Supreme Court of Ohio Clerk of Court - Filed February 22, 2016 - Case No. 2016-0282

IN THE SUPREME COURT OF OHIO
CASE NO.

CITY OF CLEVELAND Plaintiff-Appellant	:	On Appeal from the Eighth Appellate District, Cuyahoga County, Ohio
v.	:	Case No. 102835
BENJAMIN S. OLES Defendant-Appellee	:	

JURISDICTIONAL MEMORANDUM OF AMICUS CURIAE CUYAHOGA COUNTY PROSECUTOR'S OFFICE IN SUPPORT OF APPELLANT-CITY OF CLEVELAND

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INTRODUCTION AND STATEMENT OF INTEREST OF AMICUS CURIAE AND WHY THIS COURT SHOULD ACCEPT THIS CASE AS INVOLVING A CONSTITUTIONAL QUESTION OR ISSUE OR GREAT PUBLIC OR GENERAL INTEREST

The Cuyahoga County Prosecutor's Office, regularly prosecutes felony OVI cases, aggravated vehicular assaults and homicides, drug trafficking and possession cases and other felonies. Between 2011 and 2015, the Cuyahoga County Prosecutor's Office indicted 620 cases involving violations of R.C. 4511.19 ("OVI cases"). As of the filing of this brief, the Cuyahoga County Prosecutor's Office indicted 27 OVI cases this year. In addition to felony OVI cases, the Cuyahoga County Prosecutor's Office will prosecute misdemeanor OVI cases where the driver has caused serious physical harm to others or death to others.

The thirty-four judges of the Cuyahoga County Court of Common Pleas will be bound by the constitutional precedence established by the Eighth District Court of Appeals ("Eighth District") in *City of Cleveland v. Oles*, 8th Dist. Cuyahoga No. 102835, 2016-Ohio-23. Inevitably, felony prosecutions, including those for OVI offenses, will involve suppression motions whether they be attacks on the scientific evidence or whether they be constitutional challenges.

As a result the opinion in *City of Cleveland v. Oles*, 8th Dist. Cuyahoga No. 102835, 2016-Ohio-23 affects felony prosecutions in Cuyahoga County and limits how law enforcement may investigate traffic stops that involve individuals suspected of operating a vehicle under the influence.

The Eighth District certified a conflict in this case on the issue of whether a defendant was subjected to a custodial interrogation when the officer questioned the defendant, who had been placed in the front passenger seat of the police vehicle. According, to the Eighth District its decision is in conflict with decisions from the First, Second, Fifth, Seventh and Eleventh Appellate

Districts. The certified question as well as this jurisdictional appeal involves whether the Fourth Amendment of the United States Constitution and the analytical framework developed through both United States Supreme Court precedence and this Court's decision in *State v. Farris,* 109 Ohio St.3d 519, 2016-Ohio-3255, 849 N.E.2d 895 and considers an OVI suspect who is placed in front passenger of the a police vehicle under custodial interrogation, and if not, at what point can such an interrogation be transformed into a custodial interrogation. The other appellate districts, in applying *Farris,* have held that a defendant who is placed in a police cruiser is not necessarily under custodial interrogation. *Oles,* ¶16. The Eighth District expressly declined to adopt the holdings from these courts that distinguished *Farris*. *Id.* at ¶19.

In addition, the Amicus Curiae urges this Court to consider what the remedy would be if this Court were to agree that the defendant was under custodial interrogation and not provided *Miranda* warnings. Here, the Eighth District affirmed both the suppression of statements and the results of the field sobriety tests. Amicus Curiae submits that suppression of both the statements and the field sobriety test exceeded what the United States Constitution protects, and that there is no requirement that evidence that can stand on its own, without the taint of the evidence obtained in an unconstitutional manner, be suppressed. The Eighth District was puzzled by the officer's questioning of the defendant, noting that the officer may have had reasonable suspicion to conduct the field sobriety test after the officer's initial interaction with the defendant or at the point when the defendant was removed from the vehicle and that there was a confirmed source of alcohol odor outside the suspect vehicle. *Oles,* ¶21 citing *Cleveland v. Reese,* 8th Dist. Cuyahoga No. 100579, 2014-Ohio-3587, ¶19-20.

