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

IN THE SUPREME COURT OF OHIO

CITY OF CLEVELAND	)	Case No. 2016-0282, 2016-0172
	)	
Plaintiff-Appellant,	)	On Appeal from the Cuyahoga County
	)	Court of Appeals, Eight Appellant
vs.	)	District
	)	
BENJAMIN S. OLES,	)	Court of Appeals Case No. 2014-L-088
	)	
Defendant-Appellee.	)	

MEMORANDUM IN RESPONSE OF APPELLEE BENJAMIN S. OLES

JOSEPH C. PATITUCE, #0081384
Patituce & Associates, LLC
26777 Lorain Road, Suite 708
North Olmsted, OH 44070
Office: (440) 471-7784
Fax: (440) 398-0536
attorney@patitucelaw.com

COUNSEL FOR APPELLE, BENJAMIN S. OLES

JONATHAN L. CUDNIK #0077308
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

COUNSEL FOR APPELLEE, CITY OF CLEVELAND

TABLE OF CONTENTS

Page

EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS NOT OF GENERAL PUBLIC INTEREST 1

STATEMENT OF THE CASE AND FACTS 2

ARGUMENT IN RESPONSE TO APPELLANT'S PROPOSITIONS OF LAW

Proposition of Law No. I: The trooper conducted a custodial interrogation in violation of *Miranda* when he detained a motorist for questioning from inside a police cruiser 5

Proposition of Law No. II: The routine exclusion of evidence flowing from a violation of a suspect's constitutional rights does not warrant review by this Honorable Court 6

CONCLUSION 8

CERTIFICATE OF SERVICE 9

EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION, NOR IS IT OF GENERAL PUBLIC INTEREST.

The Eight District Court of Appeals properly ruled in a routine decision, following both State and Federal precedent, that a reasonable person removed from their vehicle and detained within a police cruiser would not feel that they were free to leave and therefore was the subject to a custodial interrogation and the protections of *Miranda*. *City of Cleveland v. Benjamin S. Oles*, 8th Dist. Cuyahoga No. 102835.

The City of Cleveland complains that the Eight District used an analysis that is "severely flawed" and alleges that the Eight District ignored this Honorable Court's decision in *State v. Farris*, 109 Ohio St. 3d 519. In *Farris* this Honorable Court held that Farris was in custody for the purpose of *Miranda* when he was detained in the police cruiser and that his statements to police were inadmissible because they were made without the proper warnings.

Farris also held that the Section 10, Article I of the Ohio Constitution excludes all physical evidence found in violation of Farris's constitutional right to remain silent. In *Farris* this involved the search of a trunk resulting in the discovery of illegal contraband, in this case the search resulted in evidence of impairment. In this case the Eight District properly applied the precedent set forth in *Farris* and suppressed the statements taken in violation of *Miranda* and excluded the evidence illegally obtained as a result.

This Honorable Court has already answered the questions posed by the City in its two propositions of law, there is no need for further review.

STATEMENT OF THE CASE AND FACTS

On September 19, 2014, Benjamin Oles was arrested in Cleveland, Ohio and charged with two counts of the operation of a vehicle while under the influence of alcohol. Oles was also charged with a marked lanes violation.

The allegations stem from a traffic stop that occurred at approximately 10:15 p.m. on September 19, 2014. At this time Lieutenant Eric Sheppard ("Sheppard") was 'running radar' positioned between the highway split of two large interstates; Interstate 90 and 71.

This positioning essentially placed him in the middle of the two roadways, well after it was dark out. Sheppard initially testified that Oles nearly struck the rear of Sheppard's cruiser but later admitted that Oles did not come closer than ten feet. Sheppard did not observe Oles' speeding prior to his approach and after Sheppard gave chase Oles committed no traffic violations. Sheppard testified he observed no indications of impaired driving. Sheppard then initiated a traffic stop.

Sheppard testified he detected an odor of alcohol coming from within the vehicle and that Oles was "slow and deliberate" when asked to produce his driver's license, registration, and insurance. Sheppard testified this was not an indicator of impairment and that Oles did produce the requested documents. Sheppard, based only on this, ordered Oles to exit Oles' vehicle and enter the cruiser. Sheppard testified that his purpose for doing this was so that he, Sheppard, could conduct an investigation.

Sheppard observed no clues of impairment while Oles exited the car Oles was driving. Sheppard observed no clues as Oles walked to and entered the cruiser. Sheppard conducted an investigation and interrogation inside of his cruiser. Sheppard waited until Oles was seated in the confinement of the cruiser before asking any questions.

Sheppard, following the custodial interrogation, ordered Oles to exit the cruiser to perform field sobriety tests so that Sheppard could obtain physical evidence of impairment. Sheppard testified his justification for ordering the field sobriety tests were based on the odor of alcohol he detected from Oles in the cruiser combined with Oles' in cruiser admission to drinking four mixed drinks at a wedding.

Sheppard removed Oles from Oles' vehicle for virtually the same reasons as Farris was removed from his vehicle in *Farris*. The Eight District correctly applied the *Farris* holding to this case – there is no substantial question present here.

ARGUMENT IN RESPONSE TO THE CITY OF CLEVELAND'S PROPOSITIONS OF LAW

Proposition of Law No. I: The trooper conducted a custodial interrogation in violation of *Miranda* when he detained a motorist for questioning from inside a police cruiser.

