IN THE COUNTY COURT OF THE SECOND CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

STATE OF FLORIDA **CASE NO: 2016CT2536**

v. **SPN NO: 247586**

KAREN KEPICS

AMENDED ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS URINE REQUEST & URINE RESULTS

This matter came before the Court on June 5, 2017, on the Defendant's April 27, 2017 Motion to Suppress Urine Request and Urine Results. Ms. Kepics appeared with her counsel, Joshua D. Zelman, and the State was represented by Assistant State Attorney Ryan Sandy. In August 2017, the Court requested supplemental arguments be submitted. The Defendant submitted her supplemental memorandum of law on August 6, 2017. The State chose to not submit a supplemental memorandum, but instead provided the court with Section 5:4 from the DUI Handbook

After review of said Motion and memorandum, hearing testimony from the witnesses, argument from the parties, and being further advised in the premises, the Court makes the following findings of fact:

1. Ms. Kepics was arrested by Trooper Fredrick Henning of the Florida Highway Patrol for Driving Under the Influence on November 1, 2016.

2. After transporting Ms. Kepics to the Leon County Jail, Trooper Henning read her Implied consent and administered a breath test.

3. Ms. Kepics agreed to provide a sample of her breath pursuant to the implied consent law, and the Intoxilyzer returned a BAC of .000/.000.

4. After this result, Trooper Henning re-read the Implied consent form applicable to a urine test and requested Ms. Kepics provide a urine sample, which was submitted to the Florida Department of Law Enforcement for testing.[1]

5. Trooper Henning made no attempt to obtain a warrant to secure a urine sample from Ms. Kepics.

6. Ms. Kepics filed a motion to suppress, arguing the request she submit to a urine test under the implied consent law without a warrant was unlawful as a result of *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016); *see also Williams v. State*, 210 So.3d 774, n.1 (Fla. 5th DCA 2017). And as a result, she argued that the subsequent urine test and results must be suppressed.

7. In her supplemental memorandum of law, Ms. Kepics argued that the State cannot rely on voluntary consent since Trooper Henning secured the urine sample pursuant to the implied consent law. *See, e.g.*, *State v. Willie Anthony*, Gadsden County Case No. 14-1793CT (Order Granting Defendant's Motion to Suppress & In Limine Breath Test under Traditional Scientific Predicate, April 1, 2015); *State v. Buono*, 16 Fla. Law Weekly Supp. 765a (Fla. Sarasota Cty. 2009); *State v. Landrum*, 18 Fla. Law Weekly Supp. 983b (Fla. Manatee Cty. 2011); *State v. Johnson*, 16 Fla. Law Weekly Supp. 869a (Fla. Manatee Cty. 2009).

8. Alternatively, Ms. Kepics argued that even if she could voluntarily consent to the urine test, the evidence failed to support the conclusion her consent was voluntary by either a preponderance of evidence or clear and convincing evidence.

Based upon the foregoing, this Court makes the following conclusions of law:

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[1] Although Trooper Henning did not specifically recall whether he re-read Ms. Kepics implied consent and there is not an Implied Consent form filled out for a Urine test, he testified before this court on June 5, 2017 that he would normally have re-read implied consent. The facts do not lead this court to believe the circumstances on the night of November 1, 2016 would be unlike what Trooper Henning normally would do.

9. For the reasons set forth below, this Court agrees with Ms. Kepics that *Birchfield* mandates the conclusion that Trooper Henning was required to obtain a warrant to obtain a urine sample, and that no exception to the warrant requirement was established

10. In *Birchfield*, the Court crafted a specific test for examining the legitimacy of a warrantless search in DUI investigations. This new test consists of three parts: (1) the amount of physical intrusion required in obtaining the evidence, (2) the extent to which the sample may be preserved and used to acquire additional private information, and (3) the amount the test would significantly increase the embarrassment already inherent in an arrest.

11. With respect to the amount of physical intrusion required in obtaining the evidence, the Court recognized that blood tests require the skin to be pierced to extract a part of the subject's body, whereas breath tests only require putting a small tube in one's mouth, causing an almost negligible amount of intrusion. However, urine tests do not require piercing of the skin in any manner. In addition, both the excretions of breath and urine would leave the body regardless of whether or not a test is performed. The same cannot be said be said for blood. Since the physical intrusion to obtain a urine sample is negligible or nonexistent, this factor weighs in favor of the State.

