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IN THE SUPREME COURT OF FLORIDA

CASE NO: 65,398

THE STATE OF FLORIDA,

Petitioner,

vs.

JAMES A. ADAMS,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

BRIEF OF RESPONDENT

HARRY W. PREBISH, P.A.
Attorney for Respondent
19 W. Flagler St., #606
Miami, Florida 33130
(305) 377-2640

By: Gregory A. Prebish

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INTRODUCTION

The Respondent, James A. Adams, was the Defendant in the trial court and the Appellant in the District Court of Appeal.

The Petitioner, the State of Florida, was the prosecution in the trial court and the Appellee in the District Court.

In this brief the parties will be referred to as they appeared in the trial court.

The following symbols are used in this brief:

-(R)- For the record on appeal consisting of pages R1 - R98.

-(T)- For the transcript of proceedings consisting of pages T1 - T749.

-(A)- For the appendix to the Petition for Discretionary Review previously filed herein.

STATEMENT OF THE CASE

On November 22, 1981 Defendant James Adams was involved in a head-on collision with a drunk driver. Adams himself however, was issued two (2) Florida uniform traffic citations, one for violation of 316.193 Florida Statutes (1979), Case No: 578728-Q, and another for violation of 316.085 Florida Statutes (1971), Case No: 578729-Q. On January 21, 1982, Case No: 578728-Q was nolle prosse by the State and Case No: 578729-Q was dismissed by the Court per the State's recommendation.

On January 18, 1982, the State filed a one (1) count Information charging Defendant with Manslaughter by operation of a motor vehicle while intoxicated, in violation of 860.01(2) Florida Statutes. (R. 1, 1A). (Now repealed).

On January 27, 1982 Defendant was arrested on capias #82-1640, and arraignment set for February 17, 1982. On February 12, 1982 Defendant filed a written plea and a Demand for Discovery pursuant to Florida Rules of Criminal Procedure. Trial was set in this cause for March 22, 1982.

On February 24, 1982 Defendant served his Demand for Compliance with Discovery and Notice of Taking Deposition of the following witnesses:

1) Demerrick Brown.

2) Cpl. C. Mulinari.

3) Det. D.F. Dorn.

4) Dr. Francisco Alvarez.

On March 10, 1982, Defendant served his Notice of Taking Deposition of the following:

1) Off. D. Rhodes.

2) Off. A. Diaz.

On March 19, 1982 Defendant filed his Motion to Dismiss for State's failure to make discovery (R. 41), and his Motion to Suppress (R. 20-22A).

On March 22, 1984 (day of trial), the State furnished Defendant with an amended discovery response under Florida Rule of Criminal Procedure 3.220, and additional lists of witnesses in the cause.

On April 27, 1982, Defendant re-noticed taking of deposition of the following:

1) Off. D. Rhodes.

2) Demerrick Brown.

The State was also noticed Re: L. Brantley, a witness furnished to Defendant on March 18, 1982.

On August 3, 1982, Defendant filed his Memorandum in Support of Motion to Suppress (R. 25-34). The State did not file a Memorandum of Law or responsive motion to Defendant's Motion to Suppress, but rather conceded that the Defendant was not advised of his Implied Consent Rights, nor his Miranda Rights (TR. 278 & 280) prior to the drawing of his blood. The State relied upon State v. Gunn, 408 So.2d 647 (Fla. 4th DCA 1982); and State v. Mitchell, 245 So.2d 618, 623 (Fla. 1971), and quoted from it. (TR. 283). The State did not however, raise any issues under the 1982 revisions to the DUI statute which effectively repealed the statute charged (860.01) in the Information.

On August 4, 1982, the trial court held that it would follow the majority opinion in Gunn, supra, (while noting the vigorous dissent by Judge Herdley),(TR. 286) and denied Defendant's Motion to Suppress (R. 4-5). No authority was cited as regards its denial of suppression on privilege grounds pursuant to 316.066(4).

The case came to trial in the afternoon of August 4, 1982 and continued through August 6, 1982. During the trial, evidence relating to the blood alcohol level of the sample in question was introduced in evidence. On August 6, 1982, the jury returned a verdict of guilty. (R. 79).

