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Electronically Filed
Sep 09 2016 09:00 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

8 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

9 IN AND FOR THE COUNTY OF WASHOE

10 * * *

11 THE STATE OF NEVADA,

12 Plaintiff,

13 v.

Case No. CR16-0502

14 GREGORY FRANK ALLEN SAMPLE, also
15 known as GREGORY F.A. SAMPLE,,

Dept. No. 6

16 Defendant.

17 NOTICE OF APPEAL

18 Notice is hereby given that Plaintiff above-named, hereby appeals to the Supreme Court
19 of Nevada from this Court's Order granting Defendant's Motion to Suppress, signed and filed
20 on September 2, 2016.

21 AFFIRMATION PURSUANT TO NRS 239B.030

22 The undersigned does hereby affirm that the preceding document does not contain the
23 social security number of any person.

24 DATED: September 6, 2016.

25 CHRISTOPHER J. HICKS
26 District Attorney

By /s/ JENNIFER P. NOBLE
JENNIFER P. NOBLE
Appellate Deputy

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Larry K. Dunn, Esq.

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1 CODE No. 1310
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8
9 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
10
11 IN AND FOR THE COUNTY OF WASHOE

12 * * *

13 THE STATE OF NEVADA,

14 Plaintiff,

15 v.

Case No. CR16-0502

16 GREGORY FRANK ALLEN SAMPLE, also
17 known as GREGORY F.A. SAMPLE,

Dept. No. 6

18 Defendant.
19 _____/

20 CASE APPEAL STATEMENT

21 1. Appellant, the State of Nevada, hereby files this Case Appeal Statement.

22 2. Honorable, Lynne K. Simons, District Judge.

23 3. Counsel for Appellant The State of Nevada is:

24 CHRISTOPHER J. HICKS
25 District Attorney

26 Jennifer P. Noble
Appellate Deputy
P. O. Box 11130
Reno, Nevada 89520

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1 4. Appellate counsel for Defendant Gregory Frank Allen Sample is:

2 Larry K. Dunn, Esq.
3 1188 California Avenue
4 Reno, Nevada 89509

5 5. Counsel for Appellant and Defendant are licensed to practice law in the State of
6 Nevada.

7 6. Not applicable.

8 7. Not applicable.

9 8. Not applicable.

10 9. The Information was filed in the district court on April 12, 2016. Defendant's Motion
11 to Suppress was filed on July 11, 2016.

12 10. This appeal is from an order granting Defendant's Motion to Suppress, signed and
13 filed on September 2, 2016.

14 11. This case has not previously been the subject of an appeal or original writ proceeding
15 in the Supreme Court.

16 12. This appeal does not involve child custody or visitation.

17 13. Not applicable.

18 This is a fast track appeal.

19 AFFIRMATION PURSUANT TO NRS 239B.030

20 The undersigned does hereby affirm that the preceding document does not contain the
21 social security number of any person.

22 DATED: September 6, 2016.

23 CHRISTOPHER J. HICKS
24 District Attorney

25 By /s/ JENNIFER P. NOBLE
26 JENNIFER P. NOBLE
Appellate Deputy

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Larry K. Dunn, Esq.

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**SECOND JUDICIAL DISTRICT COURT
COUNTY OF WASHOE**

Case History - CR16-0502

DEPT. D6

HON. LYNNE K. SIMONS

Report Date & Time

9/6/2016

2:53:13PM

Case Description: STATE VS. GREGORY FRANK SAMPLE (D6)

Case ID:	CR16-0502	Case Type:	CRIMINAL	Initial Filing Date:	4/1/2016
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Parties

PLTF	STATE OF NEVADA - STATE
DA	Chelsea Barbara Mazza, Esq. - 13534
DA	Terrence P. McCarthy, Esq. - 2745
DEFT	GREGORY FRANK ALLEN SAMPLE - @123256
DATY	Larry K. Dunn, Esq. - 1627
PNP	Div. of Parole & Probation - DPNP

Charges

<i>Charge No.</i>	<i>Charge Code</i>	<i>Charge Date</i>	<i>Charge Description</i>
1	53916	4/12/2016	INF DRIVING UNDER THE INFLUENCE

Plea Information

<i>Charge No.</i>	<i>Plea Code</i>	<i>Plea Date</i>	<i>Plea Description</i>
1	53916	4/13/2016	PLED NOT GUILTY

