



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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August 3, 2017

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Re: *Commonwealth of Virginia v Julio Cesar Ingles Pineda*, FE-2017-585

Dear Counsel:

This case is before the Court on the Defendant Julio Cesar Ingles Pineda's ("Mr. Ingles Pineda") Motion to Suppress Field Sobriety Tests. There is one question presently before the Court:

Should a field sobriety test be suppressed when the defendant receives instructions from the Officer through a translator, and the translator is not available for confrontation or cross examination at trial?

After considering the pleadings and exhibits, authorities, the evidence presented and oral arguments presented by Counsel, the Court finds that the instructions provided by the translator are testimonial, and thus introduction of those statements without an opportunity to cross-examine or confront the translator is a violation of the Sixth Amendment. Without the ability to

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test the veracity of the translation, the Defendant's constitutional rights are violated. The Motion to Suppress is granted, and the field sobriety tests are excluded from evidence at trial.

I. Background

A. Factual Background

Mr. Ingles Pineda was arrested for allegedly driving while intoxicated ("DWI") on October 7, 2016. It was later discovered that he was previously convicted in Loudon County on April 15, 2015 and January 9, 2017 on related DWI charges.

In this case, Officer Tillman observed sparks flying from underneath Mr. Ingles Pineda's vehicle while driving down Fairfax County Parkway around 11 p.m. While following, the Officer further noticed not only the flat tire, which caused the sparks, but also erratic driving. He subsequently turned on his lights, and when Mr. Ingles Pineda failed to respond, used his sirens to gain his attention. Mot. to Suppress CW. Ex. 1 at 11:16 Only after turning on his sirens did the defendant pull to the side of the road. *Id.* at 11:17

The ensuing encounter proceeded primarily in English, until Mr. Ingles Pineda eventually expressed the need for a Spanish interpreter. Initially, Mr. Ingles Pineda attempted to exit the vehicle, but immediately ceased upon Officer Tillman's English command to "Get back in the car!" *Id.* at 11:18 Officer Tillman approached the driver from his passenger window, and after noticing a distinct odor of alcohol, asked in English why Mr. Ingles Pineda was driving on flats. *Id.* at 11:19. The driver responded by repeatedly claiming his window was not working. *Id.* at 11:22. Officer Tillman then asked Mr. Ingles Pineda whether he had anything to drink, at which point he confessed, still in English, to one beer. At that point, Mr. Ingles Pineda told Officer Tillman that he did not speak English.

After attempting to find a Spanish speaking officer, Officer Tillman decided to conduct the field sobriety test through an interpreter from the "language line"—the language line is a telephonic translation service whereby the service operator connects the caller with a translator who may be located anywhere in the nation. After willingly stepping out of the vehicle, Officer Tillman directed Mr. Ingles Pineda to follow the instructions coming from the interpreter through the phone. Standing several feet from the defendant, Officer Tillman spoke the instructions into the phone, then handed the phone to Mr. Ingles Pineda for the translation. Mr. Ingles Pineda's performance on the sobriety test gave Officer Tillman additional indicia of intoxication, who proceeded to arrest him and take him to the Fairfax Adult Detention Center ("ADC"). *Id.* at 11:39-12:01.

During the drive to the ADC, Mr. Ingles Pineda made multiple attempts to have a conversation in a mix of Spanish and English with the arresting officers. *Id.* at 12:06 After arriving at the ADC, the laboratory technician conducted a 45 minute English-interview of the defendant, and a breath alcohol analysis test. The laboratory technician testified that she had no

problem conducting the analysis in English and Mr. Ingles Pineda utilized English to communicate.

Additionally, Officer Martin of the Town of Leesburg Police Department testified that he had previously arrested the Defendant for DWI on July 19, 2016. He testified that the Defendant conducted all of the field sobriety tests in English. He further testified that Mr. Ingles-Pineda did not request an interpreter, and did not demonstrate any need for one based upon his ability to speak English.

B. Procedural Background

The Commonwealth originally brought this case in the General District Court of Fairfax County. Subsequently, on June 14, 2017, it was nolle prosequed, and the Commonwealth re-charged the defendant for a DWI 3rd in five years in the Circuit Court of Fairfax County. Mr. Ingles Pineda filed a Motion to Suppress the field sobriety tests, which was heard on July 7, 2017. Upon hearing evidence and oral arguments, this court has taken the matter under advisement.

