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 14-00022APANO
UCN522012CT098502XXXXXX

CHRISTOPHER BARTZ

Appellee.
_____/

Opinion filed November 4, 2014.

Appeal from an Order Granting
Motion to Suppress
entered by the Pinellas County Court
County Judge Paul Levine

John D. McBride, Esquire
Attorney for Appellant

Barry Taracks, Esq.
Attorney for Appellee

ORDER AND OPINION

ANDREWS, Judge.

THIS MATTER is before the Court on State of Florida's appeal from a decision of the Pinellas County Court to granting Defendant's motion to suppress statements made during a DUI stop. After reviewing the briefs and record, this Court reverses the judgment.

Factual Background and Trial Court Proceedings:

On September 30, 2012, at approximately 8:40 p.m., Pinellas County Sherriff's Deputy Jason Howard was on patrol in Oldsmar. He observed the Appellee's vehicle travel through a red light at the intersection of St. Petersburg Drive and State Road 580. He followed Appellee's vehicle and observed him make improper lane changes and drive in excess of the speed limit. Deputy Howard initiated a traffic stop. Appellee stopped his vehicle in a median turn lane at the intersection of St. Claire and State Road 580. While conversing with Appellee about the traffic infractions, Deputy Howard observed possible signs of impairment. At the conclusion of the civil portion of the traffic stop, Deputy Howard gave Appellee a verbal warning, a written warning, and a traffic citation and returned Appellee's license and registration. The Defendant was then informed that the deputy was initiating a DUI investigation. The Defendant was asked to step out of his vehicle. At all times the deputy conversed with the Defendant in what he described as a calm and casual manner. At the beginning of the DUI investigation a backup deputy, Deputy West, arrived to assist. At no time did either deputy threaten or yell at the Defendant. The deputies were in uniform. Their firearms remained holstered. The Defendant was compliant. Deputy Howard testified that he observed the Defendant to be unsteady on his feet as well as having difficulty exiting his vehicle. Deputy Howard also observed that The Defendant had bloodshot and glassy eyes.

Deputy Howard asked the Defendant where he was coming from and if Appellee had any alcoholic beverages. The Defendant replied he was coming from Jack Willies, a local restaurant and bar. Appellee initially indicated that he had two alcoholic beverages and later changed his answer to four alcoholic beverages. Prior to asking Appellee these questions, Deputy Howard did not advise Appellee he was free to leave. All of the questions were asked at the location of

the traffic stop. All statements made by Appellee in answer to those questions asked were made at the location of the stop. The deputy requested that Appellee participate in field sobriety exercises. Appellee refused. The request and refusal were both relayed at the scene of the stop. Deputy Howard never read *Miranda* rights to the Defendant. Deputy Howard placed the Defendant under arrest for DUI based upon all of Deputy Howard's observations. Deputy Howard's interaction with the Defendant from the initiation of the traffic stop to the conclusion of the DUI investigation was between 30 and 45 minutes.

Issue:

At hearing on the motion, defense counsel argued that where, as was the case here, an officer informs the Defendant that he is conducting a DUI investigation and asks the Defendant to exit his car, the Defendant is effectively in custody for the purposes of *Miranda* because the Defendant was not free to leave. Thus, any questions asked of the Defendant after the officer advised him of the DUI investigation should have been asked only after the Defendant had been read *Miranda.* In response, the prosecutor argued that the Defendant was not in custody for the purpose of *Miranda* at the time the deputy began his DUI investigation. The prosecutor argued that the actions of the deputy in advising the Defendant that the police were starting a DUI investigation and asking him to step outside of his car did not rise to the level of custodial interrogation. The trial court in its ruling was persuaded by the Defendant's argument. The court stated, in sum and substance:

> THE COURT: I'm going to grant the motion. … *Had the police officer, the deputy, not told the defendant, I am now conducting a DUI investigation after he had him come out of the vehicle,* I would agree with you. It would be certainly a much harder decision for me, but what we have here is a situation where the defendant's ordered out of the car after a routine traffic stop for running a red light. *He's told after police observe bloodshot eyes. He testified he smelled an odor of alcohol and he was fumbling for his registration. He told him he's conducting a DUI investigation.* I think you're focusing, which you certainly

> have to do to some extent on the stop and whether or not he is -- the type of custody he's in. But one of the things you have to look at, the whole purpose of *Miranda*, if you look at the words of *Miranda*, is to let someone know that any statement he made can be used against him. That's the purpose of *Miranda.* And *if you're going to tell someone they're under investigation of DUI, clearly the defendant's not allowed to leave.* In fact, they escort him over to the parking lot. So no reasonable person can think, well, I'm just going to walk away from this. Then you have to go to the next step and ask yourself, which is one of the prongs in some of the materials you gave me from Judge Demers, is whether or not the statements asked or the questions asked are designed to lead to inculpatory statements by the defendant. And I think I agree with some of your analysis on the stop perhaps, *but once you tell someone they're under investigation for DUI and you're conducting a criminal investigation and then you ask them questions I think you have to read them Miranda.* I understand all your cases. I understand your point of view. We just disagree on that one point. So for that reason I'm going to grant the motion.

