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

CASE NO: 17-010258MU10A

JUDGE: UNASSIGNED, DIVISION MS
(J. GOTTLIEB COVERING)

STATE OF FLORIDA,

Plaintiff,

vs.

KEVIN NIEME,

Defendants.

ORDER ON DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE TO SUPPRESS BREATH TEST RESULTS

THIS CAUSE having come before this Court upon the Defendant's Motion to Dismiss or in the Alternative to Suppress Breath Test Results, and the Court having considered the Defendant's Motion, having heard arguments on the same and being otherwise fully advised in the premises,

ORDERS AND ADJUDGES that the Defendant's Motions are hereby **DENIED** for the reasons set forth below.

The defendant was arrested on April 21, 2017 for a violation of Florida Statue 316.193 and subsequently submitted to a breath test. During the DUI investigation, Deputy Sapp of the Broward Sheriff's Office utilized a body-worn camera (hereinafter "BWC"). However, the BWC was not utilized to record the 20-minute observation period or the administration of the defendant's breath test.

The defense contends that the failure of the Deputy to utilize the body-worn camera to record the 20-minute observation and administration of the breath test amounted to a deprivation of the defendant's due process rights.

The defense presented the testimony of Matthew Malhiot. Mr. Malhiot is the President and proprietor of Forensic Alcohol Consulting and Training, a limited liability corporation since 2010, based out of Canton, Georgia. It was apparent from Mr. Malhiot's testimony that he has vast experience regarding the Intoxilyzer 8000. Mr. Malhiot testified that during his time with FDLE, the Intoxilyzer 8000 was still in the evaluation and testing process for approval for use in the State of Florida. Mr. Malhiot was an integral part of the evaluation, research and approval studies team. According to Mr. Malhiot, he has first-hand knowledge of what was done during this process.

Mr. Malhiot testified that the possibility of RFI affecting breath testing started as a theory years and years ago, that a cause of electronic radio frequency in the environment can affect electronic circuits and change the value flowing through the circuits, and therefore it could affect the breath test results (higher or lower), or some other change. This is because external radio frequencies have penetrated the instrument and are being absorbed by the circuits, thereby changing the electronic value in the circuits. Mr. Malhiot testified that he is familiar with the Intoxilyzer 8000's capability deal with radio frequency interference (hereinafter "RFI"). He explained that within the Intoxilyzer 8000 face plate or display is an antenna that contains a cell phone circuit, and if radio frequency penetrates the case and trips the circuit, the instrument will terminate the breath test, inspection test, etc. if the radio frequency is above the threshold of the limits set by the factory and will alert the operator of the RFI condition.

Mr. Malhiot testified that while it is possible for RFI to interfere with the breath test analysis process, it is not realistic to expect that it would. He stated that the hardware and software safeguards will terminate the analysis should radio frequency occur. Mr. Malhiot stated that he has seen the Intoxilyzer 8000 affected by and identify RFI, but that the breath test results were not altered by radio frequency and produce a valid result. He further stated that in order for RFI to affect a subject's breath test result, the RFI would have to occur and affect only the two breath test samples provided, and not affect any of the other testing processes. Essentially, the RFI would have to affect only two out of the ten testing processes, and still produce two breath test samples that are within .02 agreement of each other.

Mr. Malhiot testified that he reviewed the Broward Sheriff's Office general policy, dated September 5, 2017, section 17.1.3 which was stipulated into evidence. He stated that the policy does not have any reference to breath testing at all, and that while there are exceptions for not deactivating the BWC, breath testing is not one of them. Having reviewed the BWC footage, Mr. Malhiot stated that the breath test in this case was not videotaped. He stated that the Deputy turned off the camera as he walked the defendant into the breath testing facility and made announcement that he was turning off the BWC for breath testing and implied consent.

