

25 Fla. L. Weekly Supp. 666b

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**Criminal law -- Driving under influence -- Discovery -- Field sobriety testing manual -- Defendant's motion to produce field sobriety testing manual for use in cross-examining officer regarding his administration of exercises is denied -- Fact that officer testifies as to his training and experience regarding field sobriety exercises does not transform officer into expert whose testimony may be impeached with a treatise, book, or manual -- State's motion in limine to prevent cross-examination of officer concerning alleged failure to comply with standardized instructions for exercises is granted**

STATE OF FLORIDA, Plaintiff, vs. MARY ARMENT, Defendant. County Court, 18th Judicial Circuit in and for Brevard County. Case No. 052016CT032230AXXXXX. September 19, 2017. Michelle A. Baker, Judge. Counsel: Ben Fox, Assistant State Attorney, State Attorney's Office, Viera, for Plaintiff. Matthews R. Bark, Altamonte Springs, for Defendant.

**ORDER DENYING'S DEFENDANT'S MOTION TO  
PRODUCE FIELD SOBRIETY TESTING MANUAL AND  
GRANTING STATE'S ORE TENUS MOTION IN LIMINE**

THIS CAUSE came on to be heard on August 16, 2017 on the Defendant's Motion to Produce Field Sobriety Testing Manual. After hearing argument, this Court determined that it would deny said Motion. Based on this ruling, the State moved in limine, ore tenus, to prevent the Defense from attempting to demonstrate on cross-examination, by reference to any manuals from which the law enforcement officer had been trained or to any other materials, that the officer failed to comply with standardized instructions for administering said exercises. Consistent with the Court's ruling on Defendant's Motion to Suppress, the Court granted the State's Motion in Limine. This Order shall now explain the basis of the Court's rulings.

The Defendant's Motion to Suppress requested, based on Fla. R. Crim. P. 3.220(f), that the Court require the State to provide the Defendant with a complete copy of the specific DUI field sobriety testing manual (or manuals) used or possessed by Officer Oscar Lugo of the Titusville Police Department. The Motion alleged that such manual(s) constituted necessary "impeachment evidence" to be used in cross-examining the officer concerning his administration of field sobriety exercises.

During the hearing, Counsel for Defendant argued that if the officer does not provide any testimony at trial concerning his DUI training and experience, then there would be no need to cross-examine him regarding whether he complied with the training from said field sobriety testing manual(s). However, if he does testify to such training and experience, then this would open the door to cross-examination of the officer on his recollection of his training and on the credibility of the administration of the exercises in accordance with his training; and the way to do that is by using the material the officer was trained on.

The prosecutor argued that in accordance with *State v. Meador*, 674 So.2d 826 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1152a], the testimony elicited from the officer regarding the field sobriety exercises would be as a lay witness and not as an expert witness. The prosecutor

acknowledged that pursuant to *Meador*, the State could not elicit testimony regarding the use of terms such as “test,” “pass,” “fail,” or “points” -- because the Court in *Meador* determined that “such terms should be avoided to minimize the danger that the jury will attach greater significance to the results of the field sobriety exercises than to other lay observations of impairment.” *Meador*, at 674 So.2d 833. Thus, the prosecutor argued that as long as such terms were not presented, then the officer would be testifying only as a lay witness.

This Court then asked Counsel for Defendant how he intended to impeach a lay witness (as opposed to an expert witness) with a treatise, a book, or a manual. Defense Counsel responded that even though the officer is not being classified as an expert, the State is -- by introducing his training -- submitting him as someone with superior knowledge than the ordinary person. Thus, Defense Counsel argued, the State is presenting the officer as more than a lay witness without calling him an expert.

The prosecutor then pointed out that similar arguments were raised and rejected by the Courts in *State v. Feinstein*, 21 Fla. L. Weekly 587a (Fla. Broward Cty. Ct., Dec. 9, 2013) and *Gladding v. State*, 10 Fla. L. Weekly 985a (Fla. 15th Cir., Oct. 10, 2003). This Court agrees with these cases. In *Gladding*, the following occurred:

[D]uring the trial by jury, Appellant attempted to use the *Florida Standardized Field Sobriety Testing Screening Procedures Manual* as an authoritative source to question Trooper Bates on whether he administered the field sobriety exercises in accordance with the manual and his training. *Appellant argued that Trooper Bates was not testifying as a lay person or to lay observations, and therefore claimed that he should be able to question the officer as an expert.* The trial court sustained the State's objection to Appellant's cross examination of Trooper Bates using the training manual.

