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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 RESPONDENT 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. 3rd DCA 1985).

I
STATEMENT OF THE CASE

The Respondent respectfully accepts the statement of the case set forth in the brief of Petitioner on the Merits.

However, in the next to last paragraph on page 5 of the aforementioned brief, the Respondent herein would correct the statement "that the District Court reasoned nevertheless that Florida Law in the guise of Section 316.1932 (1)(f) 2. (1982)" as the controlling statute.

The Court did not hold that that Statute provided greater protection for Defendant than the requirement of a warrant under article1, Section 12 of the Florida Constitution and the Fourth Amendment of the United States Constitution. The Court held that the aforementioned statute was mandatory in its compliance before blood alcohol evidence could be admitted at trial.

II

QUESTION PRESENTED

WHETHER THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY DENYING THE PRE-TRIAL MOTION TO SUPPRESS BLOOD AND URINE SAMPLES

SUMMARY OF ARGUMENT

The State failed to comply with the mandatory provisions of Florida Statute 316.1932 (1)(f)2. (1982), as it relates to taking blood from a Defendant. The blood alcohol evidence was introduced over Defendant's objections.

The Third District Court of Appeal correctly held that the statute calls for strict compliance with its terms. Failure to follow the statute's directives is not a technical nor harmless error. Strong v. State, 465 So.2d 550 (3rd Dist. 1985).

III

ARGUMENT

THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY DENYING THE PRE-TRIAL MOTION TO SUPPRESS BLOOD AND URINE SAMPLES

The Third District Court of Appeal was correct in its ruling of reversal of the instant case because of the State's admitted failure to comply with the "mandatory" provisions of Florida Statute 316.1932, (1982) in effect at the time of the Defendant's crime.

It is undisputed that the blood taken from Richard Strong was not taken in compliance with Florida Statute 316.1932 (1)(f)2. (1982). The samples were not taken at the request of a law enforcement officer nor were the samples taken by a person qualified under the statute to take blood.

At trial, and again before this Court, the State attempts to bypass its admitted failure to abide by the legislature's requirements for taking a person's blood by arguing cases not on point. See Pardo v. State. 429 So.2d 1313 (Fla. 5th DCA 1983), State v. Gunn, 408 So.2d 647 (Fla. 4th DCA 1981).

This learned Court has previously mandated its acceptance of Florida Statute 316.1932 (1)(f)2. and its mandatory requirements in its previous review of State v. Roose, review denied, 451 So.2d 850 (Fla. 1984). The same Statute was in effect in the Strong case as was in Roose.

This Court denied review in Roose two years after Article I, Section 12 of the Florida Constitution was enacted. By that ruling, this Court has understood the "wrongness" of the State's "constitutional" argument that is again put forth in its brief.

This is not a Fourth Amendment, search and seizure situation. The Defendant did not object to the validly obtained warrant and the subsequent seizure of Defendant's blood.

This case is about compliance with an "admissibility" statute.

Florida Statute 316.1932 (1)(f)2. (1982) was an initial admissibility "obstacle" to be overcome by the State before the results of blood alcohol could be used as "testimony" under Schmerber v. California, 384 U.S. 757 (1966).

By having a mandatory statute on the books at the instant time, the Florida legislature's intent was to protect its citizens from the extreme invasion of individual privacy that taking one's blood has been construed, as well as setting the minimum standards necessary to ensure sufficient scientific trustworthiness of the testing process. See Strong v. State, 465 So.2d 549,550 (Fla. 3rd DCA 1985); State v. Roose, supra, at 862.

If a police officer had requested the blood of Richard Strong to be taken, and it was then taken by a proper person (under the statute), the blood alcohol evidence would have been admissible at trial (emphasis supplied). However, this admittedly was not the case.

A closer examination of the cases relied upon the State finds the significant ommission of any mention of Florida Statute 316.1932 (1)(f)2. (1982).

