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Criminal law -- Driving under influence -- Evidence -- Refusal to submit to breath test -- Reading of implied consent warning was improper where officer knew that defendant was engaged in conversation with another officer and was not paying attention during reading and made no attempt to secure defendant's attention -- Because defendant was not made properly aware of adverse consequences of refusal, refusal is suppressed

STATE OF FLORIDA, v. KRISTINA L. LAWRENCE, Defendant. County Court, 2nd Judicial Circuit in and for Leon County. Case No. 2021 CT 2043, SP No. 268154. August 26, 2022. Monique Richardson, Judge. Counsel: Jack Campbell, State Attorney, for State. Aaron Wayt, Pumphrey Law, Tallahassee, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION

TO SUPPRESS BREATH TEST REFUSAL

THIS CAUSE came before the Honorable Court on July 20, 2022, to hear the Defendant's Motion to Suppress Refusal to Submit Breath Test. After reviewing the pleadings, case law provided by both parties, and listening to testimony and arguments by counsel, the Court makes the following ruling:

Findings of Fact

On November 20, 2021, law enforcement responded to a disabled vehicle in Leon County, Florida. While there, TPD Officer Roy investigated the Defendant for DUI, and she was ultimately arrested without being afforded the opportunity to perform any field sobriety exercises.

After her arrest, Officer Roy initially asked the Defendant whether she would like to give a breath sample. The Defendant repeatedly advised Officer Roy that she was not refusing but wanted to speak to a supervisor based on the circumstances surrounding her arrest. According to Officer Roy, the Defendant's response was considered a refusal; therefore, he retrieved the Implied Consent form to read to the Defendant.

A new officer approached the Defendant and Officer Roy as he began to read the Implied Consent warnings. Believing the new officer was a supervisor, the Defendant began to inquire with him about his title. It is apparent from the video that the Defendant was turned away from Officer Roy and engaged in conversation with another officer for much of the time Officer Roy spent reading the consequence portion of the form.

Officer Roy testified that he was aware the Defendant was engaged in conversation with another officer and believed she was not paying attention. There was no evidence that Officer Roy made any attempt to direct the Defendant's attention to the Implied Consent warnings or confirm that the Defendant heard him while he was reading Implied Consent. When Officer Roy requested the Defendant to submit to a breath test for a second time, she maintained that she was not refusing and wanted to speak to a supervisor. Officer Roy then escorted the Defendant to his patrol car and advised her he would contact a supervisor for her. He called the supervisor moments later with his bodycam still activated and told his supervisor that, “she wants you to come out here and do her DUI investigation not me because she doesn't like me. She has no complaint, no reason, nothing other than the fact she's in handcuffs, she's under arrest, she's going to jail.” The supervisor's response could not be heard on video but after a few moments of silence, Officer Roy stated “Exactly, I'll take care of it.”

Application of the Law

Generally, reading Implied Consent warnings pull a defendant out of the “safe harbor,” making them aware that their refusal to submit a breath test carries with it adverse consequences. However, determining whether the defendant was pulled out of the safe harbor does not hinge upon the quantity of the warnings but instead hinges upon the quality of the warnings. *See South Dakota v. Neville,* 459 U.S. 553 (1983) (defendant's refusal to

submit to testing was admissible where he was aware he would lose his driver license after a refusal, effectively pulling him out of the safe harbor). Courts have similarly excluded evidence when law enforcement gives a perfunctory reading of Miranda warnings, thereby minimizing or downplaying their significance. *See Ross v. State,* 45 So.3d 403, 428 (Fla. 2010) [35 Fla. L. Weekly S501a]; *see also Ramirez v. State,* 739 So.2d 568, 576 (Fla. 1999) [24 Fla. L. Weekly S353a].

In the instant case, the State argues that law enforcement complied with Florida Statute § 316.1932 because the arresting Officer read the Defendant Implied Consent warnings. Contrary to the State's argument, intentionally reading Implied Consent warnings to someone known to be distracted and not paying attention is improper where there are no attempts to secure their attention. This is not the type of warning contemplated by Implied Consent laws and the United States Supreme Court holding in *Neville.*

As the Defense argued, it is not the Defendant's responsibility to pull herself out of the safe harbor. It is the arresting officer's responsibility to do so. Without attempting to capture the Defendant's attention even once, based on the totality of the circumstances of this case, the Defendant was not properly made aware of the adverse consequences associated with her failure to submit to the breath test. Therefore, it is hereby

ORDERED AND ADJUDGED that the Motion to Suppress the Refusal to Submit a Breath Test is **GRANTED**.

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