(Emphasis added).

The issue presented to the court is whether informing the Defendant that he was being investigated for driving under the influence and asking him to exit his car, was restraint on his freedom of movement to the degree associated with a formal arrest.

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).

Custody for the Purpose of Miranda:

"Under *Miranda,* statements made to the police during a 'custodial interrogation' must be suppressed if the police have not informed the suspect of his constitutional rights before the

interrogation." *McAdams v. State,* 137 So.3d 401 (Fla. 2d DCA 2014). As the Second District explained in *State v. Pitts,* 936 So.2d 1111 (Fla. 2006),

> [i]n determining "whether a suspect is 'in custody' for purposes of receiving of *Miranda* protection, *the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest.*" Whether a suspect has been subjected to such a restraint on freedom of movement depends on "how a reasonable person in the suspect's position would have understood his situation."

Id. at 1123 (emphasis added). The Fifth Amendment of the United States Constitution and Article I, section 9 of the Florida Constitution require police to inform an individual of their right against self-incrimination prior to any custodial police interrogation. *Traylor v. State,* 596 So.2d 957, 965-966 (Fla. 1992) ("Based on the foregoing analysis of our Florida law and the experience under *Miranda* and its progeny, we hold that to ensure the voluntariness of confessions, the Self–Incrimination Clause of Article I, Section 9, Florida Constitution, requires that prior to custodial interrogation in Florida, suspects must be told that they have a right to remain silent, that anything they say will be used against them in court, that they have a right to a lawyer's help[.]"). A person is in custody, for *Miranda* purposes, from the moment of formal arrest or as soon as the person's "freedom of action is curtailed to a 'degree associated with formal arrest.'" *Berkemer v. McCarty,* 468 U.S. 420, 440, 104 S.Ct. 3138, 3150, 82 L.Ed.2d 317, 335 (1984) (quoting *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275, 1279 (1983)); *Caldwell v. State,* 41 So.3d 188 (Fla. 2010). The Florida Supreme Court has adopted the objective, reasonable person test to determine if a suspect is in custody and therefore entitled to *Miranda* warnings before questioning. *See Ramirez v. State,* 739 So.2d 568 (Fla.1999); *Allred v. State*, 622 So.2d 984 (Fla. 1993); *Caso v. State*, 524 So.2d 422 (Fla. 1988); *Roman v. State*, 475 So.2d 1228 (Fla. 1985). The trial court must determine if, under the totality of the circumstances, a reasonable person in the suspect's position would not feel free to

leave or to terminate the encounter with police. *Connor v. State,* 803 So.2d 598, 605 (Fla.2001); *McAdams v. State*, 137 So.3d 401 (Fla. 2 DCA 2014). The first step is to determine whether an individual's freedom of movement was curtailed. *Howes v. Fields,* 132 S.Ct. 1181, 1189, 182 L.Ed.2d 17, 27 (2012). "For *Miranda* purposes, custodial interrogation means 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" *Ross v. State*, 45 So.3d 403, 415 (Fla. 2010).

The freedom of movement inquiry is not, in and of itself, the deciding factor in determining whether a person is in custody for the purpose of *Miranda* but instead the first step in the analysis. *See MacKendrick v. State* 112 So.3d 131 (Fla. 1 DCA 2013) ("Determining whether an individual's freedom of movement was curtailed, however, is simply the first step in the analysis, not the last."). Every time a person is stopped for a traffic violation there is restraint on the freedom of movement. However, routine traffic stops and other investigative stops pursuant to *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), do not implicate *Miranda* even though the detained persons are not free to leave during the stop. *Berkemer*, 468 U.S. at 440, 104 S.Ct. at 3150–51, 82 L.Ed.2d at 334–35; *State v. Dykes*, 816 So.2d 179 (Fla. 1st DCA 2002) ("Roadside questioning of a defendant pursuant to a routine traffic stop does not alone warrant *Miranda* warnings."). Whether a person is in custody for the purposes of *Miranda* depends upon totality of the circumstances. *Stansbury v. California,* 511 U.S. 318, 322, 114 S.Ct. 1526, 1529, 128 L.Ed.2d 293, 298 (1994) (When "determining whether an individual was in custody, a court must examine *all of the circumstances* surrounding the interrogation, but the ultimate inquiry is simply whether there was a formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest.") (emphasis added)