On September 20, 1982, the trial court denied Defendant's Motion for New Trial (R. 84)-(filed August 12, 1982) and sentenced him to 5 years incarceration (R. 87).

From that Order Defendant filed a timely Notice of Appeal (R. 89).

On February 25, 1983, Defendant/Appellant's Brief was filed. On May 5, 1983, the Brief of the State/Appellee was filed. On June 1, 1983, the State filed a Notice of Intent to rely on additional authority, citing Pardo v. State, (no citation). On June 6, 1983, Defendant filed his Notice of Intent to rely on Sambrine v. State, 388 So.2d 26 (Fla. 3d DCA 1980)-(on remand from the Florida Supreme Court, Sambrine v. State, 386 So.2d 546).

On July 12, 1983, oral argument was heard in this cause. At the hearing, Defendant/Appellant cited for the Court Duval Motor Co. v. Woodward, Supreme Court Number 60,276, decided June 24, 1982, 419 So.2d 303 (Fla. 1982). There, this Court held that results of field sobriety tests during the accident report phase of the investigation are protected by 316.066(4) Florida Statutes. In response, the State argued that the recent legislative changes pertaining to this privilege against self-incrimination and admissions of civil liability were merely procedural and were to be applied in pending cases.(Though this issue was never raised while the Motion to Suppress or trial was pending).

The Third District Court soundly rejected that assertion then; in two explicit opinions; and in the denial of all other post opinion motions.

On October 18, 1983, the Third District Court of Appeal issued its opinion reversing the trial court's denial of Defendant's Motion to Suppress. The Court held that Defendant's reliance on 316.066(4), Florida Statutes (1981) was well founded. The Court cited Cooper v. State, 183 So.2d 269 (Fla. 1st DCA 1966); and State v. Coffey, 212 So.2d 632 (Fla. 1968). Furthermore, the Court made two significant observations:

(1) That under the prevailing test, there was no evidence that Appellant (Defendant) was informed, or by other means might have known, that the blood test was being administered to him as part of an investigation for the crime of Manslaughter by operation of a motor vehicle while intoxicated; and

(2) That the new Statute 316.1933 (Fla. Supp. 1982), did not become effective until after the date of the offense. As the privilege provided under the section of the statute in question is substantive in nature, (citing Coffey) there would be no retrospective application.

On November 2, 1983, the State filed its Motion for Rehearing, arguing that the Third District utterly misconstrued State v. Coffey, supra and State v. Mitchell, supra. Defendant's response filed November 11, 1983 argued that the Court's focus on the Defendant's knowledge was proper in light of the Supreme Court's recent decision in Duval Motor Company v. Woodward, 419 So.2d 303 (Fla. 1982). The Court recognized in its statement of facts that the officer acted with impunity in regard to the rights of Defendant/Appellant, and that he used medical treatment as a ruse to take Defendant to the hospital and extract his blood.

On April 24, 1984, the Third District issued its opinion on Motion for Rehearing, and in an effort to satisfy the State, traced the interpretive history of 316.066(4), citing Stevens v. Duke, 42 So.2d 361 (Fla. 1949); Nash Miami Motors Inc. v. Ellsworth, 129 So.2d 704 (Fla. 3d DCA 1961) cert. dismissed, 142 So.2d 733. (cf. Defendant's Memorandum of Law in support of Motion to Suppress, R. 25-34). The Court then discussed the "declared purpose" test of Cooper, supra. It also visited Coffey, supra, where the Florida Supreme Court approved Cooper, but changed the focus to the Defendant's knowledge as to whether the officer had "changed his hat", thus protecting the accused's statutory and constitutional privilege against self-incrimination.

In footnote #1, the Court cited Sambrine v. State, 386 So.2d 546, 548 (Fla. 1980), where the Supreme Court held that the legislature may extend greater protections to its citizenry than those provided under these circumstances by the opinion of Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

The Court then discussed State v. Mitchell, 245 So.2d 618 (Fla. 1971) where the Supreme Court returned to the near-forgotten "declared purpose" test in Cooper. The opinion quoted a trial colloquy that shows clearly that the blood test in the case at issue was given for the declared purpose of completing the accident report. (See Motion to Suppress transcript pages 216-217 and P. 221). Hence, under either test, the trial court's failure to suppress was error.