Release Information

Custody Status

Hearings

<i>Department</i>	<i>Event Description</i>	<i>Sched. Date & Time</i>	<i>Disposed Date</i>
1 D6	ARRAIGNMENT	4/13/2016 09:00:00	4/13/2016

Event Extra Text:

Disposition:
D725 4/13/2016
TO THE INFORMATION. TRIAL SET

<i>Department</i>	<i>Event Description</i>	<i>Sched. Date & Time</i>	<i>Disposed Date</i>
2 D6	Request for Submission	8/5/2016 10:36:00	9/6/2016

Event Extra Text: REPLY TO OPPOSITION TO MOTION TO
SUPPRESS/DISMISS -TRIAL SET FOR 9/12/16

Disposition:
S200 9/6/2016
order

<i>Department</i>	<i>Event Description</i>	<i>Sched. Date & Time</i>	<i>Disposed Date</i>
3 D6	MOTION TO SUPPRESS	8/29/2016 14:00:00	8/29/2016

Event Extra Text: TRIAL STARTS 9/12/16

Disposition:
D840 8/29/2016
THE COURT WILL PROVIDE WRITTEN DECISION.

Case Description: STATE VS. GREGORY FRANK SAMPLE (D6)

Case ID:	CR16-0502	Case Type:	CRIMINAL	Initial Filing Date:	4/1/2016
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Department	Event Description	Sched. Date & Time	Disposed Date
4 D6	MOTION TO CONFIRM TRIAL	8/31/2016 09:00:00	8/31/2016
Event Extra Text: TRIAL SET 9/12/16 FOR 3 DAYS		Disposition: D355 8/31/2016 MOTION TO SUPPRESS PREVIOUSLY HEARD WILL BE DISPOSITIVE OF CASE	

Department	Event Description	Sched. Date & Time	Disposed Date
5 D6	TRIAL - JURY	9/12/2016 09:00:00	8/31/2016
Event Extra Text: 3 DAYS		Disposition: D845 8/31/2016	

Agency Cross Reference

Code	Agency Description	Case Reference I.D.
DA	District Attorney's Office	DA1511549
PC	PCN number	PCNWASO0061940C
RJ	Reno Justice's Court	RCR2015083421
WC	Washoe County Sheriff's Office	WC15008161

Actions

Action Entry Date	Code	Code Description	Text
4/7/2016	NEF	Proof of Electronic Service	Transaction 5455940 - Approved By: NOREVIEW : 04-07-2016:15:06:10
4/7/2016	1491	Pretrl Svcs Assessment Report	Transaction 5455836 - Approved By: KJONES : 04-07-2016:15:05:05
4/12/2016	4265	Waiver of Preliminary Exam	Transaction 5462142 - Approved By: LBARRAGA : 04-12-2016:14:43:45
4/12/2016	1800	Information	Transaction 5462142 - Approved By: LBARRAGA : 04-12-2016:14:43:45
4/12/2016	NEF	Proof of Electronic Service	Transaction 5462241 - Approved By: NOREVIEW : 04-12-2016:14:44:28
4/18/2016	NEF	Proof of Electronic Service	Transaction 5470237 - Approved By: NOREVIEW : 04-18-2016:08:38:10
4/18/2016	MIN	***Minutes	Arraignment 4/13/16 - Transaction 5470232 - Approved By: NOREVIEW : 04-18-2016:08:37:10
5/14/2016	4185	Transcript	041316.HEARING - Transaction 5515752 - Approved By: NOREVIEW : 05-14-2016:16:34:15
5/14/2016	NEF	Proof of Electronic Service	Transaction 5515753 - Approved By: NOREVIEW : 05-14-2016:16:35:05
7/11/2016	NEF	Proof of Electronic Service	Transaction 5601941 - Approved By: NOREVIEW : 07-11-2016:13:07:48
7/11/2016	2490	Motion ...	MOTION TO SUPPRESS/DISMISS - Transaction 5601407 - Approved By: CSULEZIC : 07-11-2016:13:04:30
7/29/2016	2645	Opposition to Mtn ...	OPPOSITION TO MOTION TO SUPPRESS/DISMISS - Transaction 5634371 - Approved By: MCHOLICO : 07-29-2016:14:00:52
7/29/2016	NEF	Proof of Electronic Service	Transaction 5634463 - Approved By: NOREVIEW : 07-29-2016:14:00:52
8/4/2016	3860	Request for Submission	REPLY TO OPPOSITION TO MOTION TO SUPPRESS/DISMISS (PAPER ORDER NOT PROVIDED) - Transaction 5642852 - Approved By: TBRIT
8/4/2016	3790	Reply to/in Opposition	REPLY TO OPPOSITION TO MOTION TO SUPPRESS/DISMISS - Transaction 5642852 - Approved By: TBRIT
8/4/2016	NEF	Proof of Electronic Service	Transaction 5643598 - Approved By: NOREVIEW : 08-04-2016:16:07:04
8/5/2016	NEF	Proof of Electronic Service	Transaction 5644297 - Approved By: NOREVIEW : 08-05-2016:10:12:00
8/8/2016	NEF	Proof of Electronic Service	Transaction 5647916 - Approved By: NOREVIEW : 08-08-2016:16:28:37
8/8/2016	2610	Notice ...	NOTICE OF ERRATA - Transaction 5647081 - Approved By: RKWATKIN : 08-08-2016:16:26:58
8/22/2016	1250	Application for Setting	August 29, 2016, at 2:00 PM - Transaction 5670407 - Approved By: RKWATKIN : 08-22-2016:16:10:17
8/22/2016	2592	Notice of Witnesses	NOTICE OF WITNESS PURSUANT TO NRS 174.234 - Transaction 5670455 - Approved By: TBRITTON : 08-22-2016:16:11:23
8/22/2016	NEF	Proof of Electronic Service	Transaction 5671233 - Approved By: NOREVIEW : 08-22-2016:16:11:23

