IN THE SUPREME COURT OF THE STATE OF FLORIDA

WILLIAM E. BURNS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO.:86,520

FIFTH DISTRICT COURT
OF APPEAL CASE NO.: 94-457

AN APPEAL SEEKING THE DISCRETIONARY JURISDICTION OF THIS COURT TO REVIEW AN ORDER OF THE FIFTH DISTRICT COURT OF APPEAL REVERSING THE THE TRIAL COURT'S GRANTING OF APPELLANT'S MOTION TO SUPPRESS

AMENDED JURISDICTIONAL BRIEF

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AUTHORITIES CITED

STATEMENT OF CASE

The Appellant, WILLIAM BURNS, Appellee below, respectfully seeks to invoke this Court's discretionary jurisdiction pursuant to Rule 9.120, Florida Rules of Appellate Procedure and Article 5, Section 3, of the Florida Constitution, to review the decision of the Fifth District Court of Appeal in State v. Burns (Case Number 94-457) and as grounds therefore would state:

Appellant is a defendant in a Driving Under the Influence case. He filed a motion to suppress evidence at roadside (field sobriety tests and statements) and at the Orange County Breath Testing (interrogation, requested field sobriety and breath tests, and refusals thereof). His motion was based on the police failure to advise him of various rights under Article One, Sections 9 and 16 of the Florida Constitution and as required by this Court in Traylor v. State, 596 So.2d 957 (Fla. 1992) and Allred v. State 622 So.2d 984 (Fla. 1993).

A suppression hearing was held and testimony heard by the trial court. The trial court had the opportunity to observe the demeanor of the arresting officer and William Burns, both of whom testified. The arresting officer testified falsely, saying repeatedly she never told Mr. Burns he could not leave, only to be forced to admit that falsity on cross-examination. (R 19)

The trial judge found that the Petitioner was in custody at roadside for purposes of Article one, Section 9, and suppressed the statements made during the field sobriety tests as Defendant had not been advised of his rights under Traylor and Allred. The trial court accepted the argument that the videotaped

questioning of the Defendant after his arrest was violative of both his right to remain silent under Section 9 and his right to have an attorney present under Section 16 at this "crucial stage", e.g. interrogation, and suppressed the videotaped questioning of Mr. Burns. The trial judge futher suppressed under Section 16, the request of Mr. Burns to take field sobriety tests, e.g. alphabet tests, the request for him to take a breath test, and Mr. Burn's refusals thereof. The trial court apparently found said testing after arrest to constitute a "crucial stage" for which no written waiver of counsel had been obtained, and that it was "feasible" at the Breath Testing Center for Mr. Burns, who was in "custodial restraint" to contact an attorney prior to taking a breath test.

In the trial court's order granting suppression of this evidence, the trial court certified this issue to the Fifth District Court of Appeal under Rule 9.160(e)(2), Fla. R. App. P. From that trial court order, the State appealed to the Fifth District Court of Appeal. The Fifth District accepted the appeal and rendered an opinion on March 31, 1995 reversing the trail court on most major issues herein, and ruling thereon in favor of the State. Mr. Burns timely filed a Motion for Rehearing. The Motion for Rehearing was denied, but the Fifth District reissued it Order on August 25, 1995. (Appendix A) Therefrom, Mr. Burns respectfully filed his notice under 9.120, Florida Rule of Appellate Procedure.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal herein ruled on the rights provided by the Florida Constitution, Article one, section 9 and section 16, as those rights apply to persons stopped and arrested for the offense of Driving Under the Influence of an alcoholic beverage.

The decision below, however, conflicts with Spivey v. State, 529 So.2d 1088 (Fla. 1988) in that it authorizes actual police questioning of persons in custody under Article one, section 9 based on whether the content of their answers are incriminating. Custodial interrogation, however, has always been improper, absent warnings, regardless of whether the answers. The decision also conflicts with Allred v. State, 622 So.2d 984 (Fla. 1993) in that it treats field sobriety tests requiring verbal responses as "non-testimonial" field sobriety tests to which Article one, section 9 rights do not apply.

The decision herein also conflicts with Traylor v. State, 596 So.2d 957 (Fla. 1992) in that it effectively adopts a "per se" rule with regard to traffic stop which makes it error "as a matter of law" for a trial judge to rule a person in custody if the Berkemer criteria are present. This is true even if the defendant's request to leave is denied, the arresting officer testifies falsely at the hearing, and the trial judge after seeing the witnesses finds the circumstances would lead a reasonable person to believe he was in custody. This invades the fact-finding province of the trial court. See also Wasco v. State, 505 So.2d 1314 (Fla. 1987); Perez v. State, 536 So.2d 359

(Fla. 3d DCA 1988). The Fifth District impermissible looked at whether the officer has the right to detain the Defendant, and not whether a reasonable person in Defendant's position would have felt detained when his request to leave was denied.

The decision also conflicts with Traylor v. State, supra, in holding a person in custody has no right to speak with an attorney under Article one, section 16 even when requested to take a breath test, even when questioned while in custody, and even when requested to take testimonial field sobriety tests. Defendant submits these are "crucial stages" of a DUI prosecution at which point the accused is in need of, and has the right to, consult with an attorney in facing the criminal justice system. The decision below, therefore, conflicts with Peoples v. State, 612 So.2d 555 (Fla. 1992); State v. Douse, 448 So.2d 1184 (Fla. 4th DCA 1984); and Phillips v. State, 612 So.2d 557 (Fla. 1993).