In preparation for the hearing, Mr. Malhiot testified that he reviewed the owner's manual and technical specification sheets for the Axon version 1 and version 2 BWC. He testified that the Axon BWC emits radio frequency, but that it will not emit radio frequency when it is recording, so long as it is not in Bluetooth mode and paired with a cell phone or not uploading to a central database or computer system. He explained that all electronic devices emit low level radio frequencies which may not escape the case, but this is different from a live streaming signal,

because it is not always transmitting because the BWC is an internal camera and storage device. Mr. Malhiot believes that Deputy Sapp would not have had to fear RFI if he was recording the defendant taking the breath test because of the instrument's safeguards are sufficient to prevent RFI from affecting the breath test results.

On cross-examination, Mr. Malhiot admitted that he has very little training and experience in radio frequency itself. He agreed that when he was conducting evaluations of the Intoxilyzer 8000, body-worn cameras did not exist and that he has conducted no testing on the Intoxilyzer 8000's propensity to be affected by Axon BWCs. He stated that he is familiar that the Broward Sheriff's Office has a specific policy that applies to their DUI/Breath Alcohol Testing Unit. This policy, BSO DUI/BAT Standard Operating Procedures was stipulated into evidence. Specifically, he noted that section 3.10.2(L)(1) states with regards to videotaping that "at no time will video recording be interrupted except during the administration of the breath, urine and/or blood test(s)."

Mr. Malhiot agreed that RFI could come from radios, cell phones, Wi-Fi signals, and any other electronic instrument. He noted that if the RFI message is displayed by the Intoxilyzer 8000, the operator must troubleshoot and determine the cause. However, he agreed that the cause of RFI is not easily determined. Mr. Malhiot admitted that he could not provide a scientific reason, if RFI affecting a breath test was so remote, why would there be a need for an RFI detector in the Intoxilyzer; just that it helps eliminate the argument about RFI. When asked why law enforcement should take the risk of leaving the BWC on, Mr. Malhiot's main response was, why should they not? Lastly, Mr. Malhiot admitted that he does not know whether the Axon BWCs maintain a constant Bluetooth connection, but that if it maintained a constant Bluetooth connection, that could be a possible reason for RFI.

The defense asserts that the Broward Sheriff's Office creation of a policy requiring and detailing the use of body-worn cameras created certain rights for those investigated by the agency for DUI. The defense equates this to the policies required for DUI checkpoints, and is intended to restrict law enforcement's discretion in the gathering of evidence once they have taken it upon themselves to gather it. Through this comparison the defense claims that turning off the BWC for the administration of the 20-minute observation and breath test, the defendant's constitutional due process rights were violated. The defense argues that the specific DUI/BAT policy (State Exhibit 1), predates the general BSO BWC policy (Defense Exhibit 1), therefore the general policy controls. Put another way, the general policy enlarged the rights of DUI suspects by imposing restrictions on BSO once they took it upon themselves to abide by the policy.

The defense further argues that the technology is outstripping the law, which is the reason for the checkpoints comparison, and that cases like *Trombetta* and *Powers* no longer apply to this situation. The defense claims that they are not imposing that law enforcement officers gather evidence in a certain respect or manner. However, because law enforcement has taken it upon themselves to avail themselves of this technology, it comes with responsibilities to preserve constitutional safeguards and curtail the discretion of the law enforcement officer.

The State argues that the defense's checkpoints comparison fails for several reasons. Checkpoints involve the detaining of motorists without reasonable suspicion or probable cause, and that such a stop would necessarily run afoul of the Fourth Amendment proscriptions against unreasonable searches and seizures. It is because of this reason that checkpoints guidelines must be explicitly followed. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 110 S.Ct. 2481 (1990). 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 Fourth Amendment permits warrantless breath test incident to arrests 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.

The State further argues that the evidence shows that two policies regarding videotaping of breath testing exists at BSO. The policies are a specific policy and a general policy. The State argues that it is possible for both to coexists with each other, since the specific DUI/BAT policy applies in addition to the general BSO policy. Nevertheless, the State contends that even if there was a violation of the policy, the failure to videotape the 20-minute observation and/or breath test is not exculpatory and the defense would have to prove that the agency acted in bad faith by not videotaping. State argues this would be difficult to do given the history of the DUI/BAT policy to not videotape breath testing. The State provided the Court and the defense with the following cases in support of their position: *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528 (1984); *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333 (1988); *State v. Powers*, 555 So.2d 888 (Fla. 2d DCA 1990); and *Bennett v. State*, 23 So.3d 782 (Fla. 2d DCA 2009).