Case Description: STATE VS. GREGORY FRANK SAMPLE (D6)

Case ID:	CR16-0502	Case Type:	CRIMINAL	Initial Filing Date:	4/1/2016
8/22/2016	NEF	Proof of Electronic Service	Transaction 5671269 - Approved By: NOREVIEW : 08-22-2016:16:17:29		
8/23/2016	NEF	Proof of Electronic Service	Transaction 5671897 - Approved By: NOREVIEW : 08-23-2016:09:34:35		
8/23/2016	2592	Notice of Witnesses	NOTICE OF EXPERT WITNESS PURSUANT TO NRS 174.234 - Transaction 5671596 - Approved By: PMSEW		
9/2/2016	NEF	Proof of Electronic Service	Transaction 5692100 - Approved By: NOREVIEW : 09-02-2016:16:13:01		
9/2/2016	3060	Ord Granting Mtn ...	ORDER GRANTING MOTION TO SUPPRESS - Transaction 5692094 - Approved By: NOREVIEW : 09-02-2016		
9/6/2016	2515	Notice of Appeal Supreme Court	Transaction 5693257 - Approved By: YVILORIA : 09-06-2016:12:36:03		
9/6/2016	1310	Case Appeal Statement	Transaction 5693261 - Approved By: YVILORIA : 09-06-2016:12:36:59		
9/6/2016	S200	Request for Submission Complet	order		
9/6/2016	NEF	Proof of Electronic Service	Transaction 5693271 - Approved By: NOREVIEW : 09-06-2016:12:37:58		
9/6/2016	NEF	Proof of Electronic Service	Transaction 5693269 - Approved By: NOREVIEW : 09-06-2016:12:37:01		
9/6/2016	1350	Certificate of Clerk	CERTIFICATE OF CLERK AND TRANSMITTAL - NOTICE OF APPEAL - Transaction 5693798 - Approved By: I		

1 CODE NO. 3370

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3
4 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
5 IN AND FOR THE COUNTY OF WASHOE
6

7 THE STATE OF NEVADA,

Case No. CR16-0502

8 Plaintiff,

Dept. No. 6

9 vs.

10
11 GREGORY FRANK ALLEN SAMPLE, also
12 known as GREGORY F.A. SAMPLE,

13 Defendant.
14 _____/

15 **ORDER GRANTING MOTION TO SUPPRESS**

16 Before this Court is a *Motion to Suppress/Dismiss*¹ filed July 11, 2016 by Defendant
17 Gregory Frank Allen Sample ("Mr. Sample") through his counsel Larry K. Dunn. The State
18 of Nevada filed its *Opposition to Motion to Suppress/Dismiss* on July 29, 2016 through its
19 counsel Chelsey Mazza, Deputy District Attorney. Mr. Sample filed his *Reply to Opposition*
20 *to Motion to Suppress/Dismiss* on August 4, 2016 and submitted the matter for decision. On
21 August 30, 2016, the parties appeared before this Court for an evidentiary hearing on the
22 instant *Motion*, where both sides presented evidence and argument in support of their
23 respective positions.
24
25

26 Mr. Sample seeks to suppress on the following grounds: (1) the results of the
27 preliminary breath test ("PBT") administered by officers is inadmissible because the PBT
28 _____

¹ This Court is considering the merits of the Motion to Suppress, not the remedy of dismissal.