The Cuyahoga County Prosecutor urges this Court to accept jurisdiction in this case and to reverse the Eighth District's decision in *City of Cleveland v. Oles,* 8th Dist. Cuyahoga No. 102835,

2016-Ohio-23. Acceptance of this case is not only necessary to provide guidance but to also ensure uniformity of law across the appellate districts and to also ensure that trial courts and appellate courts do not suppress evidence in its entirety and that if suppression is necessary, that such suppression is limited to what is unconstitutional or that evidence which is completely derived from the unconstitutional evidence.

STATEMENT OF THE CASE AND FACTS

Amicus curiae adopts and incorporates by reference the Statement of the Case and Statement of the Facts as set forth by the Appellant, City of Cleveland, in its memorandum in support of jurisdiction. Further, the Eighth District provided its own summary in *City of Cleveland v. Oles*, 8th Dist. Cuyahoga No. 102835, 2016-Ohio-23, ¶1-9.

In *City of Cleveland v. Oles*, 8th Dist. Cuyahoga No. 102835, 2016-Ohio-23, ¶1-9, the Eighth District affirmed the decision of the trial court which suppressed both the statement and the field sobriety tests. The suppression of both rested upon whether Oles was under custodial interrogation. The Eighth District agreed that Oles was under custodial interrogation and that any statements had to be suppressed because Oles was not given his *Miranda* rights. In addition, the Eighth District affirmed the suppression of the field sobriety tests. *Oles*, ¶20-23. Although, affirming the judgment of the trial court, the Eighth District certified a conflict with decisions from the First, Fifth, Seventh, and Eleventh appellate districts, discussed below. The City of Cleveland did file the certified conflict in *City of Cleveland v. Benjamin S. Oles*, Sup. Ct. Case No. 2016-0172.

LAW AND ARGUMENT

AMICUS CURIAE'S PROPOSITION OF LAW I: THE MERE QUESTIONING OF A DEFENDANT IN A POLICE CRUISER DOES NOT CONVERT A TRAFFIC STOP INTO A CUSTODIAL INTERROGATION. A DEFENDANT WHO IS PLACED IN THE FRONT SEAT OF A POLICE VEHICLE FOR QUESTIONING IS NOT NECESSARILY UNDER CUSTODIAL INTERROGATION.

The Eighth District certified a conflict finding that its opinion in *City of Cleveland v. Oles,* 8th Dist. Cuyahoga No. 102835, 2016-Ohio-23 was in conflict with *State v. Leonard,* 1st Dist. Hamilton No. C-060595, 2007-Ohio-3312, *State v. Rice,* 1st Dist. Hamilton Nos. C-090071, C-090072, C-090073, 2009-Ohio-6332 and *State v. Kraus,* 1st Dist. Hamilton Nos. C-070428, C-070429, 2008-Ohio-3965, *State v. Simmons,* 2nd Dist. Montgomery No. 23991, 2011-Ohio-5561, *State v. Crowe,* 5th Dist. Delaware No. 07CAC030015, *State v. Mullins,* 5th Dist. Licking No. 2006-CA-00019, 2006-Ohio-4674, *State v. Coleman,* 7th Dist. Mahoning No. 06 MA 41, 2007-Ohio-1573, *State v. Serafin,* 11th Dist. Portage No. 2011-P-0036, 2012-Ohio-1456 and *State v. Brocker,* 11th Dist. Portage No. 2015-Ohio-3412.

