

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING
AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

STATE OF FLORIDA

Appellant,

Appeal No. CRC 10-00066APANO
UCN 522010AP000066XXXXCR

vs.

JOSE ALFONSO PENA

Appellee.

_____ /

Opinion filed _____.

Appeal from an Order Granting
Motion to Suppress
entered by the Pinellas County Court
County Judge John D. Carballo

James S. Jenkins III, Esquire
Office of the State Attorney
Attorney for Appellant

Chris Westmoreland, Esquire
Attorney for Appellee

ORDER AND OPINION

PETERS, Judge.

THIS MATTER is before the Court on Appellant, State of Florida's appeal from an order of the Pinellas County Court granting Appellee's Motion to Suppress. After reviewing the briefs and record, this Court reverses the order of the trial court.

Factual Background and Trial Court Proceedings

On January 18th, 2010 at approximately 4:30 a.m., Sergeant Robert Wierzba of the Clearwater Police Department was on routine patrol in his unmarked police vehicle. While travelling eastbound on Drew Street, Sergeant Wierzba observed a white and orange pickup truck stopped in the westbound left through-lane on Drew Street. The truck was not stopped at a traffic light or traffic sign. Sergeant Wierzba testified as follows:

Q And what did you see as you got closer to the vehicle?

A As I got closer, I saw that there were three people directly behind the vehicle. There were two standing up, sort of kind of leaning over a third subject who was laying in the road in a fetal position, and directly behind the vehicle, pretty much in that left through lane.

Q And when you say "the fetal position," is that where his knees and arms are bent and he's curled?

A Yes.

Q And were there any other vehicles around the truck?

A No.

Q And after you saw this, did you see anything else on the ground around the three people?

A There was a wet spot on the pavement.

Q And what determination did you make at that point?

A Initially, my concern was is that this was some sort of an accident. Now, whether he, the driver, might have hit the person that was laying in the roadway, you know, or because it was a pickup truck, he might have fallen out of the back of the pickup truck, but my initial thought was that this was some sort of an accident.

Q And is that based upon the training and experience that you've had as a Clearwater Police officer for 23 years?

A Yes.

Sergeant Wierzba made the first possible u-turn he could and observed one of the people pulling the individual out of the street towards the sidewalk. While this was occurring, Sergeant Wierzba observed the pickup truck accelerate from having been at a dead stop and begin driving westbound. Sergeant Wierzba tried to find out what happened from the person pulling the individual out of the street but did not get a response due to a language

barrier and he also observed the other person walking away from the scene. Having no other information provided to him, Sergeant Wierzba decided to try to catch up to the driver of the pickup truck and stop him in case there had been a crash. Sergeant Wierzba informed dispatch at Clearwater Police what was occurring since he did not have backup at the scene and ultimately Officer Stephen Hole arrived to assist with the investigation. As Sergeant Wierzba was following the pickup truck, he noted an unusual driving pattern. He testified to the following:

Q And how was the vehicle driving when you caught up to him?

A As I was catching up to him -- again, Drew Street is divided with a concrete median and it has landscaping in the middle of it. When the driver was heading westbound, the driver's side tires were about as close as you can get to that median and it looked like he was straddling the median, like he was using it as a guide. And I was the entire way down until I pulled him over, and I was about a half a mile away.

Q And did that driving pattern seem unusual to you?

A Yes.

Q And is that based upon your training and experience of 23 years?

A Yes.

When Sergeant Wierzba made contact with the driver of the pickup truck, the Appellee, Jose Alfonso Pena, approximately a half mile away, he noticed the Mr. Pena had a very strong odor of alcohol and bloodshot, glassy eyes. Sergeant Wierzba learned from Mr. Pena that one of the occupants of the pickup truck had gotten out of the truck because he was really drunk and that two of the individuals he had seen in the street had been inside of the truck and the other individual had been riding in the pickup truck bed. The entire time period from when Sergeant Wierzba first observed the person in the road until he attempted to stop the vehicle was about ten seconds.

Officer Stephen Hole eventually made contact with Sergeant Wierzba and Mr. Pena at the location of the traffic stop after investigating the scene where the pickup truck had left. Officer Hole was unable to locate any of the three individuals Sergeant Wierzba

had seen outside of the vehicle. However, Officer Hole was able to locate the wet spot and discovered that the wet spot appeared to be from a broken bottle of beer based upon the odor and the presence of broken glass. Officer Hole initiated a DUI investigation with included multiple signs of impairment, poor performances on field sobriety exercises, and a breath test sample of .160 and .158. Mr. Pena was arrested for DUI and a Misdemeanor Information charging Mr. Pena with that offense was filed on April 6, 2010. Through counsel, Mr. Pena filed a motion to suppress which was granted after hearing. The trial court commented “[m]y gut tells me it was good police work and a good stop, but I think I got to follow *Keeling* and grant the motion.” The trial court entered the following order:

THIS CAUSE having come on to be heard upon Defendant’s Motion to Suppress, and the Court having heard testimony and argument of counsel, the Court finds the issue regarding the legality of the traffic stop is controlled by *Keeling v. State*, 929 So2d 1169 (Fla. 2nd DCA 2006). Accordingly, it is hereby ORDERED that Defendant’s motion is GRANTED.

The State appeals this order granting the motion to suppress.

Standard of Review

Our review of a trial court’s ruling on a motion to suppress evidence involves a mixed question of law and fact. We accord a presumption of correctness with regard to the trial court’s determination of facts where the trial court’s factual findings are supported by competent, substantial evidence. However, we review the trial court’s application of the law to those facts de novo. *Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); *Connor v. State*, 803 So.2d 598 (Fla.2001); *State v. Pruitt*, 967So2d 1021 (Fla. 2nd DCA 2007).

