

STATE OF MAINE  
CUMBERLAND, ss.

UNIFIED CRIMINAL DOCKET  
Docket No. CR-16-30110

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STATE OF MAINE )  
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 v. )  
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 BENJAMIN LOWRY )  
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 Defendant )

**ORDER ON MOTION TO SUPPRESS**

This matter came before the Court for hearing on Defendant’s motion to suppress on August 11, 2016. Defendant appeared with counsel, Peter E. Rodway, Esq.. The sole witness presented was the arresting officer, Phil Jones of the Bridgton Police Department. An audio and video recording was presented to the court in compact disc form. Due to time limitations, and with the consent of both counsel for the defendant and the State, the court reviewed the recording outside of the hearing. After consideration of the testimony and evidence presented and arguments of counsel, the motion is GRANTED for the reasons set forth below.

On the evening of February 20, 2016, Officer Jones, on foot, was directing traffic and assisting pedestrians in the Town of Bridgton immediately prior to the Town’s firework display, when he observed a motor vehicle driven by Defendant approaching at a rate of speed in excess of the posted limit. Defendant complied with Officer Jones’s hand-signals to pull over. Based on the odor of intoxicants emanating from Defendant, Officer Jones asked Defendant to step out of his vehicle to perform field sobriety tests. Although initially denying that he had been drinking alcohol, Defendant admitted he had had a glass of wine earlier and placed himself between one and three on a ten-point sobriety scale. (D. Ex. 1, 0:00:45).

Officer Jones first conducted a Horizontal Gaze Nystagmus test (HGN). Just as the officer was explaining the process to Defendant, the flashes and loud explosions of fireworks can be seen and heard on the officer’s dash cam recording. (D. Ex. 1, 0:01:30).

Officer Jones, apparently aware that the HGN results would be compromised by such distracting circumstances, interrupted the test remarking, "okay, we're gonna come back to that." (D. Ex. 1, 0:01:51).

Officer Jones next instructed Defendant to perform the one-legged stand test. While conducting the test, Officer Jones can be heard chiding Defendant to continue counting and looking at his elevated foot. Barely audible over the crescendo of explosions and the cheering of crowds, Defendant can be heard saying, "this is really distracting." (D. Ex. 1, 0:03:18).

Fireworks can still be seen and heard on the recording as Officer Jones instructed Defendant to recite the alphabet from the letters "E" through "T," and Defendant proceeded to recite through the letter "Z." (D. Ex. 0:04:00). Based on less than five minutes of interaction and the results of three field sobriety tests conducted while fireworks were going off, Officer Jones placed Defendant under arrest for operating a motor vehicle under the influence of alcohol.

An arrest is reasonable under the Fourth Amendment "if made pursuant to an investigative detention based on reasonable suspicion of criminal activity, or if made pursuant to an arrest based on the higher standard of probable cause that a crime has been committed." *State v. White*, 2013 ME 66, ¶ 12, 70 A.3d 1226. The State contends Defendant's performance on the field sobriety tests gave rise to probable cause to believe that Defendant had committed the crime of operating a motor vehicle under the influence of alcohol, rendering Officer Jones's arrest of Defendant permissible under the Fourth Amendment.

"[P]robable cause to believe a defendant was operating under the influence exists if there is reason to believe that his mental or physical faculties are impaired by the consumption of alcohol." *State v. Bradley*, 658 A.2d 236, 237 (Me. 1995). Under normal circumstances, Defendant's inability to complete the field sobriety tests would give rise to probable cause that the crime of operating under the influence had been committed. Under the factual circumstances of the present case, the Court finds Officer Jones's formulation of probable cause to make the arrest objectively unreasonable.

The reason police officers are trained to follow protocols in conducting field sobriety tests is to give rise to an objectively reasonable basis to determine whether or not a motorist is impaired. While we do not expect our public servants to conduct these tests with the precision of a laboratory experiment, an officer is nonetheless expected to

conduct them in a manner that reduces the number of independent variables affecting the motorist's performance. Although the nature of a field sobriety test is to divide the subject's attention, Officer Jones was not trained to perform field sobriety tests on subjects whose attention is further divided by exploding fireballs in the sky followed by clapping and cheering. As such, the Court finds Officer Jones did not have sufficient probable cause to believe Defendant had committed the crime of operating under the influence. Therefore, Officer Jones's arrest of Defendant was unreasonable under the Fourth Amendment.

In light of the preceding, Defendant's Motion to Suppress all evidence obtained by the State subsequent to the administration of the field sobriety tests on February 20, 2016 is **GRANTED**.

The Clerk is hereby directed to mail a date-stamped copy of this Order to each counsel of record and note the mailing on the Unified Criminal Docket pursuant to M.R.U. Crim. P. 41A(d).

Dated: August 18, 2016

  
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Jed J. French  
Unified Criminal Court Judge