1 device was not properly calibrated according to statute; (2) the PBT results must be
2 suppressed as a non-consensual search in violation of the Fourth Amendment; (3) because
3 the PBT results cannot be used as probable cause for Mr. Sample's arrest, there is
4 insufficient evidence to support probable cause for the arrest and all evidence obtained from
5 the illegal arrest must be suppressed. He further seeks to have this proceeding dismissed.
6

7 FINDINGS OF FACT

8 The findings of fact in this case are derived from the evidentiary hearing, the
9 telephonic search warrant, transcript of Department of Motor Vehicles Hearing, and other
10 exhibits presented to the Court to support Mr. Sample's instant *Motion*:
11

12 On August 30, 2015, Washoe County Deputy Sheriff Joshua Swanson observed a
13 blue sedan travelling northbound on Lemmon Valley Road. Deputy Swanson observed the
14 blue sedan cross the white fog line on the right side of the road with its passenger tires. He
15 also observed the vehicle speed up and cross over the double-yellow line into a turn lane
16 before returning to its lane of travel. The deputy attempted pursuit, traveling "between 55
17 and 65 miles per hour to catch [the vehicle]." *Telephonic Search Warrant*, p. 5. Deputy
18 Swanson testified at the hearing he reached speeds up to 70 miles per hour to apprehend
19 the vehicle. During that time, Deputy Swanson activated his emergency lights. The vehicle
20 slowed, but did not pull over. Further, Deputy Swanson activated his siren one time, but the
21 vehicle did not stop until it reached 175 Palace Drive and pulled into the driveway.
22

23 As Deputy Swanson approached the vehicle, he identified Mr. Sample, the sole
24 occupant of the vehicle, as the driver.² He observed Mr. Sample drinking a clear liquid from
25 a container. He instructed Mr. Sample several times to put the container down before Mr.
26
27

28

² Mr. Sample was identified by his driver's license at the scene and also at the evidentiary hearing by Deputy Swanson; the record reflects the identification.

1 Sample complied. Deputy Swanson smelled the odor of alcohol emanating from the vehicle
2 and observed that Mr. Sample's eyes were glassy, red, and watery. He heard Mr. Sample's
3 slow, slurred speech. Deputy Swanson instructed Mr. Sample to exit the vehicle. Mr.
4 Sample refused. A cover officer arrived and Deputy Swanson opened the door through the
5 partially rolled-down window to assist Mr. Sample out of the vehicle to administer Field
6 Sobriety Tests (FSTs), further noting that Mr. Sample was unsteady on his feet and used his
7 vehicle to steady himself. Deputy Swanson then smelled the odor of alcohol emanating
8 directly from Mr. Sample. Mr. Sample initially followed directions to go to the back of his
9 own vehicle. Mr. Sample was then instructed to go to the front of the patrol vehicle.
10
11

12 As the deputies prepared to administer the FSTs, Mr. Sample walked away from the
13 front of Deputy Swanson's patrol vehicle toward his residence. The cover deputy retrieved
14 Mr. Sample with a rear wrist lock, returned Mr. Sample to the patrol vehicle, placed him in
15 handcuffs, and detained him. Based on Mr. Sample's ultimate inability to continue to follow
16 the deputies' instructions and other safety concerns, Deputy Swanson decided not to
17 conduct the FSTs.
18

19 Deputy Swanson placed Mr. Sample in the rear of his patrol car and administered a
20 preliminary breath test ("PBT"). Although previously, for purposes of the Telephonic Search
21 Warrant and DMV Hearing, Deputy Swanson testified that Mr. Sample consented to the
22 PBT, at the evidentiary hearing, the deputy conceded Mr. Sample did not consent and
23 instead submitted to Deputy Swanson's directive to blow into the PBT device. Although
24 Deputy Swanson testified at the evidentiary hearing that he was prepared to arrest Mr.
25 Sample before the PBT and the PBT only confirmed his observations, this testimony differed
26 from Deputy Swanson's testimony at the DMV hearing that Mr. Sample was not under arrest
27
28

