

14 Fla. L. Weekly Supp. 472b

Criminal law -- Search and seizure -- Field sobriety exercises -- Where arresting officer was in uniform, armed and much bigger than defendant, and language used in instructing defendant to perform exercises is consistent with defendant acquiescing to apparent authority of officer, observations and testimony concerning defendant's performance on exercises is suppressed -- Observations of defendant's actions outside exercises and post-Miranda statements are admissible

STATE OF FLORIDA vs. LEVI MCKENZIE. County Court, 4th Judicial Circuit in and for Nassau County. Case No. 2006-CT-000353, Division A. March 5, 2007. Granville C. Burgess, Judge. Counsel: Sally-Anne Wilcox Brown, for State of Florida. Christopher T. Wilson, Law Office of Gary Baker, Callahan, for Levi McKenzie.

ORDER GRANTING MOTION TO SUPPRESS IN PART

THIS CAUSE, came on to be heard upon the Defendant's Motion to Suppress Evidence of Field Sobriety Exercises; counsel for the State and the Defendant having appeared and presented testimony and evidence; counsel for the parties having presented argument and case law; and, the Court being advised in the premises finds:

Deputy T. Normandin made a valid traffic stop of the defendant and noticed possible indicators of impairment. Deputy C. Arline was summoned to the scene to conduct the DUI investigation. He advised the defendant that he was under investigation for DUI, confronted the defendant with details of his suspicious driving pattern. Deputy Arline read him his Miranda Rights and ordered him to exit his vehicle. Deputy Arline stated, "What I want you to do sir is step outside the vehicle. I'm gonna have you submit to several field sobriety exercises. Come back this way." Thereafter, the defendant followed Deputy Arline to the rear of the vehicle in order to receive the deputy's instructions. The defendant then submitted to the field sobriety exercises. Deputy Arline is much bigger than the defendant and was in uniform and armed.

Field sobriety exercises are subject to Fourth Amendment principles, consistent with Fourth Amendment principles, in order to conduct a lawful search and have the defendant perform field sobriety exercises, obtaining valid consent is required. A valid consent must be voluntary, in that it requires a knowing and intelligent waiver of one's rights and must not be a submission to a claim of lawful authority. When relying on consent to establish a valid search, the State has the burden to demonstrate consent was freely and voluntarily given. There is nothing in the record to support the finding that the defendant's performance of roadside exercises was voluntary. The language used by the arresting officer in instructing the defendant to perform the exercises is consistent with the defendant's acquiescing to the apparent authority of the officer.

It is therefore, ORDERED AND ADJUDGED that:

- 1.) Any observations or testimony concerning the defendant's performance on the field exercises are suppressed.
- 2.) Any observations or testimony of the defendant's actions outside the exercises are admissible.
- 3.) Any post-Miranda statements by the defendant, including the Romberg alphabet are admissible.

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