IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,398

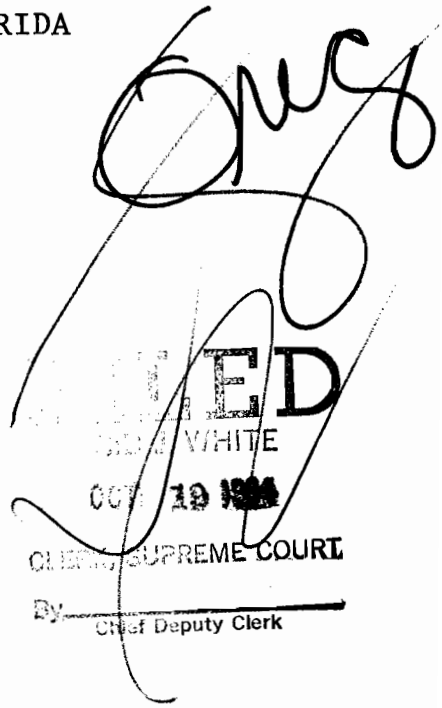
THE STATE OF FLORIDA,

Petitioner

vs.

JAMES A. ADAMS,

Respondent.



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ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF PETITIONER ON MERITS

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PREFACE

The Petitioner, The State of Florida, was the prosecution in the trial court and the Appellee in the District Court of Appeal. The Respondent, James A. Adams, was the Defendant in the trial court and the Appellant in the District Court of Appeal. 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.

I

STATEMENT OF THE CASE

The Defendant filed a pre-trial motion to suppress alleging that the Defendant's blood alcohol test was improper in that the Defendant was not advised that he had a right to refuse such tests and that if he did refuse his license could be suspended for a period of three months; that the Defendant's statements should be suppressed as part of the traffic report requirements under Section 316.066 (4) Florida Statutes and that the case against the Defendant had been previously dismissed and therefore the state was estopped from prosecuting the Defendant. See R20-R21. The Defendant was charged by information with manslaughter by operating a motor vehicle while intoxicated. See R1.

At trial, the State produced Demerick Fernando Brown who testified that approximately one o'clock in the morning on November 22, 1981, he was traveling north on northwest 32nd Avenue at 180th Street traveling behind a Monte Carlo with one person in it. See T316-T324. He was approximately two car lengths behind the Monte Carlo. Id. He observed another car southbound, a Thunderbird, with one person, in it come across very fast and collide head on into the Monte Carlo in the Monte Carlo's lane of traffic. See T325-T329. Brown said that he swerved off the road to avoid

a collision with the two cars. T330. He said that the Thunderbird knocked the Monte Carlo off the road. Id. He then jumped out of his car and ran to help the man in the Monte Carlo who was severly injured. T332-T339.

Sergeant Charles Molinari, the arresting officer, testified that when he arrived, the Defendant was standing outside of his vehicle, the Thunderbird. See T363-T364. Molinari was informed that there were eyewitnesses and he spoke to Demerick Brown. T366-T368. Sergeant Molinari said that he observed the Defendant to have bloodshot eyes; slurred speech; an odor of alcohol about his person and he was unsteady on his feet. T371. Because of the foregoing factors and the nature of the accident, Officer Molinari arrested the Defendant and charged him with driving under the influence. T371-T372. He testified that he believed the Defendant was intoxicated based upon his extensive experience. See T422-T423. He indicated that he performed no roadside test because the Defendant was slightly injured. See T408. Thereupon, because of a slight injury to the Defendant's nose he transported the Defendant to Jackson Memorial Hospital. See T371. At the hospital, Sergeant Molinari informed the Defendant that he wished to take a blood test and told him that he had the right to refuse. See T416. He did not tell the Defendant that if he refused to take the blood test that his license would be suspended for three months. T416-T417.

The Defendant signed a written consent form authorizing blood for a blood alcohol test. See T373; R57. The "consent form" which the Defendant signed is entitled, "Prison Medical Services Ward D-Emergency Room Consent Form" and provides that:

