

IN THE SUPREME COURT OF OHIO
CASE NO. 2016-0172 and 2016-0282

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

REPLY BRIEF OF APPELLANT CITY OF CLEVELAND

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STATEMENT OF THE CASE AND FACTS

On September 19, 2014, Defendant-Appellee, Benjamin Oles, was arrested and charged with violations of R.C. 4511.19(A)(1)(a), DUI; R.C. 4511.19(A)(1)(d), DUI .08-.17 and, R.C. 4511.33, driving in marked lanes.

After a series of pre-trials, a hearing was held on a motion to suppress evidence. At the conclusion of the hearing on March 23, 2015, the trial court found that the initial traffic stop was reasonable. (Tr. 81). The court believed that Lieutenant Shepard, Unit #1404 of the Ohio State Highway Patrol, observed a smell of alcohol and the bloodshot eyes of Defendant-Appellee that caused him to further investigate. (Tr. 82). The court did not rule that the field sobriety tests were conducted inappropriately. Despite these findings, the trial court granted Defendant's motion to suppress. The basis for the ruling was that *Miranda* warnings were not given to Oles. The evidence that the court ordered suppressed was any evidence of the field sobriety testing done on Oles on September 19, 2014. (Tr. 82). The City of Cleveland filed a notice of appeal on March 30, 2015. After oral arguments, the Eighth District Court of Appeals issued its ruling on January 7, 2016 holding that the trial court was correct in granting the motion to suppress but also noted, *sua sponte*, this holding was in conflict with other district courts. This court certified a conflict and consolidated cases on May 10, 2016.

LAW AND ARGUMENT

PROPOSITION OF LAW 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*.

- A. The Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution does not require a law enforcement officer to provide *Miranda* warnings when the initial questioning of a suspect who is removed from his vehicle and placed in the front seat of a police vehicle does not rise to the level of custodial interrogation.

The Eighth District erred in upholding the trial court's ruling on the motion to suppress, namely the suppression of the field sobriety tests of Defendant-Appellee based on *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). However, the initial questioning and field sobriety tests were done both at the roadside and in the front seat of the State Highway Patrol cruiser. These actions by Lt. Shepard did not rise to the level of "custodial interrogation." The Eighth District applied a "totality of the circumstances" analysis and found a reasonable person removed from his or her own vehicle and questioned about his or her alcohol consumption in the passenger seat of a police cruiser would not feel free to leave and would therefore be subject to custodial interrogation and the protections of *Miranda*. *City of Cleveland v. Benjamin S. Oles*, 8th Dist. Cuyahoga No. 102835, 2016-Ohio-23

The U.S. Supreme Court in *Miranda* established procedural safeguards to protect an individual's Fifth Amendment rights. This long-established rule required that an individual be "mirandized" by law enforcement officials before they can be interrogated about their involvement in criminal activities. Defendant-Appellee argued at the suppression hearing that he was in custody once he was seated in the front passenger seat of the State Highway patrol car. (Tr. 49). The trooper testified that he did not advise Defendant-Appellee of his rights at that time but continued to question him. (Tr. 49). After a few brief questions in the cruiser the trooper asked Defendant-Appellee to exit the cruiser and conducted field sobriety tests. (Tr. 15-16). This roadside questioning was brief and did not constitute "custodial interrogation" which would incur *Miranda* warnings.

The issue is whether roadside questioning of a motorist pursuant to a traffic stop constitutes custodial interrogation and requires advisement of *Miranda* rights. The U.S. Supreme Court ruled on this very issue in *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138