(citations omitted) (internal quotations and brackets omitted); *State v. Pitts,* 936 So.2d 1111, 1124 (Fla. 2 DCA 2006) ("In order for a court to conclude that a suspect was in custody, it must be evident that, under the *totality of the circumstances,* a reasonable person in the suspect's position would feel a restraint of his or her freedom of movement …") (emphasis in original) (citations omitted).

When analyzing the totality of the circumstances the relevant inquiry is whether undue pressure or coercion was brought to bear in obtaining the defendant's statement. *State v. Scott,* 786 So.2d 606, 609 (Fla. 5th DCA 2001) ("[I]n the absence of any indicia of coercion or intimidating circumstances, police questioning about criminal conduct or activity alone, does not convert an otherwise consensual encounter into a custodial interrogation.") (internal quotations omitted). Coercion is most often present when questioning takes place in a "police-dominated atmosphere," *Miranda*, 384 U.S. at 445, 86 S.Ct. at 1612, 16 L.Ed.2d at 707, filled with the "inherently compelling pressures," *Howes*, --U.S. at --, 132 S.Ct. at 1191, 182 L.Ed.2d at 29, of being removed from familiar surroundings and interrogated in a police station. Eliminating the unduly coercive environment was the Court's concern in *Miranda*. *Id.* at 1189-1190 ("We have declined to accord talismanic power to the freedom-of-movement inquiry and have instead asked the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*."). Thus, "'custody' is a term of art that specifies circumstances that are thought generally to present a *serious danger of coercion*." *Howes*, – U.S. at –, 132 S.Ct. at 1189, 182 L.Ed.2d at 17 (emphasis added).

The Present Case:

A. Informing Defendant Of Criminal Suspicion/Investigation:

As he gave his reasoning for granting the Defendant's motion to suppress, the trial court expressed that the sheriff's deputy's decision to inform the Defendant that he was conducting a DUI investigation and asking him to step out of the car would convey to someone that he is not free to leave and therefore in custody for the purposes of *Miranda*. The court went on to cite additional observations the deputy made of the Defendant that factored into the deputy's decision to conduct a DUI investigation. The record does not reflect that these observations were shared with the Defendant. Those observations included smelling the odor of alcohol, observing the defendant fumbling for his registration and observing that the defendant had bloodshot eyes. *Miranda* rights do not commence upon the discovery of facts justifying an arrest, or because a person is the focus of a criminal investigation. *Noe v. State*, 586 So.2d 371, 381 (Fla. 1st DCA 1991). The fact that police have sufficient evidence to establish probable cause at the time they converse with a defendant does not, alone, establish custody. *See Cillo v. State*, 849 So.2d 353 (Fla. 2d DCA 2003) citing *California v. Beheler*, 463 US 1121 (1983) (concluding the sole fact that police had a warrant for appellant's arrest at the time he went to the police station did not establish that he was in custody). Even a clear statement from a police officer that the person being interrogated is a prime suspect is not, alone, dispositive of custody for the purpose of *Miranda. See State v. Pitts,* 936 So.2d 1111 (Fla. 2d DCA 2006) (Defendant was not in custody during interrogation even after he was told by police that his associate had implicated him in the murders of two people). That Appellee was informed he was the subject of a DUI investigation and asked to step outside of the car does not, alone, transform an investigatory *Terry* stop into a custodial detention.