> "TO WHOM IT MAY CONCERN:
>
> I, JAMES ADAMS, DO HEREBY GIVE MY CONSENT FOR THE PHYSICIAN ATTENDING ME AND/OR NURSE TO WITHDRAW A SAMPLE OF MY BLOOD AND/OR URINE TO BE TESTED FOR ALCOHOLIC AND/OR DRUG CONSENT. THESE SPECIMENS ARE REQUESTED BY THE METRO-DADE POLICE DEPARTMENT. THE SPECIMENS WILL BE TURNED OVER TO THE DADE COUNTY PUBLIC SAFETY DEPARTMENT CRIME LAB AND/OR THE DADE COUNTY MEDICAL EXAMINERS DEPARTMENT TOXICOLOGY LABORATORY FOR TESTING.
>
> PATIENT'S SIGNATURE (SIGNED)
>
> WITNESSES (SIGNED)
>
> DOCTOR/NURSE (SIGNED)
>
> ARRESTING OFFICER (SIGNED)
>
> POLICE CASE NUMBER 400725-B"

Dr. Francisco Alvarez-Gil testified that he signed the consent form prepared by the officer and signed by the Defendant and withdrew blood from the Defendant with Officer Molinari present. T501.

Molinari also testified that he requested that Dr. Alvarez-Gil withdraw the blood from the Defendant. T388.

He said that the vial with the Defendant's blood was specifically marked with a form which Officer Molinari had prepared to request the alcohol analysis. T388. Upon learning that the victim of the accident had died (See T419-T420) Officer Molinari gave the Defendant his Miranda rights and informed him that the case was now under criminal investigation. See T389-T390.

Lillian Brantly, a graduate nurse testified that the Defendant had a superficial cut on his nose. T518. She testified that the Defendant also had slurred speech and an unsteady gait; he had an odor of alcohol about his person and clothes and his eyes were bloodshot. T521. She indicated that the Defendant would not let the nurses examine him. T522. She observed Dr. Gil making preparations and beginning to draw blood from the Defendant. See T522-T523. She indicated that the Defendant said to her that he had only two beers. T529. Viola Phillips testified as the Medical Records Custodian for Jackson Memorial Hospital when the Defendant's medical records were admitted. See T547-T550.

David Rhodes, a criminologist with the police department, testified that he took the Defendant's tube of blood from a locked box. T551-T553. The Defendant objected at this point to Rhodes' testimony as to the blood alcohol test upon the ground that Section 360.066 Florida Statutes precluded the admission into evidence in a criminal trial of

any blood samples taken in connection with the preparation of an accident report. See T554-T558. The trial court overruled the Defendant's objection upon that ground. Id. Rhodes testified that the Defendant's blood, which was taken more than two hours after the accident, tested for .31 gram of alcohol per 100 ml of blood. T559-T560. Rhodes estimated that a person would have to drink about twelve drinks in one hour's time to raise his blood alcohol to such a level. T560. The Defendant was convicted of manslaughter by the operation of a motor vehicle while intoxicated.

On appeal, the Defendant claimed that the trial court should have suppressed the results of his blood-alcohol tests. R2. On October 18, 1983, the Third District Court of Appeal agreed, and citing Section 316.066(4), Florida Statutes, Cooper v. State, 183 So.2d 269 (Fla. 1st DCA 1966) and State v. Coffee, 212 So.2d 632 (Fla. 1968) reversed for a new trial, explaining that:

> "In the instant case, there is no evidence that [the 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."
>
> A3.

The undersigned filed a vigorous motion for rehearing, emphasizing, 1) that Court's misreading of State v. Coffee,

supra; 2) the fact that there was ample evidence that the Defendant knew or should have reasonably known that the blood test was being used in a criminal investigation; 3) that under State v. Rafferty, 405 So.2d 1004 (Fla. 4th DCA 1981) the evidence herein was specifically admissible in a criminal proceeding under the Florida Constitution. See, A2-A10. The Defendant did not file a Motion for Rehearing.

After more than six (6) months and perhaps being aware of the controversy and confusion generated by its original opinion above, on April 24, 1984, the Third District Court of Appeal withdrew its prior opinion and issued an opinion entitled, "On Motion for Rehearing." See, Adams v. State, 448 So.2d 1201 (Fla. 3d DCA 1984)(A10a-A16). The Court's opinion on rehearing is substantially identical to its previous opinion. However, the Court first embellishes upon its previous ruling holding that the evidence shows that the arresting officer took the blood test for the purpose of completing his "accident report" under Section 316.066(4) Florida Statutes. See, Id., at 1202-1203. More importantly however, the Court also added the holding that Section 316.066(4) and the Florida Constitution provides greater constitutional protection than does the United States Constitution:

> "Although the fifth amendment to the United States Constitution had been held inapplicable to the taking of a blood sample, Schmerber

> v. California, 384 U.S. 757, 86 S. Ct. 1826, 16 L.Ed.2d 908 (1966), the State of Florida has the right to extend to its citizenry greater protections than those afforded by the federal constitution. Sambrine v. State, 386 So.2d 546, 548 (Fla. 1980)."
>
> 448 So.2d at 1203, n. 1.

