

Online Reference: FLWSUPP 1801MOON

Criminal law -- Driving under influence -- Evidence -- Refusal to perform field sobriety exercises -- Where defendant recanted refusal to perform exercises moments after refusal, defendant was continuously in presence of officers between refusal and recantation, allowing defendant to perform exercises after recantation would not have inconvenienced officers, and results of any exercises would not have been affected by prior refusal, motion to suppress evidence of refusal is granted

STATE OF FLORIDA vs. JESSICA MOON. County Court, 4th Judicial Circuit in and for Duval County. Case No. 2009 ct 15139, Division J. June 17, 2010. Eleni E. Derke, Judge. Counsel: Office of State Attorney. Malcolm Anthony, P.A., Ponte Vedra Beach.

ORDER SUPPRESSING EVIDENCE

This cause came before this Court on defendant's "Motion to Suppress Evidence: Refusal of FSEs (Recantation)," and the Court having considered the Motion, heard argument of counsel, viewed the videotape, and otherwise been fully advised in the premises, finds as follows:

FACTS:

On July 11, 2009, defendant was stopped by Officer B. A. Waldrep, Neptune Beach Police Dept. for a traffic violation; officer Waldrep requested defendant perform field sobriety exercises (FSEs) and she refused. Immediately upon her refusal to perform the tasks, she was arrested. Immediately thereafter, while being handcuffed, defendant agreed to perform the FSEs and begged Officer Waldrep to allow her to do so. He refused to let her do them. Though defendant continuously and repeatedly requested to be allowed to perform the FSEs, Officer Waldrep continuously refused to allow her to do them.

ISSUE:

Defendant moved to suppress the refusal of the field sobriety exercises, alleging that since evidence of a refusal standing alone is not relevant to any material fact and would normally be inadmissible -- except as evidence of "consciousness of guilt" -- and that recantation of a refusal to submit to a *breath* test vitiates the initial refusal "curing" it when the accuracy of the results of the test would not be affected if defendant were allowed to take the test at the time she recanted her refusal, and that since field sobriety tests are voluntary while breath tests are not, refusal of the FSEs should be suppressed where a defendant recants said refusal at a time and place which would not affect the results thereof nor substantially inconvenience the police.

LAW:

The Florida Supreme Court ruled in *State v. Taylor*, 648 So.2d 701 (Fla. 1995) [20 Fla. L. Weekly S6b], that although field sobriety tests are voluntary, the refusal to submit to them may be admitted in evidence against a defendant if defendant is advised that adverse consequences would result from refusal to perform them only because such refusal may be "probative of the issue of consciousness of guilt." *Taylor*, at 705.

Recantation of a refusal to submit to a *breath* test vitiates the initial refusal and is inadmissible against a defendant if the prior refusal would not materially affect the test result, or would substantially inconvenience the police. *Larmer v. DHSMV*, 522 So.2d 941 (Fla. 4th DCA 1988). The court found it significant that retraction of Mr. Larmer's initial refusal came moments after his refusal, while he was continuously in the presence of the police officers, and under circumstances that would not result in inconvenience by permitting him immediately thereafter to take the test, and the results would not be affected. *Larmer*, at 944.

Defendant argues, by analogy, that the same analysis should apply to a field sobriety test refusal and recantation, even more so, since a breath test is *mandatory* by law and a field sobriety test is *voluntary* and that the only potential relevancy of any refusal of FSEs would be to show consciousness of guilt which cannot be established when a defendant clearly and unequivocally recants and requests, and in the case sub judice, immediately begs to be allowed

to perform them.

FINDINGS:

This Court finds defendant's retraction of her initial refusal came moments after her refusal, that she was continuously in the presence of the arresting officer, that no inconvenience resulted, and that the results of any FSEs would not have been affected had she been allowed to perform them upon her request to do so.

ORDERED AND ADJUDGED:

The Motion is GRANTED. The refusal to perform field sobriety exercises is hereby suppressed.

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