IN THE COUNTY COURT, THIRD
JUDICIAL CIRCUIT, IN AND FOR
COLUMBIA COUNTY, FLORIDA

STATE OF FLORIDA **CASE NO: 13-568-CT**

v.

KEVIN DWAYNE KIRBY

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS
(Statements made to and observations of Paramedic Finnegan)

THIS CAUSE having come before the court upon the Defendant's "Motion to Suppress Statements" made to Paramedic Kimberly Finnegan at the scene of a one-vehicle traffic accident.

During the evidentiary proceeding on this motion, the court received into evidence Defendant's exhibit "A", a DVD of the video recording made from Florida Highway Patrol Trooper E.R. Williams' in-car dash camera, Defendant's exhibit "B", a 27 page transcript of the audio portion of the video depicted on Defendant's exhibit "A" and, the Discovery Materials from both the state and defense contained within the court file. No live testimony was presented by either the Defendant or the state.

Having reviewed all evidence introduced at hearing, the arguments of counsel and, relevant case law along with controlling Florida Statutes, it is after due consideration found that:

1. Kimberly Finnegan is a paramedic who, who along with her partner, responded to the scene of a single vehicle accident after being dispatched on 14 April 2013.
2. On arrival, she observed the Defendant, Kevin Dewayne Kirby, standing upright adjacent to his vehicle which was on its' side.
3. The vehicle that she observed the Defendant standing adjacent to was the same vehicle involved in the single automobile rollover accident.
4. In conducting an initial assessment of the Defendant, Paramedic Finnegan determined he was able to answer all question posed and, that he had no medical complaints with the Defendant specifically advising he was not injured and refused medical treatment. The Defendant was not transported from the scene for medical aid or attention and there is no evidence that medical assistance was actually rendered on scene.
5. While waiting on Law Enforcement to arrive, Paramedic Finnegan observed that Kevin Dewayne Kirby approached her and then fell into her. At that time she determined the smell of ETOH (alcohol) was emanating from his person and that he had urinated on himself.
6. During her time observing the Defendant, she also noted that there were two coolers which had apparently spilled or fallen out of the Defendant's vehicle

when it crashed. She observed the Defendant retrieve these two coolers and replace liquor bottles inside of them.

7. While in contact with the Defendant, he advised Paramedic Finnegan that "he was the sole occupant of the vehicle" and "he was the restrained driver".
8. As reflected on page 8 of Defendant's exhibit "B", a conversation took place at the scene of the accident between the arresting officer, Trooper E.R. Williams, and Paramedic Finnegan as reflected below:
   - Trooper Williams: "Did he make any statements to you about being the only person in the car driving or being - - having a seat belt or anything?"
   - Paramedic Finnegan: "I asked him if he was hurting anywhere. Do you want to go to the hospital? Was anybody else in the vehicle? He was very respectful." And then I said, "Have you been drinking?" He said, "No Ma'am, I have not".
   - Trooper Williams: "Okay. He said - - but he said he was the only person in the vehicle?"
   - Paramedic Finnegan: "Yes."
   - Trooper Williams: "Great. You are my wheel witness. Thank you. That's what I needed."

The Defendant asserts that any statements made to Paramedic Finnegan are protected pursuant to the "Accident Report Privilege" as codified within Florida Statute 316.066, specifically subsection (4). Clearly the Defendant's reliance on the "Accident Report Privilege" as a mechanism to exclude as evidence, the observations of Paramedic Finnegan and the statements made to her by the Defendant, is misplaced.

Florida Statute 316.066(4) reads in pertinent part, "Except as specified in this subsection, each crash report made by a person involved in a crash and any statement made by such person to a law enforcement officer for the purpose of completing a crash report required by this section shall be without prejudice to the individual so reporting. Such report or statement may not be used as evidence in any trial, civil or criminal."…….

