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

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

APPELLATE DIVISION

STATE OF FLORIDA

Appellant,

Appeal Case No.: CRC 08- 00072 APANO
UCN No.: 522007CT095278XXXXXX

v.

ROBERT VARNEY,

Appellee.

_____/

Opinion filed: 1/8/10.

Appeal from the County Court
for Pinellas County
County Judge John D. Carballo

Bernie McCabe, Esquire
State Attorney
Sixth Judicial Circuit of Florida
Attorney for Appellant

Robert Eckard, Esquire
Attorney for Appellee

ORDER AND OPINION

DEMERS, JUDGE

Appellee was charged with DUI. Incidental to arrest, marijuana paraphernalia consisting of a pipe and an empty pill bottle that had a marijuana odor were discovered on Appellee's person. He refused to submit to a breath and urine test. When the trial court inquired as to what evidence the State had that Appellee was under the influence of marijuana, the prosecutor

responded: "the fact that he had the pipe with burnt residue, the container that smelled of marijuana was empty now, and that he refused the urine. The whole reason they were asking for urine was because they thought he was under the influence of marijuana." (R81). The prosecutor also represented to the trial court that Appellee was passed out, lethargic, dazed, and confused, which are signs of impairment consistent with smoking marijuana. (R86). Appellee made a written pretrial motion in limine to exclude any mention of the paraphernalia (R26), and prior to trial he made a verbal motion to exclude the refusal to provide a urine sample. (R87, 91). The trial court granted these motions. (R34, 87). Appellant made a motion for rehearing essentially rearguing its position and maintaining that the trial court should have conducted an evidentiary hearing before granting the motions. The trial court denied that motion. (R38-39). Appellant appeals the orders excluding the paraphernalia evidence and the refusal to submit to the urine test. This Court reverses.

In the trial judge's thoughtful and clear order denying the State's Motion for Rehearing the judge writes:

> The twenty years of age defendant was found passed out behind the wheel of a motor vehicle stopped at a traffic signal. When awakened he was incoherent, displayed poor balance, bloodshot eyes, and had a distinct odor of an alcoholic beverage. He declined to perform field sobriety exercises. He was arrested for DUI and a post arrest search disclosed the presence of a marijuana pipe in his pocket as well as an empty pill container which exhibited signs of containing marijuana sometime in the past. The defendant did not make any admissions concerning marijuana use and the odor of burnt marijuana was not detected in the vehicle. The arresting officer does not possess drug recognition evaluator certification. (R38).

Based on these factual findings the trial judge went on to conclude:

> Whatever probative value may exist for introduction of the pipe and urine refusal is greatly outweighed by the danger of unfair prejudice. Under the reasoning of *McClain* there simply is not any admissible evidence by which a jury could conclude the defendant was DUI from marijuana. And the facts here are even more compelling than those in *McClain* and the other cases cited by the parties. Those cases involved factual scenarios where it was undisputed that the defendant had cocaine or other drugs in their blood at

the time of driving. The issue was whether the drug found in their system was of sufficient probative value to outweigh the prejudice which naturally flows from the mention of drug possession. (R38-39).

While the trial judge clearly gave a great deal of thought to the application of the law to the facts of this case, this Court must respectfully disagree with the result. Unfortunately, neither the parties nor the judge had two recent cases available to them which might have led to a different conclusion. Those cases are *Estrich v. State*, 995 So.2d 613 (Fla. 4th DCA 2008) and *Gonzales v. State*, 9 So.3d 725 (Fla. 4th DCA 2009). These cases, particularly *Gonzales*, compel a different result.

In *Estrich*, a DUI manslaughter, the court reversed denial of a defense motion in limine seeking to exclude evidence of the defendant's marijuana usage. All of the State's evidence in that case supported the conclusion that the accused was impaired by ingestion of Xanax, but the trial court allowed the State to present evidence of the defendant's marijuana use. On appeal, the court said:

> **Every expert witness at the trial and at the hearing on the motion in limine stated that the presence of the marijuana metabolite in the defendant's blood sample likely would not have affected him at the time of the accident....** Focusing on Xanax as the cause of the defendant's impairment, the state conceded in closing argument that the marijuana metabolite in the defendant's blood did not contribute to the crash.... The evidence of marijuana metabolites in the defendant's blood raised the spectre of illegal drug use, a fertile source of prejudice in the eyes of the jury. This case is close to *State v. McClain*, 525 So.2d 420, 422 (Fla.1988), in which the Florida Supreme Court held that evidence of a trace amount of cocaine in the defendant's blood was too prejudicial to admit in a vehicular manslaughter case, where alcohol was the cause of the driver's impairment.... Applying *McClain* and *West*, we hold that the probative value of the marijuana metabolite in the defendant's blood was substantially outweighed by the danger of unfair prejudice. (emphasis added).

995 So.2d at 616-18.

Unlike *Estrich*, in the case at bar, there is no evidence that there was marijuana in Appellee's blood or urine sample. Indeed, there is no sample because Appellee refused to submit

to a urine test. But that begs the question. These are the things that mattered in *Estrich*: (1) there was ample evidence of impairment by a controlled substance – a prescription medication; (2) there was ample evidence that marijuana had no effect on the accused; and (3) the disclosure that the accused was using an illegal drug was unfairly prejudicial.