1 prior to administering the PBT. *DMV Transcript*, p. 11. Further, Deputy Swanson testified
2 for purposes of the Telephonic Search Warrant that Mr. Sample "did consent to a
3 Preliminary Breath Test, and that registered [a fail],³ [s]o based on that, we placed him
4 under arrest for suspicion of Driving Under the Influence of Alcohol." *Telephonic Search*
5 *Warrant*, p. 7. Deputy Swanson obtained a Telephonic Search Warrant for three
6 descending blood draws⁴ for evidentiary testing and analysis because Mr. Sample refused
7 to consent to a blood draw.
8

9 Deputy Swanson further testified under cross-examination at the evidentiary hearing
10 that he is not trained regarding obtaining consent from a suspect for a preliminary breath
11 test; he did not review the Nevada Implied Consent statute's consequences of failing to
12 consent with Mr. Sample; and, he did not specifically recall whether his training included
13 "consent" language. *Evidentiary Hearing*, 8/30/16. Further, the Deputy admitted he was
14 changing his testimony from prior testimony and Mr. Sample did not consent to the PBT;
15 however, Deputy Swanson testified he was prepared to arrest Mr. Sample under suspicion
16 of driving under the influence prior to issuing the preliminary breath test. Id.
17

18 CONCLUSIONS OF LAW

19 As a general rule, "suppression issues present mixed questions of law and fact."
20 State v. Beckman, 129 Nev. Adv. Op. 51, 305 P.3d 912, 916 (2013). In this case, the issue
21 is whether the results of the PBT should be suppressed as a non-consensual search and
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23
24 ³ A majority of Mr. Sample's *Reply* is dedicated to argument that the State should be sanctioned because it
25 included the result of Mr. Sample's PBT in its *Opposition*. Therefore, Mr. Sample contends this Court could not
26 fairly consider the instant *Motion* because the "bell cannot be unrung." *Reply*, p. 3. However, as the Court
27 pointed out at the evidentiary hearing, Mr. Sample himself put his own PBT result in the record. *Motion*,
28 "Exhibit 1." The exhibits were intended to be attached to the *Motion* but were omitted. The exhibits were
provided to the Court at the commencement of the evidentiary hearing. This Court certainly has the ability to
evaluate the *instant Motion* by balancing due process concerns with relevant evidence before it. Accordingly,
Mr. Sample's request for sanctions is denied.

⁴ This appears to be based on Mr. Sample's prior felony DUI conviction. *Telephonic Search Warrant*, p. 7.

1 whether the resulting arrest and blood draw should be suppressed under the exclusionary
2 rule as fruit of the poisonous tree.

3 Both the Fourth Amendment of the United States Constitution and Article 1, Section
4 18 of the Nevada Constitution provide citizens with a right "to be secure in their persons,
5 houses, papers and effects against unreasonable seizures and searches." Nev. Const. art.
6 I, § 18; State v. Bayard, 119 Nev. 241, 246, 71 P.3d 498, 502 (2003) (discussing the
7 Nevada Constitution and United States Constitution as providing similar search and seizure
8 clauses).

9
10 "The Fourth Amendment prohibition against unreasonable searches and seizures
11 extends to investigative traffic stops." State v. Rincon, 122 Nev. 1170, 1173, 147 P.3d 233,
12 235 (2006). Along with reasonable suspicion for an investigatory stop, an officer must
13 possess probable cause for an arrest. Probable cause for an arrest "exists when police
14 have reasonably trustworthy information of facts and circumstances that are sufficient in
15 themselves to warrant a person of reasonable caution to believe that [a crime] has been . . .
16 committed by the person to be arrested." State v. McKellips, 118 Nev. 465, 472, 49 P.3d
17 655, 660 (2002); Beck v. Ohio, 379 U.S. 89 (1964). "A warrantless search is reasonable
18 only where it falls within a recognized exception to the warrant requirement." Byars v. State,
19 130 Nev. Adv. Op. 85, 336 P.3d 939, 943 (2014).

