IN THE COUNTY COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO: 17-030828MU10A

JUDGE: POLE

STATE OF FLORIDA,	:
	:
Plaintiff,	:
	:
vs.	:
	:
UROS IVOVIC,	:
	:
Defendant.	:

ORDER DENYING DEFENDANT'S AMENDED MOTION TO DISMISS OR IN THE ALTERNATIVE TO SUPPRESS BREATH ANALYSIS RESULTS

THIS CAUSE having come before this Court upon the Defendant's Amended Motion to Dismiss or in the Alternative to Suppress Breath Analysis Results and the Court having considered the Defendant's Motion, having heard testimony of the witnesses, arguments on the same, having reviewed the applicable case law, and being otherwise fully advised in the premises,

ORDERS AND ADJUDGES as follows:

The Defendant's Amended Motion to Dismiss or in the Alternative to Suppress Breath Analysis Results is hereby **DENIED** for the reasons set forth below.

The Defendant was arrested on December 27, 2017 for a violation of Florida Statutes 316.193 (Driving Under the Influence). During the DUI investigation, Deputy Sapp of the Broward Sheriff's Office utilized an Axon 2 body-worn camera (hereinafter "BWC"). It was

stipulated to, by the State, that Deputy Sapp did not utilize his BWC during the pre-breath test 20-minute observation period, or during the administration of the defendant's breath test on an Intoxilyzer 8000 breath test instrument which was located in the back of Deputy Serphos's SUV vehicle.

The defense alleges that the Deputy Serphos' deactivation of the BWC amounted to a direct violation of an agency policy intended to restrict officer discretion, and therefore the failure to record the 20-minute observation period and breath test amounts to a deprivation of the defendant's due process rights.

A hearing was held on May 14, 2018 wherein the defense called Sergeant Robert Hager, Supervisor of Regional Traffic Investigations for the Broward Sheriff's Office. Sgt. Hager oversees the DUI Task Force, activities at the Breath Alcohol Testing (hereinafter "BAT") facility, and all Breath Test Operators and Agency Inspectors. Sgt. Hager testified that there are two policies within the Broward Sheriff's Office that references videotaping. The general BWC policy contains specific references to the protocols to be used when law enforcement officers wear BWCs, while the unit-specific DUI/BAT Standard Operating Procedures (hereinafter "DUI/BAT SOP") manual contains protocols to be followed when dealing with impaired drivers and, specifically, regarding video-recording during the administration of the breath test.

Sergeant Hager testified that the DUI/BAT SOP, section 3.10.2 (entered into evidence as Defense Exhibit 1), specifically mandates that "[a]t no time will video recording be interrupted *except during the administration on the breath, and/or urine, and/or blood test(s).*" (emphasis added). According to Sgt. Hager, breath testing has never been videotaped at the BAT facility—not necessarily because of policy, but because there are no cameras where the instruments are located and the agency does not allow electronic devices near the Intoxilyzers because it could

possibly interfere with the instruments. He stated that officers must deactivate their BWCs when they enter the BAT facility to ensure they do not interfere with the breath test instruments. He further testified that the civilian Breath Test Operators are not issued BWCs, but admitted that if they were issued BWCs, then they could record the administration of a breath test if it otherwise was not prohibited by the DUI/BAT SOP.

Sergeant Hager testified that the Intoxilyzer 8000 has a Radio Frequency Interference (hereinafter "RFI") detector, but doesn't know if the BWCs would trigger the RFI detection in the instrument. According to Sgt. Hager, all BSO DUI Task Force deputies receive training on how to use, operate and position the BWCs as well as the policies pertaining to BWC usage. Deputies must comply with all procedures outline in the policy, which do contain exceptions outline with the policies, but that the officers have discretion in some situations also outlined in the policies.

The Broward Sheriff's Office Policy Manual, section 17.1 "Body Worn Cameras (BWC)," (entered into evidence as Defense Exhibit 2), contains the general provisions for BWC usage. Section 17.1.2(F) notes that any activation or deactivation of BWCs will be documented in all incident reports, citations, field contact entries, and other documents. Sgt. Hager testified that it was also acceptable for a deputy to document the deactivation of the BWC in the video itself, which is considered another type of report.

