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IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,964

THE STATE OF FLORIDA,

Petitioner,

vs.

RICHARD STRONG,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF PETITIONER ON THE MERITS

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PREFACE

The Respondent, Richard Strong, was the Defendant in the trial court. The Petitioner, the State of Florida, was the prosecution in the trial court. In this brief the parties will be referred to as they appeared before the trial court.

The following symbols are used in this brief:

(T) - For the Transcript of Proceedings consisting of pages T1-T509.

(R) - For the Record-on-Appeal consisting of pages R1-R169.

The opinion of the district court herein is reported at Strong v. State, 465 So.2d 549 (Fla. 3d DCA 1985).

I

STATEMENT OF THE CASE

The Defendant, was charged by information with two counts of D.U.I. manslaughter under Section 860.01(2) and two counts of manslaughter under Section 782.07, Florida Statutes arising from the deaths of two victims in a collision with the Defendant's vehicle on June 8, 1982. See, R1-R4. The trial court entered a directed verdict as to the two counts of D.U.I. manslaughter and the Defendant was subsequently convicted of the two counts of manslaughter. See, R132-R133; R140.

Relevant to the present proceeding Graciela Urdaneta testified that it was "really dark" on Old Cutler Road at about 8:30 o'clock, p.m., the time of the accident. See, T71. She was overtaken by the Defendant as she traveled south on Old Cutler Road. T71-T72. Urdaneta indicated that an oncoming car, as the Defendant passed, had its lights on. See T75; T77. She said that she was driving at 50 mph when the Defendant passed. T71.

Anthony Meyers testified that the Defendant's car had no headlights on. T92. He also said that the victim's car was "entering the curve" with its headlights on. T93. Meyers said that he was traveling 50 to 55 when the Defendant tried to pass. T94. Mildred Gil was in Meyers truck;

she confirmed that the Defendant was driving without lights. T109. She also said that Meyers was doing 50 to 60 when the Defendant tried to pass. T114. Lawrence Mullins also in Meyer's truck similarly testified that the Defendant's car had no lights on when it passed and the victim's car had its lights on. T135-T136. He estimated the speed of the Defendant's car at about 80 mph. Id. Mullins also said that the Defendant's car, "didn't try to dodge or nothing." T150.

With respect to the level of intoxication of the Defendant, the examining physician, Dr. Jeffrey Bettenger testified that upon seeing the Defendant in an emergency room after the accident, he smelled alcohol on the Defendant and noted it on a medical report. T163-T165. Daniel Johnson, a firefighter for Dade County also testified that he smelled alcohol on the Defendant's breath. T125.

Sergeant James Poss testified that the defendant was doing 65 to 70 mph, as he began to skid, just before the impact and struck the victim's vehicle at about 45 mph. T204. Sergeant Poss testified that the physical evidence showed that the Defendant did not take evasive action and simply, "failed to follow the curvature of the roadway." Poss also indicated that the roadway has, slight curvature" and that the speed limit for the Defendant going south bound was 45 mph. T204; T231; See, R97.

The Defendant took the stand and admitted, 1) that he had been drinking; 2) that he was unaware of the speed limit; 3) that he was traveling 60 mph just before the collision and 4) that the victim's car had its lights on . T388-T390; T393; T395; T398.

Relative to this petition, as a result of his immediate hospitalization following the collision, the Defendant's blood and urine samples were initially obtained (without a police request or police participation) by civilian medical personnel. See, Strong v. State, 465 So.2d 549 (Fla. 3d DCA 1985). The State sought and obtained an admittedly lawful criminal search warrant and seized the blood and urine samples from the medical personnel. Id. In the criminal trial, the trial court therefore refused to suppress the evidence of the Defendant's blood or urine samples. See, Id.

On appeal to the Third District Court of Appeal, the Defendant contended that the blood and urine samples should have been suppressed because the civilian lab technician was not officially certified under Section 316.1932 (1)(f)(2). See, Id. On March 5, 1985, with Judge Jorgenson dissenting the District Court agreed. See, Id.