The District Court declined to say whether the Legislature's enactment of the new statute, Section 316.1933 Florida Statutes (Supp. 1982) was constitutional under its reading of the Florida Constitution. Id. at n. 2.

The undersigned again filed a vigorous Motion for Rehearing and Motion to Certify pointing the Court's misreading of State v. Coffee and conflict with other district courts and asserting that Rule 3.220(b)(1)(vii) Florida Rules of Criminal Procedure enacted by this Court precluded the District Court's construction of the Florida Constitution. See, A17-A18. On May 11, 1984, the District Court denied a Motion to Recall its Mandate which had been issued on the same day as its opinion on rehearing. A19. As a consequence of the latter order, on May 24, 1984, the State was forced to file its timely Notice of intent to seek discretionary review and on June 21, 1984, the Court therefore struck the State's Motion for Rehearing and Motion to Certify. A21. On September 21, 1984 this Court accepted the State's application for review.

II

QUESTION PRESENTED

WHETHER THE DEFENDANT HAS PRESENTED ANY ERROR IN THE DENIAL OF HIS MOTION TO SUPPRESS?

III

ARGUMENT

THE DEFENDANT HAS FAILED TO SHOW ANY ERROR IN THE DENIAL OF HIS MOTION TO SUPPRESS.

The Defendant contended below that because Sergeant Molinari did not advise the Defendant that if he refused the blood alcohol test his license could be suspended three months, that therefore all criminal evidence of the blood alcohol tests should be suppressed. The Defendant relied principally upon Section 322.261 (1)(a) Florida Statutes (1976).

A.

The offense for which the Defendant was charged in the present case, was recodified effective July 1, 1982 as Section 316.1931(2), Florida Statutes. Concurrent with that enactment, the Legislature also enacted Section 316.1933 Florida Statutes which clearly indicates that when a Defendant is charged with an accident involving death or serious injury, he shall take a blood test and can be forced to take a blood test. See, State v. Williams, 417 So.2d 755, at 758, n.6 (Fla. 5th DCA 1982). It is well settled that procedural changes in the law are to be applied in pending cases. See, e.g., Johnson v. State, 371 So.2d 556 (Fla. 2d DCA 1979);

McShay v. State, 321 So.2d 464 (Fla. 4th DCA 1975); Heilman v. State, 310 So.2d 376 (Fla. 2d DCA 1975); Ratner v. Hensley, 303 So.2d 41 (Fla. 3d DCA 1974); See also, Hall v. State, 358 So.2d 891 (Fla. 2d DCA 1978).

In the present case, the Motion to Suppress hearing and the trial of this matter occurred in August of 1982, after the effective date of Section 316.1933. It is clear that Section 316.1933 merely establishes a procedure for the administration of blood tests to determine blood alcohol content. Therefore, as a rule of procedure, it is directly applicable in the present case. The Defendant's complaints as to the procedures under the former statute are therefore irrelevant and moot.

B

In the present cause, the District Court reversed the denial of the Defendant's Motion to Suppress holding that the "accident report" statute, Section 316.066(4) Florida Statutes, and State v. Coffee, 212 So.2d 632 (Fla. 1968), prohibit the introduction under Florida Constitutional Law of any blood samples taken during the course of the preparation of an accident report. Adams v. State, 448 So.2d 1201 (Fla. 3d DCA 1984). The District Court further held that the Florida Constitution provides greater constitutional

protection for the admission of blood samples then does the United States Constitution[1]. Id., at 1203 n. 1.

Perhaps the greatest flaw in the present opinion is its analysis of Legislative intent. In State v. Williams, 417 So.2d 755 (Fla. 5th DCA 1982), the defendant had also been involved in a head-on collision by crossing the center line of a road in which the victim died. The arresting officer testified that he believed the defendant to be intoxicated based upon the manner in which the accident occurred, the odor of alcohol about the defendant's person and the fact that the defendant's eyes were unusually red. The officer in Williams similarly sought to administer a blood test to determine blood alcohol content and warned the defendant that he could refuse and that if he did refuse his license would be suspended. The issue in Williams was whether or not the defendant had to be arrested prior to the administration of the blood test to determine blood alcohol content. In rejecting the defendant's claim, the Williams court noted that Section 322.261, treated blood tests for blood alcohol content differently than breathalyzer tests for blood alcohol content. 417 So.2d at 757-758. In reading the statutes closely, the Williams court determined that the