The cases of 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 (5th DCA 1983), and Grant v. Brown, 429 So.2d 1229 (5th DCA 1982) all deal with other non-mandatory non-controlling statutes. For that reason alone they are distinguishable, not controlling, nor applicable to this case.

Brackin v. Boles, supra, and State v. Adams, supra, relate to Florida Statute 316.066 (4) (1981), the "accident report privilege" and admissibility of blood alcohol evidence. The Court held that blood tests are not communications under the Fifth Amendment and the purpose of the statute (F.S. 316.066) is to grant immunity for verbal statements compelled to be made in order to comply with the statute.

Under Schmerber, that is a correct analysis.

However, neither Adams nor Brackin is on point with the case at bar. The accident report privilege issue does not arise in this case. Neither Adams nor Brackin addresses the issue of whether the blood alcohol evidence is not admissible by failing to comply with Florida Statute 316.1932 (1)(f)2. (1982).

In the instant case, the taking of the Defendant's blood (although not an issue at trial) may have been admissible under Florida Statute 316.066 (4), (1982). But that taking still fails to comply with the legislature's mandate as to when and how

its citizens' privacy can be violated and what the minimum standard of scientific reliability is for admissibility in evidence at trial as to blood alcohol.

Pardo v. State, supra moves from Adams and Brackin and discusses blood alcohol taken in violation of Florida Statutes 322.261 and 322.262 (1982). The Fifth District Court held that the failure to comply with the Implied Consent Law should not preclude admissibility of the blood alcohol evidence.

But, Pardo specifically limits itself, at 1315, wherein the Fifth District states:

> " we hold that similar tests likewise may be admissible in criminal cases if otherwise admissible merely because they don't comply with the special purpose Statutes." (emphasis supplied)

Obviously, the key phrase in Pardo is "otherwise admissible."

In the case at bar, the blood was not "otherwise admissible" because it was not taken in compliance with Florida Statute 316.1932 (1)(f)2. (1982). Furthermore, Florida Statute 316.1932 (1)(f)2. (1982) is not one of the "limited purpose statutes" such as the Implied Consent Statutes, referred therein, relating to drivers licenses. Florida Statute 316.1932 (1)(f)2. (1982) was a mandatory statute, dealing with minimum standards of admissibility.

> "The fact that the person who has drawn the Defendant's blood is not statutorily authorized to do so fatally infects the reliability and renders them inadmissible into evidence." State v. Roose, supra.

To recapitulate, the blood evidence may have been admissible under a non-testimonial Schmerber argument; see Article I, Section 12, Florida Constitution. The blood alcohol evidence may have been admissible under an exception to the accident report privilege (See Adams and Brackin). However, those arguments come into play only after the blood alcohol complies firstly with the Florida Legislature's admissibility requirements set forth in the mandatory language of Florida Statute 316.1932 (1)(f)2. (1982). (emphasis supplied).

The evidence of the Defendant's intoxication, primarily through the use of testimony about the Defendant's blood alcohol level, derived from the improperly admitted blood alcohol evidence was not merely harmless error.

The State put on two expert witnesses to testify about Defendant's blood alcohol level (Dr. Bednarczyk T-307-320 , and Mr. Hime, T-232-307). In addition, the stipulation as to State's Exhibit 15 would not have been entered (R130). This evidence was a feature of the State's case.

The testimony coming from two experts and the introductions of the blood itself rose far beyond the eyewitness testimony as prejudicial and harmful to the Defendant.

The Third District correctly ruled that the Richard Strong's blood alcohol was not taken pursuant to the Statute and that the evidence thereof was reversible error.

This Court should affirm the decision of the Third District Court of Appeal.

IV

CONCLUSION

Wherefore, upon the forgoing, the Respondent, Richard Strong, prays that this Honorable Court will affirm the ruling of the Third District Court of Appeal.

Respectfully Submitted, this 8th day of November, 1985.

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