In footnote #2, the Court again rejected the State's misplaced reliance on the new statute. The Court reiterated that the change was substantive in nature and would not be applied retrospective to pending proceeding where the effective date of the legislation was after the date of the offense.

On May 4, 1984 the State filed its Motion to Recall Mandate. On May 9, 1984 the State filed its Motion for Rehearing and Motion to Certify. On May 11, 1984, the Third District Court issued its Order denying the State's Motion to Recall Mandate. On May 24, 1984 the State filed its Notice of Intent to seek discretionary review. On June 1, 1984, the Third District Court issued its Order striking State's Motion for Rehearing and Motion to Certify.

On June 8, 1984 Defendant filed his Motion to Dismiss Notice of Discretionary Review on grounds that the State failed to timely and diligently pursue this notice by filing its Brief on Jurisdiction within the time prescribed by Rule 9.120(d), Fla. R. App. Procedure. On June 11, 1984 the State filed its Brief on Jurisdiction with this Court. On June 25, 1984, the State filed a Notice of Additional Authority in Direct Conflict and Motion for Summary Reversal. On June 29, 1984, Defendant filed his Motion to Strike and Dismiss in this Court, and on July 24, 1984 the State responded thereto. On September 21, 1984, this Court accepted jurisdiction, denied Defendant's Motion to Strike and Dismiss and further denied the State's Motion for Summary Reversal.

On October 11, 1984 the State filed its Brief of Petitioner on Jurisdiction. In its Statement Of The Case, the State reviews trial testimony which is not at issue in this appeal. What is at issue is the Motion to Suppress which appears in the record between pages 159 and 287. Wherefore, the State's statement of the case (P. 2-6) should be disregarded.

The State then asserts at P. 7 of its Brief that following the Third District's reversal under 316.066(4), that Defendant did not file a Motion for Rehearing and that said reversal generated controversy

and confusion. Defendant is aware of no controversy and confusion; filed a response to the State's Motion for Rehearing; and feels that the State's appeal is wholly without merit as having been sufficiently addressed by the lower court's multiple opinions and orders in this cause.

ARGUMENT

DEFENDANT'S MOTION TO SUPPRESS THE RESULTS OF THE BLOOD TEST AS BEING INADMISSIBLE AS EVIDENCE IN THE CRIMINAL PROSECUTION PURSUANT TO 316.066(4), FLORIDA STATUTES (1981) WAS "WELL FOUNDED" AND THE TRIAL COURT ERRED IN FAILING TO SUPPRESS.

PRELIMINARY STATEMENT

In the initial Brief of Appellant filed February 25, 1983 in the District Court, Defendant argued in his Point #1 that the trial court erred in denying his Motion to Suppress. This argument was two pronged, however, asserting (1) that blood samples were taken from Defendant in violation of F.S. 322.262 and 322.261 (P.12); and (2) that results of blood alcohol tests made pursuant to the accident investigator's report were inadmissible in evidence under F.S. 316.066(4). (P.16). The reason for this seperate approach is that issues relating to Chapter 322, titled "Drivers' Licenses" are substantively distinct from any issue arising under Chapter 316, titled "The Florida Uniform Traffic Control Law." As pointed out in Pardo v. State, 429 So.2d 1313 (Fla. 5th DCA 1983), "those statutes (Chapter 322) were primarily intended to relate to drivers' licenses....." Id. at P. 1315. On the other hand, unlike those "limited purpose statutes," (Pardo at P. 1315), Chapter 316, the Florida Uniform Traffic Control Law involves the broad exercise of police power and the prosecution, trial, adjudication, and punishment thereunder.

From the unequivocal language of the opinions issued in this cause on October 18, 1983 and April 24, 1984 by the Third District Court of Appeal, it is clear that the Court also made this distinction. Although the Court silently rejected Defendant's argument under

Chapter 322, it resoundingly held however that his argument grounded on Chapter 316.066(4) was "well founded."