Sergeant Hager testified that, under section 17.1.3 "Recording Protocol," there is a list of situations in which a deputy is instructed to activate their BWC prior to initiating any investigative or enforcement activity. Sergeant Hager noted that the general BWC policy was designed more so for patrol units and not necessarily for specialized units such as the DUI Task Force. He further admitted that while the general BWC policy does not enumerate an exception for turning off or deactivating a BWC for the administration of a breath test, the policy does allow for the

deactivation in certain situations. According to Sg.t Hager, Section 17.1.3(B)(6) details exceptions where the deputy is not required to activate, or may deactivate, their BWC. One of these exceptions, listed under subsection (g) states that if, in the deputy's judgment "*a recording would interfere with his or her ability to conduct an investigation*, or may be inappropriate, because of the victim or witness's physical condition, emotional state, age, or other sensitive circumstances." (emphasis added). Sgt. Hager testified that this exception would allow a deputy to deactivate their BWC when administering a breath test.

Sergeant Hager testified that the main reason for requiring the deactivation of BWC during breath testing and at the BAT facility is to eliminate the possibility of RFI interfering with the breath test instruments. He noted that it takes time for BSO to approve policy revisions, but that it doesn't change the policy of not videotaping during the administration of breath tests or at the BAT facility. He further testified that the best evidence of the administration of the breath test itself would be the results generated by the instrument and printed on the breath test affidavit. He agreed that keeping BWC activated during the administration of breath tests could result in a recurring cycle of breath tests that are invalid due to RFI being detected by the breath test instrument. Sgt. Hager admits that he himself has never done any testing on whether RFI from radios or cell phones would affect the Intoxilyzer, nor has he done so with any BWCs. However, he stated that he would not be willing to risk losing a case over RFI, and it is easier to prevent it up front and turn off the BWCs to err on the side of caution as per the procedures utilized at the BAT facility.

At the conclusion of the May 4th hearing, the defense requested additional time in order to call an expert witness in order to try and establish that the Axon BWCs would not generate RFI that would interfere with the Intoxilyzer 8000. The State objected, reasoning that no witnesses

other than Deputy Hager had been listed by the defense, and because the hearing had already begun. Over the State's objection, the court allowed the defense the opportunity to find and call an expert witness.

The hearing continued on September 27, 2018, at which the defense called Matthew Malhiot. Mr. Malhiot is the proprietor of Forensic Alcohol Consulting and Training in Canton, Georgia. Mr. Malhiot provides expert witness servies, consultation and training services to the legal practitioner in any area that includes alcohol including in the areas civil or criminal litigation, breath testing, DUI or workman's compensation. Prior to this Mr. Malhiot was a Department Inspector with the Florida Department of Law Enforcement Alcohol Testing Program from 2002-2010, and served as an officer in the United States Air Force for 20 years, and a law enforcement officer and breath testing specialist in Montana, having been certified in the use of the Intoxilyzer 5000 and 8000 breath testing instruments.

Mr. Malhiot was involved in the initial evaluations of the Intoxilyzer 8000 for use in Florida. He testified that the Intoxilyzer 8000 has circuitry dedicated to the detection of RFI located in the faceplate of the instrument and that the plastic casing of the instrument is coated on the inside to repel or absorb radio frequencies which helps to prevent RFI from penetrating the case and getting to the RIF detector. Mr. Malhiot stated that although it was not specifically a part of the evaluation process, he did conduct some RFI testing of the Intoxilyzer 8000 above and beyond the normal evaluation procedures, testing The Intoxilyzer 8000's operability in a high RFI environment in simulated, controlled and subject testing. During this testing, the Intoxilyzer 8000 was exposed to cell phones and police radios during subject testing to see if the RFI detector of the instrument picked up the RFI or not and whether it affected the expected analytical results. Mr. Malhiot also testified that the Intoxilyzer's software also protects against RFI, since any RFI

would have to not have affected any of the air blanks or controls tests during a breath test, and only affect the two subject samples, while also maintain the .02 agreement. According to Mr. Malhiot, the RFI testing never provided a breath test with false readings; the instrument either identified the RFI or it didn't affect the analytical results. Mr. Malhiot testified that during his time with FDLE there was no protocol for testing the RFI circuitry, nor is it a requirement today, and has never been part of the inspection protocol. He also testified that there is no requirement by FDLE that limits the presence of cell phones or radios when administering breath tests, other than those policies set by individual agencies.

It was Mr. Malhiot's opinion that use of a BWC would not affect a breath test on an Intoxilyzer 8000 where the instrument would produce a valid breath test. Nor was there any information that he reviewed that would lead him to believe that it would be unsafe to video record a breath test using a BWC, since it would be almost impossible to have RFI affect two subject samples, but none of the other ten analyses or two diagnostic processes during the breath testing sequence.

