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11-25-2013

## Joseph W. Lambert vs. Safety

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**BEFORE THE COMMISSIONER OF THE TENNESSEE  
DEPARTMENT OF SAFETY AND HOMELAND SECURITY**

**IN THE MATTER OF:**

**DEPARTMENT OF SAFETY**

**v.**

**2012 Nissan Pathfinder**

**VIN: 5N1AR1NB4CC619161**

**Seized from: Joseph Lambert**

**Date of Seizure: March 29, 2013**

**Claimant: Joseph Lambert**

**DOCKET NO: 19.05-123550J**

**D.O.S. Case No. N7306**

**INITIAL ORDER**

This matter was heard on November 6, 2013, in Knoxville, Tennessee, before Kim Summers, Administrative Judge, assigned by the Secretary of State, Administrative Procedures Division, to sit for the Commissioner of the Tennessee Department of Safety. Ms. Nina Harris, Staff Attorney for the Department of Safety, represented the State. The Claimant was present and represented by Robert White, Esq..

The issue in this case is whether the State properly seize the Claimant's interest in the above referenced vehicle because he violated T.C.A. §§ 55-10-401, 55-10-403 and 40-33-201 *et seq.* After consideration of the record in this matter, it is determined that the vehicle should be returned to the Claimant. This decision is based upon the following Findings of Fact and Conclusions of Law.

**SUMMARY OF THE EVIDENCE**

The State presented the testimony of Officer Kevin Fuller from the Maryville Police Department. Three exhibits were entered into evidence – EXHIBIT NO. 1, the June 3, 2013 Alcohol Report; EXHIBIT NO. 2, the September 19, 2013 Toxicology Report; and EXHIBIT NO. 3, the Claimant's DUI Record.

The Claimant testified on his own behalf and entered one exhibit into evidence – EXHIBIT NO. 4, video from the March 29, 2013 traffic stop.

### **FINDINGS OF FACT**

1. On March 29, 2013, the Claimant was pulled over by Officer Fuller because the license plate on the Claimant's 2012 Nissan Pathfinder was registered to a Chevrolet Tahoe.

2. After being signaled by Officer Fuller to pull over, the Claimant continued to drive for several minutes to a safe location.

3. The Claimant was not driving his vehicle in an erratic or unsafe manner.

4. The Claimant coherently answered Officer Fuller's questions regarding the tags for his Nissan Pathfinder.

5. Upon inquiry, the Claimant disclosed to Officer Fuller that he'd had two beers that evening which he had finished about forty-five to sixty minutes prior to the traffic stop and had, at that time, begun drinking water.

6. While still seated in his vehicle, the Claimant was asked to perform the finger count test by counting twice on his fingers one, two, three, four, four, three, two, one. The Claimant accurately followed the counting instructions.

7. The Claimant was instructed to walk from his vehicle and stand still in front of the police vehicle. In doing so, he showed no signs of intoxication.

8. The Claimant was cooperative with the three standard field sobriety tests he was asked to perform by Officer Fuller.

9. Officer Fuller has received training in administering field sobriety tests and detecting when someone may have been driving under the influence of an intoxicant.

10. Contrary to his training, Officer Fuller did not inquire about prior injuries or consider the Claimant's footwear before administering the field sobriety tests.

11. The Claimant does have issues with both knees that he did not disclose due to anxiety caused by the traffic stop.

12. The Claimant was wearing cowboy boots with a heel.

13. Officer Fuller determined that the Claimant failed his field sobriety test for the following reasons – during the finger count test, he counted one, two, three, four, one, two, three, four rather than one, two, three, four, four, three, two, one; during the Walk-and-Turn, he fell off the line while being instructed, did not touch heel to toe, and stumbled during the turn; and during the One Leg Stand he switched legs and started over and held out his arms for balance.

14. Upon completion of the field sobriety tests, the Claimant was arrested by Officer Fuller for driving under the influence of alcohol or drugs.

15. Officer Fuller seized the Claimant's vehicle because the Claimant was previously convicted of driving under the influence on October 21, 2010, for an incident which occurred on September 26, 2010.

16. The Claimant's blood alcohol level within thirty minutes of the traffic stop was .03. The Claimant also tested positive for the presence of Wellbutrin which he takes daily in the morning for depression.