The State, however, in a desperate attempt to reverse this ruling ignores this distinction. Its muddled arguments in both its Briefs on jurisdiction and the merits, endeavors to have this Court review issues which are not properly before it. Defendant accepts the District Court's holding as limited to §316.066(4) F.S., and will not argue issues outside the limited scope of the opinion for which this Court has granted its precious discretionary jurisdiction. Where the State asserts that the District Court's opinion is in "direct conflict" with an opinion of this Court or another District Court, those issues pertain to Chapter 322, for which the District Court affirmed the trial court's reliance on State v. Gunn, supra. Hence, those references are misplaced and should be ignored. Similarly, the State's assertion that the District Court "expressly construed" the Florida Constitution is erroneous. The District Court's opinion merely interprets a legislatively created privilege, not a constitutional right. Furthermore, the Court returned to the "declared purpose" test in its April 24, 1984 opinion and cited a trial colloquy. This analysis involved no construing of the Florida Constitution, but rather the application of clear facts to the prevailing test set forth by this Court in State v. Mitchell, 245, So.2d 618 (Fla. 1971).

RESULTS OF BLOOD ALCOHOL TESTS MADE PURSUANT TO THE ACCIDENT INVESTIGATOR'S REPORT WERE INADMISSIBLE IN EVIDENCE PURSUANT TO 316.066(4) F.S. (1981).

FACTS

At the Motion to Suppress held on August 4, 1982, the following testimony was elicited:

Sergeant Charles Mulinari testified that on November 22, 1981 he was on road patrol shortly after 1:00 a.m. when he responded to a call; that another two-man unit was on the scene first; that officer Diaz advised him that the driver of one car was standing by his car; He testified that he went over and asked Mr. Adams for his driver's license, registration and insurance card (TR. 166); that the cars were totalled (TR. 167); that Adams told him the other car swerved over and hit him. He stated that he spoke with Adams for the purpose of gathering information in reference to the accident (TR. 169); and that he did not advise him of Implied Consent Rights nor Miranda Rights (TR. 170-171).

Mulinari testified he made arrangements for towing and left with Adams for Jackson Memorial Hospital, Ward D (TR. 171); that Adams had a laceration to the nose area and was bleeding (TR. 171); that fire rescue had looked at it, and that he himself considered it minor (TR. 172). He stated that his purpose in going to Ward D was for medical attention and a blood alcohol test (TR. 173).

On voir dire examination by defense counsel, the witness stated that he told the jailers at Ward D that he brought Mr. Adams there for purpose of a blood alcohol test, but that he told Adams he was taking him there for treatment and that he didn't mention a

blood alcohol test at that time (TR. 181); that he had not told Adams about any Miranda or Implied Consent Rights (TR. 182); that he didn't tell the jailers he was conducting a homicide investigation (TR. 183); that he was not conducting a homicide investigation (TR. 184); and that he did not have any conversation with Adams prior to taking him down for the purpose of blood testing (TR. 186).

The witness testified that the accident report and DUI charge were in connection with his investigation of the accident (TR. 187); that he took Adams over to the emergency room in a wheelchair and on the way over did not tell him anything about where he was being taken (TR. 188); that he did not tell him he was conducting a homicide investigation; that he told Adams about homicide charges after blood was drawn; that he was still conducting an accident investigation at the time; and that he did not tell him that it was in connection with the accident and arrest that occurred earlier (TR. 188-193).

He stated that later Detective Dorn called and advised him that Martinez had expired and that he was to advise Mr. Adams of his Miranda Rights and advise him that it was now a criminal investigation (TR. 202); that he did so and Adams kept saying the other man caused the accident; that he swerved in front of him (TR. 204).

On cross-examination, Mulinari testified that he was not the Homicide Investigator in this case (TR. 205); that he was there to investigate an accident (TR. 206); that he also cited him for traffic infractions (TR. 208); that he observed minor injuries, but never saw Adams treated; that Adams was never unconscious and was able to move around and respond to questions (TR. 208-210).