The decision below conflicts with a number of cases concerning the rights available to criminal defendants under the Florida Constitution. Acceptance of jurisdiction by this Court is necessary to reaffirm that those rights apply to all criminal defendants, even those accused of driving under the influence.

POINT I

WHETHER ANSWERING QUESTIONS AND THE TAKING, OR REFUSING, OF CERTAIN FIELD SOBRIETY TESTS CONSTITUTES INTERROGATION UNDER ARTICLE ONE, SECTION 9, FLORIDA CONSTITUTION

The Fifth District's ruling that the constitutionality of police questioning depends on whether a suspect's answers are incriminating or not, directly conflicts with this Court's ruling in Spivey v. State 529 So.2d 1088 at 1116 (Fla . 1988):

> The Miranda rights were established as a prophylactic rule to minimize the coercive atmosphere of custodial interrogation by law enforcement officers. The rule prohibits the use by the state of any statement, whether exculpatory or inculpatory, obtained in a custodial setting unless the procedural safeguards of Miranda are followed.

Herein the Fifth District ruled the post-arrest questioning of Mr. Burns on video would be admissible, even without Miranda warnings, if he answered correctly. While the Fifth District acts as if these are immaterial biographical questions, the motivation for asking these questions was admittedly to obtain incriminating answers. (Interestingly, after rehearing, the Court changed its Order of March 31, 1995 to exclude references to this motivation and suddenly found this interrogation to be a "legitimate memorilization of the Defendant's speech.")

The Fifth District can change its Order, but it can't change the facts. These were custodial questions intended to obtain incriminating answers. No Florida court has ever allowed custodial interrogation without Miranda warnings, where the police have sought incriminating responses.

The decision below encourages the systematic, wholesale violation of constitutional rights. Thereunder a police officer could freely question a person in custody without warning, yet

only be required to discard those answers later determined to be incriminating. The Fifth District has no power to authorize police officers to ask custodial questions without warnings under the theory that constitutional violations can later be sorted out (ignoring the taint such a procedure creates). That directly conflicts with this Court's ruling in Traylor, supra:

> We hold that to ensure the voluntariness of confessions, the Self-Incriminating Clause of Article 1, Section 9, Florida Constitution, requires that prior to custodial interrogation in Florida, suspects must be told [their Miranda warnings] (emphasis added)

596 So.2d at 966. The decision below conflicts because it allows custodial questioning of DUI defendants without warnings.

The Fifth District's decision also directly conflicts with Allred v. State, supra, wherein this Court held a custodial request to recite the alphabet constituted interrogation. Although "counting" on field sobriety was not addressed, this Court's footnote in State v. Taylor 648 So.2d 701 (Fla. 1995) would appear to consider "counting" as interrogation also.

Herein, the Fifth District sought to use Allred to justify its ruling that custodial field sobriety tests having a testimonial portion, still are admissible without warnings to show slurred speech. That ruling ignores that Allred spoke in terms of a suspect "reading a transcript" and that Allred disapproved of Contina v. State 599 So.2d 728 (Fla. 2d DCA 1992) and suppressed the alphabet therein even though correctly recited through the letter "p". Under the decision herein, the Contina alphabet would have been admissibly through "p" because it was correct, even though no Miranda warnings had been given.

The decision herein also conflicts with Allred in that the it defines the alphabet test as "non-testimonial." Despite the clear ruling in Allred, the Fifth District says that the refusal of Mr. Burns to perform "physical, non-testimonial field sobriety tests" is admissible. Yet, this ignores the evidence that Mr. Burns was told previously he would be requested to take the alphabet test and the walk and turn test, both of which require testimonial responses, e.g. counting. (R 47-48) Because he did not want to count or recite the alphabet, he therefore declined to take the tests (R 49). For the Fifth District to call such tests "non-testimonial" when in fact they clearly require testimonial responses, conflicts with Allred.

Moreover a request of one in custody to perform field sobriety tests which require testimonial responses, clearly is a request to be interrogated. Mr. Burns said "no." (A chance to do only the physical portion of the tests was not offered. R 49)

This Court has unequivocally ruled that once an individual is in custody, his refusal or failure to talk cannot be commented upon at trial. Spivey v. State, supra. Mr. Burn's "no" response clearly invoked his section 9 rights. The decision below therefore conflicts because it allows Mr. Burn's refusal to be interrogated through the recitation of the alphabet or the counting on walk and turn tests to be used against him.

Absent warnings, Sec. 9 precludes custodial interrogation, whether by direct questioning or recitation of the alphabet, The decision below conflicts therewith by holding custodial interrogation is admissible if the answers are correct, and by ignoring the testimonial aspect of certain field sobriety tests.

POINT II

WHETHER MR. BURNS HAD A RIGHT TO COUNSEL AT ROADSIDE UNDER ARTICLE 1, SECTION 9 OF THE FLORIDA CONSTITUTION

The Fifth District's decision further conflicts with Traylor v. State, supra, wherein this Court stated at 966:

> A person is in custody for Section 9 purposes if reasonable person placed in that same position would believe that his or her freedom of action was curtailed to a degree associated with actual arrest.

The District Court impermissible shifted the inquiry away from what a reasonable person believes, to a standard based more on federal law and the police view of the stop, e.g. categorizing this as a "routine traffic stop" reflects more a police view than a focus on whether the driver believes he is in custody.