II. Standard of Review

The Court will suppress evidence that violates the Confrontation Clause in the Sixth Amendment. The Confrontation clause requires that a defendant have the opportunity to confront, and/or cross-exam, a witness who provides testimonial evidence. *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004). The Supreme Court has provided the definition of testimonial evidence as a statement that a reasonable witness would believe is going to be used to prosecute the defendant. *Id*

III. Arguments

A. Defendant's Arguments

Mr. Ingles Pineda argues that the translator's statements are out-of-court statements that will be offered for the truth of the matter asserted, and thus there must be an applicable hearsay exception. Addressing the language-conduit exception, the language-line translator is not reliable enough to meet the factors that would establish the translator as a "language-conduit". Thus, because the translator's interpretations of the field sobriety test instructions are unreliable, the officer's testimony of his performance on the test is more prejudicial than probative.

Furthermore, the translator's statements are also testimonial, and thus introduction of his/her statements without any opportunity to confront or cross-examine is a violation of the Sixth Amendment Confrontation clause. The instructions are the crux of the whole field sobriety test, and thus, if the instructions are suppressed, then the whole test is inadmissible.

B. Commonwealth's Arguments

The Commonwealth argues that field sobriety tests have been ruled as non-testimonial. Therefore, evidence of the field sobriety test is not a violation of the Confrontation clause, whether or not the interpreter is available to testify.

Additionally, the Commonwealth contends that the test instructions are duplicative because the officer spoke them out loud in English and Mr. Ingles Pineda understands English. Therefore, the field sobriety test should not be suppressed because the officer can testify to what he said in front of Mr. Ingles Pineda.

Furthermore, the Commonwealth asserts that even if the field sobriety test testimony is a violation of the Confrontation clause, suppression is not the proper remedy because the violation can only occur during trial—the motion is premature. Finally, even if the court finds suppression is the proper remedy, the court should not suppress the Horizontal Gaze and Nystagmus test results because they are physical tests that would not differ whether Mr. Ingles Pineda understood the instructions or not.

IV. **Analysis**

The Field Sobriety Tests Are Suppressed for Violation of the Confrontation Clause

Admitting the field sobriety test is a violation of the Confrontation Clause because: (1) the instructions that were translated by the interpreter are testimonial evidence; (2) the interpreter is unavailable to be confronted by the defendant; and, (3) the defendant did not have an opportunity to cross-examine the interpreter prior to them being unavailable.

The Sixth Amendment declares, “In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him” and if the witness is not available, the defendant must have had a prior opportunity to cross-examine. U.S. Const. amend. VI, §1; *Crawford v. Washington*, 541 U.S. 36, 42 (2004) In *Crawford*, the Supreme Court further explained that this “confrontation clause” only gives defendants the right to confront witnesses providing *testimonial* evidence. *Crawford*, 541 U.S. at 68; *see also, Pointer v. Texas*, 380 U.S. 400, 406(1965) (holding the 6th amendment applies to states). The Supreme Court went on to define testimonial evidence as a statement that “a reasonable witness would believe is going to be used to prosecute the defendant.” *Crawford*, 541 U.S. at 52; *See also, Davis v Washington*, 547 U.S. 813, 822 (2006).

An interpreter's translation of an officer's statements to a driver is almost conceptually inseparable from an interpreter's translation of a defendant's statements to an officer. *See United States v Charles*, 722 F.3d 1319 (11th Cir. 2013). In *Charles*, the 11th Circuit Court of Appeals held that the latter, an interpreter's translations of a defendant's responses to police interrogation questions, are testimonial. *Id.* The defendant was stopped by a Customs Border Patrol (“CBP”) officer at the airport for a possible immigration violation; however, she only spoke Creole. *Id.*