[1]Implicit in such a holding is a ruling sub silentio that the Legislature's enactment of Section 316.1933 is unconstitutional under the Florida Constitution, an issue which the District Court expressly recognized but declined to rule upon. See, 448 So.2d at 1203, n. 2.

blood test portion of Section 322.261 did not require a prior arrest before administering the test. In its reasoning, however, the Williams court relied upon the subsequent enactment of Section 316.1933 as indicative of prior legislative intent regarding Section 322.261:

> "The rewritten statute effective July, 1982 continues to treat blood tests differently than chemical breath tests for many purposes, one of which is not requiring an arrest for blood tests but continuing to require it for breath tests, if the test is later to be admissible. See ch. 82-155, Sections 3, 4, 5 Laws of Florida. This is indicative of prior legislative intent regarding Section 322.261. [Citations omitted]" 417 So.2d at 758.

As in Williams, the Legislature in enacting Section 316.1933 noted above at Section "A", has clearly indicated its intent not to apply the sanction of the exclusion of criminal evidence where there is serious injury, death or serious property damage as in the case at bar.

Contrary to the present opinion and consistent with the policy and analysis underlying State v. Williams, supra and the enactment of Section 316.1933, in Bracklin v. Boles, 452 So.2d 540 (Fla. 1984), this Court expressly receded from State v. Coffee, supra, and State v. Mitchell, 245 So.2d 618 (Fla. 1971), to the extent that they in any way prohibit the introduction of a blood alcohol test because of the

"accident report" statute, in either a civil or criminal proceeding. Furthermore, this Court in Brackin expressly reaffirmed its view that Florida's constitutional analysis was entirely content with Federal constitutional analysis as expressed in Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1968). See Id, at 542-543; Accord; Fla.R.Crim.P. 3.220(b)(1)(vii); State v. Rafferty, 405 So.2d 1004 (Fla. 4th DCA 1981); contra, State v. Roose, 450 So.2d 861 (Fla. 3d DCA 1984)(State must strictly comply with statute or criminal evidence will be suppressed); State v. Schmitz, 450 So.2d 1254 (Fla. 3d DCA 1984)(same).

Indeed, the District Court's conclusion of a more restrictive interpretation of the Florida Constitution is not even supported by State v. Coffee, upon which it relys. In Coffee the Court specifically rejected the application of the "accident report statute" to the defendant and held the evidence against the defendant was admissible under the criminal law irrespective of any accident report statute requirement:

> "The fact that the crime was committed in the operation of a motor vehicle is pertinent to the highway safety program of this State; but it does not entitle the person suspected of or charged with committing such a crime to any special treatment in so far as the determination of his guilt or innocence is concerned. In our opinion he is entitled to the same constitutional safeguard as any other person

> suspected of or with a crime --no more and no less." 212 So.2d at 635 [Emphasis added].

Accord, Schmerber v. California, supra; State v. Rafferty, 405 So.2d 1004 (Fla. 4th DCA 1981); See also, Fla.R.Crim.P. 3.220(b)(1)(vii). The District Court's conclusion that there is somehow a different standard of constitutional review in Florida because of the so-called "traffic accident report statute" is therefore erroneous in view of the plain language in State v. Coffee.

In the trial court below, the court relied upon State v. Gunn, 408 So.2d 647 (Fla. 4th DCA 1982) to deny the motion to suppres. In Gunn, the defendant had voluntarily submitted to a breathalyzer test without being informed as to the appropriate sanction to be imposed if he refused to submit to the breathalyzer test. The Gunn court, distinguished Sambrine v. State, the driver had affirmatively refused to consent to a blood test. See also, Brown v. State, 371 So.2d 161 (Fla. 2d DCA 1979); State v. Riggins, 348 So.2d 1209 (Fla. 4th DCA 1977). The Gunn court held that the State would not be precluded from introducing evidence of a breathalyzer test for blood alcohol content, even where the defendant had not been advised of the administrative sanctions to be imposed. 408 So.2d at 649. Consistent with the policy underlying this Court's decision in

Brackin v. Boles, and State v. Williams, supra, the Gunn Court reasoned that there was no Legislative intent to impose a penalty of the exclusion of evidence in a criminal trial, where the State had not complied with the administrative restrictions of the statute:

> "Take as a while, the statute manifests a legislative intent that a failure to inform a driver of the consequence of refusing to submit to testing will simply afford the driver an escape from suspension of driving privileges, should he, in fact, face such suspension by virtue of having refused testing.
>
> We find no legislative intent to impose a further sanction on the state by excluding as evidence the results of a chemical test administered to a driver (who has not affirmatively revoked the statutory consent) merely because of his not being informed prior to testing, of the consequences should testing be refused."
>
> Id.