The factor most associated with arrest is the loss of freedom to leave and do as one wishes. Yet, the Fifth District summarily dismisses the fact that Mr. Burns was repeatedly told from the moment of the stop he could not leave, by stating:

> Additionally, Burn's testimony to the effect that prior to the roadside tests, he requested to be allowed to go because he was just around the corner from his residence is not determinative. The deputy could properly have refused the request regardless of whether Burns was subject to full custodial arrest or a temporary detention.

This has nothing to do with a reasonable person's beliefs. The court did not explain why denying a request to leave cannot be determinative of a reasonable person's belief, if the trial court so finds. This impermissible shifts attention from the reasonable person's beliefs as required in Traylor and instead focuses on the officer's legal right to detain Mr. Burns.

Moreover, that rationale conflicts with this Court's

decision in Roman v. State 475 So.2d 1228 (Fla. 1985):

> A policeman's unarticulated plan [to arrest] has no bearing on the question of whether a suspect was "in custody" at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.

475 So.2d at 1231. If the "unarticulated plan" to arrest has no bearing on a suspect's beliefs, then the opinion below conflicts in holding an unarticulated right to detain has a bearing on a suspect's belief. It is simply illogical to say one has a bearing and the other does not, when neither was articulated to Mr. Burns. The repeated denial of Mr. Burn's request to leave would certainly give rise in reasonable persons to a belief that they were not free to leave, as the trial court found.

The Fifth District's decision also conflicts with Traylor, supra, in that it effectively adopts a "per se" rule with regard to traffic stops. While even the Supreme Court in Berkemer v McCarty, 468 U.S. 420, 104 S.Ct. 3138 (1984) realized that each case would require a factual determination, the Fifth District has now effectively created an arbitrary standard in ruling:

> Here, there are no factors which would take this case outside the holding of Berkemer. The trial court's finding that Burns reasonably believed his freedom of action was "curtailed to a degree associated with actual arrest" was erroneous as a matter of law. (emphasis added)

This is nothing more than a "per se rule." Instead of considering the totality of the factual situation as Traylor and Berkemer require, the Fifth District ruled that a trial judge in effect could only look to see if the Berkemer factors were present. If those factors are present, then "as a matter of law" the trial judge is required to rule for the State, even if

the arresting officer lacks credibility and candor, or if there are factors not present in Berkemer, e.g. a request to leave.

The Fifth District's statement that there are no factors outside Berkemer is itself a factual conclusion. It overlooks that reasonable persons' beliefs can vary based on whether they are being stopped by Officer Friendly at noon in downtown, or at night by Officer Hostile on a lonely, deserted country road. Similar police actions may give rise to different responses and beliefs based upon the persons and attitudes involved. It is for this reason there is no "per se rule" about custody, but only a factual issue best left for trial court determination.

The decision below thus invades the fact finding province of the trial court and conflicts with Wasco v. State, 505 So.2d 1314 (Fla. 1987) and Perez v. State, 536 So.2d 359 (Fla. 3d DCA 1988) which hold that witness credibility and resolution of factual issues are the province of trial courts. Significantly, the arresting officer herein testified several times she had never told Mr. Burn's he could not leave, only to be forced on cross-examination to admit the falsity of her testimony. (R 19)

The Fifth District did not see the arresting officer herein have difficulty remembering facts or see her lying at the suppression hearing as the trial court did. The trial court below could simply have chosen not to believe the officer's testimony upon which the Fifth District now bases its finding this was a "routine stop." The Fifth District's decision conflicts with case law and invades the trial court's fact-finding province in holding as a "matter of law" the trial court erred in finding Mr. Burns in custody.

POINT III

WHETHER A PERSON ARRESTED FOR DUI HAS A RIGHT TO COUNSEL UNDER ARTICLE 1, SECTION 16 OF THE FLORIDA CONSTITUTION

The Fifth District acts as if there is a DUI exception to the Florida Constitution, in denying section 16 rights to DUI suspects. There is not. Its decision conflicts with numerous cases including Traylor v. State, wherein this Court stated:

> In order for [sec. 16] rights to have meaning, it must apply at least in each crucial stage of prosecution. For purposes here, "crucial stage" is any stage that may significantly effect the outcome of the proceeding.

596 So.2d at 968. Despite this broad definition, none of the post-arrest activities at the DUI testing center were found by the Fifth District to be a "crucial stage," so as to invoke, or make applicable, section 16 rights in this case.

Yet, when did custodial interrogation of suspects to elicit incriminating responses, stop being a "crucial stage?" The evidence showed, and the Fifth District expressly found in its March 31, 1995 Order, the following:

> The trial court's apparent conclusion that the deputies were repeating the questions [age, address, etc.] already asked and answered in order to elicit an incriminating response from Burns is supported by the circumstances surrounding the questioning.

Although this finding was deleted from the August 25th order, it does reflect the finding of the trial court and the admitted purpose for questioning Mr. Burns on videotape.

For the Fifth District to say such interrogation is not a "crucial stage" conflicts with Peoples v. State, 612 So.2d 555 (Fla. 1992); State v. Douse 448 So.2d 1184 (Fla. 4th DCA 1984); Phillips v. State, 612 So.2d 557 (Fla. 1993) and Traylor v.

State, supra. These cases make clear that ANY and EVERY initiation of custodial interrogation is a "crucial encounter," which violates Section 16 absent a written waiver of counsel.

