

IN THE SUPREME COURT OF OHIO

CITY OF CLEVELAND,

Plaintiff-Appellant,

v.

BENJAMIN S. OLES,

Defendant-Appellee.

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:
: Case No.: 2016-0172 and 2016-0282
:
:
: On Appeal from the
: Cuyahoga County Court of Appeals
: Eighth Appellate District
:
:

MERIT BRIEF OF DEFENDANT-APPELLEE BENJAMIN S. OLES

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STATEMENT OF FACTS

Defendant-Appellee, Benjamin S. Oles (hereinafter “Mr. Oles”), was stopped by Lt. Sheppard of the Ohio State Highway Patrol for a perceived traffic violation while merging onto the highway. *Oles* at ¶3; Tr. 11, 29, 34. Lt. Sheppard testified that prior to stopping Mr. Oles, he followed Mr. Oles and did not observe any other traffic violations that might indicate Mr. Oles was impaired. *Id.* at ¶4, Tr. 33-34. Lt. Sheppard testified that Mr. Oles was not confused by any instruction and complied with the order to produce his license, insurance, and registration without fumbling or dropping them, although he felt Mr. Oles’s movements were “very slow and deliberate” which he found to be suspicious. *Id.*, Tr. 13, 38, 46-47. Lt. Sheppard testified that he noticed an odor of alcohol, but that Mr. Oles’s speech was not the least bit slurred and his appearance was not sloppy or disheveled. Tr. 48, 59.

Lt. Sheppard removed Mr. Oles from his vehicle and ordered him to sit in the front passenger seat of the patrol vehicle. *Id.* at ¶5, Tr. 13-14, 15, 49-50. At this point, Lt. Sheppard testified that Defendant was detained and he was not free to go. (Tr. 49). In fact, Lt. Sheppard testified that had Defendant attempted to leave he would have been arrested for a violation of R.C. 4511.19(A)(1)(a). *Id.* at ¶7, Tr. 49-52. While being interrogated in the patrol car, Defendant admitted to consuming four mixed drinks at a wedding. *Id.*, Tr. 15. Lt. Sheppard then removed Mr. Oles from the patrol vehicle and administered a series of field sobriety tests. *Id.* at ¶6, Tr. 16. After these tests, Lt. Sheppard arrested Mr. Oles. *Id.*

Mr. Oles was charged in the Cleveland Municipal Court with violations of R.C. 4511.19(A)(1)(a), R.C. 4511.19(A)(1)(d), and R.C. 4511.33. A hearing on Mr. Oles’s Motion to Suppress was held on March 23, 2015, after which the trial court granted, in part, Mr. Oles’s Motion to Suppress. The City appealed the trial court’s decision to the Eighth District Court of Appeals. After briefing and oral argument, the Eighth District affirmed the trial court’s decision

on January 7, 2016 and certified a conflict between this decision and those rendered in other districts.

ARGUMENT

Proposition of Law No. I:

The investigative questioning of a driver in the front seat of a police vehicle during a routine traffic stop does not rise to the level of custodial interrogation and any statements elicited do not incur the protections of Miranda

The Eighth District Court of Appeals properly affirmed the trial court's order granting Mr. Oles's Motion to Suppress in *State v. Oles*, 8th Dist. Cuyahoga No. 102835, 2016-Ohio-23. The Court's decision follows the federal precedent set forth regarding *Miranda* warnings during traffic encounters in *Berkemer v. McCarty*, as well as that in Ohio pursuant to *State v. Farris*. *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), *State v. Farris*, 109 Ohio St. 3d 519, 2006-Ohio-3255, 849 N.E.2d 985. The decisions from the First, Fifth, Seventh, and Eleventh Districts have interpreted the controlling case law in a manner inconsistent with the Eighth's decision. The decision from the Eighth District, however, applies the prevailing law in a manner most consistent with that set forth in *Berkemer* and *Farris*.