With regard to rights, he testified that he only advised Adams of Miranda after blood was drawn and he was told to by Dorn;

that he never advised Adams of Implied Consent Rights (TR. 210); that he never told Adams he would be offered a chemical test (TR. 211); that he didn't ask him to perform any sobriety tests at the scene, nor any tests whatsoever (TR. 213); that he asked him to stay in the backseat of the police car; that he wasn't handcuffed; that he told Adams they were going to Ward D, but did not specifically tell him he was taking him to jail (TR. 213-215); and that he did not have any conversation with Defendant on the way to JMH (TR. 216).

The witness stated that he was taking Adams to Jackson Hospital for treatment for injuries and giving of the blood test in connection with his accident report (TR. 217).

At this time, the accident report was received in evidence (TR. 217). Mulinari testified that he inserted the word "blood" in the box marked "chemical tests" and that this is part of his investigation (TR. 221); and that the only time he told Adams about a homicide investigation was after the blood had been taken and he was returned to his cell (TR. 225).

DISCUSSION

F.S. 316.066(4) (1981) provides:

> "(4) All accident reports made by persons involved in accidents shall be without prejudice to the individual so reporting and shall be for the confidential use of the department or other state agencies having use of the records for accident prevention purposes, except that the department may disclose the identity of a person involved in an accident when such identity is not otherwise known or when such person denies his presence at such accident, and except that the department shall disclose the final judicial disposition of the case indicating which if any of

> the parties were found guilty. No such report shall be used as evidence in any trial, civil or criminal arising out of an accident, except that the department shall furnish upon demand of any person who has, or claims to have, made such a report or demand of any court a certificate showing that a specified accident report has or has not been made to the department solely to prove a compliance or a failure to comply with the require ments that such a report be made to the department."

As first interpreted, the statute was generally applied to exclude statements made by motorists or other persons involved in accidents that comprised part of the report such persons were required by law to give. Stevens v. Duke, 42 So.2d 361 (Fla. 1949); Herbert v. Garner, 78 So.2d 727 (Fla. 1955); Nash Miami Motors, Inc . v. Ellsworth, 129 So.2d 704 (Fla. 3d DCA 1961). Later, the statute was construed as excluding nontestimonial evidence (an analysis for blood alcohol content) because the test formed a portion of the officer's accident report. Cooper v. State, 183 So.2d 269 (Fla. 1st DCA 1966). The Cooper ruling was approved by the Florida Supreme Court in State v. Coffey, 212 So.2d 632 (Fla. 1968), the Court observing that since the officer in Cooper caused the blood sample to be withdrawn for the purpose of completing his accident report, doubt was cast upon the capacity of the Defendant to understand that she was not required to take the blood test. 212 So.2d at 634. "The appellate court rightly held that, in these circumstances, the trial court erred in allowing evidence of the blood test to go to the jury". In Coffey, this Court went on to observe that:

> "This particular section of the statute was designed to protect the constitutional right against self-incrimination guaranteed by Sec. 12, Decl. of rights, Fla. Const., while at the same time

> requiring persons involved in accidents to make a true report thereof so as to enable the Department of Public Safety to facilitate the ascertainment of the cause of accidents****, Wise v. Western Union Telegraph Co., Fla. App. 1965, 177 So.2d 765". Id. at P. 635

Following Coffey, supra, many Courts turned their focus in these situations to whether Defendants were made aware that the accident report phase had ended and a criminal investigation had begun. In 1971, however, this Court revisited Coffey in State v. Mitchell, 245 So.2d 618 (Fla. 1971). There, the Court used a two-pronged approach to the blood-test issue similar to that done here. First, the Court took up the issue of the District Court's suppression pursuant to Chapter 322. F.S. Noting a "clear and unavoidable" conflict with a decision of its own, the Court granted certiorari. The Supreme Court relied upon Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) to hold that it was unnecessary under §322.261 F.S. to place a person under arrest prior to administering a blood test.

NOTE: In the instant case there is no "clear and unavoidable" conflict of decisions because the District Court affirmed the trial court's denial of the Motion to Suppress pursuant to Chapter 322.