Moreover, the decision below ignores that the request to take field sobriety tests post-arrest on the videotape also constitutes interrogation, e.g. alphabet test (as would be the counting on the one leg stand and on the walk and turn test). Errors in the verbal content of responses to these tests have historically been argued as indicative of impairment.

For the Fifth District to hold that a police request to participate in such interrogation is not a "crucial stage" directly contradicts Allred v. State, supra. If testimonial field sobriety tests are interrogation, then the request by the officer to take same is the initiation of interrogation which has been consistently held to be a "crucial stage."

Likewise the Fifth District's ruling that the request to take a breath test is not a "crucial stage" overlooks that the breath test is the most crucial element in a DUI case. In order to convict a suspect under Fla. Stat. 316.1932, the State needs only prove driving and an unlawful blood alcohol level. Since driving is rarely at issue, the admission of a breath test result into evidence is virtually outcome determinative in every DUI prosecution in Florida.

A breath test sample differs from other physical evidence such as hair samples or handwriting exemplaries. With these, the defendant can always reproduce another identical sample for use and comparison by the defense, unlike a breath sample which can never be duplicated. Further, while other physical evidence

may be evidence of a crime, they are not an actual element of the crime like the breath sample reading is in a UBAL case.

The Fifth District's rational that a defendant can defend himself "as he has always done" and thus does not need an attorney, conflicts with this Court's definition of "crucial stage" in Traylor. The issue is not whether a defendant can go back and defend himself, but whether this is a "crucial stage."

The purpose of the attorney at this stage is not to help the suspect evade the law, but to assist him when confronted by the criminal justice system. At that point, the suspect has just been arrested (frequently for the first time ever) and is now confronted with an array of police commands, requests, instructions and options. The attorney not only calms the person down and gets him to act in his best interest, but can also:

a) Inform him of his rights and assist in exercising those rights, e.g. obtaining an independent blood test;

b) Advise the person of factors which may affect the test or which should be told to police, e.g. burping, a disability;

c) Answer driver license questions or clarify common misconceptions, e.g. "you have to give more than one sample;"

d) Allay fears about the test and procedures, e.g. If you think the machine is inaccurate, take the test contrary to your natural reaction to refuse, and we will challenge it in court.

Each of these are factors which can mislead persons into actions having serious legal consequences. This is when an attorney's advice is most needed in facing the criminal justice system.

Breath tests are the most important evidence in DUI cases. It is an "element" of the crime. For the Fifth District to rule otherwise conflicts with Traylor's definition of "crucial stage" as being any stage that may "significantly affect the outcome."

CONCLUSION

The Fifth District's decision herein conflicts with established Florida constitutional law by affording DUI suspects less rights than other criminal defendants. The decision limits the constitutional rights guaranteed by Article one, section 9 and section 16, and contrary to this Court's ruling in Traylor and Allred. Accordingly, this Court has jurisdiction pursuant to Rule 9.030 (a)(2)(A)(iv), Florida Rule Appellate Procedure.

This is an issue which needs the precise guidance of the Florida Supreme Court to insure that the rights enuciated in Traylor will be applied to all criminal defendants, including DUI suspects. Supreme Courts in other states have ruled on these issues, e.g. Friedman v. Commissioner of Public Service, 473 N. W. 2d 828 (Minn 1991) and State v. Spencer, 750 P.2d 147 (Or. 1988). Defendant would respectfully ask this Court to accept jurisdiction and clarify Florida law with respect to these vital constitutional issues.

Respectfully submitted,

Herbert H. Hall, Jr.

Herbert H. Hall, Jr.

I HEREBY CERTIFY that a true copy hereof has been served by mail upon Kristen L. Davenport, Assistant Attorney General, 444 Seabreeze Boulevard, Daytona Beach, Florida 32118 this 5th day of October, 1995.

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APPENDIX A

ORDER OF THE FIFTH DISTRICT COURT OF APPEAL
DATED AUGUST 25, 1995, CASE NUMBER 94-457,
ON WHICH DISCRETIONARY APPEAL IS SOUGHT

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1995

STATE OF FLORIDA,

Appellant,

v.

WILLIAM E. BURNS,

Appellee.

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

Case No. 94-457

Opinion filed August 25, 1995

9.160 Appeal from the County Court
for Orange County,
Carolyn B. Freeman, Judge.

Robert A. Butterworth, Attorney General,
Tallahassee, and Kristen L. Davenport,
Assistant Attorney General, Daytona Beach,
for Appellant.

Herbert H. Hall, Jr., Winter Garden,
for Appellee.

ON MOTION FOR REHEARING

GOSHORN, J.

We deny the State's motion for rehearing. We withdraw our opinion issued March 31, 1995 and substitute the following opinion.

The State appeals from a suppression order entered by the county court. This court accepted jurisdiction pursuant to Florida Rule of Appellate Procedure 9.160(e)(2) as a matter certified to be of great public importance because individual Orange County judges were issuing conflicting rulings on the issues presented.

THE FACTS

Deputy Roberta Almadova, seeing William E. Burns's vehicle make a wide turn and weave, turned on her overhead red and blue lights and pulled Burns's vehicle over. She intended to ticket him for failure to maintain a single lane. She asked him to please exit his vehicle and to keep his hands out of his pockets. Burns had a strong odor of alcohol on his breath, red, bloodshot eyes and slurred speech. Burns asked several times to be allowed to go because he was only just around the corner from his house. The deputy refused his requests and initiated field sobriety tests. At the time the deputy started the field sobriety tests, the deputy believed she had probable cause to arrest Burns for DUI. She did not read Burns his Miranda rights before beginning the tests.

