staying upright, and had an orbital sway, he asked him to perform field sobriety exercises and Appellee refused. Officer Eller also asked Appellee to perform the exercises and he again refused. Appellee was then arrested for DUI.

The trial court found that neither Officer Voiselle nor Officer Henry "presented any observations that the Defendant was impaired before requesting he perform field sobriety exercises." The court determined that Officer Henry "never observed the Defendant to determine impairment prior to ordering the Defendant exit the vehicle and the information relayed by [Officer Voiselle] was not sufficient to constitute reasonable suspicion." The trial court concluded that the initial detention and arrest were unlawful.

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)). "Whether a person has

consumed sufficient alcohol to be deemed 'under the influence' . . . is a judgment call made by a police officer." *State v. Brown*, 725 So. 2d 441, 444 (Fla. 5th DCA 1999). "It must be based on objective facts and circumstances observed by the officer at the time and place of the accident, and reliable information given to the officer by others." *Id.*

"[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)).

This Court finds that the trial court's findings of fact are not supported by competent, substantial evidence. First, the trial court found that neither Officer Voiselle nor Officer Henry presented any observations that Appellee was impaired before requesting that he perform field sobriety exercises. Second, the trial court found that Officer Henry never observed Appellee to determine impairment prior to ordering him to exit the vehicle. However, Officer Voiselle testified that when he pulled Appellee over to investigate the hit-and-run accident,[1] he observed the following: Appellee had slurred speech, bloodshot and watery eyes, the strong odor of alcohol coming from him which could be smelled even over the cigarette smoke, and the inability to answer simple questions. And, Officer Henry testified that when he approached Appellee he smelled a strong odor of alcohol emitting from him. Henry stated that based on his personal observation combined with what Voiselle told him he personally observed, he believed that was sufficient to ask Appellee to step out of the vehicle, and then his observation of the

[1] Appellee did not contest the traffic stop for the hit-and-run accident at the motion to suppress hearing.

orbital sway was sufficient to ask Appellee to perform field sobriety exercises. This Court agrees.

The Court acknowledges, as argued in Appellee's brief, that more than the odor of alcohol is required to establish reasonable suspicion for a DUI investigation. *See State v. Kliphouse*, 771 So. 2d 16, 24 (Fla. 4th DCA 2000). However, this case involves much more than the mere odor of alcohol. The officers' combined observations (especially coupled with their knowledge that Appellee had been involved in a hit-and-run accident)[2] were sufficient to request that Appellee exit his vehicle and perform field sobriety exercises, and constituted a reasonable suspicion that Appellee had been driving under the influence. *See State v. Taylor*, 648 So. 2d 701, 703 (Fla. 1995) (holding that staggering, slurred speech, watery, bloodshot eyes, and a strong odor of alcohol, combined with speeding, was "more than enough" to provide the officer with reasonable suspicion of DUI); *Carder v. State*, 15 Fla. L. Weekly Supp. 547a n.2 (Fla. 9th Cir. Ct. Sept. 4, 2007) (finding that the combination of the odor of alcohol and bloodshot, glassy eyes constituted competent, substantial evidence to support the officer's request to perform field sobriety exercises, even if petitioner's speech was not slurred); *Fewell v. State*, 14 Fla. L. Weekly Supp. 704a (Fla. 9th Cir. Ct. May 14, 2007) (finding that the odor of alcohol emanating from petitioner, combined with his appearance - bloodshot eyes and sunburn - was sufficient to request that he exit his vehicle and perform field sobriety exercises); *see also Sawyer v. State*, 905 So. 2d 232, 234 (Fla. 2d DCA 2005) (an officer can arrest a person for DUI where another officer calls upon that officer for assistance and the combined observations of the two or more officers are united to establish probable cause under the fellow officer rule).

[2] *See Dep't of Highway Safety and Motor Vehicles v. Ivey*, 73 So. 3d 877, 881 (Fla. 5th DCA 2011) (the information given to the dispatcher was constructively imputed to the arresting officer).

The Court points out that Appellee argues in his answer brief that the trial court "made it very clear . . . that it did not find the testimony of the officers credible." However, a review of the trial court's order and the suppression hearing transcript shows that the court did not make any specific credibility findings.[3]

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the trial court's order granting the Motion to Suppress 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/_____
A. JAMES CRANER
Presiding Circuit Judge

O'KANE and THORPE, J.J., concur.

[3] Appellee relies in part on *State v. Hines*, 692 So. 2d 280, 281 (Fla. 5th DCA 1997) to support the proposition that an appellate court can read between the lines to assess the trial court's credibility findings where findings were not explicitly made in an order. Appellee quotes the Fifth District's ruling that the trial court must not have believed the witness's testimony since it concluded suppression was warranted. However, in that case, the trial court specifically referred to the testimony as "disingenuous." *Id.* There were *no* such findings in the instant case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was furnished to: **The Honorable Tina Caraballo**, 425 North Orange Avenue, Suite 465-B, Orlando, Florida 32801; **Carol Levin Reiss, Assistant State Attorney**, PCF@sao9.org, 415 North Orange Avenue, Suite 200, Orlando, Florida 32801; and **Rachel Harman, Assistant Public Defender**, rharman@circuit9.org, 435 North Orange Avenue, Suite 400, Orlando, Florida 32801, on this ____ day of _____, 2017.

_____
Judicial Assistant