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| **COUNTY COURT**  COUNTY OF GILPIN, COLORADO  2960 Dory Hill Road, Suite 200 Black Hawk, CO 80422 | DATE FILED: December 20, 2016  FILING ID: 6FCEB68E28819 CASE NUMBER: 2016T169 |
| **Plaintiff**: PEOPLE OF THE STATE OF COLORADO | ▲ COURT USE ONLY ▲ |
| v. |  |
| **Defendant:** ROBERT FRIEDLANDER | Case Number: 16T169 |
|  |
| ATTORNEYS FOR THE DEFENDANT  Fife Luneau, P.C. Charles Fife, #17799  Daniel Luneau, #43639 | Div.: 1 |
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| **MOTION TO SUPPRESS ILLEGAL STOP, INVOLUNTARY ROADSIDE TESTS, WARRANTLESS ARREST, STATEMENTS AND INVOLUNTARY BREATH TEST** | |

COMES NOW the Defendant, above named, by and through his attorneys, Fife Luneau, P.C., and moves this court for an Order suppressing the illegal stop, involuntary roadside tests and warrantless arrest of Defendant and all evidence obtained as a result of such illegal stop, involuntary roadside tests and warrantless arrest including any statements allegedly made by the defendant as well as the involuntary breath test. As grounds, Defendant states as follows:

1. On or about May 30, 2016, at approximately 22:14 hours, Trooper Sullivan of the Colorado State Patrol conducted a traffic stop on Mr. Friedlander.
2. Trooper Sullivan lacked a reasonable articulable suspicion of criminal activity prior to stopping and detaining Mr. Friedlander.
3. As a part of the illegal detention, Trooper Sullivan requested, took and retained Mr. Friedlander’s driver’s license[1](#_bookmark2) registration[2](#_bookmark0) and insurance.[3](#_bookmark1)

1 Section 42-2-115 C.R.S. states as follows:

**No person** who has been issued a driver’s. . . license. . ., who operates a motor vehicle

1. While the officer retained Mr. Friedlander’s driver’s license, registration and proof of insurance, Mr. Friedlander was, as a matter of fact and as a matter of law, not free to leave.
2. Until the officer returned to Mr. Friedlander his driver’s license, registration or proof of insurance, Mr. Friedlander was unable to end the police officer’s detention of his person. People v. Jackson, 39 P.3d 1174, 1182 (Colo. 2002); People v. Castaneda, 187 P.3d 107 (Colo. 2008).
3. Therefore, Mr. Friedlander had no choice but to wait for the officer to finish her business with him before he could go about his own business. As noted in Jackson:

[It] may strain “strain credulity to imagine” that the driver of an automobile, “directly on the heels of having been pulled over to the side of the road by armed and uniformed police officers in marked patrol cars, would ever feel ‘free to leave’ or ‘at liberty to ignore the police presence and go about his business.’ Id. at 1185.

1. Mr. Friedlander was not free to leave since the officer had his driver’s license and other documents. Therefore, he had no choice but to wait for the return of the officer and his documents. As noted again in Jackson:

“[O]nce the identification is handed over to the police and they have had a reasonable opportunity to review it, if the identification is not returned to the detainee it is difficult to imagine that any reasonable person would feel free to leave without it. Jackson at 1188, citing, United States v. Savage, 889 F.2d 1113, 1117 (D.C.Cir. 1991).

“[A]bandoning one’s driver’s license . . . is simply not a practical or realistic option for a ‘reasonable’ traveler in this day in age.” citing, United States v. Jordan, 951 F.2d at 1282

in this state, and who has such license, . . . in such person’s immediate possession **shall refuse** to remove such license . . . from any billfold, purse cover, or other container and **to hand the same to any peace officer** who has requested such person to do so if such peace officer reasonably suspects that such person is committing, has committed, or is about to commit a violation . . . [emphasis added].

2 Section 42-3-112(8) C.R.S. states as follows:

**The registration card** issued for a vehicle required to be registered under this article **shall**, at all times while the vehicle is being operated upon a highway within this state, **be in the possession of the driver** thereof or carried in the vehicle and **subject to inspection by any peace officer**. [emphasis added].

3 Section 42-4-1409(3) C.R.S. states as follows:

When . . . **requested** to do so following any lawful traffic contact or during any traffic investigation **by a peace officer**, **no owner or operator of a motor vehicle shall fail to present to the requesting officer immediate evidence of a complying policy** . . . as required by law. [emphasis added].

“[O]nce the identification is handed over to the police and they have had a reasonable opportunity to review it, if the identification is not returned to the detainee [it is] difficult to imagine that any reasonable person would feel free to leave without it.” Id., citing, Richmond, 468 S.E.2d at 710.