Burns was asked (1) to recite the alphabet non-rhythmically while standing with his feet together, hands at his side and head back, (2) to stand on one leg and count, (3) to walk heel to toe nine steps and (4) to put his finger to his nose. Burns was unable to perform the first three tests and refused to take the finger to nose test. Burns was arrested for DUI eleven minutes after he was stopped.

Deputy Almadova drove Burns to the South Orange Blossom Trail testing center, which has small rooms for videotaping and breath testing. Burns refused to repeat the field sobriety tests on camera and refused the breath test. After Burns's refusals, the deputy read Burns his Miranda rights off a form. Burns signed the form and invoked his rights.

Burns moved to suppress his statements, the field sobriety tests and the fact of his refusals to submit to testing. Burns testified at the suppression hearing that he stopped

in response to the flashing lights and believed that he had no choice but to stop. At the testing center, Burns refused to repeat the tests while being videotaped because he knew he had not done the tests properly and did not want to repeat them. He was distracted by having to do more than one thing at a time, i.e., count while standing on one leg. Burns was videotaped while answering questions regarding his name, age, address, and date of birth, which information had already been given to the deputy. He believed he was asked these questions again in an effort to "trip him up." The officers did not make notes of what he said. Burns further testified that had he been read his rights at the scene of the stop, he would have asked for an attorney then. He never did ask for an attorney.

The county court suppressed statements by Burns at the roadside, including his recitation of the alphabet and counting, the videotape taken at the testing center and evidence of Burns's refusal to perform all tests. The State appeals. We affirm in part and reverse in part for the reasons hereinafter set forth.

ROADSIDE TESTS

The trial court found Burns was in custody at the point he was asked to exit his vehicle and provide his license and registration to the deputy and that accordingly, Burns should have been advised of his Miranda rights prior to being asked to perform the field sobriety tests. Because Burns had not been Mirandized, the court suppressed Burns's roadside statements made in response to the deputy's instructions, including Burns's recitation of the ABC's and his counting.

In resolving this issue, we first must determine if Burns was legally in custody at the roadside because Miranda warnings are required only when a defendant is subjected to

custodial interrogation.[1] See Roberts v. United States, 445 U.S. 552, 560, 100 S. Ct. 1358, 63 L. Ed. 2d 622 (1980); Arbelaez v. State, 626 So. 2d 169 (Fla. 1993), cert. denied, ___ U.S. ___, 114 S. Ct. 2123, 128 L. Ed. 2d 678 (1994); Traylor v. State, 596 So. 2d 957 (Fla. 1992).

The facts found by the trial court show nothing more than a routine traffic stop. Burns was stopped and was asked for his license and registration and to perform field sobriety tests. The stop was short (eleven minutes), occurred in a public area, only one officer was present, and the tests were simple. These factors are identical to those cited by the Court in Berkemer v. McCarty, 468 U.S. 420, 442, 104 S. Ct. 3138, 3151, 82 L. Ed. 2d 317 (1984) in holding that "treatment of this sort cannot fairly be characterized as the functional equivalent of formal arrest." The Court determined that generally the roadside questioning of a motorist pursuant to a routine traffic stop does not constitute custodial interrogation, but did not adopt a per se rule in this regard. Instead, the Court left to the trial courts the determination whether a detained motorist "thereafter is subjected to treatment that renders him 'in custody'. . ." entitling him to the protections afforded by Miranda. 468 U.S. at 440.[2] See also Pennsylvania v. Bruder, 488 U.S. 9, 109 S. Ct. 205, 102 L. Ed. 2d 172 (1988) (holding that where defendant was subjected to an ordinary

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[1]The Florida Supreme Court recently addressed the propriety of roadside tests under a similar factual scenario in State v. Taylor, 648 So. 2d. 701 (Fla. 1995) and held: "The officer was entitled under section 901.151 to conduct a reasonable inquiry to confirm or deny that probable cause existed to make an arrest. [The officer's] request that Taylor perform field sobriety tests was reasonable under the circumstances and did not violate any Fourth Amendment rights."

[2]The Court acknowledged, "Admittedly, our adherence to the doctrine just recounted will mean that the police and lower courts will continue occasionally to have difficulty deciding exactly when a suspect has been taken into custody." 468 U.S. at 441.

traffic stop, asked a "modest" number of questions, and requested to perform a simple balancing test, defendant was not in custody for purposes of Miranda).

Here, there are no factors which would take this case outside the holding in Berkemer. The trial court's finding that Burns reasonably believed his freedom of action was "curtailed to a degree associated with actual arrest" was erroneous as a matter of law. While his freedom of action was curtailed, as it is in any detention, Burns did not bring forth any evidence that he was subjected to any restraints comparable to those found in a formal arrest. See Taylor. Additionally, Burns's testimony to the effect that prior to the roadside tests, he requested to be allowed to go because he was just around the corner from his residence is not determinative. The deputy could properly have refused the request regardless of whether Burns was subject to a full custodial arrest or a temporary detention.