When police take an individual into custody or otherwise deprive the person of his or her freedom in any significant way, that individual "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda v. Arizona*, 384 U.S. 436, 478-9, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). An ordinary traffic stop does not rise to the custodial detention level required to trigger *Miranda*. *Berkemer* at 439. The warnings will, however, be triggered "as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" *Id.* at 440, citing *California v. Beheler*, 463 U.S. 1121, 1125

(1983). “If a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him ‘in custody’ for practical purposes, he will be entitled to the full panoply of protection prescribed by *Miranda*.” *Id.*, citing *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977).

In *Berkemer*, the defendant’s vehicle was stopped for a traffic violation after which the officer asked the defendant to step out of his vehicle. *Id.* at 423. The officer noted that defendant was unable to stand upon exiting his vehicle. *Id.* It was at this time that the officer decided he was going to arrest the defendant, although he did not communicate his intention to the defendant. *Id.* Instead, the officer asked the defendant to complete a balancing test, but the defendant was unable to do so. *Id.* The defendant, through slurred speech, admitted that he had used alcohol and marijuana a short time before driving. *Id.* The officer then placed the defendant under arrest. Although the Court held that *Miranda* applies “regardless of the nature or severity of the offense” suspected, it held that in this instance, the defendant was not in custody for the purposes of *Miranda*. *Id.* at 434, 442. The Court specifically noted that the officer’s “unarticulated plan has no bearing on the question whether a suspect was ‘in custody’ at the particular time; the only relevant inquiry is how a reasonable man in the suspect’s position would have understood his situation.” *Id.* at 442.

In *State v. Farris*, *supra*, the Ohio Supreme Court addressed whether *Miranda* applied to a traffic stop that led to a suspect’s detention in the officer’s vehicle and concluded that they did apply. *Farris* at 521. In *Farris*, the defendant was stopped for a traffic violation. *Id.* at 519. Upon approaching the vehicle, the officer noted the smell of burnt marijuana and had the defendant step out the vehicle. *Id.* The officer took the defendant’s keys, patted him down, and directed him to sit in the front seat of his cruiser. *Id.* at 519-20. While in the cruiser, the officer

questioned the defendant about the odor. *Id.* The defendant stated that his roommates had been smoking marijuana before he left the house, but that there was a bowl located in his trunk. *Id.* The officer then advised the defendant of his rights pursuant to *Miranda*, asked the same questions, and received the same answers. *Id.* at 520. Upon searching the vehicle, the officer found the drug paraphernalia and the defendant was charged with a misdemeanor. *Id.*

The *Farris* court decided that the officer had effectively placed the defendant in custody. *Id.* at 521. Noting that the officer took the defendant's keys, patted him down, and then placed him in the front seat of the cruiser, the Court concluded that the defendant was not free to leave the scene. *Id.* at 521-2. "The 'only relevant inquiry' in determining whether a person is in custody is 'how a reasonable man in the suspect's position would have understood his situation.'" *Id.* at 522, citing *Berkemer* at 442. In this case, the Court held that it was reasonable for an individual in the defendant's position to "have understood himself to be in the custody of a police officer as he sat in the cruiser." *Id.* Additionally, the Supreme Court of Ohio found physical evidence obtained as a result of a Defendant's unwarned statements is inadmissible pursuant to Section 10, Article I of the Ohio Constitution. *Id.* at 529.

The facts in *Farris* are comparable to those in the case at bar. The only difference between the facts elicited at Mr. Oles's suppression hearing and those in *Farris*, is the fact that there was no testimony elicited at the hearing as to whether Lt. Sheppard took Mr. Oles's keys and patted Mr. Oles down. Aside from these two minor factors, the facts of the encounter are nearly identical. Mr. Oles was stopped for a minor traffic violation at which time Lt. Sheppard noticed an odor of alcohol. This odor coupled with "deliberate" movements and the fact that Mr. Oles had been at a wedding formed the basis Lt. Sheppard relied upon to remove Mr. Oles and place him in the front seat of the patrol vehicle. Although Lt. Sheppard's unstated intentions are

not dispositive of the question, they are, as the Eighth District noted, instructive. At the time of questioning, which was prior to any field sobriety testing, Lt. Sheppard had already decided that he would be arresting Mr. Oles for an OVI violation.