Without any Creole-speaking officer, the interrogating officer called a telephonic interpreter service provided by the Department of Homeland Security. *Id.* The officer spoke the English questions into the phone, and then passed the phone to the defendant. *Id.* The defendant would in turn speak her Creole responses back into the phone and then the interpreter would translate the Creole responses into English to the officer. *Id.* In court, the officer testified to the defendant's responses to his questions. *Id.* On appeal, the 11th circuit found the officer's testimony violated the confrontation clause because the defendant did not get an opportunity to confront the translator. *Id.* In finding the violation, the 11th circuit reasoned that the interpreter's statements to the interrogation officer is separate testimony from the defendant's because language interpretation requires translating concepts, not one-to-one words. *Id.* Therefore, the questioning of the defendant was done in two different languages, Creole and English; the defendant is the out of court declarant of her Creole statements while the interpreter is the out of court declarant of her English statements. *Id.* In order to utilize the English statements to prove the truth of the responses by the defendant, the defendant must have the opportunity to confront the translator. *Id.*

The scenario presented to this court is factually distinct, but conceptually identical. When the translator informs the defendant of the officer's question or instruction, like informing the officer of a defendant's response, they are making a statement based on their belief of the concept they received in the source language and how that meaning would be said in the target language. Furthermore, an interpreter called by an officer to translate a field sobriety test must recognize the dialogue's utility for a possible future prosecution. The substantive information transferred through the interpreter has a dramatic effect on what the defendant believes they are to do. Any inaccuracies in the translation could result in the defendant failing the test arbitrarily. These failures would be noted by the officer and provided as evidence at trial. In short, the interpreter is making statements, by translating statements, which a reasonable person should believe are likely to be used in a future prosecution. Consequently, they should be cross-examined to ensure the veracity of their translation, as was important in *Charles* and *Crawford*.

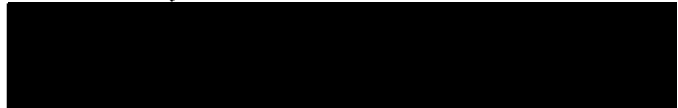
This distinguishes instructions directing the defendant during a field sobriety test from the *physical components* of a field sobriety test, which have been ruled non-testimonial. *Gibson v Commonwealth*, 57 Va. App. 772, 781 (2011). In *Gibson*, the Virginia Court of Appeals held that the physical portions of field sobriety tests are not-testimonial because the test does not reveal a defendant's knowledge, thoughts, or beliefs; the test only requires him to exhibit certain physical abilities. *Id.* Distinct from the instructions, which communicate what is to be done, and which therefore triggers the confrontation clause, the physical elements themselves are merely a revelation of the defendant's physical capacity to perform various tasks. *Id.* The translated instructions with which the defendant must comply are statements, the substance of which can radically effect a future prosecution. If translated incorrectly, the defendant might fail by no fault of their own—for example, being told to turn one's head instead of eyes, or stand on one leg rather than the other. However, once the instructions are understood, and given the opportunity to cross-examine the instructor, the test simply determines whether the defendant could comply.

Furthermore, this scenario is also comparable to the testimony of a laboratory analyst who attempts to testify on behalf of another analyst working in the same lab. *Bullcoming v New Mexico*, 564 U.S. 647 (2011); see also, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) (holding laboratory reports deeming the substance at hand as cocaine were testimonial affidavits, and thus required the availability of a witness at trial for cross-examination). The Supreme Court held that this was *not* permissible, even though the analysis only required inputting information into a computer. *Id* Like a translator interpreting English to Spanish, and vice-a-versa, the lab analyst in *Bullcoming* was essentially just receiving, computing and delivering information. The only difference is the analyst enters the information into a computer to compute, while the translator computes the language in their mind, matching words and phrases to the desired language. Even with an arguably small margin of error, the Supreme Court found the defendant has the right to confront the analyst. *Melendez-Diaz v Massachusetts*, 557 U.S. at 324. Similarly, the interpreter was taking instructions from the police officer like the second analyst was taking instructions from the first. Nevertheless, the second analyst cannot testify on behalf of the first analyst. *Bullcoming*, 564 U.S. at 652. Likewise, a police officer cannot testify on behalf of the translator as to what instructions were given to the defendant.

V. Conclusion

As a result, for the foregoing reasons, the Motion to Suppress is granted and the field sobriety tests will be suppressed.

Sincerely,

A large black rectangular redaction box covering the signature of Daniel E. Ortiz.

Daniel E. Ortiz