On cross-examination, Mr. Malhiot admitted that he has very little training and experience with RFI beyond breath testing. He has conducted no tests using the Axon BWC and RFI possibility with an Intoxilyzer 8000 instrument, and has never conducted any testing using any BWC and the Intoxilyzer 8000. Mr. Malhiot admitted that determining the cause of RFI is not always easy and that it can sometimes go undetermined. However, he noted, every electronic device gives off radio frequencies. He also admitted that the RFI detector was instituted into the Intoxilyzer instruments as a safeguard to eliminate any arguments of RFI affecting breath test results—even though, scientifically, RFI is unlike to affect breath test results.

Mr. Malhiot could offer no scientific reason as to why law enforcement officers should

leave BWCs on during the administration of a breath test. Although he testified that RFI is theoretical and unlike to affect breath test results, he agreed that the FDLE Breath Test Operator and Agency Inspector curricula's do contain remedial actions that require the removal of electronic devices from the immediate areas of the Intoxilyzer 8000 when the RFI detector is tripped. Mr. Malhiot also admitted that he has seen instances as a Department Inspector for FDLE where repeated instances of RFI detection have occurred on the same instrument for the same subject, as well as across multiple breath tests.

At the conclusion of Mr. Malhiot's testimony, the defense rested, and the Court heard argument whether the defense has met their burden regarding the instant motion. The State argues that the defense has not met their burden by failing to show that any failure to record the administration of the breath test by Deputy Serphos in this case was exculpatory, not potentially exculpatory or merely useful. The State argues that the results of the administration of the breath test are the best evidence of the breath test, not a video recording. The State further argues that there was no evidence presented that even if the breath test was recorded, the BWC would have been positioned in such a manner as to have captured the defendant during the 20-minute observation period or during the breath test.

The defense counters by arguing that this issue is constitutional in nature. The defense contends that this issue has nothing to do with gathered evidence that was destroyed or not preserved, but has to do with the technology now available to the law enforcement agencies which the Broward Sheriff's Office has taken advantage of to gather such evidence. According to the defense, the use of BWC do not fall within the arguments made under *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528 (1984) (evidence must be both exculpatory, apparent before its destruction, and be of such nature that the defendant cannot obtain comparable evidence by other

reasonably available means), because this is not an issue of destroyed evidence. The defense contends the analysis to be applied is the same as those for roadblocks.

With roadblocks, law enforcement agencies are allowed to stop vehicles on the road without any reasonable suspicion or probable cause. The reason roadblocks are legal is because the law enforcement agency must prepare guidelines that must be strictly followed and which must pass constitutional muster. Should the State fail in either of these requirements, then the roadblock is invalidated and evidence gathered pursuant to the roadblock cannot be used against that defendant. According to the defense, the policy published for use of the BWCs creates a constitutional duty on the part of the law enforcement agency pursuant to *State v. Powers*, 555 So.2d 888 (1990). Although admitting it to be dicta, the defense points to the Court's finding that while law enforcement has no constitutional duty to perform any particular tests, "[c]ertain duties arise, however, once a policy of gathering evidence through certain tests is established," and analogizes this to the Broward Sheriff's Office policy for BWCs. Essentially, once the agency instituted the BWC policy, they had a constitutional duty to record the entire DUI investigation, including the administration of the breath test, unless a specific exception would otherwise apply. For Deputy Serphos to unilaterally decide to deactivate or turn off his BWC violated those guidelines and, therefore, violated the defendant's due process.

The State argues that *Trombetta*, and *Powers*, as well as *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333 (1988) still apply. Just because new technology is being employed does not change the caselaw from being applicable to BWCs. The State argues that at some point videotaping was a new technology, but that BWC recording are just video recordings in a different medium (similar to Betamax, VHS, MPEG videos, or any other digital recording).

The State disagrees with the defense's checkpoint analogy in that the applicable caselaw—

Michigan State Police v. Sitz, 496 U.S. 444, 110 S.Ct. 2481 (1990) and *Jones v. State*, 483 So.2d 433 (Fla. 1986)—only requires that written checkpoint guidelines limit discretion on the part of the officer conducting the checkpoint. According to the State, if something changes regarding the checkpoint, it must be specifically delineated in the guidelines otherwise it would be a violation.