### **CONCLUSIONS OF LAW**

1. The state has the burden of proving, by a preponderance of the evidence, that the seized property fits within the statute defining its illegal use, thereby rendering it subject to forfeiture. Department of Safety Rule 1340-2-2-.15(4).

2. Pursuant to Tenn. Code Ann. § 55-10-401,

(a) It is unlawful for any person to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state, any shopping center, trailer park, apartment house complex or any other location which is generally frequented by the public at large, while:

- (1) Under the influence of any intoxicant, marijuana, controlled substance, controlled substance analogue, drug, substance affecting the central nervous system or combination thereof that impairs the driver's ability to safely operate a motor vehicle by depriving the driver of the clearness of mind and control of himself which he would otherwise possess;
- (2) The alcohol concentration in the person's blood or breath is eight-hundredths of one percent (0.08%) or more.

3. Pursuant to Tenn. Code Ann. § 55-10-414(a)(1),

The vehicle used in the commission of a person's second or subsequent violation of § 55-10-401, or the second or subsequent violation of any combination of § 55-10-401, and a statute in any other state prohibiting driving under the influence of an intoxicant, is subject to seizure and forfeiture.

4. The law further provides that the forfeiture of a vehicle should serve a remedial, rather than punitive, purpose – specifically to “prevent unscrupulous or incompetent persons from driving on Tennessee's highways while under the influence of alcohol or drugs.” T.C.A. § 55-10-414(a)(3).

5. The Claimant's driving did not provide probable cause to believe he was operating a vehicle under the influence of alcohol or drugs.

6. The Standardized Field Sobriety Testing (SFST) developed by the National Highway Traffic Safety Administration (NHTSA) includes the Horizontal Gaze Nystagmus (HGN), the Walk-and-Turn (WAT), and the One-Leg Stand (OLS).<sup>1</sup>

7. The finger count test is not one of the three standardized field sobriety tests that have been approved by the NHTSA.

8. Officer Fuller mistakenly concluded that the Claimant did not accurately perform the finger count test. The results of this test did not provide cause for further testing.

9. By failing to inquire about prior injuries and take into consideration the Claimant's footwear, Officer Fuller did not accurately administer additional field sobriety tests.

10. When the results of the three standard field sobriety tests are analyzed together, police officers are general accurate in predicting a blood alcohol level of .08 or greater in 91% of cases.

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<sup>1</sup> Judicial Notice has been taken of the Standardized Field Sobriety Testing included on the NHTSA website.

11. Notwithstanding Officer Fuller's conclusions regarding the results of the Claimant's field sobriety tests, the Claimant's blood alcohol level was only .03.

12. The field sobriety tests were not used appropriately to determine whether the Claimant had been driving a vehicle under the influence of drugs or alcohol, and the tests did not accurately predict the Claimant's blood alcohol level.

13. Although the Claimant's blood tested positive for the presence of Wellbutrin, no evidence was introduced at the hearing to suggest any potential impact that Wellbutrin might have on impairment, either in conjunction with alcohol or alone.

14. The preponderance of the evidence in this matter has failed to prove that the Claimant was operating a motor vehicle under the influence of alcohol or drugs.

The State has failed to prove that the vehicle had been used in a manner that would subject the vehicle to forfeiture, therefore, it is **ORDERED** that the vehicle be **RETURNED** to the Claimant.

The policy reasons for this decision are to uphold the laws of the State of Tennessee and to protect the property rights of individuals.

It is so **ORDERED**.

This INITIAL ORDER entered and effective this the \_\_\_\_\_ day of \_\_\_\_\_ 2013.

*DK Summers*

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KIM SUMMERS  
ADMINISTRATIVE JUDGE  
ADMINISTRATIVE PROCEDURES DIVISION  
OFFICE OF THE SECRETARY OF STATE

Filed in the Administrative Procedures Division, Office of the Secretary of State, this the \_\_\_\_\_ day of \_\_\_\_\_ 2014.

*J. Richard Collier*

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J. RICHARD COLLIER, DIRECTOR  
ADMINISTRATIVE PROCEDURES DIVISION  
OFFICE OF THE SECRETARY OF STATE