The Eighth District noted in its order which certified a conflict, that the defendant was subjected to a custodial interrogation when the officer questioned the defendant, who had been placed in the front passenger seat of the police vehicle. Because Oles was not provided his *Miranda* warnings, the Eighth District affirmed the suppression of the statements. As a result the Eighth District certified the question as to whether a driver of a vehicle is under custodial interrogation when the driver is placed in the front seat of a police vehicle for questioning.

As a general rule, motorists temporarily detained pursuant to ordinary traffic stops are not in custody for purposes of *Miranda*. *Berkemer v. McCarty,* 458 U.S. 420, 440, 104 S. Ct. 3138,

82 L. Ed. 2d 317. ¶13. The relevant inquiry is whether a reasonable person would feel free to leave the interview under the totality of the circumstances. *State v. Duhamel,* 8th Dist. Cuyahoga No. 102346, 2015-Ohio-3145 and *State v. Farris,* 109 Ohio St.3d 519, 2016-Ohio-3255, 849 N.E.2d 895, ¶13. In *Farris,* this Court determined that a defendant's pre-*Miranda* and post-*Miranda* statements were inadmissible where the officer patted down the defendant, the officer took the defendant's keys, the defendant was instructed to enter the police cruiser and that the defendant was told that the defendant's vehicle would be searched based on the scent of marijuana. As described by the Eighth District, other appellate districts, which applied *Farris,* have distinguished *Farris,* from situations in which a defendant was placed in the front seat of a police vehicle and questioned about the defendant's alcohol consumption. See *State v. Serafin,* 11th Dist. Portage No. 2011-P-0036, 2012-Ohio-1456, *State v. Leonard,* 1st Dist. Hamilton No. C-060595, 2007-Ohio-3312, *State v. Mullins,* 5th Dist. Licking No. 2006-CA-00019 and 2006-Ohio-4674, *State v. Coleman,* 7th Dist. Mahoning No. 06 MA 41, 2007-Ohio-1573. For instance in *Leonard,* the First District found no custodial interrogation where the intrusion was minimal, where no pat-down was conducted before placing the driver in the front seat of the patrol vehicle and where the officer did not take the driver's keys or search the vehicle. *Leonard,* ¶22. Circumstances such as what occurred in *Leonard* does distinguish the case from the facts of *Farris.*

This Court should accept review of this case, and adopt the decisions of the First, Fifth, Seventh and Eleventh appellate districts which properly distinguished this Court's decision in *State v. Farris,* 109 Ohio St.3d 519, 2016-Ohio-3255, 849 N.E.2d 895.

AMICUS CURAIE'S PROPOSITION OF LAW II: EVIDENCE OBTAINED INDEPENDENTLY OR WITHOUT INFRINGEMENT OF CONSTITUTIONAL RIGHTS CANNOT BE SUPPRESSED.

Amicus submits that evidence obtained independently or without infringement of constitutional rights cannot be suppressed. In this case, both the trial court and the Eighth District suppressed the results of the field sobriety tests. The Eighth District noted that the officer may have had reasonable suspicion to conduct a field sobriety test after the officer's initial interaction with Oles or based upon the odor of alcohol. *Oles*, ¶21. The Eighth District apparently determined that the suppression of the field sobriety test was required based upon the timing of when the field sobriety test was conducted when it noted that its analysis was "controlled" by Sheppard's testimony that he decided to perform a field sobriety test only after Oles' statements. *Id.*

In holding that the court was compelled to suppress the field sobriety test based upon the suppression of Sheppard's statements, the Eighth District failed to consider whether the field sobriety tests was based on an independent source. In simplest terms, the independent source doctrine permits the admission of evidence that has been discovered by means wholly independent of any constitutional violation. *Murphy v. Waterfront Comm'n of New York Harbor,* 378 U.S. 52, 79 (1964); *Kastigar v. United States,* 406 U.S. 441, 457, 458-459 (1972). See also State v. Perkins (1985) 18 Ohio St.3d 193. The independent source doctrine permits the admission of evidence that has been discovered by means wholly independent of any constitutional violation. Under the independent source doctrine the suppression of statements made by Oles does not require the suppression of field sobriety tests where an officer has reasonable suspicion to conduct the field sobriety test for reasons independent of the statement. Even if the field sobriety test was not wholly independent from the statements, the admissibility of the field sobriety test can be found under a theory of inevitable discovery for similar reasons. Under the inevitable discovery exception,