The State argues that the checkpoint comparison fails because checkpoints involve the detaining of motorists without reasonable suspicion or probable cause, and such stops would necessarily violation the Fourth Amendment's proscriptions against unreasonable searches and seizures. In the instant case the Deputy has already detained the motorist of a traffic violation, developed reasonable suspicion to conduct a DUI investigation, conducted a DUI investigation, determined that probable cause existed to believe the defendant was DUI, and arrested the defendant for DUI, which is a requirement for the lawful request of a breath test.

The State also notes that the Fourth Amendment protects against unreasonable searches and seizures. According to the recent U.S. Supreme Court ruling of *Birchfield v. North Dakota*, 136 S.Ct. 2160, 195 L.Ed 2d 560, 84 USLW 4493 (2016), breath testing is not an unreasonable search, because the Fourth Amendment permits warrantless breath tests incident to arrest for DUI. Thus, the State argues, because breath testing is not an unreasonable search or seizure, it cannot run afoul of the Fourth Amendment, and no constitutional issue exists.

Nevertheless, argues the State, that it has always been the policy of the Broward Sheriff's Office not to videotape the administration of the breath test. The instant case is somewhat analogous to the facts of *Powers*. In *Powers* an officer had been employed with his agency for seven years, where it was the policy of the agency to never videotape defendants performing standardized field sobriety tests. At the request of the officer's supervisors, the officer prepared a memo advising that videotaping DUI defendant did not assist with DUI prosecution, but rather

favored defendant drivers when they had a breath alcohol reading just over the illegal limit, and that standardized field sobriety tests should not be videotaped. There was no evidence to establish that the agency policy to not video tape the SFSTs was based on this memo or the officer's opinion. The trial court granted the defendant's motion finding that the officer demonstrated bad faith in failing to preserve potentially exculpatory evidence, which constituted a denial of due process. However, the Second DCA disagreed, finding that there was no due process violation because the agency was following an established policy, among other reasons, and that the defendant had sufficient opportunity to question the results of the tests.

The State argues that the facts of *Powers* are similar to the fact of the instant case. The Broward Sheriff's Office has a standing policy not to videotape the administration of the breath tests, as well as signage in the BAT facility instructing all incoming officers to turn off their cell phones, radios and other electronic devices in the BAT and when administering breath tests. Such policy has also been reduced to writing in the DUI/BAT SOP, specifically in section 3.10.2(L)(1) which requires that videotaping be turned off during the administration of breath, and/or urine, and/or blood test.

The Court acknowledges that there are two policies at issue. However, the Court notes that the DUI/BAT SOP manual specifically states, on page 30, in section 3.10.2(L)(1) that video recording shall not be interrupted "except during the administration of the breath, and/or urine, and/or blood test." A law enforcement agency is under no constitutional obligation to collect or prepare or create any type of evidence for any defendant.

The issue in *Powers* and the other cases cited to by both the State and defense state that if bad faith is shown, or if it can be shown that there is exculpatory evidence and, in bad faith, the law enforcement agency destroyed that evidence, that would permit the court to dismiss the case.

If evidence is lost and it is shown to be exculpatory, then the court can create certain sanctions against the State or provide instructions to the jury such concluding that evidence lost or destroyed could be presumed to be exculpatory. However, that is not the case here.

The Court finds no obligations for the Broward Sheriff's Office or the deputy to create evidence by utilizing the BWC. The deputy did not act in bad faith in turning off his BWC, and as testified to, he did indicate the reasons why he turned off the BWC, pursuant to policy.

The Court does not find any grounds to suppress the breath test or dismiss the instant case and finds that the defense has not met its burden because they have failed to produce evidence that by not recording the administration of the breath test that such evidence was exculpatory. The Court also does not find that the Broward Sheriff's Office violated their general BWC policy, because they did not do so.

Based on the evidence and testimony provided during the hearing, the caselaw submitted by the State and defendant, the defendant's Amended Motion to Dismiss or in the Alternative to Suppress Breath Analysis Results is hereby **DENIED**.

WHEREFORE, based on the foregoing, it is **ORDERED AND ADJUDGED** that the Defendant's Motion to Suppress Evidence, is hereby **DENIED**.

DONE AND ORDERED in Chambers in Broward County, Florida, on this 18 day of December, 2018, nun pro tunc to September 27, 2018.

HONORABLE CHRISTOPHER POLE
JUDGE OF THE COUNTY COURT
17th Judicial Circuit

Copies furnished to:

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