B. Asking Potentially Incriminating Questions:

The trial court's focus on the questions the Defendant was asked by the deputy is misdirected. The fact that Appellee was asked potentially incriminating questions does not automatically convert a traffic stop into a custodial detention. *See Berkemer,* 468 U.S. at 439, 104 S.Ct. 3138, 3150 (officers may detain a person briefly to investigate the circumstances that provoked the officer's suspicions and ask a moderate number of questions related to those suspicions); *State v. Janusheske*, 111 So.3d 967 (Fla. 5 DCA 2013) (Defendant was not in custody when officers, who were investigating a report that the defendant threatened to kill others, approached the defendant and asked him if he had drugs or weapons on him which prompted the defendant to retrieve cocaine from his pocket); *State v. Sherrod,* 893 So.2d 654 (Fla. 4 DCA 2005) (Defendant stopped for a traffic violation on a bicycle was not in custody for the purposes of *Miranda* when the officer asked him if he had any weapons or drugs on him); *State v. Hinman*, 100 So.3d 220 (Fla. 3 DCA 2012) (Defendant, suspected in a narcotics deal, was not in custody when police stopped the car for a traffic violation and asked defendant if she had any weapons or drugs which prompted defendant to produce a bag of pills); *State v. Dykes*, *supra* at 6. Drinking alcohol and driving does not run afoul of Florida law. It is drinking to the point of impairment or having a blood alcohol level of .08 or above and then driving that runs afoul of Florida law. *Florida Statutes* 316.193 (2013). Not every person detained and investigated for DUI is, at the time, under arrest or even eventually arrested. Some are detained for as long as it takes to conduct a DUI investigation and then released when it is determined they are not impaired. *See generally McKeown v. State,* 16 So.3d 247 (Fla. 4 DCA 2009). Part of the DUI investigation includes asking if the person being investigated has been drinking and if so how many drinks that person has had. The fact that a question has the potential to be

incriminating does not establish that the answers provided were the product of a custodial interrogation. The same questions have an equal amount of potential to be exculpatory.

C. Roadside Sobriety Tests:

In his ruling the trial judge expressed concern that the Defendant was asked to participate in roadside sobriety testing. It was a contributing principle in his thought process. The request for the Defendant to participate in roadside sobriety tests came after he had made the inculpatory statements that are the subject of the motion to suppress. However, even if the request had been made prior to the questioning, it still does not mean that an objective, reasonable person in the Defendant's situation would believe that he was in custody for the purpose of *Miranda.* In *State v. Burns,* 661 So.2d 842, 843-844 (Fla. 5th DCA 1995) the court held that a defendant stopped for a traffic offense was not in custody during an eleven minute stop in a public area where one officer requested the defendant's license and registration and had him perform field sobriety exercises after refusing the defendant's requests to be allowed to go home. *See also, State v. Alvarez,* 776 So.2d 1060 (Fla. 3 DCA 2001) (no *Miranda* warnings need be given prior to the administration of roadside sobriety tests where a motorist is not in custody); *Duncan v. State,* 659 So.2d 1283 (Fla. 4 DCA 1995) (the trial court did not abuse its discretion by admitting a statement the defendant made in the course of taking a roadside sobriety test, notwithstanding the absence of *Miranda* warnings).

In this case, the Appellee initially acknowledged having consumed two beers at a local bar. Upon further questioning he admitted it was really four. It may also be the case that the Defendant knew he exhibited signs of impairment. When conversing with the prosecutor the trial court was focused on the deputy's decision to explain to the Defendant that he was conducting a DUI investigation or "what's otherwise known as a criminal investigation." The

import of the court's statement lends itself to what the Defendant or any person in the Defendant's position would have been led to think. However, when analyzing whether an objective, reasonable person would have felt he was in custody when a deputy asked him to participate in field sobriety exercises, the court cannot take that person's consumption of alcohol and/or possible impairment into consideration.[1] In other words, an objective reasonable person is a person who was not driving under the influence to the extent that his normal faculties are impaired or with a blood alcohol content of .08 or above. Under the facts as presented here, there was nothing in the officer's actions or statements regarding completing field sobriety tasks that should have made an objective, reasonable person believe he was in custody.

D. Deputy's Observations:

The trial court was concerned that the officer noted that he smelled the odor of alcohol on the Defendant, noticed the Defendant fumbling for documents and observed the Defendant to have blood shot eyes. The deputy also observed the Defendant to be unsteady. It may be the case that these observations along with Appellee's driving were sufficient to arrest Appellee for DUI. It may even be the case that the deputy had already made up his mind that he was going to arrest Appellee and was just proceeding with his investigation as he normally does in this type of situation. However, unless these observations were expressed to Appellee as the reason for

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[1] The objective reasonable person standard does not and cannot take into consideration the particular circumstances of each individual. "[A]n objective, reasonable-man test is appropriate because, unlike a subjective test, it 'is not solely dependent either on the self-serving declarations of the police officers or the defendant nor does it place upon the police the burden of anticipating the frailties or idiosyncrasies of every person whom they question.'" *Berkemer,* 468 U.S. at 442, 104 S.Ct. at 3151.

> The objective test furthers 'the clarity of [*Miranda*'s] rule,' *Berkemer,* 468 U.S., at 430, 104 S.Ct. 3138, ensuring that the police do not need 'to make guesses as to [the circumstances] at issue before deciding how they may interrogate the suspect,' *id.,* at 431, 104 S.Ct. 3138. To be sure, the line between permissible objective facts and impermissible subjective experiences can be indistinct in some cases.

