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

DOUGLASS EDWARD JOHNSTONE

Appellant,

v.

Appeal No. CRC 09-00041 APANO
UCN ~~522009MM015364XXXXNO~~
522009AP000041XXXXCR

STATE OF FLORIDA
Appellee.
____________________________________/

Opinion filed ____________________.

Appeal from a judgment and sentence
entered by the Pinellas County Court,
County Judge Robert G. Dittmer

Charles E. Lykes, Jr., Esquire
Attorney for Appellant

Lee Pearlman, Esquire
Attorney for Appellee

ORDER AND OPINION

PETERS, Judge.

THIS MATTER is before the Court on Appellant, Douglass Edward Johnstone's appeal from a conviction, after a jury trial, of Use of a Firearm While Under the Influence of Alcoholic Beverage, a second degree misdemeanor, in violation of § 790.151, Fla.

Stat. (1991). After review of the record and the briefs, this Court affirms the judgment and sentence.

Relevant Factual Background and Trial Court Proceedings

On May 30, 2009, Appellant, Douglass Edward Johnstone, had been drinking alcoholic beverages at a bar. He took a taxi home, leaving his own vehicle at the bar. Shortly thereafter Mr. Johnstone was involved in a disagreement with two other persons in his residence. He armed himself with a handgun and walked to a neighbor's house. The neighbor testified, in part, as follows; Mr. Johnstone "banged quite loudly" on her front door, that she did not open the door but asked what he wanted, that Mr. Johnstone replied, "Call 911. I have a gun," as he pointed the gun at the door, that he was slurring his words, that she called 911 and told Mr. Johnstone to leave and he walked away. Officers of the St. Petersburg Police Department responded and confronted Mr. Johnstone who had a black semi-automatic pistol in his hand. He was taken into custody and placed in a police cruiser.

Officer Matthew Carter arrived at the scene a short time later. He testified at trial to several points; he has had training regarding impairment by alcohol, he has been involved in approximately 100 DUI investigations, he noticed Mr. Johnstone had signs of impairment; specifically slurred speech, he seemed unsteady on his feet, had glassy, watery eyes and the smell of alcohol. A second officer, Officer Origlio, testified at trial as to similar observations and that Mr. Johnstone appeared under the influence of alcohol to the extent his normal faculties were impaired.

Officer Sheila Desich testified at trial that Mr. Johnstone said to a person at the scene, "Paul, if you are here when I get out, I'll [f------] blow you[r] head off. I'll kill

you." As she transported Mr. Johnstone to jail he stated, "If he's still there when I get out, you're going to need a body bag."

Appellant, was arrested for Open Carrying of Weapons in violation of § 790.053, Fla. Stat. (1987). On July 6, 2009, a Misdemeanor Information was filed charging Mr. Johnstone with Use of a Firearm While Under the Influence of Alcoholic Beverage. On September 29, 2009, a jury trial was conducted. Mr. Johnstone's Motion for Judgment of Acquittal made at the conclusion of the State's case was denied. The jury found Appellant guilty.

Issues

Appellant presents four issues. First, he was denied due process of law because the police did not perform testing related to his level of intoxication and he was not informed that he would ultimately be charged with an offense requiring proof of intoxication. Second, it was error to permit law enforcement officers to offer opinions of Mr. Johnstone's level of intoxication. Third, it was error to permit testimony of Mr. Johnstone's angry statements concerning persons at the scene. Fourth, it was error to deny the Appellant's motion for judgment of acquittal.

Due Process and Police Testing for Intoxication

Mr. Johnstone, argues he was denied due process of law. Namely, the Office of the State Attorney exhibited bad faith in choosing to charge him with an offense requiring proof of impairment when he was not arrested on that charge, no blood samples were taken and no tests of impairment had been performed. The problem with this argument is that there is no constitutional requirement for any particular tests to be performed by the police prior to a prosecution for an offense involving impairment. Furthermore, in

Florida the Office of State Attorney has complete discretion in deciding whether and how to prosecute.

The Due Process Clause of the United States Constitution is not violated when the police fail to use a particular investigatory tool. "[In] a prosecution for drunken driving that rests on police observation alone; the defendant is free to argue to the finder of fact that a breathalyzer test might have been exculpatory, but the police do not have a constitutional duty to perform any particular tests." *Arizona v. Youngblood,* 488 U.S. 51, 58-59, 109 S.Ct. 333, 338 (1988). In a local case the court addressed a claim of violation of due process rights when the Pinellas County Sheriff's Office followed it's then existing policy of not video taping the performance of field sobriety tests. The court stated:

> The issue before us, however, is not the failure to preserve evidence, but the failure to gather and preserve evidence in a particular manner. If we were to require the state in every case, in its investigation of a crime, to leave no stone unturned and preserve the evidence obtained in a manner satisfactorily only to the accused, it would shift the line of fairness between the rights of an accused and the rights of society totally to one side. *State v. Wells,* 103 Idaho 137, 645 P.2d 371 (Ct.App.1982).

State v. Powers, 555 So.2d 888, 890 (Fla. 2nd DCA 1990). Law enforcement does not have a constitutional duty to perform any particular tests. *Id.* at 890.

"Under Florida's constitution, the decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute. Art. II, § 3, Fla. Const.; *Cleveland; State v. Cain,* 381 So.2d 1361 (Fla.1980); *Johnson v. State,* 314 So.2d 573 (Fla.1975)." *State v. Bloom,* 497 So.2d 2, 3 (Fla. 1986). "[P]rosecutors have the prosecutorial discretion to charge a defendant with the crime that the evidence establishes that the defendant committed, or any lesser crime

thereof." *Toledo v. State,* 580 So.2d 335, 336 (Fla. 3rd DCA 1991). "The prosecutor has great discretion in deciding which charges should be filed and may decide, for a myriad of reasons, not to prosecute on certain charges notwithstanding the fact that sufficient evidence exists to support a conviction thereon." *Id.* at 336.