12. For the second prong, we must assess the extent to which the sample may be preserved and used to acquire additional private information. Blood and urine samples may easily be preserved, and may be mined as they contain a plethora of information. In *Skinner v. Railway Labor Exec. Assoc.*, 489 U.S. 605, 617 (1989), the Court compared blood and urine tests, stating that "Chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee." The BAC machines are only able to determine one thing about each sample: the concentration of blood alcohol from alveolar air. "Urine tests, on the

other hand, can be used to detect and assess a wide range of disorders and can reveal whether an individual is pregnant, diabetic, or epileptic." *Minnesota v. Thompson*, 886 N.W.2d 224, 231 (Minn. October 12, 2016). As a result, "the taking of a urine sample . . . raises the same privacy concerns that the Court addressed in *Birchfield* with regard to blood tests." *Id.*

13. Finally, we examine the amount the test would significantly increase the embarrassment already inherent in an arrest. The *Skinner* Court stated that "Nor can it be disputed that the process of collecting the sample to be tested, which may in some cases involve the visual or aural monitoring of the act of urination, itself implicates privacy interests." The state's contention here that since a nurse conducted the test there is little to no embarrassment from the test, is without merit. Visual monitoring did exist, and it is the visual portion rather than the profession that increases the embarrassment.

14. In *Williams v. State*, 210 So.3d 774, n.1 (Fla. 5th DCA 2017), the Fifth District Court of Appeal agreed with this analysis. The court stated that "[w]e note, however, that the United States Supreme Court's decision in Birchfield makes clear that blood and urine tests raise substantial privacy concerns and not subject to the search-incident-to-arrest exception to the Fourth Amendment's general warrant requirement." Although this observation was made in dicta, it is certainly persuasive to this court.

15. Additionally, former Assistant State Attorney J. David Marsey, who was the County Court Division Chief in Leon County, recently agreed with this conclusion and wrote that "compelled urine samples have not yet been addressed, but would likely be more similar to blood than breath testing and would probably be analyzed under the more stringent blood standard." J. David Marsey, *United State Supreme Court Upholds Constitutionality of Criminal Breath Test Refusal Statutes*, (June 2016), http://www.multibriefs.com/briefs/fpca/breathtest.pdf

(last visited July 3, 2017). He concluded his article by recommending Florida law enforcement agencies revise their implied consent warnings to comply with *Birchfield.*

16. As a result, a urine test is more akin to a blood test and a warrant was required before requesting Ms. Kepics submit to a urine test.

17. Since this Court concludes that a urine test requires a warrant, the Court must now analyze whether Trooper Hening's failure to obtain a warrant can be excused by one of the exceptions to the warrant requirement.

18. In *King v. State,* 79 So. 3d 236 (Fla. 1st DCA 2012), the court emphasized that the inevitable discovery exception to the exclusionary rule would not be applied in every case, rather only those in which the officer had probable cause and was actively making an effort to obtain a warrant. Since no one sought to obtain a warrant, the inevitable discovery exception did not apply. *See also Rodriguez v. State*, 187 So.3d 841 (Fla. 2015).

19. In this case, Trooper Hening made no effort to obtain a search warrant. As a result, the inevitable discovery exception does not apply.

20. Additionally, the State presented no evidence to support its argument that the substances identified in urine would dissipate over time, which would not be present in the few hours it could take to obtain a search warrant. As a result, there exists no exigent circumstances that would permit the warrantless search and seizure of urine taken from the defendant.

21. The final analysis this Court must undertake is whether Ms. Kepics voluntarily consented to the urine test requested by Trooper Henning.