As noted above, the District Court recites that the blood and urine samples were not drawn at the request of the

police, but rather were drawn for medical reasons. See, Id. The District Court also recites that the samples were then subsequently seized pursuant to an admittedly valid search warrant. See, Id. The District Court reasons nevertheless that Florida law in the guise of Section 316.1963(1)(f)(2) provides greater protection for defendants than does the requirement of a warrant under Article I, Section 12 of the Florida Constitution and the Fourth Amendment of the United States Constitution. See, R8-R11. Judge Jorgenson in dissent would have affirmed the denial of the Defendant's motion to suppress based upon settled concepts of search and seizure in the criminal law. See, R10-R11.

On August 23, 1985, this Court granted the State's petition for review based upon a conflict with Article I, Section 12 of the Florida Constitution and State v. Adams, 466 So.2d 1067 (Fla. 1985). The present proceeding follows.

II

QUESTION PRESENTED

WHETHER THE DEFENDANT HAS PRESENTED ANY ERROR IN THE DENIAL OF HIS PRE-TRIAL MOTION TO SUPPRESS BLOOD AND URINE SAMPLES?

SUMMARY OF ARGUMENT

The present evidence was seized pursuant to a valid criminal warrant. Under Article I Section 12 of the Florida Constitution the evidence was therefore admissible in a criminal trial.

The District Court's majority opinion erroneously purports to provide greater protection in a criminal trial than does the Florida constitution and therefore must be reversed. Neither this Court's opinions nor the Legislature have ever intended such a result.

The admission of the evidence in this cause was not reversible error where the evidence was admitted as cumulative to other evidence demonstrating culpability for manslaughter.

III

ARGUMENT

THE DEFENDANT HAS FAILED TO SHOW ANY REVERSIBLE ERROR UPON THE DENIAL OF HIS PRE-TRIAL MOTION TO SUPPRESS BLOOD AND URINE SAMPLES.

At the pre-trial motion to suppress, the prosecutor stipulated that the Defendant's blood sample was not drawn, "pursuant to the statute limit." T484. It was undisputed in the case at bar, that the Defendant had given blood and urine to a non-law enforcement, third party for medical tests. It was also undisputed that these samples were not taken by a person qualified under the statute nor were they taken at the request of a law enforcement officer. The prosecutor's position was that under Pardo v. State, 429 So.2d 1313 (Fla. 5th DCA 1983) and State v. Gunn, 408 So.2d 647 (Fla. 4th DCA 1981) the limitations of Section 322.261 and 322.262 Florida Statutes (1981) apply only to license revocation proceedings. See, T485. The trial court agreed.

First of all, the present controversy arises solely from a dispute as to the admission of criminal evidence in a criminal trial, which was lawfully seized under the Fourth Amendment and Article I, Section 12 of the Florida Constitution. Under Article I, Section 12 of the Florida Constitution enacted in 1982, the rules in a criminal trial governing the admission of evidence seized by the police shall be

construed consistent with the substantive law construing the Fourth Amendment. The seizure of physical evidence herein was undoubtedly admissible under the Fourth Amendment. See, e.g. Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966); see, also, Cardwell v. Lewis, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974); Coolidge v. New Hampshire, 403 U.S. 433, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The Defendant simply cannot complain as to the seizure of that which was provided to the police through the actions and consent of a third party. See, Cardwell v. Lewis; Coolidge v. New Hampshire. Finally, even if the present state statutes were applicable, any Florida court should not suppress the evidence herein, where the officers were acting in good faith upon an admittedly valid warrant. See, United States v. Leon, ___U.S.____, 104 S.Ct. 3405 (1984); Massachusetts v. Shepard, ___U.S.___, 104 S.Ct. 3424 (1984); Segura v. United States, ___U.S.____, 104 S.Ct. 3380 (1984).

The District Court's construction of Section 316.1932 (1)(f)(2) purports to provide greater protection in a criminal trial than does the Fourth Amendment. This analysis is therefore a direct contradiction of the mandate of Article I, Section 12 and must be reversed. See, State v. Adams, 466 So.2d 1067 (Fla. 1985); Brackin v. Boles, 452 So.2d 540 (Fla. 1984); Pardo v. State, 429 So.2d 1313 (Fla.