82 L.Ed.2d 694 (1984). The *Berkemer* Court held that “persons temporarily detained pursuant to such stops are not “in custody” for the purposes of *Miranda*.” *Id.* at 440. In this case, the trial court found that the initial traffic stop of Defendant-Appellee was reasonable. (Tr. 82). The trooper observed physical characteristics consistent with intoxication that prompted him to investigate the stop further to determine if Defendant-Appellee was driving under the influence of alcohol. (Tr. 13-16). This questioning did detain Defendant-Appellee temporarily. The trooper asked him a moderate number of questions during the investigation. The trooper asked some of these investigatory questions at the roadside and some in the front passenger seat of the cruiser. (Tr. 15, 50). According to the trooper’s testimony, this was done to place him in a controlled environment to observe physical characteristics and determine where the odor of alcoholic beverage was coming from. (Tr. 15). After this initial questioning, the trooper asked Defendant-Appellee to exit the cruiser and perform field sobriety tests. These actions are not the “functional equivalent of formal arrest.” *Berkemer* at 442. Defendant-Appellee was temporarily detained until after his field sobriety tests; and therefore, was not required to be advised of his *Miranda* rights either during the initial roadside questioning or during any questioning while he was in the front seat of the police cruiser. The trial court erred in suppressing the evidence of the field sobriety tests based on *Miranda*.

Defendant-Appellee correctly states that the *Berkemer* court opined that *Miranda* warnings would be triggered “as soon as a suspect’s freedom of action is curtailed to a degree associated with formal arrest”. The facts in this case do not rise to this level. Defendant-Appellee was not patted down before being questioned in the patrol car nor were his keys confiscated prior to the short questioning in the police cruiser. Applying *Berkemer*’s holding further shows that a reasonable man in Defendant-Appellee’s position would have understood

that he was not free to go but was not under arrest. The other events surround arrest were clearly absent. There was no pat-down, property confiscation or the placing of handcuffs on Defendant-Appellee during this initial roadside questioning.

In addition, the Eighth District incorrectly upheld the trial court's order suppressing the field sobriety tests based on *Miranda* because the trooper was not required to read the *Miranda* warnings until it was determined that Defendant-Appellee was going to be arrested. In *Strongsville v. Kessler*, 8th Dist. Cuyahoga No. 71600, 1997 WL 476831 (Aug. 21, 1997) the court held that routine traffic stops did not require *Miranda* warnings because although the driver is detained during roadside questioning it does not rise to the level of custodial interrogation. The court there stated "the atmosphere surrounding an ordinary traffic stop is substantially less 'police dominated' than that surrounding the kinds of interrogation at issue in *Miranda* itself. *Id.* at 5. The traffic stop in the instant case falls under the category of "routine;" and therefore, the initial roadside questioning and the field sobriety testing by the trooper did not rise to the level that would require *Miranda* rights be invoked. Accordingly, the trial court should not have suppressed the field sobriety testing based upon the fact that Defendant-Appellee was not advised of his Fifth Amendment rights prior to any questioning while he was in the front seat of the police cruiser.

B. The Eighth District erroneously extended the holding in *State v. Farris* in deciding that investigative questioning of a motorist during a routine traffic stop about alcohol consumption was tantamount to custodial interrogation.

The Eighth District relied on *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985, to support its holding in the present case. The *Farris* court 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 521. The Eighth District

incorrectly extended *Farris* in this case opining that a reasonable person removed from his or her vehicle and questioned about his or her alcohol consumption in the passenger seat of a police cruiser would not feel free to leave. *Oles* at ¶19. The fact that Oles did not feel free to leave did not elevate the roadside questioning to custodial interrogation and incur the protections of *Miranda*.

Defendant-Appellee argues that the facts in *Farris* and *Oles* are comparable. There are similarities to the cases but there are also differing facts that distinguish the matters and make *Oles* more in line with the other districts' holdings on this issue. In *Oles* the roadside questioning was not lengthy, there was no pat-down and Defendant-Appellee's property was not confiscated. Also distinguishable from *Farris* are that Defendant-Appellee was let out of the cruiser in order to submit to field sobriety testing. The whole encounter according to the record took a little over an hour from initial stop to the BAC test. This would include the time it took to transport Defendant-Appellee to the post after his field sobriety tests indicated impairment.

Defendant-Appellee also correctly states that the front of a police vehicle is different from a civilian vehicle. The back seat of a police is vehicle is **even** more different. Notably the backseat has no handles on the inside for exiting and a protective cage separating the front and back seats. The question is not whether a reasonable person would feel intimidated but whether the situation was the functional equivalent of formal arrest. While Defendant-Appellee was very likely nervous and even intimidated the circumstances for his feeling did not rise to the level of being under arrest. When an employee is called into his boss's office and the door is closed it may be very intimidating but it is not equivalent to being fired.