*An Officer's testimony regarding their observations of a person's performance on field sobriety exercises is not scientific evidence, therefore an officer's testimony should not be treated as expert testimony, but as a lay witness. See Meador at 832.* Furthermore, in *Meador v. State*, the Fourth District Court of Appeals held that a police officer's observations of a defendant's performance on field sobriety exercises should be treated no differently than testimony of lay witnesses concerning their observations about the driver's conduct and appearance. *Meador v. State*, 674 So.2d 826, 831 (Fla. 4th DCA) [21 Fla. L. Weekly D1152a]. In addition, this Court finds that the *Florida Standardized Field Sobriety Testing Screening Procedures Manual* is inadmissible hearsay, and cannot be used to impeach the officer.

Based upon the foregoing facts and case law, this Court finds that the trial court did not abuse its discretion in precluding Appellant from cross examining Trooper Bates on his training using an inadmissible training manual.

(Emphasis added).

In *Feinstein*, the Court explained:

... *The defendant argues that once a witness testifies as to their training and experience, then they become an expert witness in lay witness clothing, and that the defendant should be able to call his own expert to refute the testimony of the State's witness. The defendant seeks to have the*

Court prohibit the state's witness from testifying regarding their training and experience in field sobriety exercises or any other areas related to this case.

The Court holds that it will not permit any expert testimony regarding the field sobriety exercises. *See State v. Meador*, 674 So.2d 816 (4th DCA 1996) [21 Fla. L. Weekly D1a 152] *It is this Court's understanding that a person testifying to their training and experience does not go towards whether they are an expert, but to the credibility of the person testifying.* In other words, a witness' training and experience goes to the weight of the evidence, of what they have seen, heard and experienced, not the admissibility. There shall be no expert testimony regarding the field sobriety exercises, their administration, or anything contained in the National Highway Traffic Safety Administration manual regarding field sobriety exercises. The officer shall be allowed to testify as to his training and experience with regards to the field sobriety exercises.

(Emphasis added).

Further, based on these two cases, the Court in *State v. Foki*, 24 Fla. L. Weekly 55a (Volusia Cty. Ct. April 11, 2016) held that “DUI manuals are not subject to discovery because they are not likely to lead to admissible evidence since they cannot be used to cross-examine an officer on the proper administration of field sobriety exercises.” This Court agrees with this holding.

Accordingly, it is **ORDERED** and **ADJUDGED** that the Defendant's Motion to Produce Field Sobriety Testing Manual is hereby **DENIED**. The State's ore tenus Motion in Limine is **GRANTED**. The Defendant shall not cross-examine Officer Lugo concerning his alleged failure to comply with any standardized instructions for administering field sobriety exercises.

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**10 Fla. L. Weekly Supp. 985a**

**Criminal law -- Driving under influence -- Cross-examination -- Officer who testifies regarding observations of defendant's performance on field sobriety exercises is testifying as lay witness, not expert -- No abuse of discretion in precluding defendant from cross-examining arresting officer on his training using inadmissible training manual**

RICHARD GLADDING, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 15th Judicial Circuit (Appellate-Criminal) in and for Palm Beach County. Case No. 02-56 AC A02. October 10, 2003. Appeal from Judge Cory Ciklin, County Court in and for Palm Beach County. Counsel: Ellen Griffin, for Appellant. Richard C. Penalta, for Appellee.

(PER CURIAM.) In this appeal, Appellant maintains that the trial court erred by refusing to allow Appellant to cross-examine the arresting officer on his training in administering field sobriety exercises during Appellant's DUI jury trial. Appellant argues that as a State Trooper for the Highway Patrol, Trooper Bates is trained to administer field sobriety exercises, and that Appellant had a right to cross-examine the officer on that training. On May 23, 2002, during the trial by jury, Appellant attempted to use the *Florida Standardized Field Sobriety Testing Screening Procedures Manual* as an authoritative source to question Trooper Bates on whether he administered the field sobriety exercises in accordance with the manual and his training. Appellant argued that Trooper Bates was not testifying as a lay person or to lay observations, and therefore claimed that he should be able to question the officer as an expert. The trial court sustained the State's objection to Appellant's cross examination of Trooper Bates using the training manual.

An Officer's testimony regarding their observations of a person's performance on field sobriety exercises is not scientific evidence, therefore an officer's testimony should not be treated as expert testimony, but as a lay witness. *See Id.* at 832. Furthermore, in *Meador v. State*, the Fourth District Court of Appeals held that a police officer's observations of a defendant's performance on field sobriety exercises should be treated no differently than testimony of lay witnesses concerning their observations about the driver's conduct and appearance. *Meador v. State*, 674 So.2d 826, 831 (Fla. 4th DCA). In addition, this Court finds that the *Florida Standardized Field Sobriety Testing Screening Procedures Manual* is inadmissible hearsay, and cannot be used to impeach the officer.

Based upon the foregoing facts and case law, this Court finds that the trial court did not abuse its discretion in precluding Appellant from cross examining Trooper Bates on his training using an inadmissible training manual. Accordingly, the trial court's decision is AFFIRMED. (COOK, OFTEDAL, & RAPP, JJ., concur.)

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