Burns, citing Traylor v. State, 596 So. 2d 957 (Fla. 1992), argues that the federal custody cases are inapplicable because Florida has expanded the definition of custody under the Florida Constitution. Traylor does contain a lengthy discourse on federalism and the ability of states to more strictly restrain state action than is imposed under the Federal Constitution. However, what Traylor also does is to define custody under the Florida Constitution almost identically to the federal definition. The Traylor court stated:

> A person is in custody for Section 9 [of the Florida Constitution] purposes 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.

Id. at 966. Berkemer defines custody as occurring "as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" 468 U.S. at 440 (quoting

California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 3520, 77 L. Ed. 2d 1275, 1279 (1983)). Accordingly, we find that Florida has not chosen to restrain governmental intrusion in this area more vigorously than does the Federal Constitution and that Fifth Amendment precedent is applicable.

Because Burns was not in custody at the time of his roadside tests, Miranda warnings were not required prior to Burns's roadside testing. Accordingly, any and all of Burns's roadside statements, including his recitation of the alphabet and counting, are admissible.

THE BOOKING PROCEDURE

After Burns was arrested at the scene, he was taken to the DUI testing center on South Orange Blossom Trail. While being videotaped but before receiving his Miranda warnings, Burns again answered questions regarding his name, age, address, and date of birth.[3] These questions are basic biographical questions which have been held not designed to elicit an incriminating response. See Allred v. State, 622 So. 2d 984 (Fla. 1993) (finding that routine booking questions do not require Miranda warnings because they are not designed to lead to an incriminating response; rather, they are designed to lead to essential biographical data). In State v. Foster, 562 So. 2d 808, 809 (Fla. 5th DCA 1990) this court recognized that "[u]nless there are unusual circumstances, . . . the routine gathering of biographical data for booking purposes cannot be characterized as an inherently coercive custodial interrogation. The questions posed do not relate to criminal activity, and they are not posed to elicit an incriminating response." The type

[3]Burns had already provided this information to the deputy prior to the videotape, and there was no indication the deputies were going to use the information for a report.

of "unusual circumstance" which would trigger the need for Miranda warnings prior to asking these routine questions is where the answer to a seemingly routine question would incriminate the suspect, for example, where a suspect is asked his nationality and then is charged with possession of a firearm by an alien. See United States v. Mata-Abundiz, 717 F. 2d 1277 (9th Cir. 1983); see also Commonwealth v. Guerrero, 588 N.E. 2d 716 (Mass. App. Ct. 1992) (holding that defendant should have been Mirandized prior to the booking officer asking his employment status where the content of defendant's answer was used as incriminating evidence at trial).

In the case at bar, the trial court apparently concluded that the deputies were repeating the biographical questions already asked and answered in order to elicit an incriminating response from Burns. However, the officers' focus was not on the content of Burns's answers, but rather was a legitimate effort to memorialize Burns's manner of speech. The officers undoubtedly wanted as much videotape as possible of Burns's physical attempts to speak. The content of most, if not all, of the answers to these routine questions was, it appears from this record, immaterial.[4] The suppression of Burns's answers is required only to the extent that Burns's answers were incriminating.

The determination of whether a defendant's response is incriminating, and hence subject to suppression in the absence of Miranda warnings, turns on whether the

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[4]Answers to these routine biographical questions, at least to the extent the questions do not call for an answer which requires a suspect to perform a mental calculation and to the extent the suspect answers correctly, are admissible. It should be noted, however, that if a suspect is so inebriated as to be unable to recall his or her own name, for example, that inability would be incriminating. The content of the response "I can't remember" to such an elementary question supports an inference of impaired mental faculties. See Pennsylvania v. Muniz, 496 U.S. 582, 599, 110 S. Ct. 2638, 2649, 110 L. Ed. 528 (1990).

custodial questioning constituted an interrogation.[5] In Allred,[6] the defendant was asked, after his arrest but before being advised of his Miranda rights, to

> recite the alphabet from "c" to "w" at the roadside, in the presence of three police officers; Allred instead recited from "e" to "w." Allred was asked to count from 1001 to 1030 at the police department after his arrest, as part of the one-legged stand test of sobriety. Allred counted from 1001 to 1021 correctly, but thereafter dropped the prefix 1000 before each number.
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> Richard DiAndrea, II, (DiAndrea) was stopped for a driving infraction and suspected DUI. He was asked by the police officer at the roadside to recite the alphabet; he could not get past "p." After his arrest, he was asked at a videotaping facility to recite the alphabet from "c" to "w" during the one-legged stand test; he instead recited it from "c" to "z." DiAndrea also was asked to count from 1001 to 1030, which he did successfully.

Id. at 985 (footnote omitted). The court held that both defendants had been interrogated.

> It is undisputed that petitioners here were in custody; they were under arrest. We find that petitioners were being interrogated within the meaning of Traylor when they were asked to recite, out of the ordinary sequence, the alphabet and numbers. A reasonable person would conclude that the request to recite, out of the ordinary sequence, letters and numbers was designed to lead to an incriminating response. We find moreover that the petitioners were denied their Florida constitutional protection against self-incrimination. Failure to

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[5]Traylor defines "interrogation":

> Interrogation takes place for Section 9 purposes when a person is subjected to express questions, or other words or actions, by a state agent, that a reasonable person would conclude are designed to lead to an incriminating response.

596 So. 2d at 966, n.17.

[6]Consolidated with Allred was DiAndrea v. State.