"illegally obtained evidence is properly admitted in a trial court proceeding once it is established that the evidence would have been ultimately or inevitably discovered during the course of a lawful investigation." *State v. Perkins,* 18 Ohio St.3d 193, 18 OBR 259, 480 N.E.2d 763 (1985), paragraph one of the syllabus

The Eighth District held that Oles was under custodial interrogation and affirmed the suppression of the statements and the results of the field sobriety test. The suppression of the field sobriety tests were affirmed even though the Eighth District readily acknowledged there may have been reasonable suspicion to conduct the field sobriety test for reasons independent of the statements. *Oles,* ¶21. Even if this Court were to conclude that Oles made statements that should be suppressed, that holding alone should not automatically exclude the results of the field sobriety tests. The trial court's exclusion of the field sobriety tests, and the Eighth District's subsequent affirmance, ignores the independent source doctrine. The independent source doctrine permits the admission of evidence that has been discovered by means wholly independent of any constitutional violation. *Murphy v. Waterfront Comm'n of New York Harbor,* 378 U.S. 52, 79 (1964); *Kastigar v. United States,* 406 U.S. 441, 457, 458-459 (1972).

Lieutenant Sheppard had reasonable suspicion to conduct a field sobriety test based on his observations that were independent from any alleged interrogation of Oles. In *Cleveland v. Reese,* 8th Dist. Cuyahoga No. 100579, 2014-Ohio-3587, the Eighth District upheld the field sobriety test holding that a police officer only requires a reasonable suspicion based upon articulable facts that the motorist is intoxicated. *Cleveland v. Reese,* 8th Dist. Cuyahoga No. 100579, 2014-Ohio-3587, ¶17.

Applying the independent source or inevitable discovery framework to the case at bar, the trial court and Eighth District exceeded the scope of the constitutional challenge when the courts held that both the statements and the field sobriety test be excluded as evidence. If absent the statements, there remained reasonable suspicion to conduct the field sobriety test, than suppression of those tests were totally unnecessary. Therefore, this Court should reverse the trial court's exclusion of the field sobriety test and remand this case to the trial court for further proceedings. This Court should accept the second proposition of law and ultimately hold that evidence obtained independently or without infringement of constitutional rights cannot be suppressed.

CONCLUSION

Amicus Curiae in support of Appellant-City of Cleveland, urges this Court to accept jurisdiction in this case. Acceptance of this case is necessary to ensure uniformity among the appellate districts on whether the questioning of an OVI suspect in the front seat of a police vehicle necessarily transforms that encounter into a custodial interrogation. Further, this Court must also review the remedy. If the Court were to find that the defendant was not under custodial interrogation and that no suppression is evidence, then the second proposition of law may be moot. However, if the Court were to agree that the defendant was under custodial interrogation, then this Court must consider whether exclusion of the field sobriety test was a necessary remedy.

Respectfully Submitted,

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**filed electronically by Jonathan Cudnik (#0077308) in conjunction with City of Cleveland's Notice of Appeal and Memorandum in Support of Jurisdiction per e-mail consent.*

CERTIFICATE OF SERVICE

A copy of the foregoing *Jurisdictional Memorandum of Cuyahoga County Prosecutor's Office in Support of Appellant-City of Cleveland* was filed electronically this 22nd day of February, 2016 and sent via electronic mail to Jonathan Cudnik, jcudnik@city.cleveland.oh.us and via U.S. Mail to Joseph Patituce, 26777 Lorain Road, Suite 708, North Olmsted, Ohio 44070.

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