22. The Court finds that Ms. Kepics acquiesced to Trooper Henning's request to provide a urine sample due to the coercive nature of the Implied Consent warning. *See, e.g.*, *State v. Willie Anthony*, Gadsden County Case No. 14-1793CT (Order Granting Defendant's

Motion to Suppress & In Limine Breath Test under Traditional Scientific Predicate, April 1, 2015); *State v. Buono*, 16 Fla. Law Weekly Supp. 765a (Fla. Sarasota Cty. 2009); *State v. Landrum*, 18 Fla. Law Weekly Supp. 983b (Fla. Manatee Cty. 2011); *State v. Johnson*, 16 Fla. Law Weekly Supp. 869a (Fla. Manatee Cty. 2009).

23. Courts have long recognized that the implied consent warning is intended to be coercive. David A. Demers, FLORIDA DUI HANDBOOK, § 5:4, p. 463 (2016-2017 ed.) (stating that "the requirement that an officer advise the suspect of the consequences of a refusal goes to the very nature of the implied consent law. It is intended to be coercive.").

24. To provide voluntary consent, one must be free of coercion, whether express or implied. *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968). Additionally, voluntary consent should only be only considered when the test being requested is not authorized by the implied consent law or where the request is made outside of the implied consent law. *Slaney*, 653 So.2d at 427-28; *see also Robertson v. State*, 604 So.2d 783, 790 (Fla. 1992) (stating that "if the defendant has consented to the test . . . then the test falls wholly outside the scope of the implied consent law.").

25. Voluntary consent cannot be obtained after reading a driver the implied consent warning and any test conducted based on voluntary consent after an officer reads the implied consent warning must be suppressed. *State v. Slaney*, 653 So.2d 422, 431 (Fla. 3d DCA 1995); *State v. Burnett*, 536 So.2d 375 (Fla. 2d DCA 1988); *see also State v. Polak*, 598 So.2d 150 (Fla. 1st DCA 1992) (breath sample).

26. However, even if Ms. Kepics could voluntarily consent and Trooper Henning had not read her the implied consent warning, since the consent would have been obtained after Trooper Henning violated the tenets of *Birchfield* by failing to secure a warrant, the burden

would be on the State to establish, by clear and convincing evidence, "an unequivocal break in the chain of illegality sufficient to dissipate the taint of the prior illegal action." *State v. Paul*, 638 So.2d 537, 539 (Fla. 5th DCA 1994).

27. The Florida Supreme Court recently addressed a similar claim in *Montes-Valeton v. State*, SC14-1672 (Fla. Feb. 23, 2017). In *Montes-Valeton*, the defendant was the driver in a single-vehicle accident in which a passenger was killed. Two troopers responded to the scene; the first did not communicate his observations of impairment to the second, who later requested the defendant submit to a blood draw but did not testify to any observations of impairment. The second trooper then read the implied consent warning to the driver. The Third District Court of Appeal affirmed the driver's conviction relying alternatively on the fellow officer rule and voluntary consent. The Florida Supreme Court disagreed on both issues, first finding the fellow officer rule did not apply, and second finding the driver could not have provided voluntary consent. Specifically, the Court held that:

> After asking Montes-Valeton to consent to a blood draw, Trooper Molina read the implied consent warnings that came with the blood draw kit to Montes-Valeton. The warnings threatened that a refusal would result in the suspension of his driver license. . . . ***The fact that Trooper Molina improperly threatened Montes-Valeton with the suspension of his driver license for refusing to give consent to the blood draw renders his consent involuntary.***

Id. at *10-11 (emphasis added).

28. The State presented no evidence to establish any break in the chain of prior illegal action. Thus, Ms. Kepics consent would have to be rendered involuntarily because the threat that her license would be suspended for refusing to submit to a urine test would be an incorrect statement of the law.

BASED UPON THE FOREGOING, IT IS HEREBY ORDERED and ADJUDGED that:

The Defendant's April 27, 2017 Motion to Suppress Urine Request and Urine Results is GRANTED. The urine test and its results are suppressed and the State is hereby prohibited from introducing any and all evidence, including testimony, concerning the urine sample obtained from the Defendant on November 1, 2016 and any results of such urine test.

DONE and ORDERED in Chambers, at Tallahassee, Leon County, Florida on this 7 day of Dec., 2017.

NINA ASHENAFI RICHARDSON
County Judge

Copies furnished to:
Joshua D. Zelman, Attorney for the Defendant
Adrian Mood, Office of the State Attorney