This privilege or, immunity, is due to the compulsory aspect of the statutorily mandated obligation under, 316.066, for a motorist involved in a traffic crash to provide truthful and unadulterated information to "Law Enforcement" when conducting a traffic crash investigation. Clearly Paramedic Finnegan, while in contact with the Defendant, was not serving in any law enforcement capacity nor, was she conducting any form of traffic crash investigation. Accordingly, Florida Statute 316.066 has no application to any testimony derived from Paramedic Finnegan.

Having failed to convince the court at hearing that the "Accident Report Privilege" pursuant to Florida Statute 316.066(4) precluded the admissibility of testimony being presented at trial from Paramedic Finnegan, the defense shifted to Florida Statutes 456.057 and, 395.3025 in support of an argument that the observations and testimony of this witness must be excluded as having been improperly obtained. In support of this

argument the Defendant also cited to, State V. Kutik, 914 So.2d 484 (Fla. 5th DCA 2005); State V. Cashner, 819 So.2d 227 (Fla. 4th DCA 2002); State V. Johnson, 814 So.2d 390 (Fla. 2002) and, Guerrier V. State, 811 So. 2d 852 (Fla. 5rh DCA 2002).

Florida Statute 456.057 deals with "ownership and control of patient records; report or copies of records to be furnished" and Florida Statute 395.3025 deals with "patient and personnel records; copies; examination". Each of the cases cited by the defense as referenced in the above paragraph deal with factual circumstances where either law enforcement or the prosecutor was found to have engaged in conduct which improperly circumvented the medical record privacy controls mandated within 456.057 and 395.3025.

Florida Statute 456.057(7)(a) which was specifically relied upon by defendant reads as follows (emphasis added and subsection 1, 2, 3 and 4 omited):

> Except as otherwise provided in this section and in s. 440.13(4)(c), *such records may not be furnished to, and the medical condition of a patient may not be discussed with*, any person other than the patient or the patient's legal representative or other health care practitioners and providers involved in the care or treatment of the patient, except upon written authorization of the patient. However, *such records may be furnished without written authorization under the following circumstances*:
>
> 1. .....
> 2. .....
> 3. In any civil or criminal action, unless otherwise prohibited by law, upon the issuance of a subpoena from a court of competent jurisdiction and proper notice to the patient or the patient's legal representative by the party seeking such records.
> 4. .....
> 5. .....

Florida Statute 395.3025(4)(d) which was also relied upon by defendant reads as follows (emphasis added and, subsections (a)-(c) omitted):

> (4) *Patient records are confidential and must not be disclosed* without the consent of the patient or his or her legal representative, but *appropriate disclosure may be made without such consent* to:
>
> (a) .....
>
> (b) .....
>
> (c) .....
>
> (d) In any civil or criminal action, unless otherwise prohibited by law, upon the issuance of a subpoena from a court of competent jurisdiction

and proper notice by the party seeking such records to the patient or his or her legal representative.

In reliance upon the statutes and case law cited, the Defendant argues Paramedic Finnegan should be precluded from offering any testimony regarding her observation(s) of Defendant at the accident scene and, any statement(s) made by him in her presence. In a pleading titled, "Memorandum In Re Defendant's Case Law", the state makes a compelling argument that State V. Kutik, 914 So.2d 484 (Fla. 5th DCA 2005); State V. Cashner, 819 So.2d 227 (Fla. 4th DCA 2002); State V. Johnson, 814 So.2d 390 (Fla. 2002) and, Guerrier V. State, 811 So. 2d 852 (Fla. 5rh DCA 2002) are each distinguishable from the facts of the instant cause.

This court adopts the reasoning and analysis of these cases as set forth in the state's "Memorandum In Re Defendant's Case Law". In this case, there has been no effort by either law enforcement or the state to obtain medical records in contravention of Florida Statutes 456.057 and, 395.3025.