There is no reason to believe that Mr. Oles's time in Lt. Sheppard's patrol vehicle was any less intimidating and custodial as that of the defendant in *Farris*. Indeed, the Eighth District was correct in stating that "a reasonable individual ordered to answer questions unrelated to the initial purpose of his traffic stop, in the front seat of a police cruiser, would not believe he was free to leave." *Oles* at ¶20. It is, in fact, "unrealistic and irrational" to conclude that a reasonable individual would believe himself free to leave after being ordered into a patrol vehicle and questioned. Rather, a reasonable individual, once ordered into a patrol vehicle and questioned, would conclude that he was being detained and was not free to leave until released by the officer. As noted by Lt. Sheppard's testimony, this rational belief of Mr. Oles, being a reasonable individual, was, in fact, correct, as Lt. Sheppard testified that Mr. Oles was not free to leave. Again, although Lt. Sheppard's unspoken belief is not dispositive, it does serve to further reinforce the fact that Mr. Oles would be reasonable in believing himself detained for the purposes of *Miranda*.

Other districts have conflicting opinions, but those opinions do not reflect what is reasonable for a person in a police vehicle to believe in a manner that is consistent with precedent. In *State v. Leonard* and *State v. Kraus*, the First District distinguished their facts from those in *Farris* by noting that the troopers in the two cases did not pat-down or otherwise search the suspects or their vehicles; they did not handcuff the suspects; they did not seize the suspects' keys; and the detention of the suspects were not "lengthy." *State v. Leonard*, 1st Dist. Hamilton No. C-060595, 2007-Ohio-3312, ¶22, *State v. Kraus*, 1st Dist. Hamilton No. C-070428, C-

070429, 2008-Ohio-3965, ¶13. The First District concluded that the absence of these facts from the cases before them were significant enough to ensure that a reasonable person would not believe himself to be in police custody. *Leonard* at ¶23, *Kraus* at ¶14.

In *Rice*, the First District went even further, pointing out that in addition to the absence of handcuffs and a lengthy detention, the fact that the interaction between officer and suspect was “neither combative nor intimidating.” *State v. Rice*, 1st Dist. Hamilton No. C-090071, C-090072, C-090073, 2009-Ohio-6332, ¶14. There is no precedent requiring an interaction be intimidating or combative before a suspect’s *Miranda* rights are triggered. There is also no precedent requiring a suspect be handcuffed, searched, or relieved of his keys before *Miranda* is triggered. The facts set forth in *Farris* were not a litmus test. Rather, the *Farris* Court clearly ruled that the “only relevant inquiry” in determining whether *Miranda* is triggered is “how a reasonable man in the suspect’s position would have understood his situation.” *Farris* at 522, citing *Berkemer* at 442. While handcuffs, pat downs, and lengthy detentions would increase the likelihood that a reasonable individual would believe himself to be in custody, they are not required. A reasonable individual can believe himself to be in custody while being questioned in a patrol vehicle without the superfluous facts.

The Fifth District has also held that *Miranda* warnings are not required for detentions in a police vehicle absent the facts set forth in *Farris*. In *State v. Mullins*, the Fifth District held that *Miranda* warnings were not required for an individual who “was permitted to sit in the front seat of the cruiser” and was not handcuffed. *State v. Mullins*, 5th Dist. Licking No. 2006-CA-00019, 2006-Ohio-4674, ¶29. In so holding, the Fifth District noted that the trooper testified that the defendant was, at that time, not under arrest or detention while in the cruiser. *Id.* Although the court noted the trooper’s unstated intentions, it failed to cite to what a reasonable individual

would have believed based on the facts in *Mullins*. Instead, the court simply concludes that *Miranda* was inapplicable. *Id.* at ¶30.

