

Criminal law -- Driving under influence -- Defendant's refusal to submit to field sobriety test not admissible where testimony of officer clearly reflected that he only asked defendant if he wished to submit to voluntary sobriety testing with no indication that there might be adverse consequences if defendant refused

STATE OF FLORIDA, Plaintiff/Appellant, v. ANDREW SONSINI, Defendant/Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 96-136AC10A. L.T. Case No. 95-26457MM10A. July 17, 2000. Susan Lebow, Judge. Counsel: Leah Mayersohn, Assistant State Attorney, for Appellant. Alan T. Lipson and Lloyd H. Golburgh, P.A., Fort Lauderdale, for Appellee.

OPINION

THIS CAUSE came before the Court upon Appellant, the State of Florida's appeal of the trial court's order granting the Appellee's Motion to Suppress. Having reviewed the Appellant's initial brief, the Appellee's answer brief, the record on appeal, applicable law, and being otherwise fully advised in the premises, this Court finds and decides as follows:

The record reveals that on November 19, 1995, Deputy Oman was alerted to a disturbance on the Hallandale Beach Boulevard exit ramp of I-95. Arriving at the scene, Deputy Oman observed that there were cars on the exit ramp honking their horns and waiting for the vehicle in front to proceed through the traffic light. Assessing that the Defendant's car was not going to move, Deputy Oman approached the car and saw Defendant slumped back in the driver's seat, appearing to be asleep or unconscious.

Deputy Oman had the Defendant exit his vehicle and asked him if he had been drinking. The Defendant responded that he was very tired from being on the road. At this time, based upon Deputy Oman's observations, he informed the Defendant that he was going to conduct a criminal investigation. The Deputy then asked the Defendant if he would voluntarily submit to roadside sobriety exercises. In Deputy Oman's words: ``I explained to Mr. Sonsini this was strictly voluntary [the roadside sobriety exercises], he did not have to perform them if he didn't want to. I explained I was conducting a criminal investigation for driving under the influence, at which time I asked him if he would be willing to submit to some roadside sobriety exercises to which his response was, `I'm not doing any roadside test or anything.' '' Moreover, during cross-examination, Deputy Oman, in response to defense counsel's question, answered that at the time he offered the Defendant ``voluntary'' roadside tests, he did not inform

Defendant of any ramifications associated with his decision on whether to cooperate until after Defendant's arrest and transport to the B.A.T. facility.

Defense counsel moved to suppress the Defendant's refusal to perform the roadside tests. The trial court conducted a hearing on the defense's Motion to Suppress on June 7, 1996. The trial court granted the motion in a written order dated July 2, 1996. On appeal, the State argues that the trial court erred in granting defense's Motion to Suppress because it is their contention that Defendant's refusal to take a field sobriety test is admissible as evidence of consciousness of guilt.

The ruling of the trial court on a motion to suppress comes to the appellate court clothed with the presumption of correctness and the appellate court is required to interpret the evidence and reasonable inferences and deductions in a manner most favorable to sustaining the trial court's ruling. See *Moody v. State*, 574 So.2d 260 (Fla. 4th DCA 1991). Determinations of factual questions and resolutions of conflicting evidence are to be accepted by appellate courts and not disturbed on appeal, See *State v. Brown*, 592 So.2d 308 (Fla. 3rd DCA 1991); questions of law are reviewed de novo. See *Phuagnong v. State*, 714 So.2d 527, 529 (Fla. 1st DCA 1998).

The United States Supreme Court ruled in *South Dakota v. Neville*, 459 U.S. 553 (1983), that evidence of a defendant's refusal to submit to blood-alcohol testing does not constitute self-incrimination, and it is not fundamentally unfair, as a due process violation, to use defendant's refusal to take a blood-alcohol test as evidence of guilt. In holding as such, the court in *Neville*, emphasized the fact that in that case, there ``was not the sort of implicit promise to forgo use of evidence that would unfairly `trick' respondent if the evidence were later offered against him at trial.'" See *id.* at 566. *Neville* reasoned there was no implicit assurance of no adverse consequences attached to the defendant's refusal based on the fact that defendant had warnings of some consequences. See *id.* Particularly, ``the warning that he could lose his driver's license made it clear that refusing the test was not a `safe harbor,' free of adverse consequences.'" *Id.* The Florida Supreme Court has addressed the safe harbor issue from *Neville* regarding pre-arrest field sobriety tests in *Taylor v. State*, 648 So.2d 701, 704 (Fla. 1995).

The *Taylor* court ruled that evidence of a defendant's refusal to perform roadside sobriety tests was admissible at trial, and did not deprive the defendant of due process, or constitute self-incrimination. See *id.* However, the court in *Taylor* was clear that although the defendant was not told his refusal could

be used against him in court, the police officer did inform the defendant of the purpose of the test and told him of possible adverse consequences, i.e., that he could be arrested based on the available evidence. Thus, both *Neville and Taylor* reiterate the necessity that a defendant receive some indication, whether explicit or inferential, that a refusal to take the field sobriety test is not merely a safe harbor, but may carry adverse consequences.

The Thirteenth Judicial Circuit has directly addressed this same issue in *Andrik v. State*, 47 Fla. Supp. 2d 50 (Fla. 13th Cir. Ct. 1991), and prior to that the Eighteenth Judicial Circuit addressed the identical issue in *State v. Cohn*, 33 Fla. Supp. 2d 160 (Fla. 18th Cir. Ct. 1988). Both of these cases hold that the defendant's refusal to take a field sobriety test was not admissible in evidence where the defendants were not told that their refusals would be used against them in court. In doing so, both *Andrik and Cohn* rely on the holding in *Herring v. State*, 501 So.2d 19 (Fla. 3d DCA 1987), which held, inter alia, that the failure to inform the defendant that his refusal to take a gunshot residue test could be used against him, rendered testimony at trial of the defendant's refusal inadmissible. *Herring* stands for the proposition that when a defendant is not told that his refusal will have consequences adverse to him, he has no motivation to submit and his refusal therefore is indeed a safe harbor. See *id.* at 21.

In the case at bar, the testimony of Deputy Oman clearly reflects that he only asked the Defendant if he wished to submit to voluntary sobriety testing with no indication that there might be adverse consequences to Defendant's refusal. In granting the Motion to Suppress, Judge Horowitz was consistent with the holdings in *Taylor and Neville*, since based on the evidence, the Defendant was not informed of any adverse consequences of his refusal. This Court recognizes that the thirteenth and eighteenth circuits' decisions in *Andrik and Cohn* are directly analogous to the issue in this case. Both *Andrik and Cohn* correctly apply the reasoning of *Herring* by holding that the defendants in those cases could not lawfully be penalized for taking the safe harbor of not volunteering potentially incriminating evidence. *Herring's* analysis is equally applicable to this case. Defendant cannot have evidence used against him since he merely took the ``safe harbor'' of not voluntarily cooperating. Evidence of taking a ``safe harbor'' is not probative of guilt, and therefore not relevant at trial.

Accordingly, it is hereby,

ORDERED AND ADJUDGED that the trial court's Order Granting Defendant's Motion to Suppress Evidence of Refusal to Submit to

Field Sobriety Tests is AFFIRMED.

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