

STATE OF MAINE
CUMBERLAND, SS.

UNIFIED CRIMINAL DOCKET
Location: Portland
Docket No.: CUMCD-CR-18-4550

STATE OF MAINE,)	
Plaintiff)	
)	
v.)	MR. XXX'S MOTION TO SUPPRESS
)	
)	
ANDREW XXX,)	
Defendant)	

NOW COMES Andrew XXX, by and through his attorney, David J. Bobrow, with
this Motion to Suppress particularly stated as follows:

- (1) This matter is currently before the Court on the State's charge of Operating Under the
Influence.
- (2) Mr. XXX is a 29-year old male with no criminal history.
- (3) On or about February 28, 2018, Mr. XXX was stopped for speeding. The officers
allegedly smelled alcohol from the vehicle and Mr. XXX admitted to drinking two beers.
Officer Gray requested that he perform FSTs. Officer Gray administered the HGN test,
the walk and turn, and the one-legged stand. Based on clues alleged by the Officer, Mr.
Gray was arrested and transported to Cumberland County Jail. At the jail, Mr. XXX took

a breath test, with a result of a .007 BAC level.⁽¹⁾

- (4) The Fourth Amendment permits brief investigative stops ... when a law enforcement officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417-418 (1981)
- (5) Probable cause to arrest exists where facts and circumstances within the knowledge of the officers and of which they have reasonably trustworthy information would warrant a prudent and cautious person to believe that the arrestee did commit or is committing the felonious offense." *State v. Lagasse*, 2016 ME 158, ¶ 13, 149 A.3d 1153 (quotations marks omitted). The probable cause standard is an objective one... . *Id.* ¶ 14 (quotations marks omitted); see *State v. Flint*, 2011 ME 20, ¶ 12, 12 A.3d 54 (" [I]t is the objective view of the circumstances that matters... .")
- (6) Based on a review of the performance by Mr. XXX on the stop and FST video, probably cause did not exist to arrest Mr. XXX and therefore, the BAC test should be suppressed.
- (7) Evidence obtained based on the illegality of a Fourth Amendment violation renders it as "fruit of the poisonous tree." *United States v. D'Andrea*, 648 F.3d 1,6 (1st Cir. 2011). The proper remedy for the illegality is the exclusion of any evidence obtained as a direct result or found to be derivative of the illegal stop, search, or seizure. *Segura v. United States*, 468 U.S. 796, 804 (1984).

¹ The first test was a .085, the second was a .067. Officer Gray attributed this to a difference in the breath volume, a

STATEMENT OF UNCONTESTED FACTS

- 1) Mr. XXX was stopped for speeding (40 MPH in a 30 MPH zone) There is no suggestion that he was operating a vehicle in an erratic fashion.
- 2) There is no video evidence of speeding.
- 3) There is no evidence of Mr. XXX exhibiting slurred speech.
- 4) There is no evidence of Mr. XXX exhibiting signs of slowness of manual dexterity.
- 5) The video does not show Mr. XXX with bloodshot eyes.
- 6) Mr. XXX performed the HGN test facing the flashing lights of the police cruiser as well as other bright lights.
- 7) The video does not show any glaring clues in the walk and turn or one-legged stand.(2)

ARGUMENT

I. THERE WAS NOT PROBABLE CAUSE TO ARREST MR. XXX, THEREFORE THE TEST SHOULD BE SUPPRESSED

The standard for probable cause is a familiar one: it exists where information allows a prudent and cautious person to believe that a crime was or is being committed. *State v. Lagasse*, 2016 ME 158, ¶ 13, 149 A.3d 1153. In the context of an OUI investigation, "an officer only needs evidence sufficient to support the reasonable belief 'that the person's senses are affected to the slightest degree, or to any extent, by the alcohol that person has had to drink.' " *State v.*

physical impossibility. See Intoxilyzer 8000 manual (insufficient sample).

2 The most obvious errors occur when Mr. XXX starts the walk and turn before instructed. The Officer, however, did not follow proper NHTSA directions by instructing Mr. XXX specifically not to start until instructed to do so, and seeking his acknowledgment that he understood. See NHTSA manual, walk and turn.

Forsyth, 2002 ME 75, ¶ 14, 795 A.2d 66 (quoting *State v. Webster*, 2000 ME 115, ¶ 7, 754 A.2d 976). Little significance exists on minor instances of unsteadiness, on initial failures to precisely follow an officer's instructions, or on isolated miscues on field sobriety tests - issues that can result from nervousness or unfamiliarity with the circumstances. *State v. Wandell*, Criminal CR-17-20183. 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. *State v. Lowry*, CR-16-30110

Information that contributes to a finding of probable cause includes the suspect's responsibility for a motor vehicle collision, see *State v. Baker*, 502 A.2d 489, 491-92 (Me. 1985); *State v. Webster*, 2000 ME 115 ¶¶ 7-8, 754 A.2d 976 (erratic driving maneuver and strong odor of alcohol combined with dubious claim that only one drink had been consumed four hours earlier found sufficient to meet the "very low threshold" of probable cause even though field sobriety tests had been successfully performed); *State v. Morrison*, 2015 ME 153 ¶¶ 8-9, 128 A.3d 1060 (Law Court found erratic operation, the odor of alcohol, bloodshot eyes, admission to drinking earlier in the evening, and a failure to successfully complete a field sobriety test sufficient to constitute probable cause).

In this matter, the only evidence on video that suggests probable cause is the admission by Mr. XXX that he consumed two beers. This does not reach the admittedly low level of probable cause.

WHEREFORE Andrew XXX respectfully requests that this Honorable Court suppress any and all tests that occurred on February 28, 2018 and any and all other relief that this Honorable Court deems fit and just.

RESPECTFULLY SUBMITTED:
RICHARD XXX
By His Attorney
DAVID J. BOBROW, Bar No. 9164
P.O. Box 366
9 Bradstreet Lane
Eliot, Maine 03903
(207) 439-4502

Date: _____

David J. Bobrow, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on this date I mailed, postage paid, a copy of this Motion to: Assistant District Attorney, Portland, Maine.

Date: _____

David J. Bobrow, Esq.