In *State v. Crowe*, the Fifth District again failed to apply *Miranda* to an individual questioned in a patrol vehicle. In distinguishing *Farris*, the court held that the defendant “was not ‘subjected to treatment’ which a reasonable person would have understood to be police custody,” because the defendant was not “patted-down before being placed in the cruiser, he was not handcuffed, and his keys were not taken away, nor was he subjected to a lengthy detention or told his vehicle was going to be searched prior to arrest.” *State v. Crowe*, 5th Dist. Delaware No. 07CAC030015, 2008-Ohio-330, ¶35. This is another example of an appellate court using the facts in *Farris* as a litmus test. The Fifth District, like the First District, failed to distinguish why the absence of handcuffs or a pat-down ensures that a reasonable person would not feel that he is in custody while in the front seat of a patrol vehicle. Rather, the courts simply note these differences and conclude they are significant enough to render *Miranda* inapplicable.

In *State v. Coleman*, the Seventh District also distinguished the facts from those in *Farris*. Although the defendant in *Coleman* had been placed in the back seat of the patrol vehicle, the court still found that the absence of a pat down, extended duration, or seizure of keys were important distinctions. *State v. Coleman*, 7th Dist. Mahoning No. 06 MA 41, 2007-Ohio-1573, ¶32. Despite the fact that an officer’s intentions are irrelevant, the court noted that “the officer did not indicate or even imply that [the defendant] had to remain in the cruiser while the officer conducted a full search of [the defendant’s] vehicle.” *Id.* It is “unreasonable and irrational” to conclude that an individual placed in the back seat of a patrol vehicle would feel himself free to leave, especially in light of the fact that the back doors of patrol vehicles generally only open from the outside, so the defendant could not have left had he tried. This is

another instance of a district using the facts in *Farris* as a litmus test, rather than using a common sense approach in which facts are objectively viewed from the point of the defendant.

The Eleventh District has followed suit in distinguishing the specific facts in *Farris* to permit questioning of suspects in patrol vehicles. In *State v. Serafin* and *State v. Brocker*, the Eleventh District took the same approach as the First, Fifth, and Seventh Districts by holding *Miranda* warnings unnecessary for questioning in patrol vehicles because of the brevity of the detentions and the fact that the defendants were permitted to keep their keys. *State v. Serafin*, 11th Dist. Portage Co. No. 2011-P-0036, 2012-Ohio-1456, ¶35, *State v. Brocker*, 11th Dist. Portage No. 2014-P-0070, 2015-Ohio-3412, ¶18. In *Serafin*, the court noted that although the defendant was searched prior to being placed in the patrol vehicle, the pat down was consensual and therefore sufficiently distinguishable from the facts in *Farris*. *Serafin* at ¶35, 38. As in the other three districts, the Eleventh District used the facts in *Farris* as a litmus test and any deviations from that set of facts rendered questioning in a patrol vehicle without providing *Miranda* warnings completely permissible.

This Honorable Court has already determined that the only relevant inquiry is, under the totality of the circumstances, if a reasonable individual would have felt free to leave. It is inconsistent with prevailing law that the possession of keys and lack of a pat down would be determining factors in whether it is reasonable to believe a person is free to leave. The front seat of a police vehicle is, by its very nature, an intimidating location. It is no normal vehicle. Rather, the vehicle contains firearms, a cage, a computer, and an armed police officer asking questions. Any normal, rational, and reasonable person would feel intimidated in such a situation. To be sure, a reasonable individual would feel in custody while in the intimidating environment of a police vehicle. A reasonable individual would not feel free to stop the

questioning, exit the patrol vehicle, and drive off. While handcuffs, pat downs, seizure of car keys, and lengthy detentions certainly make a detention more intimidating and custodial-like, the omissions of these things do not render a detention non-custodial. It is easy after the fact to comment that a detention inside a police vehicle is “not intimidating,” but that is not a realistic perception at the time of the encounter of an individual who is the subject of such a detention.

The Eighth District is correct in asserting that it is “unrealistic and irrational” to believe that an individual subject to questioning in a police vehicle would feel free to end the encounter and leave. *Oles* at ¶20. To argue otherwise, as the First, Fifth, Seventh, and Eleventh Districts have done, is inconsistent with the precedent set forth in *Berkemer* and *Farris*. These districts have disregarded the holdings of *Berkemer* and *Farris* and in failing to review the facts as they would have been perceived by a reasonable individual subject to a detention and questioning in a patrol vehicle. Instead, these districts chose to allow such detentions and questions without the benefit of *Miranda* warnings because the facts of their cases were not identical to those in *Farris*. This approach fails to abide by the prevailing standards and subjects suspects to unconstitutional questioning.