20
21 **A. Mr. Sample did not consent to the PBT.**

22 Case law establishes the "administration of a breath test is a search" under the
23 Fourth Amendment. Birchfield v. N. Dakota, 136 S. Ct. 2160, 2173 (2016). The Nevada
24 Legislature has adopted an "Implied Consent Law" that provides in full as follows:

25
26 1. Any person who drives or is in actual physical control of a vehicle on a
27 highway or on premises to which the public has access shall be deemed to
28

1 have given his or her consent to a preliminary test of his or her breath to
2 determine the concentration of alcohol in his or her breath **when the test is**
3 **administered at the request of a police officer** at the scene of a vehicle
crash or where the police officer stops a vehicle, if the officer has reasonable
grounds to believe that the person to be tested was:

4 (a) Driving or in actual physical control of a vehicle while under the influence of
5 intoxicating liquor or a controlled substance; or
6 (b) Engaging in any other conduct prohibited by NRS 484C.110, 484C.120,
484C.130 or 484C.430.

7 **2. If the person fails to submit to the test**, the officer shall:

8 (a) Seize the license or permit of the person to drive as provided in NRS
484C.220; and

9 (b) If reasonable grounds otherwise exist, arrest the person and take him or
her to a convenient place for the administration of a reasonably available
evidentiary test under NRS 484C.160.

10 3. The result of the preliminary test must not be used in any criminal action,
11 except to show there were reasonable grounds to make an arrest.

12 NRS 484C.150 (emphasis added); *see also* Byars v. State, 130 Nev. Adv. Op. 85, 336 P.3d
13 939. Under Nevada's Implied Consent Law, an individual must be given a choice to submit
14 to the preliminary breath test, which is used for the determination for probable cause for an
15 arrest along with field sobriety tests. If the person refuses, then the officer may proceed to
16 seize the driver's license of the individual and to arrest him upon reasonable grounds.
17 Further, the statute expressly provides that the results of a PBT must not be used "except to
18 show there were reasonable grounds for an arrest." NRS 484C.150(3).
19

20 The United States Supreme Court recently examined states' various Implied Consent
21 Statutes and breath tests in the context of the Fourth Amendment. In Birchfield v. N.
22 Dakota, the Court concluded "the Fourth Amendment permits warrantless breath tests
23 **incident to arrests** for drunk driving. The impact of breath tests on privacy is slight, and the
24 need for BAC testing is great." 136 S. Ct. 2160, 2184 (2016) (emphasis added). It is clear
25 the Birchfield Court did not, however, extend this exception to searches prior to arrest.
26 Accordingly, as set forth above, a valid exception or consent is necessary to justify a
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1 warrantless search.

2 In this case, the evidence shows Mr. Sample was not given a choice to take a
3 preliminary breath test. Instead he was handcuffed, placed in the rear of a patrol car, and
4 directed to blow into the PBT device. Deputy Swanson testified Mr. Sample did not consent
5 to the PBT. The Court concludes the PBT was the product of a nonconsensual search and
6 must be suppressed.
7

8 Mr. Sample's evidence presented regarding the calibration of the PBT as a basis to
9 invalidate the result was not adequately addressed at the hearing and the Court rejects this
10 argument.
11

12 **B. Deputy Swanson relied on the PBT for Probable Cause for the Arrest.**

13 Although the PBT was the result of a non-consensual search, this Court examines
14 whether probable cause for Mr. Sample's arrest existed absent the results of the PBT.
15

16 Probable cause for arrest exists "if the facts and circumstances **known to the officer**
17 **at the time** of the arrest would lead a prudent person to believe that a felony was committed
18 by the defendant." Franklin v. State, 96 Nev. 417, 420, 610 P.2d 732, 734 (1980) (emphasis
19 added). This Court examines the facts through an "objective assessment of the officer's
20 actions in light of the facts and circumstances confronting him at the time." Maryland v.
21 Macon, 472 U.S. 463, 470-71, 105 S. Ct. 2778, 2783 (1985).
22

23 In this case, it is clear Deputy Swanson possessed reasonable suspicion that Mr.
24 Sample was driving under the influence. Mr. Sample's eyes were red and watery, his
25 speech was slurred, he smelled of alcohol, and he refused to cooperate with all of Deputy
26 Swanson's instructions. However, field sobriety tests or a preliminary breath test are usually
27 administered to confirm an officer's suspicions. NRS 484C.150; see also Rincon, 122 Nev.
28