Questioning during a routine traffic stop transforms into a custodial interrogation that entitles the subject of the interrogation to the full panoply of protections prescribed by *Miranda* when that subject is subjected to treatment that renders him for all practical purposes in custody. *State v. Farris,* 2006 Ohio 3255. In reaching the conclusion as to whether or not police questioning constitutions custodial interrogation the inquiry is whether or not a reasonable person would feel free to leave. *State v. Duhamel*, 2015 Ohio 3145.

In *Farris,* Farris was stopped for speeding and removed from his vehicle after the officer detected the smell of marijuana coming from the vehicle. The officer ordered Farris to sit in the passenger seat of the police cruiser. *Farris* held that the only relevant inquiry in determining whether a person is in custody is "how a reasonable [person] in the suspect's position would have understood [their] situation." *Id.* at ¶ 14.

Here, Oles was removed from his vehicle for an alleged traffic violation based on the odor of alcohol coming from the car, rather than from Oles himself. The Trooper did not observe any

signs of impairment in Oles' driving, in Oles' speech, in the way Oles walked, or behaved. The trooper then confined Oles in the front seat of the cruiser. No reasonable person in the same situation would conclude that they were free to leave having been placed in a cruiser, at night, subjected to questioning by a police officer.

The City mistakenly applies *Berkemer v. McCarty*, 468 U.S. 420 (1984) to the facts of this case. The facts in this case are easily distinguishable from *Berkemer*. In *Berkemer* the police stopped a vehicle for rapidly weaving in and out of its lane of travel. The police officer in *Berkemer* noted that Berkemer could barely stand, that his speech was slurred to the point it was incoherent, and Berkemer could not perform a "balancing test" without falling over. *Id.* at 423. Berkemer admitted to having drank. *Id.* This all occurred on the side of the road. *Id.* Berkemer was then transported to the police station where he was interrogated further. *Id.*

Here, Oles had no problems standing, his speech was not slurred, and he performed no tests prior to the custodial interrogation which happened inside the closed cruiser. *Berkemer* applies to situations where a motorist is briefly detained at the side of the road not detained within a cruiser.

There is no indication that the Eight District erred in the application of *Farris* to the facts in this matter. This Honorable Court does not need to take a matter up where appellate court below correctly applied this Honorable Court's precedent.

<u>Proposition of Law No. II</u>: Evidence obtained in violation of an individual's Constitutional rights must be excluded under Section 10, Article I of the Ohio Constitution.

The City argues in its second proposition of law that even though Oles' was interrogated in violation of *Miranda* the physical evidence found as a result of that violation should still be allowed in. This second proposition of law ignores the clear mandate contained within Section 10, Article I of the Ohio Constitution as explained by this Honorable Court in *State v. Farris*. The

City advances this proposition of law as a sign that it anticipates a ruling in Oles' favor on the first proposition.

This Honorable Court held in *State v. Farris* that Section 10, Article I of the Ohio Constitution provides greater protection than the federal Constitution. *Id.* at ¶ 48. This Honorable Court held in pertinent part that:

> ...evidence obtained as the direct result of statements made in custody without the benefit of a Miranda warning should be excluded. We believe that to hold otherwise would encourage law-enforcement officers to withhold Miranda warnings and would thus weaken Section 10, Article I of the Ohio Constitution. In cases like this one, where possession is the basis for the crime and physical evidence is the keystone of the case, warning suspects of their rights can hinder the gathering of evidence. *Id.* at 49.

This Honorable Court was mindful that allowing the government to still use evidence gathered after an officer has violated *Miranda* would do nothing to discourage such tactics. Here, Sheppard placed Oles in custody for the sole purpose of conducting an investigation. Oles was not free to leave, and a reasonable person would have felt the same. Oles made statements that provided Sheppard with evidence that lead to physical tests, these physical tests are evidence that are central to the government's case.

As in *Farris* this Honorable Court should not encourage law enforcement to violate the spirit of *Miranda* by imposing compliance by means of a custodial interrogation. To rule that the physical evidence gathered following the custodial interrogation would encourage officers to engage in this conduct. Truly, as the trial court found the only basis to administer the field sobriety tests was based on the statements made by Oles during the custodial interrogation – the remaining evidence did not support a continued detention.

This Honorable Court need not devote time to this proposition of law. As the evidence was obtained through illegal means the Trial Court and the Eight District properly excluded it.

CONCLUSION

This matter fails to present a substantial question of constitutional law and does not present a question of great public interest. In this case a trooper simply conducted a custodial interrogation resulting in the Trial Court, and the Eight District Court of Appeals, properly ruling that the evidence must be excluded.

Respectfully Submitted,

By_____

JOSEPH C. PATITUCE, #0081384
Patituce & Associates, LLC
26777 Lorain Road, Suite 708
North Olmsted, OH 44070
Office: (440) 471-7784
Fax: (440) 398-0536
attorney@patitucelaw.com

COUNSEL FOR APPELLEE,
BENJAMIN OLES

CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail on March 22, 2016, to counsel for Appellee:

JONATHAN L. CUDNIK #0077308
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

By_____
JOSEPH C. PATITUCE, #0081384
Patituce & Associates, LLC
26777 Lorain Road, Suite 708
North Olmsted, OH 44070
Office: (440) 471-7784
Fax: (440) 398-0536
attorney@patitucelaw.com