The trial court and Eighth District in the *Oles* decisions followed the precedent set forth in *Berkemer* and *Farris* by evaluating the facts as they would have been perceived by Mr. Oles. The courts properly concluded that Mr. Oles would not have reasonably felt that he could end the encounter with Lt. Sheppard. Although Lt. Sheppard’s unstated intentions are not dispositive, the truth of the matter is that Mr. Oles could not have ended the encounter. Lt. Sheppard’s own testimony indicated that Mr. Oles was detained so that he might further investigate Mr. Oles’s level of impairment and was not free to leave. Lt. Sheppard, at the time he placed Mr. Oles in the patrol vehicle, believed Mr. Oles to be too impaired to drive and intended to question Mr.

Oles to gain evidence in further support of an OVI charge. Lt. Sheppard intended to arrest Mr. Oles and would have done so even prior to the questioning and field sobriety tests had Mr. Oles attempted to leave, as Lt. Sheppard believed he had probable cause to arrest Mr. Oles even before placing Mr. Oles in his patrol vehicle. This fact was likely apparent to Mr. Oles as he was questioned in the confined space of Lt. Sheppard's patrol vehicle, surrounded not only by Lt. Sheppard who was armed and in full uniform, but also the other equipment and firearms contained within Lt. Sheppard's vehicle. For these reasons, it was reasonable for Mr. Oles to believe that he was not free to leave and was, in fact, in custody for the purposes of questioning.

The imposition on officers is minimal. Upon deciding to place a suspect into a patrol vehicle, an officer need only advise the suspect of their rights pursuant to *Miranda* prior to questioning. The time necessary to administer these warnings is negligible and doing so protects the constitutional rights of each suspect prior to being questioned by an officer within the confines of a patrol vehicle.

The Eighth District properly interpreted *Berkemer* and *Farris* in affirming the trial court's decision to suppress based on Lt. Sheppard's failure to administer *Miranda* warnings prior to questioning Mr. Oles in the patrol vehicle. It was reasonable for Mr. Oles to believe that he was in custody and unable to leave. Although Lt. Sheppard's unspoken intention is not a controlling factor, the testimony makes clear that Mr. Oles would have been correct to believe himself unable to leave, as Lt. Sheppard testified that he would have arrested Mr. Oles for OVI had he tried to end the encounter. The facts in this case were logically and reasonably applied to the standards set forth in *Berkemer* and *Farris*, and the decision of the lower courts should be affirmed.

Proposition of Law No. II:

The evidence obtained independently in an investigation of driving under the influence during a routine traffic stop cannot be suppressed

“Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses.” *State v. Burnside*, 100 Ohio St. 3d 152, 2003 Ohio 5372, 797 N.E.2d 81, ¶8 citing *State v. Mills*, 62 Ohio St. 3d 357, 366, 582 N.E.2d 97 (1992). “Consequently, an appellate court must accept the trial court’s findings of fact if they are supported by competent, credible evidence.” *Id.* citing *State v. Fanning*, 1 Ohio St.3d 19, 437 N.E.2d 583 (1982). “Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard.” *Id.* citing *State v. McNamara*, 124 Ohio App. 3d 706, 707 N.E.2d 539 (4th Dist. 1997).

Here, the City argues that the field sobriety tests should be admissible pursuant to the independent source doctrine. This argument, however, is not one that the City made to the trial court nor to the Eighth District on appeal. This is the first time the City has raised this argument. On appeal to the Eighth District, the City simply argued that this was a *Miranda* issue and that Lt. Sheppard was not required to read Mr. Oles his *Miranda* rights prior to questioning or administering field sobriety tests and, for that reason, the field sobriety tests should not have been suppressed. This argument was consistent with the argument the City set forth at the suppression hearing. Tr. 78-9.