1 at 1172, 147 P.3d at 235; Byars, 130 Nev. Adv. Op. 85, 336 P.3d at 942. Here, Deputy
2 Swanson elected not to perform FSTs. However, although he testified at the evidentiary
3 hearing that he was prepared to arrest Mr. Sample prior to issuing a PBT, the Court finds
4 the record belies this assertion. The Court further finds the facts and circumstances known
5 to Deputy Swanson at the time reveal he did not possess probable cause to arrest Mr.
6 Sample absent further conformation in the form of FSTs, consent to a PBT, or a refusal to
7 take a PBT. Of import to this determination is the fact Deputy Swanson testified twice at the
8 DMV Hearing that Mr. Sample was not under arrest at the time he was placed in the back of
9 the patrol vehicle. *DMV Transcript*, pp. 10-11. Deputy Swanson then testified he did not
10 place Mr. Sample under arrest until "after he consented to the preliminary breath test." *Id.* p.
11 11; *Telephonic Search Warrant*, p. 7 (testifying that "based on [the PBT results], we placed
12 him under arrest for suspicion of Driving Under the Influence of Alcohol."). Deputy Swanson
13 also waited until another back-up officer, Deputy Kyler, arrived with a properly functioning
14 PBT to place Mr. Swanson under arrest, because Deputy Swanson did not have a PBT
15 device issued to him, his covering officer's PBT device was not functioning properly, and a
16 second PBT device was required. *Id.* pp. 9-10. The Court finds the record belies Deputy
17 Swanson's assertion that he was prepared to arrest Mr. Swanson prior to administration of
18 the PBT. In hindsight, the facts and circumstances may appear sufficient; however, this
19 Court is tasked with an examination of the totality of the circumstances at the time the officer
20 observed them. In this case, the chronology of the events is pivotal and the Court
21 concludes the facts and circumstances confronted by Deputy Swanson at the time of Mr.
22 Sample's investigatory detention are insufficient to support a finding of probable cause for
23 the arrest absent further confirmation.
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1 **C. The Good-Faith Exception to the Exclusionary Rule Does not Apply**

2 The exclusionary rule is a judicially created remedy for Fourth Amendment violations
3 and the "exclusionary rule, while not acting to cure a Fourth Amendment violation, is a
4 remedial action used to deter police from taking action that is not in accordance with proper
5 search and seizure law." State v. Allen, 119 Nev. 166, 172, 69 P.3d 232, 235–36 (2003);
6 Byars v. State, 130 Nev. Adv. Op. 85, 336 P.3d 939, 947 (2014); New York v. Harris, 495
7 U.S. 14, 19, 110 S. Ct. 1640, 109 L.Ed.2d 13 (1990) (Courts must exclude evidence
8 obtained after a Fourth Amendment violation as "indirect fruits of an illegal search or
9 arrest."). In this case, Mr. Sample refused to consent to an evidentiary blood draw.
10 Accordingly, Deputy Swanson applied for a Telephonic Search Warrant based on Mr.
11 Sample's refusal. NRS 484C.160. In the Telephonic Search Warrant to Judge Hascheff,
12 Deputy Swanson testified under oath as to the facts of the investigatory stop, including the
13 fact Mr. Sample consented to and failed the PBT test. Judge Hascheff found probable
14 cause⁵ existed based on the facts presented by Deputy Swanson, and entered a Seizure
15 Order for a descending blood draw of Mr. Sample's blood. Mr. Sample argues this evidence
16 must be suppressed as fruit of the poisonous tree.
17

18 The State argues the "good faith exception" to the exclusionary rule applies, because
19 Deputy Swanson had probable cause for the arrest. Further, the State argues Deputy
20 Swanson acted in good faith in his observations of Mr. Sample in arresting him, and cites to
21 authority discussing reliance on statutes and case law subsequently found unconstitutional
22 or overturned or warrants subsequently found invalid.
23

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27 ⁵ "A search warrant has three basic components: (1) it must be issued upon probable cause and have support
28 for the statement of probable cause; (2) it must describe the area to be searched; and (3) it must describe
what will be seized. The linchpin of a warrant, however, is the existence of probable cause." State v. Allen, 119
Nev. 166, 170, 69 P.3d 232, 235 (2003).