1. While still retaining Mr. Friedlander’s legal documents, Trooper Sullivan asked Mr. Friedlander to do roadside manuevers. Even though posed in the form of a question, the request constituted a legal command which Mr. Friedlander could not legally refuse. Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977); People v. Carlson, 677 P.2d 310, 314 (Colo. 1984).
2. Mr. Friedlander “cannot be compelled to take a roadside sobriety test against his wishes.” People v. Ramirez, 609 P.2d 616, 618 (Colo. 1980).
3. Furthermore, Mr. Friedlander’s decision to perform them must be intelligently and freely given, without any duress, coercion or subtle promises or threats which could flaw the free and unconstrained decision. Turbyne v. People, 151 P.3d 563, 572 (Colo. 2007), citing People v. Helm, 633 P.2d 1071, 1077 (Colo. 1981); People v. Carlson, 677 P.2d 310, 318 (1984).
4. Enacted to take effect after April 29, 2010, the Colorado General Assembly now requires all police officers to comply with the provisions of this statute prior to conducting a search of any person or such person’s vehicle who is not under arrest.
5. Specifically, Trooper Sullivan failed to inform Mr. Friedlander:
   1. That he was being asked to voluntarily consent to a search;
   2. That he had a right to refuse the request to the search.
6. Pursuant to §16-3-310 C.R.S., this Honorable Court **shall** take into account the officer’s failure to comply with the provisions of this statute if Mr. Friedlander moves to suppress the fruit of the search. Ms. Friedlander moves to suppress the fruit of the search.
7. Section 16-3-310 C.R.S. states as follows:

# Oral advisement and consent prior to search of a vehicle or a person during a police contact.

(1)(a) Prior to conducting a consensual search of a person who is not under arrest, the person's effects, or a vehicle, a peace officer shall comply with paragraph (b) of this subsection (1).

1. A peace officer may conduct a consensual search only after articulating the following factors to, and subsequently receiving consent from, the person subject to the search or

the person with the apparent or actual authority to provide permission to search the vehicle or effects. The factors are:

* 1. The person is being asked to voluntarily consent to a search; and
  2. The person has the right to refuse the request to search.

1. After providing the advisement required in paragraph (b) of this subsection (1), a peace officer may conduct the requested search only if the person subject to the search voluntarily provides verbal or written consent. Other evidence of knowing and voluntary consent may be acceptable, if the person is unable to provide written or verbal consent.
2. A peace officer providing the advisement required pursuant to subsection (1) of this section need not provide a specific recitation of the advisement; substantial compliance with the substance of the factors is sufficient to comply with the requirement.
3. If a defendant moves to suppress any evidence obtained in the course of the search, the court shall consider the failure to comply with the requirements of this section as a factor in determining the voluntariness of the consent.
4. Factors this Court can use to determine by clear and convincing evidence whether Mr. Friedlander’s decision to do roadside manuevers was knowing, intelligent and freely made without any constraints include:
5. Could the police conduct have reasonably appeared to be coercive to a person in Mr. Friedlander’s circumstances[4](#_bookmark3)?
6. Was Mr. Friedlander under the influence[5](#_bookmark4)?
7. What was his level of intoxication[6](#_bookmark5)?
8. Was he under arrest[7](#_bookmark6)?
9. Did Mr. Friedlander know he could refuse[8](#_bookmark7)?
10. What is Mr. Friedlander’s age[9](#_bookmark8)?
11. What is his education[10](#_bookmark9)?