In contrast to *Estrich*, in the case at bar, there is no evidence that Appellee's obvious impairment was caused by any particular substance – there was no explanation. There was no evidence that marijuana had no effect on Appellee. On the other hand, there was no evidence in the form of any test of bodily fluids that Appellee actually had the active ingredient in marijuana in his system. But, as in *Estrich*, the jury would be exposed to the fact that Appellee possessed an illicit drug. It would appear on balance that the lack of any actual evidence that Appellee had consumed marijuana in sufficient temporal proximity to the stop to have any impact would justify the trial court's conclusion that the probative value of such evidence was outweighed by the risk of unfair prejudice. And therefore, Florida Statutes, Section 90.403, required the exclusion of the evidence. But then *Gonzales v. State*, 9 So.3d 725 (Fla. 4th DCA 2009), seriously complicates the matter.

Gonzales, is extremely close to the instant case. The main difference is that the case involved cocaine, a much more provocative substance than the marijuana paraphernalia in the case at bar. In *Gonzales*, the court refused to sever a possession of cocaine charge from a DUI. The similarities to the instant case are compelling. As in the instant case, Defendant was passed out behind the wheel of a car in an intersection in the early morning hours, had an odor of alcoholic beverage, and appeared to be impaired. Both Gonzales and the Appellee were in possession of an illicit substance, but there was no testimony in either case that they were in fact under the influence of that substance. In *Gonzales*, the defendant sought unsuccessfully to sever

the charges on the grounds, "that the State improperly bolstered its proof of the DUI charge with evidence of the cocaine when the State was unable to prove that the defendant had actually consumed the cocaine." 9 So.3d at 727. On appeal, in a two to one decision, the court rejected the defense argument and affirmed the denial of the severance because the possession of cocaine was circumstantial evidence that defendant was under the influence of cocaine and the evidence of impairment was significant.

Given the similarities between the facts in *Gonzales* and in the case at bar it is hard to escape the conclusion that the result must be the same. Judge Taylor's dissent supports that conclusion. She writes:

> Here, there was no evidence or concession that cocaine was *not* a cause of the defendant's impairment. But, more important, there was no evidence that it was. The state presented no proof of any cocaine use at all. There were no blood test results indicating that cocaine was present in appellant's system. There was no testimony that appellant's appearance and behavior were consistent with cocaine consumption. Appellant made no admissions to using cocaine. In short, the state had no evidentiary basis for arguing to the jury, as it did, that appellant was probably impaired by cocaine.

9 So.3d at 728.

Precisely the same can be said of the marijuana evidenced by the paraphernalia in the case at bar. Here, as in *Gonzales*, the possession of these materials was circumstantial evidence that Appellant was under the influence of a controlled substance. There is no decision of any other district court conflicting with *Gonzales*; therefore, it is controlling, *Pardo v. State*, 596 So.2d 665, 666 (Fla. 1992), and it mandates reversal of the exclusion of the paraphernalia and the refusal evidence.

The decisions in *Estrich* and *Gonzales* can be reconciled. Together the two cases permit the introduction of evidence of drug usage over a 403 objection notwithstanding the absence of any test results showing that the substance was in the defendant's system at the time of driving, if

four elements are present. First, there is significant evidence that the accused was impaired. Second, the accused is in possession of evidence indicating that he or she could have recently used a controlled or chemical substance. Third, there is insufficient evidence that the accused has consumed any other substance that explains his or her impairment. Fourth, the evidence does not show that the substance found on the accused could not have contributed to the impairment.

It is important, however, to understand the limitations of this ruling. First, this Court reaches this conclusion because *Gonzales* requires it. Second, this ruling means that on the face of this record the marijuana paraphernalia and the urine test refusal are admissible; however, that in no way constitutes a ruling as to the sufficiency of the State's evidence to establish a prima facie case, which can be raised by appropriate motion. The fact that the marijuana evidence is admissible as circumstantial evidence that Appellee was under the influence of marijuana does not mean that the evidence is sufficient, and that is not the issue in this case.[1] Third, this ruling does not preclude the trial court from considering the 403 objection based on the four *Estrich/Gonzales* factors set forth in this order and evidence or stipulation.[2]

ACCORDINGLY, this Court REVERSES the trial court's order granting the Motions In Limine and remands this cause for action in accord with this order and opinion.

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[1] See *State v. Law*, 559 So.2d 187 (Fla. 1989)(sets forth test for sufficiency of circumstantial evidence).

[2] In considering whether the evidence shows that the substance found on the accused could have contributed to the impairment, the court may consider expert testimony along with other evidence consistent with marijuana usage. As noted in this opinion, the trial judge noted that the arresting officer did not possess drug recognition evaluator certification. A witness may be qualified as an expert through proof of "knowledge, skill, experience, training, or education." Florida Statutes, Section 90.702. The lack of drug recognition certification does not standing alone mean an officer cannot be an expert on the effects of controlled substances. The State may produce other evidence of qualifications. See *Sinclair v. State*, 995 So.2d 552 (Fla. 3d DCA 2008), *rev. denied*, 8 So.3d 358 (Fla. 2009) for examples of various ways witnesses can be qualified to give expert testimony.

BULONE and HELINGER, C. JJ. Concur.

ORDERED in State v. Varney (Appellate Court No. CRC 08-00072APANO) at St. Petersburg, Florida this 8th day of January, 2010.

Original order entered on January 8, 2010 by Circuit Judges David A. Demers, Joseph A. Bulone, Chris Helinger.

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