> accurately recite the alphabet "discloses information" beyond possible slurred speech; it is the content (incorrect recitation) of the speech that is being introduced, rather than merely the manner (slurring) of speech.
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> **If the recitation of the alphabet were admitted only to show slurred speech, we would agree that only physical evidence is involved.** We cannot agree that the information disclosed in the instant cases however is mere physical information. The content is incriminating evidence out of the suspect's own mouth. The incriminating inference is drawn from the testimonial act -- answering the question incorrectly, not from physical evidence -- slurred speech.

Id. at 987 (emphasis added). In so holding, the supreme court disapproved Contino v. State, 599 So. 2d 728 (Fla. 2d DCA 1992) (holding admissible the fact that defendant was unable to recite the alphabet past the letter "p," where it appeared the defendant had been asked to recite the entire alphabet).

Allred did not hold that asking a defendant to recite the alphabet or to count always constitutes an interrogation such as violates a defendant's privilege against self-incrimination. In fact, the court's opinion indicates that only where the defendant's response is incorrect does the content of the speech become incriminating. If a defendant were to correctly recite the full alphabet, yet do so with slurred speech, his performance would be admissible for its physical evidentiary value, i.e., to show the manner in which defendant performed. See Pennsylvania v. Muniz, 496 U.S. 582, 110 S. Ct. 2638, 110 L. Ed. 2d 528 (1990) (requiring a suspect to demonstrate the physical way in which he articulates words is not a request for a testimonial, potentially incriminating response). In short, under Allred, an officer may testify that a defendant

in custody slurred his speech when he performed the requested recitations, but the fact that he performed poorly, e.g., could not complete the alphabet, could not be brought out unless defendant had been Mirandized. If the State wants to be able to introduce evidence demonstrating a defendant's poor level of performance (as opposed to manner of performance), the State must first give a defendant Miranda warnings. The failure to so warn a defendant does not, however, result in the suppression of evidence of a defendant's manner of performance. In the instant case, to the extent Burns answered the questions correctly, the tape of Burns's answers is not incriminating and should have been held admissible to show his manner of speech.

RIGHT TO COUNSEL

Under the Florida Constitution, the right to counsel attaches "at the earliest of the following points: when he or she is formally charged with a crime via the filing of an indictment or information, or as soon as feasible after custodial restraint, or at first appearance." Traylor, 596 So. 2d at 970 (footnotes omitted). The court noted in Traylor that "[a]s a general rule, assignment of counsel is feasible by the time of booking. See Fla. R. Crim. P. 3.111(c)."[7] Id. at 970, n.38. The Sixth Amendment right likewise attaches at the earliest of the following points: "formal charge, preliminary hearing, indictment, information, or arraignment." Kirby v. Illinois, 406 U.S. 682, 689, 92 S. Ct. 1877, 1882, 32 L. Ed. 2d 411 (1972). The right to counsel under the two constitutions does not necessarily attach simultaneously, but "[r]egardless of when the right attaches,

[7]Rule 3.111(c) makes it the duty of the booking officer to immediately advise the defendant of his right to counsel.

the defendant must still invoke the right in order to be protected." Phillips v. State, 612 So. 2d 557, 558 n.2 (Fla. 1992). Here, however, defendant was neither advised of his right to counsel nor was he given the opportunity to try to hire one. His failure to invoke his right cannot be held against him where the State failed to inform him of his right.

Defendant argues strenuously that he had the right to counsel at the testing center because it would have been feasible to provide counsel at that point. He was at a facility that had telephones, which he could have used to phone counsel. If he had not been able to reach an attorney, then that factor would support a finding that it was not feasible.

The State answers that it is not feasible to provide counsel prior to testing because of the nature of the offense. Evidence must be captured before it disappears, and with each passing minute, key evidence is being lost. The testing center was, the State points out, "specifically designed to allow efficient, timely testing and recording of a DUI suspect's physical qualities." Immediately upon completion of the testing, a defendant is read his Miranda rights. The State also argues that the purpose of the Section 16 right to counsel, to allow a defendant to effectively defend himself against criminal charges, is not violated by the short delay in allowing him to contact an attorney. An attorney can readily attack the videotaped performance in the "usual" ways.

Whether the right to counsel was provided "as soon as feasible" is a nebulous gray area, the determination of which is completely dependent on how much importance is given the State's dilemma. Even stationing a public defender at the testing center

would not solve the problem because there has been no judicial determination of a defendant's right to a public defender at this stage of the proceedings. Certainly if "feasible" means possible, then the right to counsel attached immediately at the center. We conclude that we need not answer that question because the asking of the biographical questions and the gathering of physical data is not the type of "crucial confrontation or stage" which necessitates the presence of counsel. The Traylor court discussed "crucial stage" as follows:

> [W]e hold that a prime right embodied by the Section 16 Counsel Clause is the right to choose one's manner of representation against criminal charges. In order for this right to have meaning, it must apply at least at each crucial stage of the prosecution. For purposes here, a "crucial stage" is any stage that may significantly affect the outcome of the proceedings. Because a prime interest that is protected is the right of the individual to exercise self-determination in the face of criminal charges, prosecution begins under the Counsel Clause when an accused is charged with a criminal act, as set out below.
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> Once the defendant is charged -- and the Section 16 rights attach -- the defendant is entitled to decide at each crucial stage of the proceedings whether he or she requires the assistance of counsel.
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> * * *
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> Once the right to counsel has attached and a lawyer has been requested or retained, the State may not initiate any crucial confrontation with the defendant on that charge in the absence of counsel throughout the period of prosecution, although the defendant is free to initiate a confrontation with police at any time on any subject in the absence of counsel.

