IN THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA
APPEALS DIVISION

URANIA MARIE RISSMAN,

Appellant,

vs.

CASE NO.: 17 2010-AP-0031
L.T. Case No.: 17 2010-MM-021030
Division: 3

STATE OF FLORIDA,

Appellee.
_____/

Opinion filed June 20, 2011

An Appeal from the County Court, Escambia County, Florida, Division 3

John J. Knowles, Esquire, Assistant Public Defender, for the Appellant

Cameron Poore, Esquire, Assistant State Attorney, for the Appellee

Appellant was convicted of Unlawfully Driving or Being in the Actual Physical Control of a Vehicle While Under the Influence of Alcoholic Beverages to the extent that her normal faculties were impaired in violation of § 316.193(1), Florida Statutes (DUI) and argues that she was denied due process when the trial court denied her Motion to Suppress without holding an evidentiary hearing. The standard of review on the denial of a motion to suppress is *de novo*. *Andrews v. State*, 962 So.2d 971(Fla. 1st DCA 2007).

Appellant argues that following her arrest for DUI, she was transported to the Escambia County Jail where she provided four (4) breath samples, the results of which registered as follows: .111%, .108%, .105% and .105%. Appellant challenges the accuracy of the readings because each of the samples also registered "volume not met." A Motion to Suppress the Breathalyzer Results was filed May 24, 2010 which upon review appears to be legally sufficient on its face. The trial court reviewed the motion, heard argument of counsel but did not conduct an evidentiary hearing. The trial court,

following the argument of counsel, denied the Motion to Suppress and Appellant argues that to do so without an evidentiary hearing is reversible error. *TC v. State*, 332 So.2d 17, 18, Fla. 3rd DCA 1976). *See also Martin v. State*, 654 So.2d 978 (Fla. 1st DCA 1995). The State concedes error but argues it was harmless. Upon complete review of the record on appeal, this Court is of the opinion that the failure of the trial court to hold an evidentiary hearing under the facts of this case is harmless error because the evidence that would have been presented at the motion to suppress hearing was presented during the trial through witnesses Melinda Ply and Margaret Geddings. Ms. Geddings, as an expert witness, testified that notwithstanding the "volume not met" registration on the breath readings that the readings were accurate for the sample that was taken.

Furthermore, the conviction in this case was not for Driving With an Unlawful Blood Alcohol Level but for Driving Under the Influence to the extent the Appellant's normal faculties were impaired. The Court did not instruct the jury with regard to the statutory presumptions based upon the results of the intoxilyzer, but the results of the intoxilyzer were relevant since one of the elements of the crime charged is that the Appellant was under the influence of an alcoholic beverage.

The State argues that the decision of the trial court should also be upheld because the Appellant failed to object to the introduction of the breath test and thereby failed to preserve the issue for appeal. However, since the trial court had already denied the Motion to Suppress the Results of the Breath Test, further objection at trial is not necessary. *See Mallory v. State of Florida*, 866 So.2d 127 (Fla. 4th DCA 2004).

In summary, the Court finds that the error in failing to conduct an evidentiary hearing under the facts of this case is harmless and the Judgment and Sentence of the Court is **AFFIRMED**.

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Paul A. Rasmussen, Circuit Judge

Conformed copies to:
Cameron Poore, Esquire, ASA
John J. Knowles, Esquire, APD