The defense contends that they do not have to show that what should have been videotaped is exculpatory because this type of evidence is not controlled by *Trombetta* and its progeny. According to the defense, officers are casting out a net, to see if they can catch anything, and in order for the net to be legal it must abide by strict constitutional requirements, the most important of which is strict supervision and a plan that can be challenged. Like a checkpoint where an officer does not need reasonable suspicion or probable cause if they restrict themselves to the written

policy, the same theory applies to the use of BWCs.

The State counters that unlike checkpoints, in this situation the officer already has reasonable suspicion to have stopped the defendant's vehicle, has conducted the DUI investigation, determined that he or she has probable cause to arrest and has effectuated that arrest, and is now requesting the defendant submit to a breath test. The State argues that there is no more evidence to be gathered at this point beyond the breath test itself, the best evidence of which would be the breath test affidavit from the Intoxilyzer. If something occurred during the 20-minute observation or the breath test, the defense is free to question the officer, breath test operator, and even the defendant himself.

The State further points out that the defense is, in fact, requiring law enforcement to gather evidence in a certain manner. As the State correctly points out, caselaw does not require the person conducting the 20-minutes observation to have direct face-to-face contact with the defendant, nor does any rule require the breath test operator to face the defendant or the Intoxilyzer while administering the breath test. The State described a situation where, even if the BWC was not turned off, there is no guarantee that the 20-minute observation or the breath test would be recorded. According to the State, the defense is therefore mandating that law enforcement does videotape or record these events or evidence in a certain manner, not just that the BWC is left on.

The State challenges that the defense has not met their burden of substantial competent evidence. The defense contends that they have met their burden of substantial competent evidence through the testimony of their expert Matthew Malhiot.

The Court does not find that Mr. Malhiot is not an expert in radio frequency. His knowledge only comes from what he has read and told by others. The Court acknowledges Mr.

Malhiot's vast experience with the Intoxilyzer 8000, but that his experience with RFI and how it affects it was from 2006 and only dealt with radios and cell phones, not the Axon BWCs at issue here. He has not conducted any studies or investigations into how the Axon BWCs used operate, or whether they would or could affect the Intoxilyzer 8000 in the instant case.

The Court notes that the testimony showed that many other devices like radio and cell phones, which begs the question that the State asked wouldn't it make better sense to turn off the BWC. There is no study to the effect of the BWC and its effect on the Intoxilyzer 8000. Nevertheless, even if the situation is exactly as Mr. Malhiot testifies it is, the Court doesn't believe that a constitutional right arises such that it requires elimination of all of the evidence of the breath test.

The Court agrees with the State that the defense has not met their burden of establishing by competent substantial evidence that a policy existed requiring the officer in this case to use his BWC to record the 20-minute observation and administration of the breath test, such that failure to do so rises to the level of a constitutional violation that would require the suppression of the breath evidence. The evidence shows that two policies exist, one more specific than the other, with may or may not be in conflict with each other, regarding the use of recording equipment during breath testing. Essentially, there is the likelihood that the policy entered into evidence by the defense as Defense Exhibit 1 was violated. But that the same time, there is the same likelihood that the policy entered into evidence by the State as State's Exhibit 1 was not violated and adhered to by the officer. The two policies are similar yet different in respect to the issue at bar.

The Court agrees with the State's arguments that the caselaw regarding checkpoints is not

analogous to the issue at hand. The Courts have created procedures required for checkpoints and that is different from what we have in this case. This issue does not rise to the level of a constitutional right or violation of the Constitution with respect to the fact that a BWC was worn and turned off at a point during the investigation. This is a factual issue and a credibility issue for the jury to decide, but it does not rise to the level of a constitutional violation.

Based on the foregoing, **IT IS ORDERED** that the Defendant's Motion is hereby **DENIED**.

DONE AND ORDERED, this 15 day of August, 2018 in chambers in Broward County, Florida.

HON. KENNETH A. GOTTLIEB
Judge of the County Court

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