1 The Court finds none of the good faith exceptions to the exclusionary rule advanced
2 by the State apply to this case. While "an officer's objectively reasonable reliance on an
3 invalid warrant issued by a magistrate or judge will not act to suppress evidence seized
4 under the warrant, . . . under the objective standard, an officer is required 'to have a
5 reasonable knowledge of what the law prohibits.'" State v. Allen, 119 Nev. 166, 172, 69 P.3d
6 232, 236 (2003) *citing* United States v. Leon, 468 U.S. 897, 919-20, 104 S. Ct. 3405 (1984).
7 Here, the Court finds Deputy Swanson's reliance upon the Telephonic Search Warrant was
8 not objectively reasonable because he used the results of the non-consensual PBT as a
9 basis for the Telephonic Search Warrant in violation of applicable law. The Court also finds
10 Deputy Swanson did not rely upon a statute or case law subsequently overturned, because
11 the revised NRS 484C.160 went into effect in June 2015, three months before Mr. Sample's
12 arrest. Further, Deputy Swanson's testimony at the evidentiary hearing regarding his
13 training as to the Implied Consent Law was inconsistent. The Court therefore finds and
14 concludes there is no good faith exception to the exclusionary rule applicable to this case.
15
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17

18 CONCLUSION

19 In light of the foregoing facts, the chronology of the detention and arrest in this case
20 and the applicable law, the Court has no choice but to grant Mr. Sample's *Motion to*
21 *Suppress* because there is insufficient evidence to support probable cause for the arrest
22 and the evidence obtained from the illegal arrest must be suppressed.
23

24 Accordingly, and good cause appearing,

25 IT IS HEREBY ORDERED the *Motion to Suppress* is GRANTED.

26 Dated this 2nd day of September, 2016.
27

28 
DISTRICT JUDGE

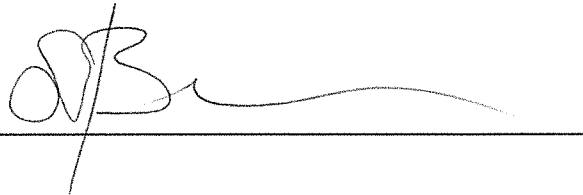
CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 2nd day of September, 2016, I electronically filed the foregoing with the Clerk of the Court electronic filing system, which will send notice of electronic filing to the following:

CHELSEA MAZZA, ESQ

LARRY DUNN, ESQ.

And further, I deposited for mailing, in the U.S. Mail, postage pre-paid, return receipt requested, the foregoing as follows:



A handwritten signature in black ink, appearing to be 'J.B.', is written over a horizontal line.

CASE NO CR16-0502 STATE V GREGORY FRANK SAMPLE

**DATE, JUDGE
OFFICERS OF**

COURT PRESENT	APPEARANCES-HEARING	CONT'D TO
4/13/16 HONORABLE LYNNE SIMONS DEPT. 6 Y. Gentry (Clerk) Cecere (Reporter) Masters (Bailiff) Brown (Prob. Ofcr)	<u>ARRAIGNMENT</u> Deputy District Attorney Nate MacLellan represented the State. Defendant was present with counsel, Larry Dunn, Esq. Appearances put on the record. TRUE NAME AS STATED ON LINE 12 OF THE INFORMATION; Defense counsel handed copy of Information; waived formal reading. Counsel for Defendant addressed the Court and advised Defendant will be pleading not guilty and is waiving his right to trial within 60 days. Counsel further advised he believes matter will be settled due to some motion work. COURT canvassed Defendant regarding plea and right to trial. Defendant pled not guilty and waived his right to trial within 60 days. COURT ORDERED Trial be set for September 12, 2016 for 3 days and Motion to Confirm Trial hearing be set for August 31, 2016. DEFENDANT was present.	8/31/16 @ 9:00 a.m. Mtn to Confirm Trial 9/12/16 @ 9:00 a.m. Trial

1 **Code 1350**

2
3
4 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
5 **IN AND FOR THE COUNTY OF WASHOE**

6 **THE STATE OF NEVADA,**

Case No. CR16-0502

7
8 **Plaintiff,**

Dept. No. 6

9 **vs.**

10 **GREGORY FRANK ALLEN SAMPLE, also**
11 **known as GREGORY F.A. SAMPLE,**

12 **Defendant.**

13 _____/

14 **CERTIFICATE OF CLERK AND TRANSMITTAL – NOTICE OF APPEAL**

15 I certify that I am an employee of the Second Judicial District Court of the State of Nevada,
16 County of Washoe; that on the 6th day of September, 2016, I electronically filed the Notice of
Appeal in the above entitled matter to the Nevada Supreme Court.

17 I further certify that the transmitted record is a true and correct copy of the original
18 pleadings on file with the Second Judicial District Court.

19 Dated this 6th day of September, 2016

20 Jacqueline Bryant
21 Clerk of the Court

22 By /s/ Yvonne Vilorio
23 Yvonne Vilorio
24 Deputy Clerk
25
26
27
28