Yarborough v. Alvarado, 541 U.S. 652, 667 124 S.Ct. 2140, 2151 U.S.,2004 (rejecting the argument that the trial should court take into consideration the defendant's status as a 17 year when assessing whether a reasonable person with the defendant's youth and inexperience would have felt free to leave the interview).

conducting a DUI investigation, they are irrelevant to the question of whether an objective, reasonable person would believe he was in custody. *See Monroe v. State,* -- So.3d --, 2014 WL 5420656 (Fla. 1 DCA 2014) (quoting, *Berkemer v. McCarty,* 468 U.S. 420, 442, 104 S.Ct. 3138, 82 L.Ed.2d 317) ("A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time ...."); *Hunter v. State*, 8 So.3d 1052, 1063 (Fla. 2008) ("A person is in custody if a reasonable person placed in the same position would believe that his or her freedom of action was curtailed to a degree associated with actual arrest. 'The proper inquiry is not the unarticulated plan of the police, but rather how a reasonable person in the suspect's position would have perceived the situation.'").

Although the trial court focused part of its reason on the officer's observations of the Defendant's physical condition, on cross-examination the deputy acknowledged that these observations did not necessarily equal impairment. Specifically on cross-examination the deputy acknowledged that the Appellee's fumbling for his registration could mean Appellee was nervous and did not necessarily mean Appellee was impaired. Similarly, on cross-examination the deputy acknowledged that the odor of alcohol coming from the car could be explained by accidentally spilled alcohol and did not mean it was emanating from the Defendant. "'It was the compulsive aspect of custodial interrogation, and *not the strength or content of the government's suspicions* at the time the questioning was conducted, which led the Court to impose the *Miranda* requirements with regard to custodial questioning') (quoting *United States v. Caiello*, 420 F.2d 471, 473 (CA2 1969))." *Berkemer,* 468 U.S. at 442, 104 S.Ct. at 3151 (emphasis added).

In his brief the Defendant cites *State v. Evans,* 692 So.2d 305 (Fla. 4th DCA 1997) to support the trial court's ruling. In *Evans,* the defendant was involved in an automobile accident.

At the conclusion of the accident investigation the defendant was then told that he was being investigated for DUI and instructed not to leave. He was then transported to a gas station to conduct FSTs. He was also asked questions about his injuries and alcohol consumption. At bar, the defendant was not involved in a car accident. He was not told he could not leave. He was not transported to the Hess station immediately after being told he was being investigated for DUI and then subjected to questioning about his alcohol consumption. There was no show of police authority beyond that necessary to dispel the deputy's suspicion. *See Berkemer,* 468 U.S. at 439, 104 S.Ct. 3138, 3150. *Evans* is distinguishable.

Conclusion:

In the totality of the circumstances, the traffic stop here did not take on the necessary characteristics of custody for the purposes of *Miranda.* The stop was in the center of a busy state road across from a convenience store. Passing motorists and pedestrians were able to observe what was happening. Only two officers were involved. The deputies did not remove their side arms. The deputies were at all times polite and used a calm tone of voice. No threats were made or other form of coercion employed. Appellee was not placed in handcuffs. He was not presented with evidence of his impairment, i.e. his bloodshot eyes, his odor of alcohol, his fumbling for his registration or his unsteadiness. The deputies did not suggest that the only way to possibly avoid arrest was to cooperate. Nor was Appellee told that cooperation would mean he would not be arrested. Appellee's license and registration were returned to him at the end of the civil traffic investigation. In short, the pressure and coercion usually present and necessary to create in the mind of an objective reasonable person that they are in custody are not present here. The facts do not establish that Appellee was subjected to the "police dominated" atmosphere. *Berkemer,* 468 U.S. at 421 & 439, 104 S.Ct. at 3140 & 3149. Considering the

totality of the circumstances, nothing in the interaction between the Appellee and the police "present[ed] a *serious danger of coercion*." *Howes*, – U.S. at –, 132 S.Ct. at 1189, 182 L.Ed.2d at 17 (emphasis added). This court concludes that the order of the trial court granting Appellee's Motion to Suppress should be reversed.

IT IS THEREFORE ORDERED that the order of the trial court denying Appellee's Motion to Suppress is reversed.

ORDERED at Clearwater, Florida this 4 day of November, 2014.

Original Order entered on November 4, 2014, by Circuit Court Judges Michael F. Andrews, Raymond O. Gross, and R. Timothy Peters.

cc: Honorable Paul Levine
Barry Taracks, Esquire
Office of the State Attorney