> In *State v. Jogan,* 388 So.2d 322 (Fla. 3d DCA 1980), the Third District Court reversed a trial court's dismissal of an information against a defendant conditioned on his military enlistment. The district court held that the pre-trial decision to prosecute or nol-pros is a responsibility vested solely in the state attorney. While recognizing a court's latitude and discretion during post-trial disposition, *Jogan* reiterated the state has absolute discretion at pre-trial. In considering similar circumstances, federal courts have held:
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> [T]he decision of whether or not to prosecute in any given instance must be left to the discretion of the prosecutor. This discretion has been curbed by the judiciary only in those instances where impermissible motives may be attributed to the prosecution, such as bad faith, race, religion, or a desire to prevent the exercise of the defendant's constitutional rights.
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> *United States v. Smith,* 523 F.2d 771, 782 (5th Cir.1975), *cert. denied,* 429 U.S. 817, 97 S.Ct. 59, 50 L.Ed.2d 76 (1976) (citations omitted). We apply these principles and hold that article II, section 3, of the Florida Constitution prohibits the judiciary from interfering with this kind of discretionary executive function of a prosecutor.

Bloom, 497 So.2d at 3. In the context of the failure to preserve evidence that is potentially useful, "[t]he term 'bad faith' generally implies something more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another." *Bennett v. State,* 23 So.3d 782, 793 (Fla. 2nd DCA 2009) (quoting *State v. Piper,* 2008 WL 170666, 2 (Ohio 5th Dist. 2008)).

In the present case, the record reflects no bad faith by the police or the Office of the State Attorney. There is no constitutional requirement for any particular tests to be

performed by the police prior to a prosecution pursuant to Florida Statute § 790.151. The Appellant concedes the police acted in good faith. The record contains nothing that suggests the Office of the State Attorney did anything more than conclude, after its own independent investigation, that the evidence established that Mr. Johnstone had committed the charged offense. There was no bad faith.

Law Enforcement Testimony Regarding Intoxication

"In general, lay witnesses have been permitted not only to testify as to their observations of a defendant's acts, conduct, appearance and statements, but also to give opinion testimony of impairment based on their observations. *See Cannon v. State,* 91 Fla. 214, 107 So. 360, 362 (1926); *City of Orlando v. Newell,* 232 So.2d 413 (Fla. 4th DCA 1970)." *State v. Meador,* 674 So.2d 826, 831 (Fla. 4th DCA 1996).

A trial court has wide discretion concerning the admissibility of evidence, and, in the absence of an abuse of discretion, a ruling regarding admissibility will not be disturbed. *Jent v. State,* 408 So.2d 1024, 1029 (Fla. 1981); *See Williams v. State,* 967 So.2d 735, 747-48 (Fla.2007), *cert. denied,* 552 U.S. 1283, 128 S.Ct. 1709, 170 L.Ed.2d 519 (2008); *Johnston v. State,* 863 So.2d 271, 278 (Fla.2003). That discretion, however, is limited by the rules of evidence. *Johnston,* 863 So.2d at 278. If the trial court mistakenly allows the introduction of inadmissible evidence it will not be reversed if the error was harmless.

In the present case, it was not an abuse of discretion for the trial court to allow the police officers to testify as to their observations of Mr. Johnstone and for Officer Origlio to also testify that Mr. Johnstone appeared under the influence of alcohol to the extent his normal faculties were impaired.

Appellant's Angry Threats

Appellant argues that the admission of the testimony by Officer Desich of his angry statements was error. He argues the statements were irrelevant, not an admission, not evidence of consciousness of guilt and "resulted in far too much unfair prejudice rather than probative relevance." In contrast, the State argues "these statements are relevant to show Appellant was impaired and specifically that Appellant's ability to make judgments and decisions was impaired; these statements are not unfairly prejudicial."

"The trial court exercises broad discretion in the admission of evidence, and in determining whether its probative value outweighs any prejudicial effect. See § 90.403, Fla. Stat. (2000); *Dennis v. State,* 817 So.2d 741 (Fla.2002); *Heath v. State,* 648 So.2d 660 (Fla.1994); *Robertson v. State,* 780 So.2d 106 (Fla. 3d DCA 2001)." *Wilchcombe v. State,* 842 So.2d 198, 199 (Fla. 3rd DCA 2003).

In the present case, the record does not establish and this court does not find an abuse of discretion in the admission of the Mr. Johnstone's statements.

The Motion for Judgment of Acquittal

Generally, an appellate court will not reverse a conviction that is supported by competent, substantial evidence. In moving for a judgment of acquittal, a defendant admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence. Courts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law. *Fitzpatrick v. State*, 900 So.2d 495, 507 (Fla. 2005);

Morales v. State, 952 So.2d 1266 (Fla. 2nd DCA 2007). In the present case, the denial of the motion for judgment of acquittal was not error.

Conclusion

For the reasons set forth above, this court concludes that the judgment and sentence of the trial court should be affirmed.

IT IS THEREFORE ORDERED that the judgment and sentence of the trial court is affirmed.

ORDERED at Clearwater, Florida this ____ day of August, 2010.

Original order entered on August 16, 2010 by Circuit Judges Michael F. Andrews, Raymond O. Gross, and R. Timothy Peters.

cc: Honorable Robert G. Dittmer
Charles E. Lykes, Jr., Esquire
Office of the State Attorney