Having disposed of the Implied Consent issue (Chapter 322.), the Court next turned to the holding of the District Court ruling the blood test inadmissible under the accident report statute (Chapter 316). Id. at P. 623. The second district had interpreted Coffey to require suppression of any blood test which was taken before the accident report was completed. In rejecting this construction, the Court set forth a new rule for statutory exclusion and thereby returned to

the "delcared purpose" test of Cooper. Under Mitchell, the test for suppression is "whether the information sought to be excused was taken by the investigating officer for the purpose of making his accident report and formed a basis for that report." [e.s.] 245 So.2d at 623.

In the present case, the colloquy during cross-examination of the accident investigator at the Motion to Suppress reveals the following:

> Q: As I understand it, your situation as far as the accident scene was concerned, you were there for the purpose of investigating the accident, right?
>
> A: Correct.
>
> Q: You were taking him to Jackson Hospital for treatment for injuries and giving of the blood test in connection with your accident investigation, right, sir?
>
> A: Correct.
>
> Q: Now, I would like to speak to you briefly about the accident report. I have an extra copy.
>
> (TR. 216-217).
>
> Q: Now, with regard to the word, "chemical tests." we see this toward the bottom of the page. The word "chemical tests," there is some marks "Driver Number 1"; the block is marked, "no driver." Number 2, the block marked is "yes"; then beside that word, "blood," and this was inserted by you?
>
> A: Yes.
>
> Q: This was in connection with your preparation and taking of the blood in this case?
>
> A: Yes. it simply indicates that there was blood analysis taken.

Q: This is part of your investigation, taking the blood, filling out the report and making what other investigations you made in connection with this case, right, sir?

A: Yes.

(TR. 221).

As pointed out by the District Court, "the responses given by Officer Mulinari show clearly that he gave Appellant the blood test for the purpose of completing the accident report and that the test did, in fact, become a part of the report. Under the rule set forth in Mitchell, then, the blood test results are inadmissible and the trial court erred in denying Appellant's Motion to Suppress."

As recently as October 5, 1982, the Supreme Court of Florida reviewed the parameters of the accident report privilege pursuant to Section 316.066(4), Florida Statutes. In Duval Motor Company v. Woodward, 419 So.2d 303 (Fla. 1982), this Court considered field sobriety tests and held that results were properly excluded when obtained as a part of the accident investigation for use in preparing the accident report.

NOTE: Field sobriety tests like blood tests are non-testimonial.

In its review pursuant to the lower court's opinion which directly conflicted with State v. Coffey, supra, 212 So.2d 632 (Fla. 1968), and State v. Mitchell, 245 So.2d 618 (Fla. 1971), the Court stated:

> "Coffey and Mitchell also dealt with a physical test, namely a chemical test to determine the amount of alcohol in the blood, as a means of determining intoxication. The results of the blood alcohol tests in those cases were held by this Court to be admissible in evidence, not because the statutory exclusion afforded

> by Section 316.066(4) did not extend to a non-testimonial communication, but because the blood tests were not given in connection with the accident report phase of the investigation. The field sobriety test is also a physical test to determine facts bearing on sobriety and intoxication. The results of a field sobriety test by the investigating officer during the accident report phase of the investigation are within the protective mantle of Section 316.066(4) and were properly excluded by the trial judge. Insofar as the statutory exclusion in question is concerned, we perceive no material difference between the results of a blood alcohol test and the results of a field sobriety test, performed in response to a request by the officer, where both are obtained during the accident investigation for use in the report.
>
> As we said in Mitchell:
>
> The test for the statutory exclusion under Florida Statutes Section 317.171, F.S.A., is whether the information sought to be excluded was taken by the investigating officer for the purpose of making his accident report and formed a basis for that report. 245 So.2d at 623."

In the present case, when the investigating officer ordered a blood test for Defendant it was for the purpose of gathering information to determine a possible or likely cause of the accident in question. It appears clear from the record on the Motion to suppress that this information was elicited by the officer during the course of his investigation for the purpose of his report. While the officer concluded from this test that Adams was driving while intoxicated, nonetheless, it was obtained as a part of the accident investigation for use in preparing the accident report.