“[Generally,] this court will not consider arguments that were not raised in the courts below.” *State v. Castagnola*, 145 Ohio St. 3d 1, 16, 2015-Ohio-1565, citing *Belvedere Condominium Unit Owners’ Assn. v. R.E. Roard Cos., Inc.*, 67 Ohio St. 3d 274, 279, 1993 Ohio

119, 617 N.E.2d 1075 (1993). If an issue not argued in the lower court “is implicit in another issue that was argued and is presented by an appeal,” the court may consider it. *Id.* at 17. Here, the argument set forth by the City in the trial court and in the Eighth District was simple and direct. The City argued that *Miranda* was inapplicable and the field sobriety tests should not be suppressed due to the fact that Mr. Oles was not advised of his rights pursuant to *Miranda*. For the first time in this court, the City now also set forth an argument urging this Court to reverse the suppression of the field sobriety tests based on the independent source doctrine. Although the City’s argument, even if considered here, should fail for the reasons set forth below, it should not be considered at all because the City failed to raise the argument below. This argument is not implicit in the City’s argument below that the field sobriety tests should be not suppressed based on *Miranda*. For this reason, the City’s second proposition should be overruled.

If this Court is inclined, however, to consider the City’s argument regarding the independent source doctrine, the City’s argument must still fail. In this case, the trial court granted the Motion to Suppress as to the field sobriety testing that occurred after Mr. Oles was questioned in Lt. Sheppard’s patrol vehicle. T.p. 82. The Eighth District noted that Lt. Sheppard “may have had reasonable suspicion to conduct a field sobriety test after his initial interaction with Oles or had he merely removed Oles from the vehicle and confirmed the source of the alcohol odor outside Oles’ vehicle.” *Oles* at ¶21. The Eighth District used the word “may.” *Id.* The Court did not review or resolve the matter. The basis for the Eighth District’s decision, however, was that Lt. Sheppard testified that his decision to administer the field sobriety tests was only after he questioned Mr. Oles in the patrol vehicle without first advising Mr. Oles of his rights pursuant to *Miranda*. *Id.* This conclusion is correct based on the fact that Lt. Sheppard

did not have reasonable suspicion to conduct the field sobriety tests prior to Mr. Oles's admissions made in the patrol vehicle.

To conduct an investigation for OVI, an officer needs to have "a reasonable suspicion that the detainee may be intoxicated based on specific and articulable facts, such as where there were clear symptoms that the detainee is intoxicated." *Rocky River v. Brenner*, 8th Dist. Cuyahoga No. 101253, 2015-Ohio-103, ¶29, citing *State v. Evans*, 127 Ohio App. 3d 56, 711 N.E.2d 761 (11th Dist. 1998). In this case, Lt. Sheppard testified that prior to stopping Mr. Oles, he did not witness any moving violations or other indications that Mr. Oles may be impaired. *Oles* at ¶4. Prior to questioning Mr. Oles in his patrol vehicle, Lt. Sheppard testified that he had only the odor of alcohol coupled with slow and deliberate movements to believe Mr. Oles was intoxicated. *Id.* However, "slow and deliberate movements" are not a NHTSA recognized indicator of impairment and Lt. Sheppard conceded as much on cross-examination. Tr. 52. Lt. Sheppard testified that the odor of alcohol he noticed was coming from the vehicle, but he could not say, prior to removing Mr. Oles, that it was coming directly from Mr. Oles. Tr. 48. There was no slurred speech, there was no weaving, and there was no fumbling. Tr. 39, 47, 48. Of the many indicators recognized by NHTSA, the only two Lt. Sheppard observed was the fact that he noticed an odor of alcohol coming from the vehicle coupled with a minor traffic violation. Tr. 52. This alone does not rise to the level of reasonable suspicion to believe Mr. Oles was intoxicated. Rather, Lt. Sheppard was operating on a mere hunch. He decided to place Mr. Oles in his patrol vehicle and question him in order to gather more information that might provide him with specific and articulable facts before administering field sobriety tests. It was Mr. Oles's statement that he had consumed alcohol at a wedding which solidified Lt. Sheppard's belief for administering the field sobriety tests. Without Mr. Oles's statement, Lt. Sheppard had no

reasonable, articulable suspicion to administer the field sobriety tests. For this reason, the trial court properly suppressed the tests and the Eighth District properly upheld the trial court's decision.