The observations of Paramedic Finnegan that the Defendant was standing upright adjacent to his vehicle which was on its' side when she first arrived on scene, fell into her when approaching her position, smelled of alcohol and, had urinated on himself, should be treated no differently than those of any other witness to a criminal act. The fact that she had been dispatched to that scene as an emergency medical provider notwithstanding, Paramedic Finnegan is simply that, another witness, whose observations fall under no constitutionally or statutorily mandated exclusion. Likewise, the statements attributed to Defendant that he was the sole occupant and driver of the vehicle involved in the traffic crash, are not protected medical files or records and also fall under no constitutionally or statutorily mandated exclusion.

Therefore, it is **ORDERED** that:

1. The Defendant's "Motion to Suppress" is hereby **DENIED.**
2. The denial of the defense motion is done without prejudice to the right of Defendant to raise the issue of "Corpus Delicti" as to statements attributed to the Defendant during trial as appropriate and, dependent upon the evidence actually presented.
   a. In any DUI case, the state is required to prove that the defendant drove the vehicle while under the influence independent of defendant's admission.
   b. The general order of proof is to show that a crime has been committed and then that the defendant committed it. Spanish v. State, 45 So.2d 753 (Fla.1950); *see* State v. Allen, 335 So.2d 823 (Fla.1976). "But in many cases the two elements are so intimately connected that the proof of the corpus delicti and the guilty agency are shown at the same time." Spanish, 45 So.2d at 754. Thus, the "evidence which tends to prove one may also tend to prove the other, so that the existence of the crime and the guilt of the defendant may stand together and inseparable on one foundation of circumstantial evidence." Cross v. State, 96 Fla. 768, 780-81, 119 So. 380, 384 (1928). A defendant's confession or statement "may be considered in connection with the other

evidence," but "the *corpus delicti* cannot rest upon the confession or admission alone." Id. at 781, 119 So. at 384. Before a confession or statement may be admitted, there must be prima facie proof tending to show the crime was committed. Frazier v. State, 107 So.2d 16 (Fla.1958); Cross; *see* Farinas v. State, 569 So.2d 425 (Fla.1990); Bassett v. State, 449 So.2d 803 (Fla.1984). Additionally, by the end of trial the corpus delicti must be proved beyond a reasonable doubt. Cross." Schwab v. State 636 So.2d 3, 6 (Fla., 1994).

c. Thus, the state has the burden of proving by substantial evidence that a crime was committed, and the proof may be in the form of circumstantial evidence. This standard does not require the proof to be un-contradicted or overwhelming, but it must at least show the existence of *each element* of the crime. Moreover, the identity of the defendant as the guilty party is not a necessary predicate for the admission of a confession. State v. Allen, 335 So.2d 823, 824 (Fla.1976). The Court in Allen explained the policy reasons for the corpus delicti rule: "The judicial quest for truth requires that no person be convicted out of derangement, mistake or official fabrication." Id. at 825. An example of a DUI case in which the facts were sufficient to remove the danger of defendant being "convicted out of derangement, mistake or official fabrication" is Burks v. State, 613 So.2d 441, 443 (Fla. 1993).

d. In Burks, the trooper was dispatched to the scene of an accident. When he arrived he found a tractor trailer blocking both northbound lanes of Hwy 17. A motorcycle was lying in the roadway, and the body of the motorcyclist was lying near the truck. The court determined that corpus delecti was established since Burks' speech was slurred, his eyes were bloodshot, he smelled strongly of alcohol; there was a dead body on the road; a truck was illegally blocking the highway; and Burks' supervisor asked if Burks could drive his vehicle away and continue on his run. The Court found that these facts were sufficient to satisfy corpus delicti. Allen, 335 So.2d at 825. Burks v. State, 613 So.2d 441, 443 (Fla. 1993).

DONE AND ORDERED in in Chambers at Live Oak, Suwannee County, Florida, on 14 July 2013.

WILLIAM F. WILLIAMS, III
County Court Judge

Copies to: (Defendant via U.S. Mail and to attorneys by electronic means & U.S. Mail)

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4. Defendant, **Kevin Dwayne Kirby**, 894 S.W. Sloam Street, Lake City, FL 32024

Joyce Cameron
JOYCE CAMERON, JUDICIAL ASSISTANT

8/14/13
DATE