CHANGES IN THE LAW ALTERING SUBSTANTIVE RIGHTS SHALL NOT BE APPLIED RETROSPECTIVELY

Because Section 316.066(4) is designed in part to protect the constitutional right against self-incrimination, Coffey, supra, at P. 635, the sections according the privilege have been given a liberal interpretation in favor of the privilege of confidence and treated as dealing with matters of substance rather than merely procedure.

The District Court has held on three (3) occasions that Section 316.066(4) is "substantive in nature", and that the incident occurred here prior to the effective date of amendments thereto. In State v. Lavazzoli, 434 So.2d 321 (Fla. 1983) this Court stated:

> "It is a well-established rule of construction that in the absence of clear legislative expression to the contrary, a law is presumed to operate prospectively. Seddon v. Harpster, 403 So.2d 409 (Fla. 1981); Walker & LaBerge, Inc. v. Halligan, 344 So.2d 239 (Fla. 1977); Fleeman v. Case, 342 So.2d 815 (Fla. 1976); Foley v. Morris, 339 So.2d 215 (Fla. 1976). This rule applies with particular force to those instances where retrospective operation of the law would impair or destroy existing rights. Trustees of Tufts College v. Triple R. Ranch, Inc., 275 So.2d 521 (Fla. 1973); In re Seven Barrels of Wine, 79 Fla. 1, 83 So.627 (1920). In accordance with the rule applicable to original acts, it is presumed that provisions added by an amendment affecting exisiting rights are intended to operate prospectively also. Seddon v. Harpster, 369 So.2d 662 (Fla. 2d DCA 1979), ctfd. question answered, approved, 403 So.2d 409 (Fla. 1981)." Id. at P. 323.

Nowhere in §316.066(4) F.S., as amended, is there manifested any intent by the legislature that the amendment be applied retroactively. Therefore, the amendment permitting the results of blood tests to become

admissible into evidence during a trial and escape the legislative immunity afforded it by statute must be given prospective effect only.

Further, the amendment of 316.066(4) unquestionably alters a substantive right, notwithstanding any procedural changes in the Implied Consent Law (now 316.1931). While as a general rule it is true that disposition of a case on appeal is made in accordance with the law in effect at the time of the appellate court's decision, this rule is not applicable when a substantive right is altered. State v. Lavazzoli, supra, 434 So.2d 321 (Fla. 1983).

CONCLUSION

In its Brief, the state concludes by grandstanding about the carnage caused by drunk drivers on our highways. Defendant is in agreement that the "proper" prosecution of drunk drivers is important. The fundamental issues here however, are the substantive rights and privileges of all citizens as they existed on the date the Defendant was arrested.

The issue here is not to decide from hindsight whether or not the Defendant in this case was drunk and deserving of constitutional safeguards. As declared in United States v. Martinez-Fuerte, 428 U.S. 543, 565, 96 S.Ct. 3074, 3086, 49 L.Ed.2d 1116,__ (1976), "[H]indsight [should not be] coloring the evaluation of the reasonableness of a search or seizure." That type of erroneous approach to the issue would misconceive constitutional ramifications of cases of this kind.

The State's assertion that the District Court's analysis makes these types of searches subject to Miranda - like warnings is misplaced. On rehearing, the District Ccurt shifted its analysis to a "declared purpose" test for exclusion which focuses on the investigating officer rather than the Defendant. Furthermore, as regards the Implied Consent statute, the trial court's ruling that Defendant need not be advised (warned) of the consequences of a refusal, was affirmed by the District Court, and hence does not "wrongfully" subject that statute or any new statute to a constitutional limitation.

WHEREFORE, upon the foregoing, the Respondent, JAMES ADAMS, prays this Court discharge its jurisdiction in this matter thereby affirming the District Court's opinion.

RESPECTFULLY SUBMITTED, on this 30th day of October, 1984, at Miami, Dade County, Florida.

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By: Gregory A. Prebish

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent was served by mail upon Calvin C. Fox, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida, on this 30th day of October, 1984.

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