Traylor, 596 So. 2d at 968 (footnotes omitted).

The right is designed to allow the accused to effectively defend himself against

the charges. The defendant's right is not impacted by administering the tests outside the presence of counsel. The defendant can defend himself, without handicap, as he has always done. Defense counsel can attack the field tests and the breathalyzer tests through discovery, cross examination, and defense experts. We do not agree with the analogy Burns attempts to make between the DUI evidence gathering process and the staging of a line-up, a circumstance where the procedure "is riddled with the danger of unreliable identification and cannot be effectively questioned at trial without counsel's presence to note problems." See United States v. Wade, 388 U.S. 218, 228, 87 S. Ct. 1926, 1933 18 L. Ed. 2d 1149 (1967). The Supreme Court in Wade distinguished line-ups from physical testing such as the taking of blood samples. Blood alcohol tests and breathalyzer tests are the types of scientific tests which can be adequately challenged through cross-examination, as was pointed out in Wade with regard to blood sampling.

We hold that administering a breathalyzer and having a defendant perform the field sobriety test on videotape are really nothing more than the collection and preservation of physical evidence, as is done in every type of case, and do not constitute a crucial confrontation requiring the presence of defense counsel.

REFUSAL TO SUBMIT TO TESTS

Burns was asked to perform the field sobriety tests again on the videotape. Burns refused to repeat the tests and refused to take a breath test. The deputy then read Burns his Miranda rights off a form. Burns signed the form and invoked his rights. The trial court excluded evidence of his refusal.

We find that Burns's refusal to submit to the breathalyzer test is clearly admissible. See Section 316.1932, Fla. Stat. (1992) (refusal to submit to breath test is admissible in evidence in any criminal proceeding); Edwards v. State, 603 So. 2d 89 (Fla. 5th DCA 1992) (holding that the statute's requirement that the refusal to take the test be received in evidence does not violate any constitutional privileges); State v. Sowers, 442 So. 2d 239 (Fla. 5th DCA 1983) (holding that a suspected drunk driver's refusal to submit to a blood alcohol test can be used as evidence in a criminal case and its admission does not violate either the Florida Constitution or the United States Constitution).

We also find that Burns's refusal to perform physical, non-testimonial field sobriety tests, e.g., finger-to-nose, heel-to-toe, etc., on videotape at the testing center is admissible. In Occhicone v. State, 570 So. 2d 902 (Fla. 1990), cert. denied, 500 U.S. 938, 111 S. Ct. 2067, 114 L. Ed. 2d 471 (1991), evidence that the defendant had refused to allow his hands to be swabbed for an atomic absorption test was introduced by the State to refute the defendant's claim that his intoxication prevented him from knowing what he was doing. On appeal, defendant argued that allowing the State to comment on his refusal to take the hand swab test penalized him for exercising his Miranda rights. The court disagreed, finding that the comment on the evidence was made only to refute defendant's claim of diminished capacity, not to demonstrate his guilt and further noted that there was no timely objection. In a special concurrence, Justice Grimes wrote that the refusal to take the test was not protected by the constitutional privilege against self-incrimination:

> Just as he could have been required to submit to fingerprinting, photographing, or blood tests, . . . Occhicone could have been compelled to undergo the hand-swab test. Having refused to taking the test, evidence of this fact was admissible for any relevant purpose. Thus, W. LaFave & J. Israel, Criminal Procedure § 7.2(c) (1985), states:
>
> > What happens if a defendant refuses to cooperate in an identification procedure which requires his active participation? One possibility is that the prosecutor may be permitted to comment on the refusal to cooperate. If the identification procedure in which the defendant has refused to participate or cooperate, such as a lineup or taking of exemplars, is not protected by the Fifth Amendment, then of course there is no right to refuse and thus the act of refusal is not itself a compelled communication. Rather, that refusal is considered circumstantial evidence of consciousness of guilt just as is escape from custody, a false alibi, or flight.
>
> (Footnote omitted).

Occhicone, 570 So. 2d at 907 (citation omitted). The First District in Wilson v. State, 596 So. 2d 775 (Fla. 1st DCA 1992), adopted the concurrence in Occhicone and held that evidence of defendant's refusal to submit handwriting exemplars pursuant to court order was admissible. The instant case involves a post arrest refusal to perform which, pursuant to the reasoning of Wilson and Justice Grimes in his concurrence to Occhicone, is admissible as to the physical, non-testimonial aspects of the tests.

The supreme court in Taylor has now held that in a pre-arrest situation, a defendant's refusal to take a field sobriety test (not involving a testimonial response) is admissible as relevant to show consciousness of guilt. We find nothing in Taylor which requires a different result in a post-arrest circumstance. Thus, to the extent that Burns refused to comply with a request to take physical, non-testimonial tests, we hold that the

refusal is admissible. Cf. Allred.

In summary, we hold that Burns's statements and physical performance at the roadside are admissible. The videotape of Burns taken at the testing center is admissible only to the extent that his responses were not incriminating, i.e., to the extent he answered the questions correctly, Burns's answers are admissible to show the manner in which he performed. Burns was not entitled to counsel at the center prior to the testing. His refusal to perform the physical, non-testimonial field sobriety tests on videotape at the center and his refusal to submit to the breathalyzer test are also admissible.

REVERSED in part; AFFIRMED in part; and REMANDED.

COBB and SHARP, W., JJ., concur.