4 Turbyne, at 572.

5 Helm at 1077.

6 Turbyne at 572.

7 Helm at 1076.

8 Helm at 1077; Carlson at 318.

9 Turbyne at 572; Helm at 1077; Carlson at 318.

10 Turbyne at 572; Helm at 1077; Carlson at 318.

1. What is his intelligence[11](#_bookmark10)?
2. What was the duration of the stop[12](#_bookmark11)?
3. What was the location of the stop[13](#_bookmark12)?
4. What were the circumstances of the search[14](#_bookmark13)?
5. What was Mr. Friedlander’s state of mind[15](#_bookmark14)?
6. Were there any other factors that might have affected Mr. Friedlander’s free and unconstrained choice[16](#_bookmark15)?
7. “Suppression of the evidence is an appropriate sanction when consent to the search is not voluntary.” Turbyne v. People, 151 P.3d 563, 572 (Colo. 2007), citing People v. Diaz, 53 P.3d 1171, 1175 (Colo. 2002).
8. Any observations made by law enforcement personnel constituted an illegal search and seizure. Further, that such roadside maneuvers violated the defendant's right against self- incrimination. In support of these contentions, Defendant cites the Fourth, Fifth and Sixth Amendments to the U.S. Constitution, Article II, Sections 7 and 18 of the Colorado Constitution, and People v. Carlson, 677 P.2d 310 (1984).
9. Subsequently, Trooper Sullivan arrested Mr. Friedlander without a warrant or probable cause.
10. Any evidence obtained as a result of this illegal contact and arrest was obtained unconstitutionally and must be suppressed.
11. In support of the above, Defendant cites Terry v. Ohio, 392 U.S. 1, 88 S.Ct., 20 L.Ed. 2d 899 (1968); People v. Carlson, 677 P.2d 310 (Colo. 1984); People v. Lewis, 659 P.2d 676 (Colo. 1983); Stone v. People, 485 P.2d 495 (1971), People v. Ralphson, 605 P.2d 46 (Colo. 1985); People v. Hazelhurst, 662 P.2d 1081 (Colo. 1983), People v. Archuleta, 719 P.2d 1091 (Colo. 1986), Colorado Constitution; Article II, Section 7, United States Constitution Amendments Four, Five, Fourteen.
12. Subsequent to the arrest, Officer Sanchez obtained Mr. Friedlander’s consent to take a

11 Turbyne at 572; Helm at 1077; Carlson at 318.

12 Helm, 633 P.2d at 1077; Carlson, 677 P.2d at 318.

13 Helm, 633 P.2d at 1077; Carlson, 677 P.2d at 318.

14 Turbyne at 572; Helm, 633 P.2d at 1077; Carlson, 677 P.2d at 318.

15 Carlson at 318.

16 Carlson at 318.

breath test without obtaining his legal consent as required by the Colorado’s Express Consent law.

1. Consent obtained after an erroneous advisement of law cannot be introduced into evidence. Turbyne v. People, 151 P.3d 563, 572 (Colo. 2007), citing People v. Diaz, 53 P.3d 1171, 1175 (Colo. 2002).
2. Furthermore, absent a predicate allegation pursuant to §42-4-1301.1 (3) C.R.S., however, an involuntary chemical test cannot be used against the Defendant in a prosecution pursuant to §42-4-1301(6) (e) C.R.S.. Compton v. People, 444 P.2d 263 (Colo. 1968); Hess v. Tice, 598 P.2d 536 (Colo.App. 1979); Augustino v. Colorado Dept. Of Revenue, 565 P.2d 933 (Colo. 1977); Zahtila v. Motor Vehicle Div., Dept. Of Revenue, (Colo. App. 1977).
3. In Compton, 444 P.2d 263 (Colo. 1968) the Colorado Supreme Court held:

Absent an affirmative finding that the defendant gave [his] consent to the taking of a blood alcohol test, it was error for the trial court to admit into evidence the results of such a test. Id. At 266.

1. Any chemical test done on any sample of breath from Mr. Friedlander’s body, without his consent, cannot be admitted into evidence at trial. Turbyne v. People, 151 P.3d 563, 572 (Colo. 2007), citing People v. Diaz, 53 P.3d 1171, 1175 (Colo. 2002).
2. Before, during, and after the arrest, officers from the Colorado State Patrol may have obtained statements from the defendant.
3. At no time did Mr. Friedlander expressly or implicitly express a desire to waive his right to remain silent.
4. Consequently, any and all statements made by Mr. Friedlander were made involuntarily and without a valid waiver of his right to remain silent.
5. Any statements made while the defendant was in custody were obtained without adequate warning and valid waiver of rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966).
6. Any statements made by Mr. Friedlander were obtained in violation of the defendant's right to counsel under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Miranda v. Arizona, 384 U.S. 436 (1966) 16-3-401 et. seq., 8 C.R.S. and are presumptively involuntary and inadmissable.

WHEREFORE, Defendant requests that the Court enter an Order suppressing the illegal stop, involuntary roadside tests, warrantless arrest of Defendant and all evidence derived as a result thereof of said illegal stop, involuntary roadside tests and warrantless arrest including any test performed on any breath sample and all statements made by Mr. Friedlander.

DATED THIS 20th DAY OF December, 2016.

Respectfully submitted,

/s/Danny Luneau Charles L. Fife Daniel E. Luneau

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF MAILING

I do hereby state and affirm that a copy of the foregoing **MOTION TO SUPPRESS ILLEGAL STOP, INVOLUNTARY ROADSIDE TESTS, WARRANTLESS ARREST, STATEMENTS AND INVOLUNTARY BLOOD TEST** was served, via ICCESS, this 20th

day of December, 2016, to the following:

Office of the District Attorney County of Gilpin

**/s/Danny Luneau**