The case law relied upon by the State pertains to immunity granted to witnesses compelled to testify before a grand jury. *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52 (1964), *Kastigar v. United States*, 406 U.S. 441 (1972). In these cases, the relevant question was whether witnesses could be compelled to testify before a grand jury after a grant of immunity and to what extent, if any, a witness's testimony under immunity given at a grand jury proceeding might be used against him. *Id.* The Court held that the government could compel a witness to testify after granting immunity, but could not use that testimony against the witness in any later proceedings, as an investigative lead, or as the basis of an investigation. *Kastigar* at 460. Further, once a defendant establishes that he has testified under the protection of immunity, the burden shifts to the prosecution to establish that the disputed evidence was independently gathered from a legitimate source and not tainted by the testimony given under the protection of immunity. *Id.*

While the origin of the statements in question in *Kastigar* and *Murphy* are not the same as those in the case at bar, these cases can still be instructive. It is undisputed that Mr. Oles was questioned without the benefit of being advised of his constitutional rights. This questioning was custodial in nature. The burden would then be on the prosecution to establish that the evidence gathered after Mr. Oles's statements was not tainted by Mr. Oles's statements. They cannot meet this burden. Lt. Sheppard admitted to using Mr. Oles's statements as the basis for further investigation and thus any evidence gathered after those statements is tainted. *Oles* at ¶21. Even if he had not so testified, Lt. Sheppard did not have the necessary reasonable suspicion to

continue with the investigation without Mr. Oles's statements. For this reason, the prosecution did not meet the burden at the suppression hearing that is set forth in *Kastigar* and *Murphy*.

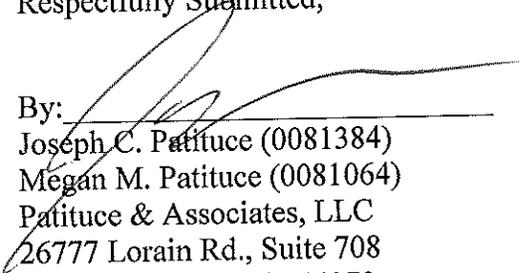
The trial court heard the testimony of Lt. Sheppard and considered it in light of the prevailing standards. By his own admission, Lt. Sheppard made the decision to further his investigation based on Mr. Oles's admissions. With the admissions of Mr. Oles suppressed, Lt. Sheppard lacked reasonable suspicion to conduct the field sobriety tests and the results thereof were properly suppressed. As the trial court was in the best position to hear and weigh the evidence, its decision should be affirmed.

CONCLUSION

The decisions issued by the Cleveland Municipal Court and the Eighth District properly interpreted and applied prevailing case law. Mr. Oles was subjected to custodial interrogation without the benefit of an advisement of his rights pursuant to *Miranda*. A reasonable person in Mr. Oles's position would not have felt himself free to leave the situation. For this reason, the statements made by Mr. Oles in the patrol vehicle were properly suppressed. Without those statements, the only NHTSA recognized indicators of impairment Lt. Sheppard had observed was a minor traffic violation and an odor of alcohol coming from the vehicle, but he could not say that it was coming from Mr. Oles until he removed Mr. Oles from the vehicle. The testimony elicited by the City at the hearing was insufficient to support a finding that Lt. Sheppard had reasonable suspicion to continue the investigation of Mr. Oles by administering field sobriety tests. For this reason, the trial court properly suppressed the evidence related to the field sobriety tests.

For these reasons, the decisions below must be affirmed.

Respectfully Submitted,

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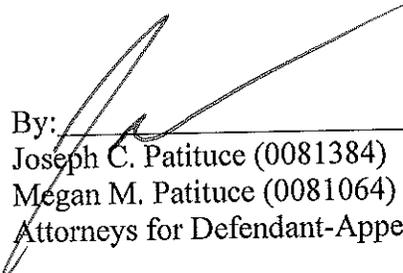
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Brief of Defendant-Appellee was served by ordinary U.S. Mail on this 7th day of September, 2016 upon the following:

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