The Eleventh District ruled on a factually similar case in *State v. Serafin*, 11th Dist. Portage No. 2001-P-0036, 2012-Ohio-1456. The *Serafin* court held that routine questioning of a detained motorist, including whether the motorist has been drinking, does not require the administration of the Miranda warnings. *Id* at ¶35 quoting *State v. Coleman*, 7th Dist. Mahoning No06MA41, 2007-Ohio-1573. The facts in *Oles* are substantially similar to the facts in *Serafin*. The drivers in both cases were stopped for traffic infractions. They were both ordered to the front passenger seat of the police cruiser. There is no indication that the trooper confiscated Oles' keys. Both drivers were in the front seat of the cruiser to help ascertain where the odor of alcoholic beverage was coming from and for investigative questioning. Neither driver was placed in handcuffs. The questioning of Oles in the vehicle was brief and he was then asked out of the vehicle to perform field sobriety tests. In fact, the entire encounter from the initial traffic stop to the breath test at the post lasted just over one hour including travel time from the roadside to the State Highway Patrol post. There is no indication that this encounter was excessively long in duration for a driving under the influence investigation which was a valid extension of the initial traffic stop. (Tr. 81).

In *Farris*, the initial stop for speeding was extended into a search for marijuana. The trooper in *Oles* was still investigating the traffic violation to determine if the additional violation of driving under the influence had occurred. The brief detention of Oles in the passenger seat of the police vehicle did not convert the routine traffic stop into a custodial interrogation. The extension of *Farris* to this case was incorrect and, as such, statements elicited from Oles and the results of the field sobriety tests should be allowed.

This Court should hold that a brief detention in the front passenger seat of a police vehicle during an investigation for driving under the influence does not constitute custodial

interrogation. This bright-line holding would resolve conflicts within the various appellate districts within the State of Ohio.

PROPOSITION OF LAW II: The evidence obtained independently in an investigation of driving under the influence during a routine traffic stop cannot be suppressed.

- A. Independent of the Eighth District's ruling the evidence obtained independently in an investigation of driving under the influence during a routine traffic stop cannot be suppressed.

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

In holding that the trial court was compelled to suppress the field sobriety test based upon the suppression of Defendant-Appellee's statements, the Eighth District failed to consider whether the field sobriety tests were based upon an independent source. 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). Under the independent source doctrine, the suppression of statements regarding alcohol consumption made by Defendant-Appellee does not require the suppression of his performance

on field sobriety tests where the investigating officer had reasonable suspicion to conduct the tests for reasons independent of the statement. In this case, the trooper had already observed an odor of alcoholic beverage and slow, deliberate movements by Oles prior to any statement about alcohol consumption.

The Eighth District held that Oles was under custodial interrogation and affirmed the suppression of the statements **as well as** the results of the field sobriety tests. 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* at ¶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 trooper had reasonable suspicion to conduct field sobriety tests based upon his observations that were independent from any questioning of Defendant-Appellee. In *Cleveland v. Reese*, 8th Dist. Cuyahoga No. 100579, 2014-Ohio-3587, the Eighth District upheld the admission of field sobriety tests holding that a police officer only requires a reasonable suspicion based upon articulable facts that the motorist is intoxicated.

Applying the independent source doctrine in this matter demonstrates that the lower courts exceeded the scope of the constitutional challenge when it was held that both the statements and the field sobriety test be excluded as evidence. Even without the statements about alcohol consumption, there remained reasonable suspicion to conduct the field sobriety tests. The suppression of those tests was incorrect and unwarranted. Therefore, this Court should

reverse the appellate court's affirmation of the trial court's exclusion of the field sobriety tests and remand this case for further proceedings.

CONCLUSION

Wherefore, Plaintiff-Appellant respectfully requests that this Honorable Court reverse the decision of the Eighth District Court of Appeals and remand this case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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