5th DCA 1983); Grant v. Brown, 429 So.2d 1229 (Fla. 5th DCA 1982). In Adams, supra, the District Court had held that Section 316.066(4) Florida Statutes provides greater protection for defendants regarding the admission of blood samples in a criminal trial than does Schmerber v. California, supra and the Fourth Amendment. See, Adams v. State, 448 So.2d 1201 at 1203, n1 (Fla. 3d DCA 1984). This Court reversed, holding that there was no state constitutional bar to the admission of blood-alcohol tests in civil or criminal proceedings, notwithstanding Section 316.1932, another similar provision regarding the admission of blood-alcohol tests in traffic cases. In the present case the District Court has again held that Florida's traffic statutes provide greater protection for defendants than does the Fourth Amendment. This contradiction of Article I, Section 12 and this Court's views in State v. Adams, must be reversed.

In Brackin v. Boles, supra, the Court expressly receded from State v. Coffee, 212 So.2d 632 (Fla. 1968), 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, the Court in Brackin expressly reaffirmed its view that Florida's constitutional analysis with respect to chemical tests was entirely constant with Federal constitutional analysis as expressed in Schmerber v. California, supra. The district

court opinion in State v. Roose, 450 So.2d 861 (Fla. 3d DCA 1984), which was relied upon by the panel herein for reversal, directly contradicts this Court's announced rule and policy in Adams and Brackin. As in the case at bar, the district court in Roose applied the traffic report statutes to exclude criminal evidence seized in a criminal proceeding. Contrary to the present opinion, in Pardo v. State, supra, the Court held that the failure to give traffic statute warnings to a defendant did not require any exclusion of criminal evidence but rather only required that a defendant's license not be suspended. The Pardo Court and the specially concurring opinion specifically declined to apply any rule of exclusion in a criminal trial under the administrative sections of the traffic statutes, where the substantive criminal law does not require any such exclusion. The opinion in Roose and the present District Court's conclusion that there is somehow a different standard of constitutional review in a criminal trial because of the traffic statutes, are in direct conflict with Pardo and this Court's admonition in Adams and Brackin and should therefore be overruled.

The present issue is of grave importance to the proper prosecution of drunk drivers who are responsible for the increasing carnage on our highways. The District Court's analysis permits drunk drivers, who also kill, to avoid criminal prosecution through the escape hatch of traffic

statutes. Such a result is directly contrary to both the policy and intent of the Legislature in enacting such statutes and the will of the people of this state in voting overwhelming approval of Article I, Section 12.

Finally, if there was any error in the admission of the evidence Defendant's blood and urine samples, it must be harmless where the trial judge entered a judgment of acquittal as to both counts of D.U.I. manslaughter (T358) and the issue of the Defendant's intoxication is still a relevant factor with respect to the issue of the Defendant's culpability for manslaughter. See, Filmon v. State, 336 So.2d 586, 589 (Fla. 1976)(where defendant acquitted of D.U.I. manslaughter, admission of evidence of intoxication is still relevant to show culpability as to manslaughter); Smith v. State, 65 So.2d 303 (Fla. 1953)(same); Taylor v. State, 46 So.2d 725 (Fla. 1950)(same). Assuming any impropriety, under the present circumstance, the evidence of the chemical tests was merely cumulative to the Defendant's own admission and substantial eyewitness testimony as to his level of intoxication. Cf., State v. Wilson, 276 So.2d 45 (Fla. 1973).

IV

CONCLUSION

WHEREFORE, upon the foregoing, the Petitioner, THE STATE OF FLORIDA, prays that this Honorable Court will reverse the ruling of the Third District Court of Appeal.

RESPECTFULLY SUBMITTED, on this 17th day of September, 1985, 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 ON THE MERITS was served by mail upon COREY E. HOFFMAN, Esq., Suite 500, 7000 S.W. 62nd Avenue, South Miami, Florida 33143, on this 17th day of September, 1985.

CALVIN L. FOX, Esquire
Assistant Attorney General

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