Accord, Pardo v. State, 429 So.2d 1313 (Fla. 5th DCA 1983).

Also contrary to the present District Court construction of the Florida constitution and Florida criminal law, in Sambrine v. State, 386 So.2d 548, at 549 (Fla. 1980), the Court expressly held that, "there is no provision that a driver be informed of his right to refuse; he must merely be informed that his failure to submit to a chemical test will

result in a three month suspension [of his license]." [Emphasis added]. Accord, State v. Edge, 397 So.2d 939, at 942 (Fla. 5th DCA 1981). Furthermore, two years after Coffee, the Court in State v. Mitchell, 345 So.2d 618, at 623 (Fla. 1968) also did not contemplate any sort of requirement that a defendant be warned of any change in the capacity of the investigating officers. Sambrine has refuted such a requirement and it has never been a requirement stated by the Supreme Court of Florida. See also, Pardo v. State, 429 So.2d 1313 (Fla. 5th DCA 1983); State v. Edge, supra.

In the trial court consistent with Gunn and this Court's announced policy in Brackin v. Boles, the evidence was properly not suppressed. In the present case and in State v. Roose and State v. Schmitz, supra, the Third District has misinterpreted Coffee and has rejected Gunn and the policy of this Court as expressed in Bracklin. There is no basis in the Florida Constitution or this Court's decisions for the present analysis. The present decision must therefore be overruled.

C.

Additionally, the State submits that the evidence herein was indeed plainly admissible under the Fourth

Amendment and Rule 3.220 (b)(1)(vii) Florida Rules of Criminal Procedure. See, Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966); State v. Rafferty 405 So.2d 1004 (Fla. 4th DCA 1981). In State v. Rafferty, the court held specifically that:

> "We believe that in light of the severity of the accident, the zero readings yielded by the breathalyzer test and Rafferty's apparent lack of comprehension, the arresting officer had probable cause to believe that Rafferty had been driving under the influence of a drug. Given these circumstances, the testing for drugs is constitutional even without consent or a warrant. [Citing Schmerber v. California]."
>
> 405 So.2d at 1004.

As in Rafferty, there were ample factors in the present case to enable Officer Molinari to arrest and take blood samples from the Defendant with or without his consent. Schmerber v. California; Fla.R.Crim.P. 3.220 (b)(1)(vii). Therefore, the evidence below should not have been suppressed.

D.

Finally, there was, in any event, ample evidence of consent, distinguishing the present case from Sambrine and Rafferty, supra. The trial court in fact made an express finding that the Defendant's consent was free and voluntary.

See T383--T391. There was no evidence to the contrary and therefore the judgment concerning the Defendant's consent should be sustained. See, Kujawa v. State, 405 So.2d 251 (Fla. 3d DCA 1981); State v. Rafferty, supra.

IV

CONCLUSION

The present issue is of grave importance to the proper prosecution of drunk drivers who are responsible for the carnage on our highways. The District Court's analysis has made the prosecution of drunk drivers, who also kill, susceptible to a Miranda-like warning not contemplated by either this Court's rule or the substantive law. Under the District Court's analysis, despite contrary Legislative intent, the new statute, 316.1933 is also wrongfully subject to such a state constitutional limitation.

WWHEREFORE, upon the foregoing, the Petitioner, THE STATE OF FLORIDA, prays that this Court will reverse the Florida Third District Court of Appeal and reinstate the judgment and conviction below.

RESPECTFULLY SUBMITTED, on this 11th day of October, 1984, at Miami, Dade County, Florida.

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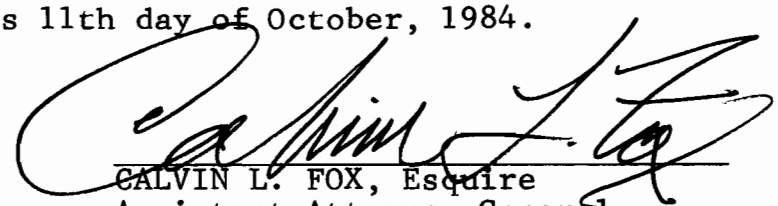
V

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER was served by mail upon HARRY W. PREBISH, Suite 606, 19 West Flagler Street, Miami, Florida 33130, on this 11th day of October, 1984.



CALVIN L. FOX, Esquire
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ss/